

Case No. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE
and AMERICAN IMMIGRATION LAWYERS
ASSOCIATION, SOUTHERN CALIFORNIA CHAPTER

Petitioners,

v.

GAVIN NEWSOM,
California Governor, in His Official Capacity

and XAVIER BECERRA,
California Attorney General, in His Official Capacity

Respondents.

PETITION FOR WRIT OF MANDATE

Jennifer Pasquarella, SBN 263241

jpasquarella@clusocal.org

Liga Chia, SBN 328143

lchia@clusocal.org

Michelle (Minju) Cho, SBN 321939

mcho@clusocal.org

Jessica Bansal, SBN 277347

jbansal@clusocal.org

Jordan Wells, SBN 326491

jwells@clusocal.org

Melissa Goodman, SBN 289464

mgoodman@clusocal.org

ACLU Foundation of Southern California

1313 W Eighth St.

Los Angeles, CA 90017

(213) 977-5236

Bardis Vakili, SBN 247783

bvakili@clusandiego.org

Monika Langarica, SBN 308518

mlangarica@clusandiego.org

ACLU Foundation of San Diego & Imperial
Counties

P.O. Box 87131

San Diego, CA 92138-7131

(Continued on next page.)

Document received by the CA Supreme Court.

Angelica Salceda, SBN 296152

asalceda@aclunc.org

William S. Freeman, SBN 82002

wfreeman@aclunc.org

ACLU Foundation of Northern California

39 Drumm Street

San Francisco, CA 94111

Attorneys for Petitioners California

Attorneys for Criminal Justice and American

Immigration Lawyers Association, Southern

California Chapter

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Petitioners hereby certify that they are not aware of any entity or person that rules 8.208 and 8.488 of the California Rules of Court require to be listed in this Certificate.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS 3

TABLE OF CONTENTS 4

TABLE OF AUTHORITIES..... 6

PETITION FOR WRIT OF MANDATE..... 13

INTRODUCTION 13

PARTIES..... 16

JURISDICTION 17

FACTS..... 19

A. COVID-19 Poses Grave Risk of Harm to Incarcerated People 19

B. ICE’s Abject Failure to Protect Human Lives in its Detention
Centers from COVID-19 23

i. COVID-19 Conditions in ICE’s Detention
Centers in California 25

ii. Detainee Hunger Strikes and Protests in
California..... 33

C. The State of California is Well-Aware of the Humanitarian
Crisis Unfolding in California’s Immigration Detention
Facilities 34

D. The State of California Continues to Transfer People in Jail
and Prison to ICE during this Pandemic 35

E. Legal and Policy Framework for California’s Transfers to
ICE Custody 39

F. The State of California Disfavors Immigration Detention,
Especially During the Pandemic 42

CLAIMS ASSERTED..... 43

RELIEF SOUGHT 44

VERIFICATION 47

MEMORANDUM OF POINTS AND AUTHORITIES 48

INTRODUCTION 48

DISCUSSION..... 49

I. Transferring Individuals into ICE Custody During this
Pandemic Violates Due Process 49

Document received by the CA Supreme Court.

A.	The State of California Has an Obligation Not to Place Individuals in its Custody into Danger.....	49
B.	Given the General Danger of Continued Detention During this Pandemic, the State of California Violates Due Process by Transferring People to ICE Custody	52
C.	The State of California Violates Due Process by Transferring People to ICE Given the Actual Dangers in ICE Custody in California.....	56
II.	This Court Should Exercise its Original Jurisdiction and Issue a Writ of Mandate to Halt Transfers to ICE Given the Extraordinary Circumstances of the COVID-19 Pandemic	60
A.	Respondents Have Breached Their Constitutional Duty to Protect the Lives of People in State and Local Custody.....	61
B.	Petitioners Have a Beneficial Interest in Securing the Constitutional Rights of their Clients and Standing to Enforce Respondents’ Constitutional Duties	64
C.	Petitioners have no Adequate Administrative Remedy.	68
	CONCLUSION	70

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Alta Loma Sch. Dist. v. San Bernardino Cty. Comm’n on Sch. Dist. Reorganization</i> , 124 Cal. App. 3d 542 (1981)	69
<i>Arizona v. United States</i> , 567 U.S. 387 (2012).....	55
<i>Associated Builders & Contractors, Inc. v. San Francisco Airports Comm’n</i> , 21 Cal. 4th 352 (1999)	65, 66
<i>Basank v. Decker</i> , No. 20-cv-2518, 2020 WL 1481503 (S.D.N.Y. Feb. 28, 2020)	20
<i>Bd. of Soc. Welfare v. Los Angeles Cty.</i> , 27 Cal. 2d 98 (1945)	68
<i>Bell v. Wolfish</i> , 441 U.S. 520 (1970).....	50, 57
<i>Bent v. Barr</i> , No. 5:19-cv-6123-DMR, 2020 WL 1812850 (N.D. Cal. Apr. 9, 2020)	59
<i>Bravo Castillo v. Barr</i> , 20-cv-00605-TJH, 2020 WL 1502864 (C.D. Cal. Mar. 27, 2020)	<i>passim</i>
<i>In re Brindle</i> , 91 Cal. App. 3d 660 (1979)	67
<i>Brown v. Plata</i> , 563 U.S. 493 (2011).....	51
<i>Cal. Correc. Peace Officers Ass’n v. Schwarzenegger</i> , 163 Cal. App. 4th 802 (2008)	64

<i>California Redevelopment Ass’n v. Matosantos</i> , 53 Cal. 4th 231 (2011)	19, 61
<i>City and County of San Francisco v. Trump</i> , 897 F.3d 1225 (9th Cir. 2018)	42
<i>Cty. of Los Angeles v. Superior Court (Peters)</i> , 68 Cal. App. 4th 1166 (1998)	64
<i>De La Mar v. Superior Court</i> , 22 Cal. App. 2d 373 (1937)	62
<i>DeGidio v. Pung</i> , 920 F.2d 525 (8th Cir. 1990)	51
<i>Dep’t of Corr. v. State Pers. Bd. (Wallace)</i> , 59 Cal. App. 4th 131 (1997)	67
<i>Dep’t of Pers. Admin. v. Superior Court</i> , 5 Cal. App. 4th 155 (1992)	70
<i>DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.</i> , 489 U.S. 189 (1989).....	50, 51, 53, 57
<i>Dibb v. Cty. of San Diego</i> , 8 Cal. 4th 1200 (1994)	65
<i>Edward W. v. Lamkins</i> , 99 Cal. App. 4th 516 (2002)	62
<i>Estelle v. Gamble</i> , 429 U.S. 97 (1976).....	50
<i>Fraihat v. U.S. Immigration & Customs Enf’t.</i> , No. CV 19-1546-JGB, 2020 WL 1932570 (C.D. Cal. Apr. 20, 2020)	56, 59
<i>Fraihat v. Wolf</i> , No. 5:20-cv-590-TJH, ECF No. 18 (C.D. Cal. Mar. 30, 2020)	20, 59
<i>Gonzalez v. ICE</i> , 416 F.Supp.3d 995 (C.D. Cal. 2019)	40, 41

<i>Gordon v. Cty of Orange</i> , 888 F.3d 1118 (9th Cir. 2018), cert. denied sub nom. <i>Cty of Orange, Cal. v. Gordon</i> , 139 S.Ct. 794 (2019)	50, 51
<i>Green v. Obledo</i> , 29 Cal. 3d 126 (1981)	67
<i>In re Head</i> , 42 Cal. 3d 223 (1986)	67
<i>Hector F. v. El Centro Elementary Sch. Dist.</i> , 227 Cal. App. 4th 331 (2014)	67
<i>Helling v. McKinney</i> , 509 U.S. 25 (1993).....	51
<i>Hernandez Roman v. Wolf</i> , 20-cv-00768-TJH, ECF 53 (C.D. Cal. Apr. 23, 2020)	55, 58
<i>Hernandez v. City of San Jose</i> , 897 F.3d 1125 (9th Cir. 2018)	51
<i>Hernandez v. Cty. of Monterey</i> , 110 F. Supp. 3d 929 (N.D. Cal. 2015).....	53
<i>Hernandez v. Sessions</i> , 872 F.3d 976 (9th Cir. 2017)	56
<i>Hernandez v. Wolf</i> , 5:20-cv-617-TJH, ECF No. 17 (C.D. Cal. Apr. 1, 2020)	20, 59
<i>Hope v. Doll</i> , No. 20-cv-00562-JEJ, ECF No. 22 (M.D. Penn, Apr. 10, 2020)	20
<i>Hull v. Cason</i> , 114 Cal. App. 3d 344 (1981)	70
<i>Hutto v. Finney</i> , 437 U.S. 678 (1978).....	51
<i>Inmates of Riverside Cty. Jail v. Clark</i> , 144 Cal. App. 3d 850 (Ct. App. 1983).....	50

<i>Ixchop Perez v. Wolf</i> , No. 5:19-cv-5191-EJD, ECF No. 29 (N.D. Cal. Apr. 14, 2020)	59
<i>John Doe v. Barr</i> , No. 3:20-cv-2141-LB, ECF No. 27 (N.D. Cal. Apr. 20, 2020)	59
<i>Doe ex rel. Johnson v. S.C. Dep’t of Soc. Servs.</i> , 597 F.3d 163 (4th Cir. 2010)	52
<i>Jolicoeur v. Mihaly</i> , 5 Cal. 3d 565 (1971)	62
<i>Jones v. Blanas</i> , 393 F.3d 918 (9th Cir. 2004)	50, 57
<i>Kennedy v. City of Ridgefield</i> , 439 F.3d 1055 (9th Cir. 2007)	51
<i>Lindeleaf v. Agric. Labor Relations Bd.</i> , 41 Cal. 3d 861 (1986)	70, 71
<i>Macias v. State of California</i> , 10 Cal. 4th 844 (1995)	63
<i>Malam, et al. v. Adducci</i> , 20-cv-10829-JEL, ECF No. 33 (E.D. Mich. Apr. 17, 2020)	16, 20
<i>Molar v. Gates</i> , 98 Cal. App. 3d 1 (1979)	62
<i>Ochoa v. Superior Court</i> , 39 Cal.3d 159 (1985)	50
<i>Ogo Assocs. v. City of Torrance</i> , 37 Cal. App. 3d 830 (1974)	69
<i>Ortuño v. Jennings</i> , No. 20-CV-02064-MMC, 2020 WL 1701724 (N.D. Cal. Apr. 8, 2020)	20, 59
<i>Palma v. U.S. Indus. Fasteners, Inc.</i> , 36 Cal. 3d 171 (1984)	45

<i>Reynolds v. City of Calistoga</i> , 223 Cal. App. 4th 865 (2014)	67
<i>Riverside Sheriff's Ass'n v. Cty. of Riverside</i> , 106 Cal. App. 4th 1285 (2003)	61
<i>San Francisco Unified Sch. Dist. v. Johnson</i> , 3 Cal. 3d 937 (1971)	19
<i>Save the Plastic Bag Coal. v. City of Manhattan Beach</i> , 52 Cal. 4th 155 (2011)	65, 66, 67, 68
<i>Savino v. Souza</i> , No. 20-cv-10617-WGY, 2020 WL 1703844 (D. Mass. Apr. 8, 2020)	25
<i>Steinle v. City and Cnty. of San Francisco</i> , 919 F.3d 1154 (9th Cir. 2019)	42
<i>Stone v. Bd. of Directors of City of Pasadena</i> , 47 Cal. App. 2d 749 (1941)	62
<i>Thakker v. Doll</i> , 20-cv-480, 2020 WL 1671563 (M.D. Penn. Mar. 31, 2020)	16, 19, 25
<i>U.S. v. California</i> , 921 F.3d 865 (9th Cir. 2019)	42, 54
<i>Venegas v. Cty. of Los Angeles</i> , 32 Cal. 4th 820 (2004)	64
<i>Weiss v. City of Los Angeles</i> , 2 Cal. App. 5th 194 (2016)	68
<i>Wood v. Ostrander</i> , 879 F.2d 583 (9th Cir. 1989)	52
<i>Xochihua-Jaimes v. Barr</i> , No. 18-71460, 2020 WL 1429877 (9th Cir. Mar. 23, 2020)	19
<i>Youngberg v. Romeo</i> , 457 U.S. 307 (1982)	50
<i>Zadvydas v. Davis</i> , 533 U.S. 678 (2001)	44, 56

<i>Zelig v. Cty. of Los Angeles</i> , 27 Cal. 4th 1112 (2002)	51
------------------------------------------------------------------------	----

Statutes

8 U.S.C. § 1182	25
Gov't Code § 7284	42, 43
Civ. Proc. Code § 1085.....	16, 18
Civ. Proc. Code § 1086.....	18, 69
Civ. Proc. Code § 1087.....	45
Civ. Proc. Code § 1088.....	45
Civ. Proc. Code § 1104.....	45
Civ. Proc. Code § 1105.....	45
Civ. Proc. Code § 1021.5	47
Gov't Code § 7282	43
Gov't Code § 7282.5	<i>passim</i>
Gov't Code § 7283	41
Gov't Code § 7284.6	<i>passim</i>
Gov't Code § 8569	18
Gov't Code § 8571	18, 46, 64
Gov't Code § 8627	18, 46
Gov't Code § 8567	18, 46
Gov't Code § 8658	64
Gov't Code § 8672	63
Gov't Code § 12560	64
Gov't Code § 26605.....	18

Penal Code § 9501.....	44
Penal Code § 9505.....	44
Other Authorities	
U.S. Const. amend. IV.....	40
U.S. Const. amend. V.....	58
U.S. Const. amend. VII.....	51, 52
U.S. Const. amend. X.....	55
U.S. Const. amend. XIV.....	45, 47, 49, 50
Cal. Const. art. V, § 13.....	18, 47, 64, 65
Cal. Const. art. I, § 7.....	45, 47, 49, 50
Cal. Const. art. VI, § 10.....	16, 18, 61
8 C.F.R. § 212.5.....	25
Cal. Rules of Court 8.208.....	3
Cal. Rules of Court 8.488.....	3
Cal. Rules of Court 8.486.....	18

PETITION FOR WRIT OF MANDATE

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF CALIFORNIA

INTRODUCTION

1. Coraima Sanchez Nuñez is presently on hunger strike at the Mesa Verde immigration detention facility in Bakersfield, California. She is demanding her right to live. Since the COVID-19 pandemic began, Immigration and Customs Enforcement (“ICE”) has subjected her and her fellow detainees to intolerable conditions, as if encouraging COVID-19 to spread within the facility. “I [] feel like I am in a death trap and it’s just a matter of time before infection will harm me.” Declaration of Coraima Yaritza Sanchez Nuñez (Exh. 58) ¶17. She is in ICE’s Mesa Verde facility, fighting for her life, because the State of California put her there. Sonoma County Jail officials transferred¹ her to ICE custody. *Id.* ¶5.

2. Kelvin Hernandez Roman was detained in the Adelanto immigration detention facility in San Bernardino County, California, until a court ordered his release just days ago. There he was crammed into a dorm of 70–80 people, without any protective equipment or adequate sanitation to ward against COVID-19. Declaration of Hernandez Roman (Exh. 64) ¶¶6–30, 40–59. When, just a few weeks ago, he fell ill with a fever, a cough, and body aches, “[n]o one took me to medical.” *Id.* ¶61. “They were trying to tell the officer, this guy is sick, you have to take him to medical, but the officer didn’t care.” *Id.* When he requested a COVID-19 test and medication for his

¹ This petition defines “transfer” as any time a prison or jail provides notification to ICE of release dates and/or facilitates ICE’s ability to take custody of an individual as they are being released, as discussed further *infra* Facts, Sec. E.

asthma, the facility nurse told him “no.” *Id.* ¶62. Mr. Hernandez Roman was in Adelanto, fighting for his life, because the State of California put him there. Orange County’s Theo Lacy Jail officials transferred him to ICE custody. *Id.* ¶4.

3. Andre Luis Lara—a 48-year-old man with diagnosed hypertension—has been detained pretrial in the Marin County Jail for a month and half, even though he can afford to pay his bail, because ICE has requested his transfer upon his release from custody. Declaration of Andre Luis Lara (Exh. 55) ¶¶2–6; Declaration of Nathan Peterson (Exh. 51) ¶¶3–11. Under the Marin County Sheriff’s policy, if Mr. Lara posts bail, he will be transferred to ICE. Peterson Decl. (Exh. 51) ¶5–11; Lara Decl. (Exh. 55) ¶¶5–8. As a result, Mr. Lara remains unnecessarily detained—and every additional day in custody is one additional day of heightened exposure to a virus that could seriously harm, if not kill him. He faces this danger solely because the State of California continues to permit transfers to ICE during the COVID-19 pandemic.

4. Up and down the state, California’s jails and prisons are continuing to voluntarily transfer individuals to ICE custody in the midst of the pandemic, even though they are not legally required to do so. By transferring individuals to ICE custody, California agencies are delivering the individuals in their care to dangerous conditions of confinement in ICE’s five detention centers in California. ICE’s abject failure to protect the lives of people in its custody from the deadly COVID-19 is inviting a calamity—a public health crisis that will affect not just the detainees, but the surrounding communities and California as a whole.

5. The State of California is aware of the unconscionable conditions in ICE’s detention centers. Attorney General Becerra called the conditions a “COVID-19-related catastrophe” in the making, and even demanded that ICE halt the transfers and introduction of new individuals into

its detention facilities. Exh. 82 at 1801. Yet, the State of California is just as responsible for populating ICE’s “death trap” detention centers. Transfers from California prisons and jails account for most of ICE’s bookings into detention during the COVID-19 pandemic. Many of those transferred to ICE are the very same people the State of California has released early from criminal custody, due to COVID-19 efforts to depopulate jails and prisons and save lives.

6. The State of California’s continued transfers to ICE at this moment in time is cruel and inhumane, and it defies every effort this state has already made to ebb the spread of the lethal COVID-19 virus. Federal courts across the country, including in California, have lambasted ICE’s failures to mitigate the spread of COVID-19 in its detention facilities as “callous disregard for the safety of our fellow human beings,” *Bravo Castillo v. Barr*, 20-cv-00605-TJH, 2020 WL 1502864, at *6 (C.D. Cal. Mar. 27, 2020), as encouraging an “unconscionable and possibly barbaric result,” *Thakker v. Doll*, 20-cv-480, 2020 WL 1671563, at *9 (M.D. Penn. Mar. 31, 2020), and “play[ing] Russian roulette with [a detainee’s] rights and with her life.” *Malam, et al. v. Adducci*, 20-cv-10829-JEL, ECF No. 33, at 25 (E.D. Mich. Apr. 17, 2020) (Exh. 50).

7. Judicial intervention is urgent and imperative to protect the health of all California residents and save lives. By this verified petition, Petitioner California Attorneys for Criminal Justice and American Immigration Lawyers Association, Southern California Chapter (“Petitioners”) seek a writ of mandate for extraordinary relief under California Constitution article VI, section 10 and California Code of Civil Procedure section 1085 enjoining the Governor and Attorney General of the State of California to exercise their mandatory duties in conformance with the United States Constitution and Constitution of California.

PARTIES

8. **Petitioner California Attorneys for Criminal Justice (“CACJ”)** is a membership organization of criminal defense attorneys practicing in California. CACJ has approximately 1,300 attorney members, who handle criminal cases in every county in the state. CACJ routinely engages in advocacy to advance justice, fairness, and constitutional protections in the criminal systems in the courts and the Legislature. CACJ members have clients or former clients incarcerated in California prisons and jails who are subject to ICE requests for transfer of custody or who have been transferred to ICE.

9. **Petitioner American Immigration Lawyers Association, Southern California Chapter (“AILA SoCal”)** is a membership organization of over 1,050 member attorneys in Los Angeles, Orange, Riverside, San Bernardino, Santa Barbara, San Luis Obispo, and Ventura Counties, who handle all manner of immigration-related cases. AILA SoCal’s mission is to promote justice, advocate for fair and reasonable immigration law and policy, advance the quality of immigration and nationality law and practice, and enhance the professional development of its members. AILA SoCal members have clients or former clients who are incarcerated in California prisons and jails and subject to ICE requests for transfer of custody, and who are presently detained in ICE custody because they were transferred to ICE by California authorities.

10. **Respondent Gavin Newsom** is Governor of California. He is sued in his official capacity. It is Governor Newsom’s legal duty to ensure that the laws of California are uniformly and adequately enforced. Governor Newsom also has special, emergency duties pursuant to the State of Emergency concerning COVID-19, which he declared on March 4, 2020, and which remains in effect. The State of Emergency vests Governor

Newsom with broad authority to take actions necessary to mitigate the threat of COVID-19. Governor Newsom has complete authority over the California Department of Corrections and Rehabilitation (“CDCR”) and can order a moratorium on transfers to ICE during the State of Emergency. Gov’t Code §§ 8627, 8567. The Governor also has the power to suspend laws and regulations temporarily if compliance with their terms would hinder or delay the state’s emergency response. Gov’t Code § 8571. As described below, he can suspend Gov’t Code § 7282.5 and certain sections of Gov’t Code § 7284.6(a) to stop local jail transfers to ICE. The Emergency Services Act also charges the Governor with the responsibility to coordinate the emergency plans and programs of all local agencies. Gov’t Code § 8569.

11. **Respondent Xavier Becerra** is Attorney General of California. He is sued in his official capacity. It is Attorney General Becerra’s duty to ensure that the laws of California are uniformly and adequately enforced. Attorney General Becerra also is responsible for exercising “direct supervision” over all sheriffs in the state “in all matters pertaining to the duties of their respective offices.” Cal. Const. art. V, § 13. Under California law, sheriffs’ law enforcement duties include the duty “to keep the county jail and the prisoners in it.” Gov’t Code § 26605. As the state’s chief law enforcement officer, Attorney General Becerra is responsible for ensuring that the sheriffs’ custodial practices comply with California law and constitutional requirements. As such, the Attorney General has the power to order local law enforcement to stop transfers to ICE.

JURISDICTION

12. Petitioners respectfully invoke this Court’s original jurisdiction under article VI, section 10 of the California Constitution, Code of Civil Procedure sections 1085 and 1086, and Rule 8.486 of the California Rules of Court. Petitioners invoke this Court’s original jurisdiction because

the issues presented are of paramount public importance and must be resolved promptly to address a looming and urgent public health crisis in the state’s correctional and immigration detention facilities. *See California Redevelopment Ass’n v. Matosantos*, 53 Cal. 4th 231, 253 (2011) (original jurisdiction over mandate challenging statutes that placed redevelopment agencies at risk of imminent dissolution); *San Francisco Unified Sch. Dist. v. Johnson*, 3 Cal. 3d 937, 945 (1971) (original jurisdiction over writ petition concerning the legality of compulsory busing as a means of achieving integration in public schools).

13. COVID-19 is a highly contagious, potentially deadly virus with no vaccine or cure. It is spreading rapidly in California. In recognition of these grave risks, the State of California has adopted sweeping measures to reduce infections in communities throughout the state. California has also taken some important steps to reduce its prison and jail populations, though these actions have not yet been at a pace or scale to significantly prevent COVID outbreaks in California’s carceral facilities. Immigration and Customs Enforcement (“ICE”), however, has not made *any* effort whatsoever—large or small—to meaningfully mitigate the spread of COVID-19 in its facilities, despite the virus rapidly coursing through the five facilities in which ICE detains 4,000 people in the state of California. Federal courts have declared the prospect of failing to release ICE detainees in advance of a COVID-19 outbreak to be “barbaric” and “unconscionable.” *Thakker*, 2020 WL 1671563, at *9 (ordering release of 13 detainees).² Yet

² *See, e.g., Xochihua-Jaimes v. Barr*, No. 18-71460, 2020 WL 1429877, *1 (9th Cir. Mar. 23, 2020) (ordering, *sua sponte*, the release of a petitioner at Adelanto “[i]n light of the rapidly escalating public health crisis, which public health authorities predict will especially impact immigration

the State of California continues to populate these federal immigration facilities by transferring people to ICE’s custody.

14. Time is of the essence. Piecemeal litigation in the lower courts is not an option given the dramatic pace at which the crisis is unfolding and given the sheer number of jails and prisons in the state that transfer people every day to ICE’s custody. A uniform, statewide moratorium on transfers to ICE is necessary to immediately protect the rights and lives of California residents. Petitioners respectfully urge this Court to intervene.

FACTS

A. COVID-19 Poses Grave Risk of Harm to Incarcerated People

15. COVID-19 is a deadly global pandemic. In the United States alone, there are 828,441 cases and 46,379 confirmed deaths, Exh. 73 at 1529,

detention centers.”); *Malam, et al. v. Adducci*, 20-cv-10829-JEL, ECF No. 33, at 25 (E.D. Mich. Apr. 17, 2020) (granting preliminary injunction and stating “[t]o order Petitioner’s continued civil detention would be to play Russian roulette with her rights and with her life.”); *Hope v. Doll*, No. 20-cv-00562-JEJ, ECF No. 22, at 5 (M.D. Penn, Apr. 10, 2020) (denying Defendants’ motion for reconsideration and ordering the release of 22 ICE detainees); *Basank v. Decker*, No. 20-cv-2518, 2020 WL 1481503, *1 (S.D.N.Y. Feb. 28, 2020) (ordering release of 10 ICE detainees who “face[] an imminent risk of death or serious injury in immigration detention if exposed to COVID-19”); *Bravo Castillo v. Barr*, 20-cv-00605-TJH, 2020 WL 1502864, at *5, *6 (C.D. Cal. Mar. 27, 2020) (ordering release of 2 individuals in Adelanto ICE Processing Center) (“Under the Due Process Clause, a civil detainee cannot be subject to the current conditions of confinement at Adelanto”); *Fraihat v. Wolf*, 5:20-cv-590-TJH, ECF No. 18, at 12 (ordering release of detainee because the COVID-19 pandemic rendered his continued detention in Adelanto unconstitutional); *Hernandez v. Wolf*, 5:20-cv-617-TJH, ECF No. 17, at 14–15 (C.D. Cal. Apr. 1, 2020) (same); *Ortuño v. Jennings*, No. 20-CV-02064-MMC, 2020 WL 1701724, at *5 (N.D. Cal. Apr. 8, 2020) (Exh. 92) (ordering release of 4 ICE detainees in Yuba and Mesa Verde).

and in California more than 35,396 cases and 1,354 confirmed deaths. Exh. 72 at 1520. The number of cases and deaths has been increasing at an extremely rapid rate because of the exponential growth of infections. Declaration of Dr. Joe Goldenson (Exh. 77) ¶6. Without effective public health intervention, some estimates indicate that more than 200 million people in the United States could be infected with COVID-19, with as many as 1.5 million deaths in the most severe projections. Declaration of Dr. Jonathan Golob (Exh. 32) ¶11; *accord* Declaration of Dr. Todd Schneberk (Exh. 81) ¶¶ 16–17.

16. There is no vaccine, antiviral treatment, or cure for COVID-19. Goldenson Decl. (Exh. 77) ¶10; Golob Decl. (Exh. 32) ¶10. The disease is believed to spread through “droplets” that can be transmitted during close interpersonal contact of about six feet, as well as through touching surfaces contaminated by respiratory droplets produced by a sick person. Schneberk Decl. (Exh. 81) ¶8. And evidence shows individuals infected with COVID-19 can transmit it to others even if they have no symptoms. *Id.* ¶¶12-13.

17. Nearly every adult appears to be at risk of infection. *Id.* ¶23. Although certain characteristics such as advanced age or underlying health conditions exacerbate the risk of death or serious illness from COVID-19, significant numbers of even young, otherwise healthy people with no pre-existing conditions have died from the virus. *Id.* ¶24. And in New York, approximately *one-third* of the patients between the ages of 30 and 39 who died from COVID-19 did not appear to have any risk factors. *See id.* Moreover, many individuals have risk factors that have not been diagnosed. *Id.* ¶34. This is particularly likely among immigrants in the United States, who are disproportionately likely to lack access to health insurance and quality health care. *Id.* Among the nonelderly population, 23% of lawfully present immigrants and more than 45% of undocumented immigrants were uninsured as of March 2020, compared to 9% of citizens, Exh. 22 at 972, and

the lack of health insurance often results in a failure to identify chronic diseases or other health conditions. *See also* Schneberk Decl. (Exh. 81) ¶34.

18. The only known effective measure to reduce the risk of serious illness or death from COVID-19 is to prevent people from being infected in the first place. Golob Decl. (Exh. 32) ¶10. In the absence of a comprehensive testing regime, “social distancing,” or maintaining six feet of separation at all times from other people, and quarantining is the *only* effective means of stopping the spread of the virus in the long run. *Id.* ¶10; Schneberk Decl. (Exh. 81) ¶38; Goldenson Decl. (Exh. 77) ¶11.

19. As a result, incarcerated people are at heightened risk of COVID-19 infection. *Id.* ¶¶13-24. Correctional and immigration detention facilities are “congregate settings,” places where people live and sleep in close proximity. Schneberk Decl. (Exh. 81) ¶41. Such enclosed group environments make it very difficult, if not impossible, for people to practice “social distancing.” Goldenson Decl. (Exh. 77) ¶¶13–14. Indeed, in settings like immigration detention facilities, “it will be very difficult irrespective of the amount of sanitation and hygiene practices employed, to prevent spread in such a confined densely populated space.” Schneberk Decl. (Exh. 81) ¶40.

20. In immigration detention facilities, there is a heightened risk of infection due to crowding and the layout of facilities, which make social distancing impossible; inadequate sanitation and hygiene supplies; scant medical resources and care; and a high proportion of vulnerable people detained. *See id.* ¶42; Golob (Exh. 32) Decl. ¶13.

21. ICE’s own medical subject matter experts have recognized that conditions in immigration detention amount to a “tinderbox scenario” for the rapid spread of COVID-19. *See* Exh. 23 at 984; *see also* Schneberk Decl. (Exh. 81) ¶¶109–11.

22. For these reasons, leading public health officials have warned that without swift and large judicial intervention, the “epicenter of the

pandemic will be jails and prisons.” *See, e.g.*, Exh. 20 at 961; Exh. 84 at 1809-10. Experience already shows how quickly the virus can course through a correctional or detention facility. For example, in the span of one week, the number of confirmed COVID-19 cases Chicago’s Cook County jail jumped from two to 101. Exh. 28 at 1094. As of April 22, 2020, 448 detainees and 334 correctional officers and other sheriff employees had tested positive for the virus. Exh. 68 at 1496.

23. Transmission in correctional and immigration detention facilities endangers not only the incarcerated, but also the broader community. As correctional staff enter and leave the facility, they can carry the virus with them. Goldenson Decl. (Exh. 77) ¶27. And any outbreak in a correctional or detention facility impacts the surrounding community’s health care system. Schneberk Decl. (Exh 81) ¶¶99-106. For example, news outlets report the COVID-19 outbreak at the federal prison in Lompoc, California—the worst federal prison outbreak in the nation—is believed to be responsible for nearly one-third of all confirmed COVID-19 cases in Santa Barbara County. Exh. 47 at 1253-56; Exh. 44 at 1217-23. The outbreak is so severe that, according to the Los Angeles Times, the County’s public health resources are now being committed to the prison to help contain the outbreak and a field hospital is being set up within the prison grounds to prevent “local hospitals from being overwhelmed by patients and their accompanying security.” Exh. 44 at 1220.

24. The same strain on state and local public health resources is expected of any outbreak in federal immigration detention facilities. Schneberk Decl. (Exh. 81) ¶¶104–06. Mitigation efforts recommended by medical experts and public health officials include depopulating correctional facilities to enable social distancing, limiting or suspending new bookings into custody, and sharply restricting transfers. *Id.* ¶¶ 94–95; Exh. 26 at 1020-30. The CDC’s guidance specifically urges the “restrict[ion of] transfers of

incarcerated/detained persons to and from other jurisdictions and facilities unless necessary for medical evaluation, medical isolation/quarantine, clinical care, extenuating security concerns, or to prevent overcrowding.” Exh. 26 at 1024.

B. ICE’s Abject Failure to Protect Human Lives in its Detention Centers from COVID-19

25. COVID-19 is raging through ICE’s detention facilities across the country due to ICE’s abject failure to mitigate its spread. While the total number of infected people is unknown given the scarcity of testing, as of the date of this petition, ICE reports a total of 297 confirmed COVID-19 cases among detainees, 35 confirmed cases among ICE employees at detention centers, and 88 confirmed cases among ICE agents, while the number of confirmed cases among private prison company employees is unknown. Exh. 76 at 1548-49; *see* Exh. 35 at 1175.

26. ICE’s Otay Mesa facility, in San Diego, has one of the largest outbreaks of any ICE detention facility in the country, with 42 confirmed cases among those in custody. Exh. 76 at 1548-49. The actual numbers of infected detainees nationwide and in California are—because of the long incubation period of the virus, the nationwide shortage of testing, and the time it takes to process a test—undoubtedly far higher. Schneberk Decl. (Exh. 81) ¶111. The outbreak in ICE’s detention centers is so significant that, according to news reports, Guatemala has refused to accept new deportees until ICE can ensure that they are not infected by COVID-19. This is following the revelation that at least 44 individuals aboard a recent deportation flight to Guatemala tested positive for COVID-19. Exh. 48 at 1264; *see* Exh. 43 at 1214. According to news reports, CDC officials themselves randomly tested 12 individuals aboard one deportation flight to Guatemala and their tests were all positive for COVID-19, suggesting that

the true rate of infection in ICE’s detention centers is necessarily far greater than reported confirmed cases. Exh. 43 at 1214.

27. ICE has taken no meaningful action to reduce its detention center populations or to address the spread of the virus coursing through its facilities—effectively willing people in its custody to die. As of April 15, 2020, ICE had released only 700 vulnerable individuals nationwide in response to COVID-19, out of a total of 32,309 detained. Exh. 41 at 1202; Exh. 39 at 1195. Meanwhile, it has continued its enforcement activities, including routinely booking into custody new detainees into its detention facilities. *See, e.g.*, Declaration of Kelly Engel Wells (Exh. 78) ¶5; Declaration of Katie Kavanagh (Exh. 75) ¶19; Declaration of Lisa Knox (Exh. 65) ¶8. The result is continued crowding in facilities that house people in congregate settings, allowing for no possibility of social distancing. *See, e.g., Savino v. Souza*, No. 20-cv-10617-WGY, 2020 WL 1703844, *2–*3 (D. Mass. Apr. 8, 2020) (in granting motion for class certification of ICE detainees, describing the impossibility of social distancing in Massachusetts facility).

28. ICE can use alternatives to detention—which are proven to have a 99% success rate at ensuring appearances in removal hearings, *see* Exh. 14 at 621, 625—and exercise discretion to release people on humanitarian grounds. *See Thakker*, 2020 WL 1671563, at *8 (noting “that ICE has a plethora of means *other than* physical detention at their disposal by which they may monitor civil detainees and ensure that they are present at removal proceedings, including remote monitoring and remote check-ins”); 8 U.S.C. §§ 1182(d)(5); 1226(a), 1231(a)(3), 8 C.F.R. § 212.5(b)(1).

See Robles Rodriguez v. Wolf, Declaration of Andrew Lorenzen-Strait (Exh. 29) ¶11. It simply refuses to do so.³

i. COVID-19 Conditions in ICE’s Detention Centers in California

29. In California, ICE has five detention facilities: the Adelanto ICE Processing Center, the Mesa Verde Detention Center, the Otay Mesa Detention Center, the Imperial Regional Detention Facility, and the Yuba County Jail. As of July 2019, these five facilities detained approximately 4,000 people. Exh. 13 at 606. Four of these facilities—all but the Yuba County Jail—are operated by private prison companies the GEO Group, CoreCivic, and the Management Training Corporation. These companies are notorious for providing substandard medical care to immigration detainees in California. *See* Exh. 2 at 22-24, 32-36; *see also, e.g.*, Exh. 9 at 412-14; Exh. 6 at 264-318; *see also* Exh. 10 at 424-25.

30. ICE’s detention centers in California remain crowded and, given the design of the facilities, ICE forces detainees to live in conditions that allow for no social distancing, while providing paltry, if any, protections against the spread of the virus. As public health officials have warned, from the southern border to northern California, these facilities threaten public health

³ ICE’s refusal to use alternatives-to-detention programs, even during this pandemic, is consistent with ICE’s general approach under the Trump Administration to aggressively rely on detention over other alternatives. These policies led to a sharp increase in the number of people in immigration detention, rising from 34,376 in FY 2016 to 50,165 in FY 2019. Exh. 18 at 659. *See also* Knox Decl. (Exh. 65) ¶5 (stating that 37% of detained individuals in Mesa Verde who she surveyed were actually eligible to apply for bond from an immigration judge or parole from ICE, indicating ICE had chosen to detain them in its discretion).

throughout the state and threaten to compromise our already taxed health care system. *See* Schneberk Decl. (Exh. 81) ¶¶83–85.

31. **Otay Mesa Detention Center, San Diego, County.** The Otay Mesa facility, which is owned and operated by CoreCivic, houses male and female detainees, including pregnant detainees, in housing units with 64 double bunk cells in each unit, separated by a distance of about one meter. *See* Exh. 11 at 472. Although the bed capacity for ICE detainees is around 896, in fiscal year 2017, the average daily population was 1,028. *Id.* In shared spaces, including the dining area, gym, chapel, library, commissary, in/out processing areas, medical units, and legal visitation areas, detainees are necessarily packed closely together and must often stand in lines just inches apart to enter or exit them. Declaration of Luis Gonzalez (Exh. 60) ¶ 9. There is no possibility of social distancing in an already over-capacity facility designed to house people in congregate settings. Schneberk Decl. (Exh. 81) ¶54.

32. Transfers in and out of the detention centers continue to be a regular occurrence, with detainees sharing booking areas in close proximity to others. *Id.* at ¶49.

33. Detainees are responsible for cleaning the facility. Facility officials do not clean the facility, nor do they hire cleaning staff. Declaration of Dorien Ediger-Soto (Exh. 56) ¶ 6. Similarly, until April 17, 2020, detainees continued to prepare food in the kitchen for a \$1 per day wage in a shared kitchen space. *Id.* at ¶ 9.

34. In Otay Mesa, detainees often do not have access to soap, hand sanitizer, masks or gloves. *See* Ediger-Soto Decl. (Exh. 56) ¶¶12–13; *see also* Schneberk Decl. (Exh. 81) ¶50–51. In fact, on April 10, 2020, guards at the Otay Mesa facility attempted to use this deprivation as a source of coercion, telling detainees they would not receive face masks unless they signed a waiver releasing CoreCivic of responsibility if the detainees contracted COVID-19. Declaration of Anna M. Hysell (Exh. 38) ¶¶ 5–12. *See also* Exh.

36 at 1177-81. Running out of soap is such a frequent occurrence that detainees regularly must buy soap from the commissary. Ediger-Seto Decl. ¶ 12. Guards in Otay Mesa—who regularly monitor and interact with detainees and are most likely to be carriers of the virus because they work in shifts, entering and exiting the facilities daily—do not consistently wear masks or gloves. Schneberk Decl. (Exh. 81) ¶52; Ediger-Seto Decl. (Exh. 56) ¶¶14, 22, 25.

35. Information about COVID-19 has been disseminated only in English, with detainees asked to interpret for facility officials from English to Spanish. Ediger-Seto Decl. (Exh. 56) ¶40. There is no attempt to provide information to any other language speakers, including detainees who speak French, Hindi, Punjabi, Gujaarati, Dari, and Mandarin. *Id.*

36. Members of Congress have intervened to urge ICE to address the humanitarian crisis unfolding in Otay Mesa with no discernable impact on ICE’s conduct. Exh. 33 at 1165-66; Exh. 40 at 1199-1200.

37. *Pro se* detainees continue to call immigration attorneys begging them for representation on bond or parole and expressing terror at the prospect of getting sick and nobody on the outside knowing what’s happened to them. Ediger-Seto Decl. (Exh. 56) ¶43.

38. **Imperial Regional Detention Facility, Imperial County.** The Imperial Regional Detention Facility (IRDC)—owned and operated by the Management Training Corporation—houses male and female detainees, including pregnant detainees, in open dorm style housing units, four detainees housed per dorm. Exh. 11 at 464-65. Beds are placed approximately one meter apart. Declaration of Elizabeth Lopez (Exh. 59) ¶4. The facility holds about 640 detainees and has capacity for 704. *Id.* at 464.

39. In the Imperial Regional Detention Facility, sinks, showers, and toilets are shared, and meals are communal. Schneberk Decl. (Exh. 81) ¶57; Ediger-Seto Decl. (Exh. 56) ¶¶5-8; Lopez Decl. (Exh. 59) ¶¶4-6. Detainees

do not have regular access to soap, which they frequently must buy from the commissary. Ediger-Seto Decl. (Exh. 56) ¶12; Lopez Decl. (Exh. 59) ¶8. They do not have hand sanitizer, masks, or gloves. Schneberk Decl. (Exh. 81) ¶58; Ediger-Seto Decl. (Exh. 56) ¶12; Lopez Decl. ¶¶7-8. Detainees have not been told anything about COVID-19 apart from instructions to wash their hands. Ediger-Seto Decl. (Exh. 56) ¶31. Detainees have learned about COVID-19 mostly from family members outside of detention and from the television, and are extremely worried for their safety. *Id.* ¶39.

40. Staff do not regularly wear protective equipment even though they are in constant contact with the detainees between different sections and booking areas, as well as visitors. Schneberk Decl. (Exh. 81) ¶59; Ediger-Seto Decl. (Exh. 56) ¶13-14. *See also* Lopez Decl. (Exh. 59) ¶¶14-16 (describing lack of precautions for visitors and newly booked detainees). There also have been numerous reports about untrained staff at the facility providing deficient medical care that resulted in inadequate medical assessments, wrong medication dosage, and delays in emergency response. Exh. 5 at 197-231. Detainees struggle to get medical care beyond ibuprofen, even when they are suffering great pain. Lopez Decl. (Exh. 59) ¶10. It is very difficult for anyone not fluent in English or not literate to request medical attention, as requests must be made in writing. *Id.*

41. As of mid-April 2020, Imperial continued to book new detainees into the facility. Lopez Decl. (Exh. 59) ¶14. These new arrivals were quarantined for only 7 days before being placed with the rest of the population. *Id.*

42. **Adelanto ICE Processing Center, San Bernardino County.** The Adelanto Detention Facility—owned and operated by the GEO Group, Inc. (“GEO”)—currently detains approximately 1,300 individuals and has capacity to detain up to 1,940. Exh. 11 at 462; Exh. 61 ¶19. The facility is designed in such a way as to make social distancing impossible absent a

dramatic reduction in population. Schneberk Decl. (Exh. 81) ¶69; *see* Declaration of Beatrix Forero Chavez (Exh. 63) ¶¶4-11; Hernandez Roman Decl. (Exh. 64) ¶¶6-10; Declaration of Miguel Aguilar Estrada (Exh. 67) ¶¶4-10. Detainees are either placed in enclosed housing areas, sharing a large common room surrounded by four sections containing 12 sets of double-bunks to house up to 96 detainees; or in groups of 18 cells surrounding a large common room, with each cell housing between two to eight detainees with shared sinks, toilets and showers. Exh. 11 at 463. Meals are communal and detainees sometimes eat only inches apart in the cafeteria. *Castillo*, 2020 WL 1502864, at *2; Schneberk Decl. (Exh. 81) ¶64.

43. In Adelanto, guards regularly rotate through the various holding areas several times a day. *Castillo*, 2020 WL 1502864, at *2. Guards, detainees and cafeteria workers do not regularly wear or have access to gloves, masks or hand sanitizer. *Id.*; Chavez Decl. (Exh. 63) ¶¶21-23, 39-42, 50; Hernandez Roman Decl. (Exh. 64) ¶¶22-24, 33, 38, 53-54, 59; Estrada Decl. (Exh. 67) ¶¶17, 25, 33, 49, 51-52.

44. Detainees report that since the pandemic began countless people have fallen ill in Adelanto with COVID-19 symptoms without receiving any medical attention at all, let alone testing. Estrada Decl. (Exh. 67) ¶¶53-62; Hernandez Roman Decl. (Exh. 64) ¶¶39, 60-64; Chavez Decl. (Exh. 63) ¶45-49. In one case, it was not until a woman with COVID-19 symptoms had convulsions and then became unconscious that medical authorities responded, and even then “they didn’t bring a stretcher. Instead, they forced her unconscious body into a wheelchair and wheeled her away.” Chavez Decl. (Exh. 63) ¶47.

45. The *sole* measure the facility takes to limit staff-to-detainee transmission of COVID-19 is to ask staff to “submit to temperature checks and complete questionnaires to determine COVID-19 risk prior to assuming their posts and positions.” Exh. 61 ¶31. This protocol ignores the

overwhelming medical consensus that “asymptomatic carriers of COVID-19 are enormous contributors to the continued spread of the virus.” Schneberk Decl. (Exh. 81) ¶14. Yet there is *no* protocol for Adelanto to screen for asymptomatic, contagious staff who may come into and go out of the facility every day. *See id.* ¶68.

46. Prior to the COVID-19 pandemic, Adelanto was known for lacking proper sanitation and adequate access to medical care, Exh. 12 at 582-88, with requests to seek medical attention for acute or chronic illnesses being delayed or ignored for weeks or months, Exh. 9 at 412-14; *see* Schneberk Decl. (Exh. 81) ¶¶100, 103. There have also been numerous reports citing preventable deaths and risky conditions for people who get sick while detained at Adelanto. Exh. 8 at 343-85.

47. For example, in 2018, the Adelanto facility, run by GEO Group, was blasted by the DHS Office of Inspector General as providing “untimely and inadequate detainee medical care” and failing to “take[] seriously the recurring problem of detainees hanging bedsheet nooses” in their cells, which the OIG alarmingly observed in 15 out of 20 male detainee cells and detainees reported were used for suicide attempts, among other functions. Exh. 9 at 407-09.

48. **Mesa Verde Detention Center, Kern County.** Similarly, the Mesa Verde Detention Facility—owned and operated by the GEO Group—currently holds approximately 385 individuals and has capacity for 400. Exh. 11 at 469. Detainees are housed in barrack-style housing units, each of which has 50 double bunk beds to accommodate 100 detainees. *Id.* at 470. Detainee beds are only a few feet away from each other. *See* Schneberk Decl. (Exh. 81) ¶¶70–73; Sanchez Nuñez Decl. (Exh. 58) ¶14; Knox Decl. (Exh. 65) ¶9.

49. In Mesa Verde, detainees also endure inadequate hygiene and sanitation. Toilets, sinks, and showers are shared and are not disinfected between each use. *See* Schneberk Decl. (Exh. 81) ¶72. Detainees are not

provided with soap or have to share soap with others. Knox Decl. (Exh. 65) ¶¶5, 8, 12. Detainees receive one hotel-size shampoo bottle and one bar of soap at a time for bathing, washing hands, and cleaning personal products, which is insufficient to practice proper hygiene. Sanchez Nuñez Decl. (Exh. 58) ¶11. Detainees are solely responsible for cleaning the dorm and bathrooms. *Id.* ¶12. Because they do not have sufficient access to cleaning supplies, they use their hotel-size shampoo bottles, toothpaste, and lotion to clean the dorm and bathrooms. *Id.*

50. Detainees have no access to gloves (except cleaning), and have only recently begun receiving masks. Sanchez Nuñez Decl. (Exh. 58) ¶13. Staff do not regularly wear masks. *Id.*; Knox Decl. (Exh. 65) ¶7.

51. Food service is communal and there are no forms of sanitation provided during mealtimes. Kavanagh Decl. (Exh. 75) ¶¶10–11; Schneberk Decl. (Exh. 81) ¶72. When entering and exiting the dining hall, as well as while eating, detainees are only inches apart. Sanchez Nuñez Decl. (Exh. 58) ¶14.

52. In recent days, new detainees continue to enter Mesa Verde from other facilities without being quarantined or isolated before joining the dorm. Sanchez Nuñez Decl. (Exh. 58) ¶16.

53. In recent years, oversight agencies have also flagged Mesa Verde’s failure to report and document medical assessments and delays in medical care. *See* Exh. 1 at 8. Detainees are regularly provided with the wrong medication. Knox Decl. (Exh. 65) ¶4. Other detainees with doctor-prescribed diets are unable to receive appropriate meals. *Id.*

54. **Yuba County Jail, Yuba County.** Yuba County Jail, which is operated by the Yuba County Sheriff’s Department through an agreement with ICE, houses a maximum of 220 ICE male and female detainees. Exh. 11 at 475. Detainees are housed in barrack-style cells separated from each other by a few feet away. *Id.* Kavanagh Decl. (Exh. 75) ¶¶11-18. Although

they are civil detainees, they are commingled with the county jail population in the housing units. *Id.* Many of the units are extremely compact and meals are served in group settings by detainees or county jail inmates. *See* Schneberk Decl. (Exh. 81) ¶77; Kavanagh Decl. (Exh. 75) ¶10.

55. Toilets and sinks are communal. There are only two urinals and a few sinks, and detainees must stand in line close together to wait for their turn to use them. Declaration of Angel de Jesus Zepeda Rivas (Exh. 57) ¶21.

56. In Yuba, cleaning is done by the detainees or county jail inmates themselves, using dirty buckets of mop water and reusable rags. Schneberk Decl. (Exh. 81) ¶77; Kavanagh Decl. (Exh. 75) ¶10. Detainees get a tiny bar of soap every two to three days. Zepeda Rivas Decl. (Exh. 57) ¶18. When they run out of soap, they must wash their hands using a harsh cleaning liquid the detainees are given to clean the bathrooms, causing their hands to burn. *Id.*

57. While Yuba staff have begun to wear their own masks and gloves, detainees who have asked for personal protective equipment for themselves have been told no. *Id.* ¶20. Detainees have occasionally been told to stay six feet apart by officers coming through the dorms, but the lack of space makes it impossible to do so. *Id.* ¶22.

58. In March 2020, a new detainee arrived at Yuba with a cough and fever. *Id.* ¶27. Shortly after, more than a dozen people in the pod were sick with the same symptoms. *Id.* As of mid-April, new detainees continue to be added to the detainee population without being quarantined for even one week—much less 14 days. *Id.* ¶30.

59. Reports by the Department of Homeland Security’s Office of Detention Oversight, Exh. 4 at 140-41, and non-governmental organizations have reported issues with medical care, including instances of deficient medical care by unqualified staff and delays in treatment of serious medical conditions, including broken bones and suspicious lumps. Exh. 5 at 214-16.

60. Detainees often complain that requests for medical visits are ignored. Kavanagh Decl. (Exh. 75) ¶¶21-22. One detainee with diabetes reports he has made at least ten requests to see the doctor since February 2020 due to symptoms of tingling throughout his body, shortness of breath, and stabbing pain in his chest. Zepeda Rivas Decl. (Exh. 57) ¶9. The two times a medic came to see him, they simply took his blood pressure and sent him back to his pod—without even telling him what his blood pressure measurement was. *Id.* A few weeks later, his feet became so swollen he could not walk normally. *Id.*

ii. Detainee Hunger Strikes and Protests in California

61. There is no better barometer of the humanitarian crisis unfolding in ICE’s detention centers than the fact the detainees themselves have taken enormous risks to plea for help.

62. In at least three of California’s immigration detention centers, detainees are on hunger strike. In Otay Mesa, detainees in at least 11 units are on hunger strike over their concerns about their safety. Ediger-Seto Decl. (Exh. 56) ¶42; Exh. 36 at 1178.

63. In Mesa Verde, beginning on April 9, 2020, 40 detainees begun a hunger strike “to call attention to the inhumane conditions we are living in inside the facility, including not receiving antibacterial soap, cleaning supplies, protective equipment, poor medical care, and calling for our liberation from immigration detention.” Sanchez Nuñez Decl. (Exh. 58) ¶17. In retaliation for their strike, facility staff have threatened the hunger strikers with denying their commissary privileges, which detainees depend on for personal hygiene supplies, among other things. *Id.*

64. Since mid-March, other groups of detainees at Mesa Verde have pled for authorities to protect them from COVID-19. In late March, detainees in Dorm C and D sent letters to ICE and the ACLU pleading for

release, protection from COVID-19, and adequate medical care. Exh. 85 at 1814-1820; *id.* at 1814 (“Some of us have been here over three years and are still in the courts, while most of us have been here for months. . . . Some of us have paid our debt to society and were found suitable for parole and released by state prisons only to be detained by ICE for a civil matter which doesn’t require us being in custody. . . . Many of us have underlining medical issues. . . . This will turn our detention into a death sentence. . . . because this pandemic requires social distancing and that is impossible in this environment. . . . All it takes is one person to have the virus and we will all be infected in this pietridish”). Eighty-five detainees clandestinely filmed themselves making their plea in a widely circulated video.⁴

65. In Adelanto, according to news reports, more than 100 men began a hunger strike in mid-April to protest the facility’s complete failure to protect them adequately from the threat of a COVID-19 outbreak. Exh. 49 at 1270. According to the Los Angeles Times, their demands include the most basic preventative measures against COVID-19: that “ICE stop booking in new people, that all staff members wear masks and gloves, that detainees be provided with adequate hygiene supplies and that those experiencing coronavirus symptoms be tested.” Exh. 62 at 1443. Separately, in early April, nearly 100 women began a cleaning strike in response to the incident where a woman with COVID-19 symptoms (fever and shortness of breath) was not able to get any medical attention until she began convulsing and lost consciousness. Forero Chavez Decl. (Exh. 63) ¶ 48. As punishment, GEO staff forced all the women to stay on their beds, with only five women at a time allowed to leave their beds for meals. *Id.*

⁴ See Mesa Verde detainee video, <https://www.youtube.com/watch?v=piQGtgKx5uY>.

C. The State of California is Well-Aware of the Humanitarian Crisis Unfolding in California’s Immigration Detention Facilities

66. Governor Newsom and Attorney General Becerra are well-aware of the dangerous situation unfolding in ICE detention centers in the state. In fact, on April 13, 2020, the Attorney General urged the Department of Homeland Security to “reduce the population of detainees” and “implement policies to reduce the risk of transmission among the remaining detainees and staff” to avert unnecessary loss of life in facilities and surrounding communities. Exh. 82 at 1801. Advocacy organizations and detainees themselves have urged the Governor and the Attorney General since mid-March to address the mounting crisis in immigration detention centers, including urging him to stop populating those facilities by transferring people to ICE custody. Declaration of Maria Romani (Exh. 80), ¶¶17–22; *see also* Exh. 86. When asked in a news conference about his position on issuing a moratorium on transfers to ICE, Governor Newsom replied: “It’s a legal question, it’s a moral and ethical question. . . . As you know, I signed legislation to make these for-profit prisons in the State of California and ICE detention centers illegal.”⁵

D. The State of California Continues to Transfer People in Jail and Prison to ICE during this Pandemic

67. Amid this pandemic, the State of California has continued its practices of transferring people to ICE from state prisons and county jails, populating the very detention centers that the Attorney General himself has

⁵ Office of the Governor, COVID-19 Update, News Conference, Apr. 17, 2020, <https://twitter.com/CAgovernor/status/1251301451751583744?s=20> (at 35:20–35:36).

called on ICE to depopulate and that the Governor has sought to make illegal through legislation enacted earlier this year. *See* Exh. 82 at 1801; *infra*. Sec. F.

68. Public defenders and legal service providers report ongoing transfers into ICE custody throughout the pandemic. Declaration of Graciela Martinez (Exh. 52) ¶6 (Los Angeles County transfers to ICE continue); Declaration of Jean Costanza (Exh. 53) ¶7 (same); Declaration of Bernice Espinoza (Exh. 54) ¶6 (same for Sonoma County); Declaration of V. Starrett (Exh. 45) ¶6 (same for Ventura County); Declaration of Rachael Keast (Exh. 71) ¶5 (same for Marin County); Declaration of Avantika Shastri (Exh. 69) ¶6 (same for Alameda County); Declaration of Jacqueline Dan (Exh. 74) ¶3 (same for Orange County); Kavanagh Decl. (Exh. 75) ¶3 (same for San Quentin State Prison); Declaration of Lisa Knox (Exh. 70) ¶8 (California state prisons transfers continue, resulting in new bookings in Mesa Verde); Wells Decl. (Exh. 78) ¶5 (same, including resulting in new bookings in Yuba). These practices have continued unabated, despite efforts to urge counties and the state to stop. Shastri Decl. (Exh. 69) ¶5 (Alameda County Public Defender letter to Alameda Sheriff calling for a moratorium); Declaration of Maria Romani (Exh. 80) ¶¶17–22 (detailing significant advocacy efforts to urge county sheriffs and the state to adopt moratoriums on transfers during pandemic).

69. In fact, since the pandemic started, transfers from California’s prisons and jails have become the *primary* source of ICE’s new bookings into California’s immigration detention centers. In other words, it is the actions of the State of California, more than actions of ICE at this unique moment, that are keeping a flow of new people into ICE detention facilities. In litigation, ICE stated that it “is continuing to transfer detainees from state and local criminal custody” while otherwise “limit[ing] the intake of new detainees being introduced into the ICE detention system.” *Fraihat v. ICE*,

Declaration of Russell Hott (Exh. 42) ¶12. This is consistent with available data and the first-hand accounts of detainees. For example, in the Yuba County Jail, ICE booked 44 individuals into custody between March 11 and April 20, 2020. Kavanagh Decl. (Exh. 75) ¶¶26. Lawyers interviewed 26 of the 44 individuals and learned that all 26 had been transferred to ICE from other institutions, with 21 coming from California prisons and jails. *Id.* Similarly, all new bookings into one dorm in Mesa Verde in a recent two-week period were the product of jail and prison transfers. Knox Decl. (Exh. 65) ¶8. *See also* Wells Decl. (Exh. 78) ¶5.

70. In regular times, California prisons and jails account for a large percent of new bookings into ICE’s detention centers. In Fiscal Year 2018, California prisons and jails contributed to 38% of all ICE arrests in the state, with 30.5% (or 4,336) coming from local jails⁶ and 7.5% (or 1,073) coming from state prisons. Exh. 87. *See also* Knox Decl. (Exh. 65) ¶¶4–8 (discussing study of detained population at ICE’s Yuba and Mesa Verde facilities that found 35 percent came from jail and prison transfers); Exhibit A to Knox Decl. (Exh. 66). In 2019, the Los Angeles Sheriff’s Department transferred 457 individuals to ICE. Martinez Decl. (Exh. 52) ¶5.

71. When California prisons and jails transfer individuals, ICE books those individuals into one of California’s five immigration detention facilities where they often remain for long periods of time. *See* Starrett Decl. (Exh. 45) ¶6 (confirming client transferred during pandemic is still in ICE custody); Martinez Decl. (Exh. 52) ¶10 (same); Costanza Decl. (Exh. 53) ¶7

⁶ These numbers for ICE arrests at local jails are generally consistent with those reported to the California Attorney General. In 2018, 30 local law enforcement agencies in California reported to the Attorney General 2,038 transfers into ICE custody. *See* Romani Decl. (Exh. 80) ¶16.

(same); Espinoza Decl. (Exh. 54) ¶6 (same); Kavanagh Decl. (Exh. 75) ¶3 (same); Shastri Decl. (Exh. 69) ¶6 (same).

72. Without any moratorium or limit on transfers, California prisons and county jails have continued to transfer individual to ICE custody even when individuals are released due to COVID-19 measures put in place by the Governor, the Judicial Council, or local law enforcement. For example, on March 25, 2020, the Los Angeles County Sheriff's Department transferred a 68-year-old man whom the Los Angeles County Superior Court had ordered released in specific consideration of COVID-19 to ICE. Martinez Decl. (Exh. 52) ¶¶7–9. He is now detained at the Adelanto ICE Processing Center, where the likelihood of his being exposed to the virus is far higher than if he had been released as intended. *Id.* ¶10. Similarly, on April 14, 2020, the Ventura County Sheriff's Office transferred an individual to ICE after he was ordered released due to Emergency Rule 4 of the Judicial Council, which directed courts to set \$0 bail for certain individuals. That individual remains detained at Adelanto. Starrett Decl. (Exh. 45) ¶6. Further, in the first two weeks of April, the Sonoma County Sheriff's Office transferred four people to ICE who were released due to the Judicial Council's emergency bail orders. Espinoza Decl. (Exh. 54) ¶6.

73. California's continued cooperation with ICE transfer requests is not only undermining the (not-yet-sufficient) state and local decarceration efforts to address COVID-19, by simply moving people from one carceral setting to another, but it is also keeping people incarcerated in county jails despite their eligibility for bail. For example, in Marin County, the Sheriff's policy is to transfer individuals to ICE custody based on pending charges, not convictions, meaning that a person can be transferred to ICE pretrial when they post bail or are otherwise ordered released pretrial. Keast Decl. (Exh. 71) ¶4; Romani Decl. (Exh. 80) ¶10. As a result, some individuals in

custody in counties like Marin may not seek pretrial release, despite their eligibility, to avoid transfer to ICE—keeping them needlessly incarcerated.

74. For a month and a half, Andre Luis Lara, a 48-year-old Brazilian citizen with no prior convictions or criminal history, has been unnecessarily detained in Marin County Jail because he has an ICE detainer that the Marin County Sheriff’s Office has confirmed in writing it intends to comply with. Lara Decl. (Exh. 55) ¶¶2–5; Peterson Decl. (Exh. 51) ¶¶3–9. Although Mr. Lara is eligible for release on bail and he can afford to pay the amount, he has not posted bail because, if he did, the Sheriff would transfer him to ICE custody, where his life would be further jeopardized. Peterson Decl. (Exh. 51) ¶5–11; Lara Decl. (Exh. 55) ¶¶5–8. Mr. Lara suffers from hypertension—every additional day that he spends in custody is one additional day of heightened exposure to a virus that could seriously harm, if not kill him. Peterson Decl. (Exh. 51) ¶¶10–11; Lara Decl. (Exh. 55) ¶6.

75. California’s continuing transfers to ICE is also contributing to ICE’s Fourth Amendment violations during this pandemic. For example, on April 9, the San Quentin State Prison transferred a United States citizen to ICE custody. That person was unlawfully detained by ICE at the Yuba County Jail (which holds people for ICE) for over one week before a lawyer intervened. Kavanagh Decl. (Exh. 75) ¶¶3–7. On April 14, 2020, the Ventura County Sheriff transferred a person to ICE custody on an immigration detainer that the district court for the Central District of California has ruled unconstitutional and permanently enjoined, *see Gonzalez v. ICE*, 416 F.Supp.3d 995 (C.D. Cal. 2019), yet ICE nonetheless issued the detainer and arrested the individual. Starrett Decl. (Exh. 45) ¶¶6–7.

E. Legal and Policy Framework for California’s Transfers to ICE Custody

76. ICE requests custody transfers through its I-247 immigration detainer forms. These detainers are unilaterally issued, unsworn, check-the-

box forms ICE agents complete without any judicial review either before or promptly after arrest. *See Gonzalez v. ICE*, 416 F. Supp. 3d 995, 1000 (C.D. Cal. 2019). The I-247 form requests that a state or local law enforcement agency notify ICE of a person’s release date and detain a person in its custody for up to 48 hours beyond their release time to allow ICE to come take custody. *See, e.g.*, Exh. 51-1 (I-247 form). California law and policy prohibits state prisons and local jails from detaining individuals on immigration detainers, so California agencies interpret immigration detainers as requests for notification and transfer of custody to ICE at the point of release. Gov’t Code § 7284.6(a)(1)(B) (prohibiting local law enforcement from detaining an individual on an immigration detainer, but permitting notification and transfer in certain circumstances); Exh. 7 at 320 (“CDCR will no longer retain an inmate past his/her parole/discharge date to facilitate pick-up by ICE” but stating it will facilitate notification and release to ICE).

77. For the purposes of this petition, “transfer” to ICE shall refer to any time a state prison or local jail provides notification to ICE of release dates and/or facilitates ICE’s ability to take custody of an individual as they are being released from prison or jail, whether or not the jail or prison uses the term “transfer,” and whether or not the ICE arrest or pick-up happens inside the jail or prison or in a public lobby. *See, e.g.*, Romani Decl. (Exh. 80) ¶10 (describing how Marin and Fresno County take the position that handing a person over to ICE in a custodial setting is not a “transfer”), Exhs. 80-6 and 80-7 (Marin and Fresno County policies); Keast Decl. (Exh. 71) ¶4 (noting that Marin County Sheriff allows ICE into the sally port area of the jail to make arrests). This petition’s use of the term “transfer” is consistent with California law, which defines transfer to ICE as an “agency facilitat[ing] the transfer of an individual in its custody to ICE.” Gov’t Code § 7283(g).

The Attorney General’s Office has further clarified that any hand-off to ICE, even if it occurs in a non-public area of the jail is a transfer.⁷

78. Transfers to ICE are voluntary. Federal law does not require state or local compliance with ICE’s requests for notification of release dates and cooperation in facilitating transfers. *United States v. California*, 921 F.3d 865, 887 (9th Cir. 2019) (“neither an administrative warrant issued by federal authorities nor any other provision of law identified by the United States *compels* any action by a state or local official”); *Steinle v. City and Cnty. of San Francisco*, 919 F.3d 1154, 1164 (9th Cir. 2019) (federal law does not prohibit state and local restrictions on providing release date information to ICE); *City and County of San Francisco v. Trump*, 897 F.3d 1225, 1241 n.7 (9th Cir. 2018). Rather, as California law makes clear, compliance is discretionary. Gov’t Code § 7282.5 (“A law enforcement official shall have discretion to cooperate with immigration authorities only if doing so would not violate any federal, state, or local law, or local policy, and where permitted by the California Values Act.”).

79. California law does not constrain the discretion of the state’s prisons—the California Department of Corrections and Rehabilitation (“CDCR”)—to comply with ICE’s requests for transfer of custody. That is, state law currently permits the CDCR to comply with any ICE transfer request. But it does not require it.

80. California law does, however, constrain the discretion of local law enforcement. The California Values Act (“Values Act”), Gov’t Code § 7284, prohibits local law enforcement from transferring custody of individuals to ICE absent a judicial warrant or judicial probable cause

⁷ See Oral Argument at 43:45, *U.S. v. California*, 921 F.3d 865 (9th Cir. 2019), https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000015368.

determination, unless an individual has certain criminal convictions, or from providing notification of release dates, unless an individual has certain criminal charges or convictions. Gov't Code §§ 7284.6(a)(1)(C), 7284.6(a)(4), 7282.5. *See also* § 7284.2(e) and (f) (noting California adopted these protections to ward against California residents being detained by ICE in violation of the United States Constitution and “to protect the safety, well-being, and constitutional rights of the people of California”).

81. Under California law, a person in local law enforcement custody can be transferred to ICE custody only once he or she is eligible for release from criminal custody because (1) all criminal charges against the individual have been dropped or dismissed, (2) the individual has been acquitted of all criminal charges filed against him or her, (3) the individual has served all the time required for his or her sentence, (4) the individual has posted a bond, and (5) the individual is otherwise eligible for release under state or local law, or local policy. Gov't Code § 7282(b). Under CDCR policy, a person can be released to ICE custody within five business days *prior* to the scheduled release date, and even when a person is released due to the Board of Parole Hearings granting release on parole. Exh. 7 at 320.

82. Today, CDCR generally complies with all ICE detainer requests for transfer, without exception. *Id.* Similarly, most local law enforcement agencies in California comply with ICE's requests to facilitate transfers, where permitted by law, although two counties are known to prohibit them outright. Romani Decl. (Exh. 80) ¶¶5–9. In some instances, agencies are known to transfer individuals to ICE custody, even when it is prohibited by Gov't Code § 7284. *Id.* ¶¶10–12.

F. The State of California Disfavors Immigration Detention, Especially During the Pandemic

65. California barred the future operation of California's for-profit immigration detention centers with the passage of AB 32 in 2019, which

went into effect on January 1, 2020. *See* Penal Code § 9501. When Governor Newsom signed AB 32, he stated “During my inaugural address, I vowed to end private prisons, because they contribute to over-incarceration, including those that incarcerate California inmates and those that detain immigrants and asylum seekers. These for-profit prisons do not reflect our values.” Exh. 15. Despite California’s firm stance, between the signing of the bill and January 1, 2020, ICE renewed the contracts for the four privately-operated facilities for a term of 15 years for the Adelanto, Mesa Verde, and Imperial Regional facilities and a term of 5 years for the Otay Mesa facility, grandfathering in the four existing private detention facilities in the state and perpetuating the very conditions of inhumane detention that the state sought to eradicate. Exh. 88. *See* Penal Code § 9505.

66. Further, immigration detention is entirely unnecessary, as its purpose is to ensure a person’s appearance in their removal proceedings, *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001), which can be accomplished through other means. As Attorney General Becerra has acknowledged, ICE has the “discretion to release thousands of individuals” and there are sophisticated alternatives to detention, such as supervised release, electronic ankle monitoring, and telephonic monitoring, that are proven to be effective methods of ensuring a person’s appearance. Exh. 82 at 1798-99; *see* Exh. 14 at 621 (government study revealed a 99% rate of removal hearing attendance on ICE’s Intensive Supervision Appearance Program (“ISAP”)); Exh. 3 at 117-118. In the Attorney General’s words, the “public health benefits that will flow from reducing the population of detained immigrants” are paramount to any interest in keeping people detained. Exh. 82 at 1798.

CLAIMS ASSERTED

1. Executive officials must execute their duties in a manner that does not derogate the constitutional rights of others. This includes protecting the health and safety of individuals in its custody and not subjecting them to dangerous conditions. Yet, Respondents are endangering the lives of every person the state transfers to ICE custody during the COVID-19 pandemic, against the very interests of the State of California. Petitioners are thus entitled to a writ of mandate requiring Respondents to conform their conduct to the requirements of the United States Constitution and California Constitution.

2. Respondents violate the due process rights secured by the Fourteenth Amendment to the United States Constitution and article 1, section 7 of the California Constitution by continuing to transfer individuals to ICE custody during the COVID-19 pandemic.

3. This constitutional violation impacts not just the rights of impacted individuals, but the public health at large by continuing to populate immigration detention centers that have systematically failed to mitigate the virus's spread. As such, it is a matter of urgent and compelling public interest.

4. Petitioners and their members' clients, who are detained in California's prisons, jails and immigration detention facilities, will suffer irreparable injury unless this Court orders Respondents to exercise their duties in accordance with the United States Constitution and California Constitution.

RELIEF SOUGHT

Wherefore, Petitioners respectfully request the following relief:

1. As soon as practicable and, in any event, no later than May 4, 2020, issue a peremptory writ of mandate in the first instance, *see* Civ. Proc.

Code §§ 1087-88, 1104-05; *Palma v. U.S. Indus. Fasteners, Inc.*, 36 Cal. 3d 171, 178 (1984), directing Respondents:

- a. To exercise their duties without violating the constitutional rights of people incarcerated and detained in California’s state prisons and local jails by imposing a moratorium on transfers to federal immigration authorities or their agents. “Transfers” shall be defined as any cooperation to facilitate ICE or their agents taking custody of an individual for removal proceedings when they are due for release from criminal custody, including providing notification of release dates, performing a custodial transfer, allowing ICE or their agents into a sally port, booking area, or other non-public area of a jail to make arrests, or otherwise facilitating an ICE arrest as the person leaves criminal custody. Should Respondents wish to lift the moratorium after such time as COVID-19 is no longer a public health menace, it shall be incumbent on Respondents to demonstrate to the Court that it is safe to resume transfers and that the State’s interest in doing so does not jeopardize the health and safety of transferred individuals or the public at large.
- b. Specifically, issue a writ of mandate requiring:
 - Respondent Governor Newsom to direct CDCR to stop all transfers to ICE under Gov’t Code § 8627 and § 8567.
 - Respondent Governor Newsom to, under Gov’t Code § 8571, suspend the clause “or in accordance with Section 7285.2” in Gov’t Code § 7284.6(a)(4) and the clause “or is in response to a notification request from immigration authorities in accordance with Section 7282.5” in Gov’t

Code § 7284.6(a)(1)(C), which would have the effect of prohibiting local law enforcement from complying with ICE notification and transfer requests.

- Respondent Xavier Becerra to direct local law enforcement to stop transfers to ICE pursuant to his supervisory powers under art v, sec. 13 of the California Constitution.
- Respondents to communicate to DHS that the State of California will not transfer individuals to federal immigration authorities or their agents so long as this Court's moratorium is in place.
- Respondents to direct the CDCR and County Sheriffs to decline to receive I-247 form requests from ICE and certify in writing, and provide to this Court all steps said agencies have taken to implement the moratorium

2. Issue an order declaring that Respondents have violated the rights of people in California to reasonable safety and freedom from punishment as civil detainees by transferring them into ICE custody during the COVID-19 pandemic under the Fourteenth Amendment to the United States Constitution and article I, section 7 of the California Constitution;

3. Should the Court deem such action necessary and appropriate, issue an alternative writ of mandate or order to show cause compelling Respondents to demonstrate why a writ of mandate should not issue and, upon return of the alternative writ or order to show cause, if any, issue a preemptory writ as set forth above;

4. An award of attorneys' fees and costs under Code of Civil Procedure § 1021.5 and other applicable law; and

5. Any further relief to which Petitioner is entitled.

VERIFICATION

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I, Jennifer Pasquarella, a citizen of the United States and a resident of the State of California, am counsel for Petitioners in the above-captioned action. I have read the foregoing Petition and know the contents thereof. I am informed, believe, and allege based on that information and belief that the contents of the foregoing Petition are true.

Executed on April 24, 2020, at Los Angeles, California.

/s/ Jennifer Pasquarella

Jennifer Pasquarella

Document received by the CA Supreme Court.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

This Court should halt all local law enforcement transfers to ICE during California’s state of emergency due to COVID-19. Those who are eligible for release from criminal custody—whether due to COVID-19-related measures undertaken by the State, the courts, or local law enforcement, or otherwise—*should be released*. They should not be handed into dangerous, life-threatening conditions that not only jeopardize their lives, but also impede State efforts to control and contain the virus. Immigration detention is civil in nature and intended only to secure a person’s presence at a removal hearing, a goal which can be accomplished through other means. It is not a death sentence. Continuing to transfer individuals into these conditions is inhumane, and it violates the Due Process Clause of the U.S. and California Constitutions.

DISCUSSION

I. Transferring Individuals into ICE Custody During this Pandemic Violates Due Process

By transferring and facilitating the transfer of individuals from its own custody into ICE custody, the State of California violates the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and article 1, section 7 of the California Constitution. During this unprecedented pandemic, those parallel provisions prohibit the State from facilitating the transfer of any individuals into ICE’s custody during the pandemic, given the risk to their health and safety and California’s lack of interest in their continued detention. At a minimum, they prohibit such facilitation in this context, given ICE’s total failure to protect the people in its custody from the risk of deadly infection by COVID-19.

A. The State of California Has an Obligation Not to Place Individuals in its Custody into Danger

“[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.” *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 201 (1989). This includes ensuring the health and safety of people in its custody. *See Youngberg v. Romeo*, 457 U.S. 307, 315–16 (1982); *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976); *Gordon v. Cty of Orange*, 888 F.3d 1118, 1124-25 (9th Cir. 2018), *cert. denied sub nom. Cty of Orange, Cal. v. Gordon*, 139 S.Ct. 794 (2019).

Immigration detention is civil detention. Therefore, the State’s obligations to individuals subject to ICE transfer requests are embodied in the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and article 1, section 7 of the California Constitution, which wholly prohibit conditions that amount to punishment—that is, their confinement may not be “‘excessive in relation to [its non-punitive purpose]’ or “‘employed to achieve objectives that could be accomplished in so many alternative and less harsh methods.’” *Jones v. Blanas*, 393 F.3d 918, 934 (9th Cir. 2004). *See Youngberg*, 457 U.S. at 321–22 (“[p]ersons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish”); *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1970) (“Due process requires that a pretrial detainee not be punished”); *see also Ochoa v. Superior Court*, 39 Cal.3d 159, 174 (1985); *Inmates of Riverside Cty. Jail v. Clark*, 144 Cal. App. 3d 850, 858-59 (Ct. App. 1983).

When the State either creates a danger or by its actions “render[s] [an individual] any more vulnerable to” a danger, it has “placed him in [a] worse position than that in which he would have been had it not acted at all.”

DeShaney, 489 U.S. at 201. Thus, an individual establishes “a due process violation” if the State “place[d] [them] in danger,” and “act[ed] with deliberate indifference to [a] known or obvious danger in subjecting [them] to [that danger].” *Hernandez v. City of San Jose*, 897 F.3d 1125, 1137 (9th Cir. 2018) (alterations in original). See *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1062 (9th Cir. 2007); *Zelig v. Cty. of Los Angeles*, 27 Cal. 4th 1112, 1149 (2002) (The government violates due process when it “has taken some affirmative action that places the person in danger.”).

An individual need not show that the relevant government officials are “*subjectively* aware that their [actions are] unreasonable,” only that “a reasonable official in the circumstances would have appreciated the high degree of risk involved.” *Gordon v. Cty. of Orange*, 888 F.3d 1118, 1123, 1125 (9th Cir. 2018). This standard requires “more than negligence but less than subjective intent—something akin to reckless disregard.” *Id.* at 1125. In systemic cases, such as this, the key question is whether systemic deficiencies “taken as whole” subject people to a “substantial risk of serious harm.” See *Brown v. Plata*, 563 U.S. 493, 505 n.3 (2011).

Furthermore, it is well-settled that a detainee’s constitutional protections extend to “future harm,” including a “condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year.” *Helling v. McKinney*, 509 U.S. 25, 33 (1993). Constitutional violations therefore can arise from “the exposure of inmates to a serious, communicable disease” even if “the complaining inmate shows no serious current symptoms” and “even though the possible infection might not affect all those exposed.” *Id.*; see also *Castillo*, 2020 WL 1502864, at *4; *Hutto v. Finney*, 437 U.S. 678, 682–83, 687 (1978) (risk of exposing inmates to communicable diseases such as hepatitis and venereal disease violates the Eighth Amendment); *DeGidio v. Pung*, 920 F.2d 525, 527, 533 (8th Cir.

1990) (inadequate screening and control procedures in response to tuberculosis outbreak violated the Eighth Amendment).

Thus, when the State of California transfers individuals into the custody of ICE, thereby creating a substantial risk that they will be harmed, it violates due process. *See Doe ex rel. Johnson v. S.C. Dep't of Soc. Servs.*, 597 F.3d 163, 175 (4th Cir. 2010) (holding that state agencies may not transfer individuals in its custody to placements that are “deliberately indifferent to [their] right to personal safety and security”). This is true whether state agents physically hand over custody by performing an in-custody transfer or allowing ICE into the lock-up of a jail, or simply provide an individual’s release date to ICE to enable ICE arrests. Both actions create a heightened risk to the individual’s health and safety. *Cf. Wood v. Ostrander*, 879 F.2d 583, 586, 589–90 (9th Cir. 1989) (where police officer stranded the female passenger of a drunk driver on the side of the road in a high-crime area at 2:30 a.m., resulting in her being raped, she raised triable issues of fact as to whether the officer had affirmatively placed her in a position of danger and acted in callous disregard for her physical security).

The State of California’s transfers to ICE violate due process for two reasons. First, irrespective of the actual conditions in ICE custody, continued confinement undeniably presents an exponentially greater threat of contracting COVID-19 than release, which is not justified by any legitimate government purpose during this pandemic. Second, actual conditions in ICE custody present a substantial risk of harm, including death, making transfers during this time categorically unreasonable.

B. Given the General Danger of Continued Detention During this Pandemic, the State of California Violates Due Process by Transferring People to ICE Custody

Transferring people into another custodial setting where transfers and incarceration are avoidable and not necessary defies CDC guidance and medical consensus. *See, e.g.*, Exh. 26 at 1024. Such transfers place people in grave danger during this pandemic, and therefore violate substantive due process. It is undeniable that the State of California is placing people in its custody in danger by transferring them to ICE custody, as carceral settings generally pose a substantially higher risk of COVID-19 infection. Schneberk Decl. (Exh. 81) ¶¶ 42–44. Transferred individuals would be safer if the State had released them from state prison or local jail when they became due for release, rather than facilitating ICE’s arrest and detention of them. They would be at home, sheltering-in-place, not confined with hundreds of people in crowded detention centers where COVID-19 is already spreading or will inevitably spread. Schneberk Decl. (Exh. 81) ¶¶ 116–119. That is, the State of California’s transfers to ICE custody place people “in [a] worse position than that in which [they] would have been had it not acted at all.” *DeShaney*, 489 U.S. at 201.

The State of California knows that these transfers are likely to cause harm and carry a high degree of risk of COVID-19 infection and spread, and thus is acting with reckless disregard for the rights of those subject to ICE’s requests. CDC guidance explicitly urges the restriction of any transfers of custody, unless medically necessary (such as to a hospital) or to prevent overcrowding. Exh. 26 at 1024. *See Hernandez v. Cty. of Monterey*, 110 F. Supp. 3d 929, 942–43 (N.D. Cal. 2015) (finding that jail’s practices regarding tuberculosis did not conform to CDC standards, and holding that “known noncompliance with generally accepted guidelines for inmate health strongly indicates deliberate indifference to a substantial risk of serious

harm”). *See* Schneberk Decl. (Exh. 81) ¶ 83 (“From a public health perspective, ICE detention facilities must adhere rigorously to the CDC’s guidance to stop all medically unnecessary transfers.”); *id.* at ¶¶ 80–89.

Attorney General Becerra has urged DHS to “[l]imit the transfer or transport of detainees and halt the introduction of new detainees to immigration detention facilities.” Exh. 82 at 1801. However, his letter fails to mention that he too bears responsibility for this practice, as the State’s officers facilitate ICE’s continuing arrests and bookings into immigration detention facilities. During the pandemic, state prison and local jail transfers account for *most* of the new ICE bookings into detention centers. *See supra* Facts, Sec. D. The Attorney General’s criticism of DHS’s failure to address what he acknowledges is a “COVID-19-related catastrophe in our immigration detention facilities and surrounding communities,” shows that the Attorney General is well-aware of the harm that his own law enforcement officials cause when they facilitate transfers to ICE custody.

Governor Newsom is also well-aware of the need to limit transfers and movement of inmates between correctional facilities because he specifically suspended new intakes into state prisons from county jails and other settings, even as he failed to suspend transfers from state prisons to ICE. *See* Exh. 89 (Executive Order). And, due to significant advocacy, he is well-aware of conditions in ICE detention and the State’s continuing role in that by facilitating transfers. *See supra* Facts, Sec. C. Yet, he too has failed to stop the transfers.

Further, there is no legitimate, non-punitive reason for the State to continue these transfers during the pandemic. First, transfers to ICE are entirely discretionary—no law requires the State to comply with such requests, nor could it. *United States v. California*, 921 F.3d 865, 889 (9th Cir. 2019) (holding that “[f]ederal law provides states and localities the *option*, not the *requirement*, of assisting federal immigration authorities” and noting

that, under the Tenth Amendment, Congress could not force states to comply with transfer requests).

Second, neither the State of California nor the federal government have any legitimate interest in keeping people in immigration custody during the pandemic. For California, continuing these transfers only further contributes to the ongoing public health crisis in the state by keeping people incarcerated when they should be released, fueling the spread of COVID-19 in California’s immigration detention centers and surrounding communities, and burdening already underprepared county and state health care resources. Schneberk Decl. (Exh. 81) ¶ 112 (“Carceral facilities are critical parts of California’s broader public health infrastructure. Protecting the health of individuals who are detained in and work in ICE detention facilities across the state is critical to maintaining the health of the public in the cities where they are located, in California, and beyond”); *see id.* ¶¶ 104–12. Furthermore, California has already firmly and boldly rejected private immigration detention in the state, which accounts for four of the five existing immigration detention centers. Exh. 15 (statement from Governor Newsom on signing AB 32 banning private prisons in the state, declaring, “These for-profit prisons do not reflect our values.”)

The State of California also cannot claim to share in the federal government’s interest in detention during this pandemic. The State does not enforce federal civil immigration laws. *See Arizona v. United States*, 567 U.S. 387, 408 (2012).

Moreover, as numerous courts have found, even the federal government lacks a legitimate interest in detaining people during the pandemic. *See Hernandez Roman v. Wolf*, 20-cv-00768-TJH, ECF 53, 14–15 (C.D. Cal. Apr. 23, 2020) (Exh. 90) (ordering immediate depopulation of the Adelanto facility and finding that “[t]he conditions of confinement at Adelanto are inconsistent with contemporary standards of human decency”

and “that Government is not harmed when a court prevents the Government from engaging in unlawful practices”); Schneberk Decl. (Exh. 81) ¶¶ 90–98. The purported purpose of immigration detention is to secure attendance at hearings and to ensure the safety of the community. *See Zadvydas v. Davis*, 533 U.S. 678, 699 (2001). But such justifications cannot support incarceration during a pandemic when nearly everyone is required to practice social distancing to safeguard their lives, and when ICE has ample alternatives to detention that have proven capable of ensuring that individuals appear for their proceedings. *See supra* Facts, Sec. F; *see also Hernandez v. Sessions*, 872 F.3d 976, 991 (9th Cir. 2017) (“[T]he Intensive Supervision Appearance Program—which relies on various alternative release conditions—resulted in a 99% attendance rate at all EOIR hearings. . . .”).

Most important, continued confinement in ICE custody under the present moment’s perilous conditions neither furthers the goal of attendance at hearings nor any alleged public safety benefit. As the District Court for Central District of California aptly put it just days ago, in granting a preliminary injunction against ICE due to its nationwide failure to safeguard detainees against COVID-19:

[A]ttendance at hearings cannot be secured reliably when the detainee has, is at risk of having, or is at risk of infecting court staff with a deadly infectious disease with no known cure. Participation in immigration proceedings is not possible for those who are sick or dying, and is impossible for those who are dead. Another purpose of detention, public safety, is not advanced by delay. Plaintiffs establish that public safety as a whole is seriously diminished by facility outbreaks, which further tax community health resources.

Fraihat v. U.S. Immigration & Customs Enf’t., No. CV 19-1546-JGB (SHKx), 2020 WL 1932570, at *26 (C.D. Cal. Apr. 20, 2020).

Attorney General Becerra himself has stated that there is no good reason to keep people detained in immigration custody during this pandemic:

“immigration detention is discretionary, and the Department of Homeland Security (DHS) currently has discretion to release thousands of individuals with little or no risk to public safety, particularly compared to the public health benefits that will flow from reducing the population of detained immigrants.” Exh. 82 at 1798. *See Hernandez-Roman*, 20-cv-00768-TJH, ECF 53, 15 (Exh. 90) (“An outbreak at Adelanto would, further, endanger all of us – Adelanto detainees, Adelanto employees, residents of San Bernardino County, residents of the State of California, and our nation as a whole.”).

The State of California’s practice of continuing transfers to ICE creates a substantial risk that individuals will be exposed to a deadly virus, “render[ing] [them] more vulnerable” to harm. *DeShaney*, 489 U.S. at 201. It is creating this danger in spite of California’s admitted lack of interest in furthering ICE detention. *See Jones*, 393 F.3d at 931 (conditions of civil confinement must always remain “reasonable [in] relation to the purpose” of confinement); *Bell*, 441 U.S. at 539 (“[I]f a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of governmental action is punishment that may not constitutionally be inflicted.”). California’s failure to stop these transfers in light of that risk of substantial harm violates due process rights.

C. The State of California Violates Due Process by Transferring People to ICE Given the Actual Dangers in ICE Custody in California

The State of California also violates due process by transferring people to ICE custody given the well-known and well-established failures of ICE to provide for the health and safety of those in its custody during the COVID-19 pandemic. ICE has systemically failed to mitigate the spread of COVID-19, against prevailing CDC and medical advice, in its five detention centers in California. Schneberk Decl. (Exh. 81) ¶¶ 80–98.

The State is very familiar with the crisis unfolding in ICE’s detention centers. In his five-page letter to DHS, the Attorney General urged the agency to take “[s]ignificant steps” to “avoid COVID-19-related catastrophe in our immigration detention facilities,” Exh. 82 at 1801, and detailed the systematic failure of ICE to take measures to prevent the spread of the virus through releasing large numbers of detainees, stopping new admissions, enabling social distancing, improving hygiene and sanitation, and ensuring adequate healthcare resources, among other things. Exh. 82 at 1798-1801.

Federal courts in California have also now repeatedly held that ICE’s failure to protect people in its California detention centers from COVID-19 constitutes reckless disregard for their safety. Judge Hatter of the District Court for the Central District of California has now ordered ICE to immediately depopulate the Adelanto detention center to allow for social distancing. *Hernandez Roman*, No. 5:20-cv-768-TJH, ECF No. 53, 14-15 (C.D. Cal. April 23, 2020) (Exh. 90) (finding that ICE is “deliberately indifferent to the potential exposure of [detainees] to COVID-19” and has “acted with callous disregard for [their] safety”). Judge Hatter previously released approximately five dozen individuals from the Adelanto ICE Processing Facility in response to a wave of individual and multi-petitioner petitions for writ of habeas corpus and motions for Temporary Restraining Orders, holding every time that “[t]he law is clear”:

[T]he Government cannot put a civil detainee into a dangerous situation, especially where that dangerous situation was created by the Government. The Due Process Clause of the Fifth Amendment prohibits the Government from exposing an individual to a danger which he would not have otherwise faced. A civil detainee’s constitutional rights are violated if a condition of his confinement places him at substantial risk of suffering serious harm, such as the harm caused by a pandemic.

Castillo, 2020 WL 1502864, at *3 (internal citations omitted); *Fraihat v. Wolf*, No. 5:20-cv-590-TJH, ECF No. 18, at 8–9 (C.D. Cal. Mar. 30, 2020) (Exh. 30); *Hernandez v. Wolf*, No. 5:20-cv-617-TJH, ECF No. 17, at 10 (C.D. Cal. Apr. 1, 2020) (Exh. 31). Similarly, Judge Bernal of the District Court for the Central District of California, in a nationwide class action against ICE over medical conditions in its detention centers, concluded in granting a preliminary injunction that ICE has “exhibited callous indifference to the safety and wellbeing” of detainees, satisfying the deliberate indifference standard. *Fraihat v. U.S. Immigration & Customs Enf’t*, 2020 WL 1932570, at *24.

Similarly, in cases before the district court of the Northern District of California, the court has repeatedly ordered ICE to release individuals from Mesa Verde and Yuba County Jail, finding that ICE’s failure to protect against COVID-19’s spread in those two facilities, for example by enabling social distancing and to provide protective equipment to detainees and guards, is “excessive in relation to [the] purpose” of civil immigration detention. *Ortuño v. Jennings*, No. 3:20-cv-2064-MMC, ECF 38, at 7 (N.D. Cal. Apr. 8, 2020); Order re Deferred Portion of Pet’s Motion for TRO, *Ortuño v. Jennings*, No. 3:20-cv-2064-MMC, ECF 38 (N.D. Cal. Apr. 14, 2020) (Exh. 92). See also *Ixchop Perez v. Wolf*, No. 5:19-cv-5191-EJD, ECF No. 29, at 24 (N.D. Cal. Apr. 14, 2020) (ordering release due to ICE’s failure to protect petitioner from harm from COVID-19) (Exh. 93); *John Doe v. Barr*, No. 3:20-cv-2141-LB, Order Granting Petitioner’s Motion For Temporary Restraining Order, ECF No. 27, at 20–21 N.D. Cal. Apr. 20, 2020 (Exh. 94) (same); *Bent v. Barr*, No. 5:19-cv-6123-DMR, 2020 WL 1812850, at *8 (N.D. Cal. Apr. 9, 2020) (same).

Further, the evidence presented before this Court from all five immigration detention facilities in California demonstrates ICE’s failure to protect the lives of the approximately 4,000 people in California’s detention

centers, and the dangers that presents for surrounding communities. All five facilities remain crowded, making social distancing impossible. ICE has failed to release people and prioritize depopulation of the facilities, while continuing to make new arrests and book people into custody, mainly from California state and county transfers. *See, e.g.*, Kavanagh Decl. (Exh. 75) ¶21; Knox Decl. (Exh. 65) ¶8. Detainees still sleep in large dormitories with up to 100 per room and bunk beds placed no more than 3 feet apart. Schneberk Decl. (Exh. 81) ¶¶ 47, 56, 63, 71, 76; Hernandez Roman Decl. (Exh. 64) ¶7. They eat and they recreate in communal settings. Schneberk Decl. (Exh. 81) ¶¶48, 57, 64, 72, 77. Although “[t]he only known way to prevent the spread of COVID-19 is to practice social distancing,” social distancing is impossible in ICE’s facilities in California making those facilities virulent incubators of the virus. Schneberk Decl. (Exh. 81) ¶¶38, 40, 54, 61, 69, 74, 79, 113. Under these conditions, it is impossible for detainees to protect themselves. Indeed, the evidence thus far shows that as soon as there is a single case of COVID-19 in an immigration detention facility, an explosion of cases rapidly follows. *See* Schneberk Decl. (Exh. 81) ¶¶107–12.

Further, all five facilities lack personal protective equipment and proper sanitation supplies. *See* Schneberk Decl. (Exh. 81) ¶¶50–52, 58–60, 65–67, 73, 78. So desperate are detainees for some modicum of protection that guards at the Otay Mesa facility sought to take advantage of that by attempting to coerce detainees to sign liability waivers—in effect, acknowledging their own abject failure to protect them—in exchange for face masks. Schneberk Decl. (Exh. 81) ¶50; Hysell Decl. (Exh. 38) ¶¶ 4–11. These facilities have continued to book new arrivals without subjecting them to any period of meaningful quarantine. Schneberk Decl. (Exh. 81) ¶49, Ediger-Soto Decl. (Exh. 56)¶¶ 22, 32; Forero Chavez Decl. (Exh. 63) ¶¶33, 45. And they fail to provide adequate and timely medical care. Schneberk

Decl. (Exh. 81) ¶¶100–03; Ediger-Seto Decl. (Exh. 56) ¶16; Hernandez Roman Decl. (Exh. 64) ¶¶28–29; Forero Chavez Decl. (Exh. 63) ¶13; Aguilar Estrada Decl. (Exh. 67) ¶17.

Each ICE detention facility in California presents an unreasonably heightened danger of COVID-19 infection, serious illness, and death for its inhabitants. For these reasons, the State of California’s continued transfers to ICE custody violate due process.

II. This Court Should Exercise its Original Jurisdiction and Issue a Writ of Mandate to Halt Transfers to ICE Given the Extraordinary Circumstances of the COVID-19 Pandemic

This Court has original jurisdiction in proceedings for extraordinary relief in the nature of mandamus. Cal. Const. art. VI, sec. 10. This Court “will invoke [its] original jurisdiction where the matters to be decided are of sufficiently great importance and require immediate resolution.”

California Redevelopment Ass’n. v. Matosantos, 53 Cal. 4th 231, 253 (2011). Here, whether California must cease its practice of handing people over into custodial settings that threaten their lives and magnify the public health crisis is undeniably an issue of great importance.

To obtain a writ of mandate, a petitioner must show that: (1) “the respondent has failed to perform an act despite a clear, present and ministerial duty to do so,” (2) “the petitioner has a clear, present and beneficial right to that performance,” and (3) “there is no other plain, speedy and adequate remedy.” *Riverside Sheriff’s Ass’n v. Cty. of*

Riverside, 106 Cal. App. 4th 1285, 1289 (2003). Petitioners satisfy all three requirements, entitling them to immediate judicial relief.

A. Respondents Have Breached Their Constitutional Duty to Protect the Lives of People in State and Local Custody

Respondents have breached their ministerial duty to uphold the due process rights of people in state and local custody. As this Court has held, “[m]andamus is . . . appropriate for challenging the constitutionality or validity of statutes or official acts.” *Jolicoeur v. Mihaly*, 5 Cal. 3d 565, 570 n. 2 (1971). When an official’s conduct violates rights guaranteed by the U.S. or California constitutions, mandamus is available to compel the official to take corrective action. *Id.*; see also *Edward W. v. Lamkins*, 99 Cal. App. 4th 516, 529 (2002) (writ of mandate appropriate if “respondent’s practices violate the constitutional guarantees of due process”); *Stone v. Bd. of Directors of City of Pasadena*, 47 Cal. App. 2d 749, 754 (1941) (mandamus is the proper remedy to compel officials to admit Black petitioners to municipal bath houses and swimming pools, as required by state law and the Equal Protection Clause).

While officials have discretion in how they perform certain public duties, no official has discretion to violate the constitution. When an official violates rights secured by the constitution, the official has breached a non-discretionary duty, warranting mandamus relief. See *Molar v. Gates*, 98 Cal. App. 3d 1, 25 (1979) (“Plaintiff has a clear right to the enjoyment of the equal protection of the laws and defendants have a clear duty to respect that right. Accordingly, mandamus is an appropriate remedy to enforce plaintiff’s constitutional right to equal protection.”); *De La Mar v. Superior Court*, 22 Cal. App. 2d 373, 375 (1937) (mandate issued where defendant not timely indicted because “[a] party charged with crime has the constitutional right to

a speedy trial and the court has no discretionary power to deny him a right so important”).

These principles apply fully to Respondents in this case. Both directly oversee California’s county jails and Governor Newsom oversees the State’s prisons, and both owe a constitutional duty to ensure that people held in those facilities are not voluntarily transferred into ICE custody during this pandemic in violation of constitutional due process rights.

Governor Newsom’s duty to ensure public health of individuals in state and local custody flows from his emergency declaration. On March 4, 2020, Governor Newsom declared a state of emergency concerning the viral outbreak, triggering provisions of the Emergency Services Act. *See* Exh. 19. The Emergency Services Act “confers broad powers on the Governor to deal with [declared] emergencies.” *Macias v. State of California*, 10 Cal. 4th 844, 854 (1995) (“in situations of ‘extreme peril’ to the public welfare the State may exercise its sovereign authority to the fullest extent possible consistent with individual rights and liberties”).

But Governor Newsom’s duty also flows from his power over CDCR, during normal times and times of emergency. Governor Newsom has complete authority over CDCR under his emergency powers. Gov’t Code § 8672. As such, the Governor has a duty to protect the health and safety of individuals in CDCR custody by halting transfers to ICE custody. The Governor has already taken some steps to address the pandemic in CDCR facilities. *See* Exh. 89 (Executive Order on State Prisons).

The Governor also has the emergency authority to halt transfers to ICE from local law enforcement agencies to protect lives and address the public health crisis. In issuing his state of emergency declaration, the Governor expressly found that “local authority is inadequate to cope with the threat posed by COVID-19,” necessitating a unified, statewide response. Newsom March 4, 2020 Executive Order. This is particularly critical here

where a uniform response to halt transfers is required to address the public health calamity unfolding in California’s immigration detention centers, in the face of federal inaction, and to protect lives.

The Governor has the power to suspend laws and regulations that hinder or delay the state’s emergency response. Gov’t. Code § 8571. In addition, the Emergency Services Act expressly permits the release of people who are incarcerated when, as here, emergency circumstances “endanger the lives of inmates of a state, county, or city penal or correctional institution.” Gov’t Code § 8658; *see also Cal. Correc. Peace Officers Ass’n v. Schwarzenegger*, 163 Cal. App. 4th 802, 820 (2008) (holding governor had power to issue declaration of emergency based on state prison overcrowding).

The Governor can halt transfers from local law enforcement by suspending Gov’t Code § 7285.2; the clause “or in accordance with Section 7285.2” in Gov’t Code § 7284.6(a)(4); and the clause “or is in response to a notification request from immigration authorities in accordance with Section 7282.5” in Gov’t Code § 7284.6(a)(1)(C). The Governor can also direct the Attorney General to invoke his supervisor powers under California Constitution art. V, § 13 to order local law enforcement agencies to halt transfers.

Attorney General Becerra’s obligations do not flow from the Emergency Services Act but from the California Constitution art. V, § 13 and Gov’t Code § 12560. Both provide that the Attorney General “shall have direct supervision” over every sheriff. Cal. Const. art. V, § 13; Gov’t Code § 12560; *see also Venegas v. Cty. of Los Angeles*, 32 Cal. 4th 820, 836 (2004) (holding that for purposes of liability “sheriffs while performing law enforcement duties are state agents”); *Cty. of Los Angeles v. Superior Court (Peters)*, 68 Cal. App. 4th 1166, 1178 (1998) (holding that sheriff acted as state official, not a local official, in setting policies pertaining to assignment

of people who were incarcerated in county jail and was therefore immune from § 1983 liability).

As the state’s chief law enforcement officer, the Attorney General has a “constitutional responsibility to oversee the sheriff[s]” and the district attorneys, and to coordinate their response to COVID-19. *See Dibb v. Cty. of San Diego*, 8 Cal. 4th 1200, 1210 (1994). He also has the obligation to ensure that “the laws of the State are uniformly and adequately enforced.” Cal. Const. art. V., § 13. Here, fundamental constitutional rights to life are at stake. Nothing less than a uniform response to halt putting people in hazardous immigration detention conditions, that only fuel the spread of the virus in California, can address the constitutional rights at stake. Where all but two Sheriffs in the state transfer individuals to ICE, anything less than a statewide moratorium would mean some Sheriffs continue to endanger the lives of people in their custody and to populate deadly detention centers.

B. Petitioners Have a Beneficial Interest in Securing the Constitutional Rights of their Clients and Standing to Enforce Respondents’ Constitutional Duties

Petitioners may seek a writ of mandate when they are “beneficially interested,” meaning that they have “some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large.” *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 52 Cal. 4th 155, 165 (2011). To make this showing as associations, petitioners need only show that their individual members have a beneficial interest in the outcome of these proceedings. *See Associated Builders & Contractors, Inc. v. San Francisco Airports Comm’n*, 21 Cal. 4th 352, 361 (1999) (explaining that “[t]o establish associational standing, [petitioner] must demonstrate that its members would otherwise have standing to sue in their own right.”).

Both petitioners can clearly make that showing. Petitioners CACJ and AILA SoCal are associations of attorneys who represent individuals detained in state prisons and county jails who are subject to ICE detainer requests for transfer in every county in California, and AILA SoCal represents individuals detained in ICE custody. Declaration of Stephen A. Munkelt (Exh. 46) ¶6; Declaration of Scott Emerick (Exh. 83) ¶9. State and local transfers to ICE custody unequivocally affects the health and safety of Petitioners’ clients. Emerick Decl. (Exh. 83) ¶8 (“COVID-19 poses an extremely serious threat to many of our detained clients. Their continued custody in crowded and unhygienic Immigration and Customs Enforcement (“ICE”) detention facilities threatens their health and safety and deeply affects their mental health.”); Munkelt Decl. (Exh. 46) ¶4 (“Our members are incredibly concerned about the current coronavirus pandemic and its effect on our clients, not only for their rights in the criminal court process and the effects on our ability to advocate on their behalf, but also for their health and safety given the direct risks of infection and difficulty getting appropriate medical treatment.”). This risk to petitioners’ clients give petitioners a concrete interest “over and above the interest held in common with the public at large.” *Plastic Bag Coal.*, 52 Cal. 4th at 170 (holding that association of plastic bag manufacturers had beneficial interest in challenging ordinance banning plastic bags because ordinance would harm members’ business in the city); *Associated Builders & Contractors, Inc. v. San Francisco Airports Comm’n*, 21 Cal. 4th 352, 354 (1999) (holding that contractor associations had standing to challenge the legality of a project stabilization agreement that allegedly infringed members’ right of association and harmed their business through anticompetitive influence).

In addition to their beneficial interest, Petitioners have public interest standing to petition for a writ of mandate. When, as here, “the question is one of public right and the object of mandamus is to procure the enforcement of

a public duty,” any member of the public can seek public interest standing “since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced.” *Plastic Bag Coal.*, 52 Cal. 4th at 166 (quoting *Bd. of Soc. Welfare v. Los Angeles Cty.*, 27 Cal. 2d 98, 100–01 (1945)).

In evaluating whether a petitioner has public interest standing, courts weigh the public interest in ensuring that the government performs its duties against any “competing considerations of a more urgent nature.” *Green v. Obledo*, 29 Cal. 3d 126, 145 (1981). When there is a “manifest public interest” in ensuring that respondents’ conduct conforms to legal requirements, and no “urgent considerations . . . outweigh” that public interest, public interest standing is available. *Hector F. v. El Centro Elementary Sch. Dist.*, 227 Cal. App. 4th 331, 341-42 (2014); see *Reynolds v. City of Calistoga*, 223 Cal. App. 4th 865, 875 (2014) (“When the duty is sharp and the public need weighty, the courts will grant a mandamus at the behest of an applicant who shows no greater personal interest than that of a citizen who wants the law enforced.”).

Here, the public has a manifest interest in ensuring that respondents do not subject people in government custody to intolerable risks of COVID-19 infection in violation of their constitutional rights. See *In re Head*, 42 Cal. 3d 223, 230 (1986) (public policies served by the constitutional and statutory rights of incarcerated people are frequently “of interest not only to the prison inmates themselves, but the public in general.”); *In re Brindle*, 91 Cal. App. 3d 660, 670 (1979) (explaining that “the supervision of the administration of criminal justice” raises “questions of general public concern”); see also *Dep’t of Corr. v. State Pers. Bd. (Wallace)*, 59 Cal. App. 4th 131, 143 (1997) (discrimination in public employment concerns “the public generally in whose name and under whose auspices these controversial policies are carried out”).

The public also has a manifest interest in saving lives and preventing avoidable COVID-19 infections. Infections in ICE detention among people transferred there by the State of California are altogether avoidable—transfers are discretionary and there is no legitimate government interest in immigration detention at this moment given the threat to human health. Further, because ICE detention centers are not sealed off from the rest of the community—staff and contractors enter and leave every day, new arrestees arrive daily, and others are released—any outbreak that begins in a detention center will spread to the broader community. Additionally, once people contract COVID-19 in ICE detention centers and become seriously ill, they will need to be treated in community healthcare facilities. This will further strain the resources of hospitals statewide, during the most significant global pandemic in generations. Schneberk Decl. (Exh. 81) ¶¶ 99–112. The public has a strong interest in preventing these harms, which impact the health of all Californians.⁸

Further support for public interest standing comes from the structural challenges that individual people who are incarcerated face in vindicating their constitutional rights. “In determining whether a petitioner has public interest standing, the court . . . considers the burden on those who have a beneficial interest, and would have general standing, but who may be disinclined or ill-equipped to seek review.” *Weiss v. City of Los Angeles*, 2 Cal. App. 5th 194, 205 (2016). Even if every individual in custody had the resources and ability to file a lawsuit seeking protection from these infection

⁸ Courts have previously found public interest standing when the harms have a similarly broad impact. *See Plastic Bag Coal.*, 52 Cal. 4th at 170 (finding public interest in “the preparation of an environmental impact report”); *Bd. of Soc. Welfare v. Los Angeles Cty.*, 27 Cal. 2d 98, 101 (1945) (“[T]he provision of public aid to the needy aged is a matter of state-wide concern.”).

risks, such piecemeal litigation would be inefficient and inadequate to the crisis at hand—especially as COVID-19 limits the capacity of courts around the state. Given the pace at which the pandemic is unfolding, and the increased risks of exposure in each county and with each passing day, public interest litigation is necessary.

C. Petitioners have no Adequate Administrative Remedy

Mandamus is appropriate only if the petitioner has no “plain, speedy, and adequate remedy.” Civ. Proc. Code § 1086. Courts do not require exhaustion of administrative remedies where “irreparable harm will result if judicial intervention is withheld until a final administrative decision is rendered.” *Alta Loma Sch. Dist. v. San Bernardino Cty. Comm’n on Sch. Dist. Reorganization*, 124 Cal. App. 3d 542, 555 (1981); see *Ogo Assocs. v. City of Torrance*, 37 Cal. App. 3d 830, 834 (1974). Here, the rapid spread of COVID-19 and inherent susceptibility of ICE detention centers to viral outbreak create a grave risk of infection for everyone inside, and it only increases with each passing day of inaction.

Under these circumstances, it is simply impracticable for thousands of incarcerated people facing transfer to ICE to pursue relief through administrative channels.² By the time each incarcerated person has an opportunity to be heard, the statewide situation will have worsened and many

² Although some form of administrative remedy process may be available in various correctional facilities, it is neither speedy enough nor sufficient. These administrative remedy processes are typically designed to address routine individualized grievances, such as to request that a facility investigate a discrete incident of mistreatment or unprofessional behavior by staff, request changes to housing or security classifications, or correct an error in the facility’s records—not to address urgent, systemwide changes like those addressed in this petition.

of those pursuing administrative relief may already have become infected or even critically ill. Courts have excused failure to exhaust on far lesser showings of urgent need. *See Dep't of Pers. Admin. v. Superior Court*, 5 Cal. App. 4th 155, 170-72 (1992) (entertaining mandamus petition seeking without exhaustion to invalidate statute that cut employee compensation during a financial crisis because, among other things, delaying judicial review could result in unnecessary layoffs and cuts to public services).

Nor have courts required exhaustion when the public interest demands judicial resolution. *See Hull v. Cason*, 114 Cal. App. 3d 344, 358 (1981). As discussed above, preventing the spread of COVID-19 in correctional facilities is a matter of compelling, statewide public interest. Absent judicial intervention, the state's correctional facilities are likely to become hotspots of infection, threatening public health and undermining the state's efforts to limit spread of this highly contagious disease. This has already occurred in other states, and it underscores the need for immediate judicial review. *See id.* at 358 (declining to apply exhaustion requirement when "prompt determination [was] not only in the public interest, but it would also end what must be grave uncertainty in the lives and careers of the many persons . . . who [would] be affected by its outcome"); *see also Lindeleaf v. Agric. Labor Relations Bd.*, 41 Cal. 3d 861, 870-71 (1986) (hearing challenge to Labor Board protocols despite failure to exhaust when refusal to address challenge would affect not only the parties involved in current litigation, but also the parties to other nonfinal Board decisions).

For all of these reasons, the Court should decline to enforce the exhaustion requirement and resolve this petition on its merits. The petition raises important constitutional issues that "affect not only the present parties, but also" every person who is incarcerated in California, everyone who lives in the surrounding communities, and California residents at large. *Lindleaf*,

41 Cal. 3d at 870. Time is short, and there is an urgent need for remedial action.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant the relief sought in the Petition for Writ of Mandate.

DATED: April 24, 2020

Respectfully submitted,

ACLU FOUNDATION OF
SOUTHERN CALIFORNIA

By: /s/ Jennifer Pasquarella
Jennifer Pasquarella
Attorneys for Petitioners

Document received by the CA Supreme Court.

CERTIFICATE OF WORD COUNT

I, the undersigned counsel for Petitioners, relying on the word count function of Microsoft Word, the computer program used to prepare this document, certify that the foregoing Petition and Memorandum of Points and Authorities contain 19,039 words, excluding the words in the sections that the California Rules of Court 8.204(c)(3) and 8.486(a)(6) instruct counsel to exclude. I have filed concurrently with the Petition and Memorandum of Points and Authorities an Application for Permission to File Petition for Writ of Mandate in Excess of 14,000 words.

/s/ Jennifer Pasquarella

Jennifer Pasquarella

Document received by the CA Supreme Court.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE

I am employed in the County of Los Angeles, California. I am over the age of 18 and not a party to the within action. My business address is: 1313 W. Eighth Street, Los Angeles, CA 90017.

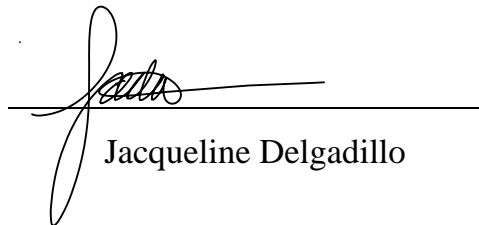
On April 24, 2020 I served the foregoing document(s), described as:

- **PETITION FOR WRIT OF MANDATE**
- **REQUEST FOR JUDICIAL NOTICE**
- **PETITIONERS’ APPENDIX OF EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF MANDATE**
- **[PROPOSED] ORDER GRANTING PETITIONERS’ REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF PETITION FOR WRIT OF MANDATE**
- **APPLICATION FOR PERMISSION TO FILE PETITION FOR WRIT OF MANDATE IN EXCESS OF 14,000 WORDS**
- **DECLARATION OF JENNIFER PASQUARELLA**

on the interested parties in this action by e-mail or electronic service [C.C.P. § 1010.6; CRC 2.250-2.261]. The documents listed above were transmitted via e-mail to the e-mail addresses on the attached service list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this April 24, 2020 at Los Angeles, CA.



Jacqueline Delgadillo

Document received by the CA Supreme Court.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SERVICE LIST

Respondent	E-Mail
<p>Xavier Becerra State of California Department of Justice 1300 I Street, Suite 1740 Sacramento, CA 95814-2954 Xavier.becerra@doj.ca.gov</p> <p>Governor Gavin Newsom 1303 10th Street, Suite 1173 Sacramento, CA 95814 (916) 445-2841</p>	<p>Xavier.becerra@doj.ca.gov</p> <p>Kelli Evans.Kelli.Evans@gov.ca.gov David Sapp, David.Sapp@gov.ca.gov Alisa Hartz, alisa.hartz@gov.ca.gov</p>
<p>Office of the Clerk California Supreme Court 350 McAllister Street, Room 1295 San Francisco, CA 94102-3600</p>	<p>Not required until further notice from the court.</p>
<p>Jennifer Pasquarella, SBN 263241 Liga Chia, SBN 328143 Michelle (Minju) Cho, SBN 321939 Jessica Bansal, SBN 277347 Jordan Wells, SBN 326491 Melissa Goodman, SBN 289464</p> <p>ACLU Foundation of Southern California 1313 W Eighth St. Los Angeles, CA 90017 (213) 977-5236</p> <p>Bardis Vakili, SBN 247783 Monika Langarica, SBN 308518 ACLU Foundation of San Diego & Imperial Counties P.O. Box 87131 San Diego, CA 92138-7131</p>	<p>jpasquarella@clusocal.org lchia@clusocal.org mcho@clusocal.org jbansal@clusocal.org jwells@clusocal.org mgoodman@clusocal.org</p> <p>bvakili@clusandiego.org mlangarica@clusandiego.org</p>

Document received by the CA Supreme Court.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<p>Angelica Salceda, SBN 296152 William S. Freeman, SBN 82002 ACLU Foundation of Northern California 39 Drumm Street San Francisco, CA 94111</p>	<p>asalceda@aclunc.org wfreeman@aclunc.org</p>
------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------

Document received by the CA Supreme Court.