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11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

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Lavrus; Claude Bent; Charles Joseph;
14 Salomon Medina Calderon; Ricardo Vasquez
Cruz; J Elias Solorio Lopez; Olvin Said
15 Lopez; Olvin Said Torres Murillo; Julio
Cesar Buendia Alas; Marco Montoya
16 Amaya; Mauricio Ernesto Quinteros Lopez;
Roxana del Carmen Trigueros Acevedo;
17 Ernesto Ambrocio Uc Encarnacion;

18 Petitioners-Plaintiffs,

19 v.

20 DAVID JENNINGS, Acting Director of the
San Francisco Field Office of U.S. Immigration
21 and Customs Enforcement; MATTHEW T.
ALBENCE, Deputy Director and Senior
22 Official Performing the Duties of the Director
of the U.S. Immigration and Customs
23 Enforcement; U.S. IMMIGRATION AND
CUSTOMS ENFORCEMENT,

24 Respondents-Defendants.
25

Case No.

**NOTICE OF MOTION AND
MOTION FOR TEMPORARY
RESTRAINING ORDER;
MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT THEREOF**

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**Motion for Admission *Pro Hac Vice*

Forthcoming

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NOTICE OF MOTION AND MOTION

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PLEASE TAKE NOTICE that, as soon as they may be heard, Plaintiffs will and hereby do move, pursuant to Civil L. R. 7-1 and 65-1, for a temporary restraining order directing that they be immediately released from their current confinement at the Mesa Verde ICE Processing Facility and the Yuba County Jail, under appropriate conditions as may be deemed necessary by the Court. This motion is supported by the following Memorandum of Points and Authorities, by the Petition for Writ of Habeas Corpus and Complaint for Injunctive and Declaratory Relief, and by declarations of each of the Plaintiffs, or their attorneys on their behalf, and various experts, all of which are filed contemporaneously.

Pursuant to Civil L.R. 65-1(b), on March 24, 2020 at 9 a.m., counsel for Plaintiffs left a voice message for Assistant U.S. Attorney Sara Winslow at the U.S. Attorney’s Office for the Northern District of California and sent an e-mail to Ms. Winslow to advise of the emergency reasons requiring them to seek a temporary restraining order. In addition, Plaintiffs’ Counsel e-mailed copies of (1) the Petition for a Writ of Habeas Corpus, (2) Complaint and Motion for Temporary Restraining Order, and (3) [Proposed] Order to Ms. Winslow.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs, civil immigration detainees whose age and/or underlying medical conditions place them at elevated risk of serious illness or death from contracting COVID-19, seek emergency relief from this Court. Despite an overwhelming consensus of public health experts—including two doctors contracted by the Department of Homeland Security—Defendants have inexplicably and unjustifiably refused to reduce the number of people in detention in the face of COVID-19, beginning with the most medically vulnerable. Authorities nationwide are taking drastic measures necessary to contain this deadly pandemic. California jails released thousands of people incarcerated in the criminal justice system to avoid risking the lives of detainees and the community at large. “In light of the rapidly escalating public health crisis, which public health authorities predict will especially impact immigration detention centers,” the Ninth Circuit yesterday “order[ed] that [an immigration detainee] be immediately released from detention[.]” *Xochihua-Jaimes v. Barr*, -- F.3d --, No. 18-71460 (9th Cir., March 23, 2020) (for publication). Plaintiffs ask this Court to follow suit and order their immediate release.

Plaintiffs’ health conditions make them exceptionally vulnerable to serious illness or death if they contract COVID-19. The Eighth Amendment protects against “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). As civil detainees, Plaintiffs enjoy greater protections under the Due Process Clause than prisoners do under the Eighth Amendment. COVID-19’s danger renders Plaintiffs’ ongoing detention unconstitutional.

This is the quintessential scenario in which emergency relief is necessary to avert irreparable harm. Public health experts agree that Plaintiffs will experience serious injury or death if infected by COVID-19, and that the spread of COVID-19 to immigration detention facilities is inevitable. Those experts agree, moreover, that reducing the number of people detained, starting with those who are most vulnerable to COVID-19, serves the public interest by

1 reducing the risk of widespread infection in a closed environment that will overwhelm demands
2 on the local health care infrastructure, especially intensive care units. With ankle-monitoring and
3 other alternatives to detention available, if necessary, ICE’s interest in Plaintiffs’ current
4 detention pales in comparison to the extraordinary equities in favor of release. The Court should
5 grant this motion and order Plaintiffs’ release.

6 **II. FACTUAL BACKGROUND**

7 **A. COVID-19 Has Killed Thousands of People, and While the Effort to Stop the**
8 **Outbreak Has Transformed Human Behavior Around the World, ICE’s**
9 **Response Has Been Haphazard and Wholly Inadequate.**

10 The medical information described below is based on the accompanying declarations of
11 five physicians with first-hand knowledge of detainee health in immigration detention facilities:
12 Robert Greifinger, MD, who has a long career of managing medical care for inmates (Greifinger
13 ¶ 1¹); Marc Stern, MD, who has deep experience with the immigration detention system (Stern ¶
14 1); Ranit Mishori, MD, MHS, FAAFP, who has studied medical outcomes of individuals in
15 correctional facilities (Mishori ¶ 2); Jonathan Louis Golob, a professor specializing in infections
16 in immunocompromised patients (Golob ¶ 2); and Allen S. Keller, MD, who has deep experience
17 reporting on conditions of detention in ICE facilities (Keller ¶¶ 2-3). Plaintiffs also present the
18 declarations of public health expert Sandra Hernandez, President and CEO of the California
19 Healthcare Foundation and the former Director of Health for the City and County of San
20 Francisco (Hernandez ¶ 1); and Andrew Lorenzen-Strait, former Deputy Assistant Director of
21 Enforcement and Removal Operations for ICE (Lorenzen-Strat ¶ 2).

22 It is now beyond dispute that COVID-19 is a rapidly escalating global pandemic with
23 devastating effects, particularly on the elderly and immunocompromised. Golob ¶¶ 3, 8; Stern ¶
24 5; Mishori ¶ 9. The numbers of confirmed diagnoses and deaths cited on any given day quickly
25 lose meaning as the figures grow exponentially. Golob ¶ 2; Mishori ¶ 6. In any event, the actual
26 number of infected is far higher than what is reported, due to a shortage of diagnostic tests.

27 ¹ All of the declarations submitted herewith will be cited using this shorthand, e.g., name of
28 declarant followed by paragraph number.

1 Hernandez ¶¶ 8, 11; Mishori ¶ 6. Alarming projections by the Centers for Disease Control and
2 Prevention (“CDC”) indicate that over 200 million people in the United States could become
3 infected with COVID-19 over the course of the epidemic without effective public health
4 intervention, with as many as 1.5 million deaths in the most severe projections. Golob Decl. ¶ 11.

5 There is no known vaccine, treatment, or cure for COVID-19. Golob ¶ 10. Because the
6 virus has not been contained, the only available measures to effectively reduce the risk of
7 infection are social distancing and improved hygiene. *Id.*; Hernandez ¶ 14.

8 In a matter of days, COVID-19’s threat of mass fatalities has transformed American life.
9 Recognizing the public health threats posed by interpersonal proximity, cities and states have
10 responded by imposing unprecedented restrictions on human interaction. On March 16, seven
11 Bay Area counties established “shelter in place” orders, and the entire State of California
12 followed three days later. Hernandez ¶ 18.

13 Many of the state’s largest jails have released people detained in the criminal justice
14 system to protect those people and the community from COVID-19. Alameda County’s Santa
15 Rita Jail released 250 people;² Los Angeles County released more than 1,000;³ Kern County,
16 where Mesa Verde is located, has released dozens.⁴ The New York Board of Corrections called
17 for “bold and urgent action” to “drastically reduce the [] jail population.”⁵ The Supreme Court of
18 New Jersey issued an order creating a presumption of release for every person serving a sentence
19
20

21 ² See Maura Dolan, et al., *California releases more jail inmates amid coronavirus crisis*, L.A.
22 Times (March 20, 2020), [https://www.latimes.com/california/story/2020-03-20/california-releases-more-jail-inmates-amid-coronavirus-crisis?](https://www.latimes.com/california/story/2020-03-20/california-releases-more-jail-inmates-amid-coronavirus-crisis?hpid=hp_hp-top-table-main-coronavirus%3Acalifornia-releases-more-jail-inmates-amid-coronavirus-crisis%3Ahomepage%2Ftcm%3A-1000000000)

23 ³ See Alene Tchekmedyan, et al., *L.A. County releasing some inmates from jail to combat coronavirus*, L.A. Times (March 16, 2020), <https://www.latimes.com/california/story/2020-03-16/la-jail-population-arrests-down-amid-coronavirus>

24 ⁴ See Quinn Wilson, *KCSO: Inmate releases based on mitigating spread of COVID-19, reserved for non-violent offenders*, Bakersfield Californian (March 19, 2020),
25 https://www.bakersfield.com/news/breaking/kcso-inmate-releases-based-on-mitigating-spread-of-covid-/article_10ffc8a2-6a3d-11ea-b7b5-7b06de300554.html

26 ⁵ Board of Correction City of New York, Letter from BOC re NYC Jails and Covid-19 (March
27 19, 2020) available at <https://www1.nyc.gov/assets/boc/downloads/pdf/News/covid-19/Letter-from-BOC-re-NYC-Jails-and-COVID-19-2020-03-21.pdf>

1 in New Jersey’s county jails.⁶ “These are extraordinary times,” Magistrate Judge Thomas S.
2 Hixson recently observed, in ordering the release of an individual on bail after taking into
3 account his risk of vulnerability to COVID-19. *In the Matter of the Extradition of Alejandro*
4 *Toledo Manrique*, Case No. 19-mj-71055, 2020 WL 1307109, at *1 (N. D. Cal. March 19, 2020).

5 ICE’s response to the threats the pandemic poses to immigrants, by contrast, has been
6 singularly resistant. Last week as Californians began sheltering in place in compliance with
7 public health directives, ICE’s Los Angeles Field Office executed pre-dawn home raids to cram
8 even more immigrants into ICE detention centers. The Field Office Director stated to the L.A.
9 Times: “We couldn’t factor this in, right? This COVID-19 and the precautions that everybody’s
10 taking We just have to continue to go with the same game plan that we’ve been doing.”⁷
11 Following public outcry, ICE issued a statement recognizing the need for alternatives to
12 detention for *new arrestees* to protect public health, but has inexplicably refused to apply that
13 same logic to its current detainees.⁸ ICE went so far as to claim, in response to a lawsuit for the
14 release of vulnerable ICE detainees, that “Plaintiffs’ assertion that detention *per se* poses an
15 increased risk of health complications or death from COVID-19 is purely speculative.” Defs’
16 Opp. at 8, *Dawson v. Asher*, ECF No. 28, Case No. 20-409 (W.D. Wash. Mar. 18, 2020).

17 While ICE refused to act to protect detainees, on March 19, 2020, two medical subject
18 matter experts for the Department of Homeland Security’s Office of Civil Rights and Civil
19 Liberties wrote to Congress that, in order “to implement immediate social distancing to reduce
20 the likelihood of exposure to detainees, facility personnel, and the general public, **it is essential**
21 **to consider releasing all detainees who do not pose an immediate risk to public safety.**” Ltr.
22 from Scott A. Allen, MD and Josiah Rich, MD, MPH to Cong’l Cmte. Chairpersons (March 19,
23

24 ⁶ [https://www.aclu-nj.org/files/5415/8496/4744/2020.03.22_-_](https://www.aclu-nj.org/files/5415/8496/4744/2020.03.22_-_Consent_Order_Filed_Stamped_Copy-1.pdf)
25 [Consent_Order_Filed_Stamped_Copy-1.pdf](https://www.aclu-nj.org/files/5415/8496/4744/2020.03.22_-_Consent_Order_Filed_Stamped_Copy-1.pdf)

26 ⁷ Brittny Mejia, *With masks at the ready, ICE agents make arrests on first day of California*
27 *coronavirus lockdown*, L.A. Times, Mar. 18, 2020,
28 [https://www.latimes.com/california/story/2020-03-17/for-ice-agents-its-business-as-unusual-day-](https://www.latimes.com/california/story/2020-03-17/for-ice-agents-its-business-as-unusual-day-after-sweeping-coronavirus-order)
[after-sweeping-coronavirus-order.](https://www.latimes.com/california/story/2020-03-17/for-ice-agents-its-business-as-unusual-day-after-sweeping-coronavirus-order)

⁸ See <https://www.ice.gov/covid19>.

1 2020) (“Allen & Rich Ltr.”) (Exh. A to Freeman Decl.). On multiple occasions since at least
2 February 25, 2020, these experts have sounded the alarm within the agency on the imminent
3 risks to the health of immigrant detainees and the public at large presented by COVID-19 unless
4 swift mitigation measures, including decreasing the number of immigrant detainees, are taken.

5 *Id.*

6 Inside the facilities, moreover, immigrants say that ICE is not consistently taking even
7 the less aggressive precautionary measures the agency claims it is taking. As set forth more fully
8 below, the declarations of the Plaintiffs and other residents of Mesa Verde and Yuba, as well as
9 attorneys who have recently visited there, demonstrate the frightening consequences of ICE’s
10 stubborn resistance to taking meaningful steps to mitigate the risk of infection. According to the
11 two DHS whistleblower experts, “the track record of ICE facilities implementing [early
12 screening, testing, isolation and quarantine] protocols historically has been inconsistent.” Allen
13 & Rich Ltr. Moreover, even if ICE was consistently taking these precautions, the DHS experts
14 explain that they “won’t be enough” without rapidly “releas[ing] those who do not pose an
15 immediate danger to public safety.”⁹

16 **B. COVID-19 Poses Grave Risk of Harm, Including Serious Illness or Death, to**
17 **Older Adults and Those with Certain Medical Conditions.**

18 People over the age of fifty face greater chances of serious illness or death from COVID-
19 19. Golob ¶ 3; Stern ¶ 5. The Centers for Disease Control has concluded that certain underlying
20 medical conditions increase the risk of serious COVID-19 symptoms for people of any age.
21 These include lung disease, heart disease, chronic liver or kidney disease, diabetes, epilepsy,
22 compromised immune systems (such as from cancer, HIV, or an autoimmune disease), blood
23 disorders (including sickle cell disease), inherited metabolic disorders, stroke, developmental
24

25 _____
26 ⁹ Josiah Rich, Scott Allen & Mavis Noah, *We Must Release Prisoners to Lessen the Spread of*
27 *Coronavirus*, The Washington Post, Mar. 17 2020,
[https://www.washingtonpost.com/opinions/2020/03/17/we-must-release-prisoners-lessen-spread-](https://www.washingtonpost.com/opinions/2020/03/17/we-must-release-prisoners-lessen-spread-coronavirus/)
28 [coronavirus/](https://www.washingtonpost.com/opinions/2020/03/17/we-must-release-prisoners-lessen-spread-coronavirus/).

1 delay, and pregnancy.¹⁰ *Id.* For people with these risk factors, the consequences of COVID-19
2 can be severe, including temporary or permanent damage to the heart and lungs or death. Golob
3 ¶ 7. These complications can manifest at an alarming pace. Although individuals may be
4 asymptomatic for up to 14 days and may transmit the virus during this time, they can show the
5 first symptoms of infection in as little as two days after exposure, and their condition can
6 seriously deteriorate in as little as five days or sooner. Stern ¶ 4.

7 Most people in higher risk categories who develop severe effects of COVID-19 will need
8 advanced supportive care, requiring highly specialized equipment that is in limited supply, and
9 an entire team of care providers, including 1:1 or 1:2 nurse to patient ratios, respiratory
10 therapists, and intensive care physicians. Golob ¶ 8.¹¹ Because severe COVID-19 cases require
11 intensive medical care, an outbreak can “quickly overwhelm a health system,” particularly in
12 medically under-resourced rural areas. Greifinger ¶ 9; Hernandez ¶ 23.

13 The need for care, including intensive care, and the likelihood of lasting complications
14 and death, is about ten times higher from COVID-19 infection than from influenza. Golob ¶ 4.
15 For people in the highest risk populations, the fatality rate of COVID-19 infection is about
16 fifteen percent. *Id.*

17 **C. People Detained at Mesa Verde and Yuba Face an Elevated Risk of COVID-**
18 **19 Transmission.**

19 People in congregate environments—places where people live, eat, and sleep in close
20 proximity—face increased danger of contracting COVID-19, as evidenced by the rapid spread of
21 the virus in cruise ships and nursing homes. Golob ¶ 12. Immigration detention facilities have
22 even an even greater risk of infectious spread than in the community and other congregate
23 settings because of crowding, the proportion of vulnerable people detained, often deficient
24

25 ¹⁰ This list is evolving. On March 23, 2020, the CDC updated its previous list as to who is at
26 higher risk of serious illness if they were to contract COVID-19. *See*
27 <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/people-at-higher-risk.html>

28 ¹¹ Even some younger and healthier people who contract COVID-19 may require supportive
care, which includes supplemental oxygen, positive pressure ventilation, and in extreme cases,
extracorporeal mechanical oxygenation. Golob ¶ 5; Greifinger ¶ 6.

1 hygiene and sanitation, and scant medical resources. Greifinger ¶¶ 14-20; Mishori ¶¶ 16-22;
2 Keller ¶¶ 6-11. People live in close quarters and may be unable to maintain the recommended
3 distance of six feet from others; there is often insufficient capacity for isolation of potentially or
4 actually infected people; people share or touch objects used by others; toilets, sinks, and showers
5 are shared, without disinfection between each use; food preparation and service is communal
6 with little opportunity for surface disinfection; detainees and staff come and go frequently. *Id.*
7 This is particularly problematic because people can transmit the disease while they are still
8 asymptomatic. Keller ¶ 13. Dr. Keller concludes that *even under normal conditions*, the health
9 care provided in immigration detention facilities is often unsafe, and this conclusion is backed up
10 by numerous recent governmental, non-governmental and investigative reports. Keller ¶ 14. Dr.
11 Greifinger, who currently monitors medical care for federal courts in three large county jails,
12 concludes it is “highly likely, and perhaps inevitable” that COVID-19 will reach immigration
13 detention facilities in California, and that these facilities “are not prepared to prevent the spread
14 of COVID-19, treat those who are most medically vulnerable, and contain any outbreak.”
15 Greifinger ¶¶ 13, 23. In fact, because the virus is communicated by air or touch, it is more likely
16 to spread in these congregate environments; for this reason, detention facilities and jails have
17 repeatedly been the sites of past outbreaks of infectious diseases. Mishori ¶¶ 24, 26-27. During
18 the H1N1 influenza epidemic in 2009, jails and prisons were sites of severe outbreaks. *Id.*¹²
19 There have already been COVID-19 outbreaks in jails which are ill-equipped to respond.
20 Greifinger ¶ 24.

21 Recently observed conditions at Mesa Verde and Yuba confirm experts’ worst fears.
22 Mesa Verde is an extremely compact facility where people sleep in bunk beds spaced only a few
23 feet apart and spend most of their time during the day in dorms that house up to 100 detainees.
24 Knox ¶ 9. Sanitary practices are poor; visitors are not routinely screened; cleaning is done by

25 _____
26 ¹² See also J. David McSwane, *ICE Has Repeatedly Failed to Contain Contagious Diseases, Our*
27 *Analysis Shows. It’s a Danger to the Public*, Pro Publica (Mar. 20, 2020), available at:
28 <https://www.propublica.org/article/ice-has-repeatedly-failed-to-contain-contagious-diseases-our-analysis-shows-its-a-danger-to-the-public>

1 detainees sharing rags; and soap and shampoo are not sufficient unless detainees can pay
2 exorbitant prices to buy them. *Id.* ¶¶ 11-13. Dormitory bathrooms lack basic hygiene supplies
3 such as toilet paper and soap. *Id.* ¶ 5. One client reported that these conditions had not changed
4 as recently as March 19, 2020. *Id.* ¶ 15. At Mesa Verde, an attorney visiting as recently as March
5 13, 2020 was denied a request to bring sanitizer with her and observed no hand sanitizer
6 anywhere in the facility or any place to wash hands in the room where attorney visits are
7 conducted. *Id.* ¶ 6. On this same day, no one was observed wearing masks; no signs were posted
8 providing any information about coronavirus; and some detainees had not even been given any
9 soap. *Id.* ¶¶ 7-8. The facility lacks the medical resources to respond to even basic medical issues,
10 with detainees being denied necessary medications, or the wrong medication being given. *Id.* ¶ 4.

11 At Yuba, based on the direct observations of an attorney who conducts frequent site
12 visits, detainees typically sleep in bunks that are less than three feet from each other; many of the
13 housing units are extremely compact. Kavanagh ¶¶ 1, 3, 5, 10-11. Meals are served in group
14 settings by detainees or county jail inmates with no instruction concerning sanitation. *Id.* ¶¶ 3-4.
15 Cleaning is done by the detainees themselves, using dirty buckets of mop water and reused rags.
16 *Id.* ¶ 4. Yuba regularly fails to provide adequate medical care to ICE detainees suffering from
17 serious conditions such as lymphoma, skin cancer and head injuries; detainees consistently
18 complaint that requests for medical visits are ignored. *Id.* ¶¶ 14-15

19 **D. Plaintiffs Are Vulnerable to Serious Illness or Death if Infected by COVID-**
20 **19.**

21 Plaintiffs' experiences, and those of non-Plaintiff declarants¹³ confirm, in the starkest of
22 terms, what the experts and attorney visitors are saying. It is difficult, if not impossible, within
23 the confines of this brief, to adequately convey the nightmarish effects on Plaintiffs of their
24 ongoing detention by Defendants during the current pandemic. In light of their age and/or
25 compromised health, Plaintiffs live in constant terror of contracting COVID-19.

26 _____
27 ¹³ Most of the accompanying detainees' declarations are submitted by Plaintiffs; several
28 additional declarations are submitted by detainees who are not Plaintiffs.

1 Plaintiffs’ detention is imposing an unspeakable physical and mental toll on each of
2 them.¹⁴ Plaintiffs already know what the experts are saying: that the conditions of their
3 confinement—including living in close quarters with 100 or more other detainees,¹⁵ close contact
4 with guards and staff,¹⁶ the constant influx and transfer of new detainees,¹⁷ being forced to clean
5 toilets and common areas without adequate protective gear,¹⁸ and being denied adequate personal
6 hygiene supplies or clean clothing¹⁹—increase their likelihood of contracting the virus. They also
7 understand, and are terrified of, the high likelihood that, if they do contract the virus, they would
8 suffer serious or even fatal consequences.²⁰ They already suffer from a serious lack of adequate
9
10
11

12 ¹⁴ Due to the difficulty of getting signed declarations from Plaintiff detainees on short notice,
13 some declarations have been submitted by their attorneys, attesting to statements made by their
14 clients. In these instances, the declaration is referenced using the attorney name and, in
15 parentheses, the client name. E.g., “Knox (Trigueros Acevedo) ¶ .”

16 ¹⁵ Medina Calderon ¶ 16 (50 people in sleeping area, less than 6 feet apart); Bent ¶ 8 (dorms
17 contain 90-100 people, with more arriving daily); Bent ¶ 11 (“There is no room for the other
18 detainees and me to stay apart from each other we are like sardines together....”); Yamane
19 (Uc Encarnacion) ¶ 12 (“near to 50 people crammed into the same room....”); Bahena Ortuño ¶
20 12 (50 beds in dormitory with “less than the space of a chair between each bed. It is impossible
21 not to be close to people.”); Joseph ¶¶ 9-10 (90-100 people in unit; “if I stretch my arms out
22 while lying down in my bunk bed, I can touch the other bunks on both sides of me.”); *id.* ¶¶ 11-
23 12 (social distancing impossible at mealtimes); Upshaw (Lavirus) ¶ 10; Minchaca Ramos ¶ 12
24 (80-90 in dorm, “very close together”).

25 ¹⁶ Buendia Alas ¶ 8; Upshaw (Lavirus) ¶ 12; Minchaca Ramos ¶ 12.

26 ¹⁷ Knox (Trigueros Acevedo) ¶ 15; Ruiz Tovar ¶¶ 7-8; Bent ¶ 8; Vasquez Cruz ¶ 11; Patel
27 (Quinteros) ¶ 9; Martinez Lopez ¶ 8; Minchaca Ramos ¶ 12 (“as soon as they deport 5 or 6
28 people, they replace them right away.”).

¹⁸ Ruiz Tovar ¶ 13 (told to clean bathrooms and dorms without protective gear); Medina
Calderon ¶ 15 (required to clean toilets and sinks without adequate protection); Claude Bent ¶¶
9-10 (paid a dollar a day to clean dorms, including bathrooms, but denied bleach or hand
sanitizer); Vasquez Cruz ¶ 8 (required to clean common areas and bathrooms without “any real
supplies to do this”); *id.* ¶ 11 (while on cleaning crew, required to sign that ICE provided rubber
gloves and work boots, but ICE does not provide them; cleaning crews wear cloth shoes that get
wet.).

¹⁹ Medina Calderon ¶¶ 17-18 (detainees have to wash their underwear in communal shower;
detainees issued used clothing from previous detainees); Medina Calderon ¶ 25 (for five days, 50
inmates had to share one 2-inch piece of soap); Vasquez Cruz ¶ 10 (detainees often have to buy
their own soap); Yamane (Uc Encarnacion) ¶ 12 (allowed to change clothing only twice per
week); Bahena Ortuño ¶ 9; Martinez Lopez ¶ 7.

²⁰ Wolfe-Roubatis (Montoya Amaya) ¶ 12; Buendia Alas ¶ 7; Knox (Espinoza Ayala) ¶ 10;
Weisner (Torres Murillo) ¶ 10; Ruiz Tovar ¶ 14; Medina Calderon ¶ 20; Bent ¶ 7; Yamane (Uc
Encarnacion) ¶ 14; Bahena Ortuño ¶¶ 8, 14; Patel (Quinteros) ¶ 8; Upshaw (Lavirus) ¶ 15.

1 medical care.²¹ They are understandably frightened that they will contract the virus,²² and that, in
2 the event of an outbreak of the virus in their detention centers, there is little or no hope that they
3 will receive appropriate treatment.²³

4 Plaintiffs range in age from 28 to 82.²⁴ They suffer from a variety of physical and
5 emotional disorders, including tuberculosis,²⁵ neurocysticercosis (a parasitic infection affecting
6 the brain),²⁶ depression and PTSD,²⁷ hypertension,²⁸ colitis,²⁹ diabetes,³⁰ and asthma.³¹ Some
7 Plaintiffs and non-plaintiff declarants have recently experienced symptoms including vomiting,
8 diarrhea, abdominal pain, coughing,³² or respiratory problems,³³ but have not received any
9 definitive diagnosis or testing for coronavirus.³⁴

10 All of them have friends or family eagerly waiting to care for them upon their release
11 from detention and help them comply with any “shelter in place” requirements and public health
12 guidelines.³⁵

14 ²¹ Wolfe-Roubatis (Montoya Amaya) ¶ 11; Ruiz Tovar ¶ 11; Medina Calderon ¶¶ 9, 13-14;
15 Medina Calderon ¶¶ 23-24; Vasquez Cruz ¶ 7 (“It is like the guards think we are animals; they
16 do not care about our health.”); Bahena Ortuño ¶¶ 6-7 (denied medications); Martinez Lopez ¶ 5
17 (medical equipment not cleaned between uses); Joseph ¶ 18 (“Medical care is limited ... If
18 someone is sick, they don’t have a place to go, they just stay in their bunk.”).

17 ²² Buendia Alas ¶ 7; Medina Calderon ¶ 19 (“The coronavirus has caused worry, anxiety, and
18 panic among the detainees at Yuba”); Joseph ¶¶ 15, 17 (“I am extremely stressed ... we are
19 living in a petri dish.”).

18 ²³ Ruiz Tovar ¶ 14 (“As more detainees have symptoms, there are more requests [for medical
19 treatment], medical gets overwhelmed and their response delays [sic.]”); Vasquez Cruz ¶ 12 (“I
20 do not think there are enough doctors and nurses to give us care if many of us get sick at once.”).

20 ²⁴ Knox (Espinoza Ayala) ¶ 3; Waldron (Solorio Lopez) ¶ 3.

21 ²⁵ Wolfe-Roubatis (Montoya Amaya) ¶ 6; Joseph ¶ 14.

21 ²⁶ Wolfe-Roubatis (Montoya Amaya) ¶¶ 8-9.

21 ²⁷ Wolfe-Roubatis (Montoya Amaya) ¶ 14; Weisner (Torres Murillo) ¶ 8.

22 ²⁸ Buendia Alas ¶ 5; Weisner (Torres Murillo) ¶ 8; Vasquez Cruz ¶ 4; Bahena Ortuño ¶ 6; Patel
23 (Quinteros) ¶ 5; Upshaw (Lavrus) ¶ 5.

23 ²⁹ Knox (Trigueros Acevedo) ¶ 14.

23 ³⁰ Medina Calderon ¶ 6; Vasquez Cruz ¶ 3; Bahena Ortuño ¶ 6; Upshaw (Lavrus) ¶ 5.

24 ³¹ Bent ¶ 4; Joseph ¶ 13; Yamane (Uc Encarnacion) ¶ 5.

24 ³² Ruiz Tovar ¶ 10; Patel (Quinteros) ¶ 8.

25 ³³ Ruiz Tovar ¶ 10; Yamane (Uc Encarnacion) ¶ 11; Minchaca Ramos ¶ 16.

25 ³⁴ Knox (Espinoza Ayala) ¶¶ 6-8; Yamane (Uc Encarnacion) ¶ 11; Patel (Quinteros) ¶ 8;
26 Martinez Lopez ¶ 9; Upshaw (Lavrus) ¶ 9; Minchaca Ramos ¶¶ 7, 11.

26 ³⁵ Wolfe-Roubatis (Montoya Amaya) ¶ 17; Buendia Alas ¶¶ 12-13; Knox (Espinoza Ayala) ¶
27 12; Knox (Trigueros Acevedo) ¶ 18; Weisner (Torres Murillo) ¶ 12; Beaty (Moncada) ¶ 10;
28 Medina Calderon ¶ 29; Bent ¶ 14; Vasquez Cruz ¶ 13; Yamane (Uc Encarnacion) ¶¶ 16-17;

1 **E. In Light of Current Conditions, Public Health Experts Agree that People**
2 **Most Vulnerable to COVID-19 Should Be Released from ICE Detention**
3 **Facilities Immediately.**

4 Because risk mitigation is the only known strategy that can protect vulnerable groups
5 from COVID-19, and because it is virtually impossible to engage in the necessary social
6 distancing and hygiene required to mitigate the risk of transmission in a congregate environment,
7 public health experts with experience in immigration detention and correctional settings agree
8 that “the most effective mitigation strategy” is to reduce crowding by releasing detainees from
9 custody. Greifinger ¶ 27; Hernandez ¶ 28; Stern ¶¶ 11; Allen & Rich Ltr. at 5 (“*it is essential to*
10 *consider releasing all detainees who do not pose an immediate risk to public safety*”) (emphasis
11 in original). Dr. Stern recommends “downsizing of these detention facilities, with priority given
12 to those in high risk of harm due to their age and health status.” Stern ¶ 11. Dr. Greifinger
13 likewise has concluded that “[t]he most urgent need is to remove those who are medically
14 vulnerable, and at risk of the most severe effects of COVID-19 from the heightened risk of
15 transmission found in the congregate setting of the immigration detention facility.” Greifinger ¶
16 25. Dr. Keller reviewed the medical conditions that Plaintiffs report having been diagnosed with
17 and concluded that each of them is “at risk of severe effects of COVID-19 if infected, because of
18 their underlying medical conditions, their advanced age, or both.” Keller ¶ 24.³⁶

19 The release of detainees from Mesa Verde and Yuba is also important for a second
20 reason: it reduces the risk of the spread of disease within the facilities and mitigates the possible
21 effects on the public health systems of the surrounding communities. Reducing the population in
22 a facility allows for greater social distancing, allows easier provision of preventive measures
23 such as soap for handwashing and cleaning supplies for surfaces, and helps the detention staff to

24 Waldron (Solorio Lopez) ¶ 19; Bahena Ortuño ¶ 15; Patel (Quinteros) ¶¶ 12-13; Martinez Lopez
25 ¶ 10; Joseph ¶¶ 22-23; Upshaw (Lavirus) ¶ 17; Minchaca Ramos ¶¶ 17-18.

26 ³⁶ In the event that vulnerable detainees have been exposed to COVID-19, these experts
27 recommend testing where possible and releasing detainees to a quarantine setting outside of
28 detention in coordination with local health authorities. Greifinger ¶¶ 29-30; Stern ¶ 17. Release
would be appropriate *even if individuals have symptoms of COVID-19*. Released detainees
could rest and recuperate at home and should not be in a congregate living situation where they
expose others to potential infection. Hernandez ¶ 32.

1 continue to ensure detainees’ safety, all of which reduce the likelihood of spread of the disease.
2 Stern ¶ 9.³⁷ These measures therefore not only protect the remaining detainee population but also
3 the staff and employees of ICE, who work at these facilities, along with their families and
4 contacts. *Id.*; Greifinger ¶ 21.

5 Moreover, detention facilities are integral parts of the public health infrastructure of their
6 surrounding communities. The spread of COVID-19 at Mesa Verde or Yuba will have ripple
7 effects in the surrounding community as detainees will need intensive care at local hospitals
8 which would “quickly become overwhelmed in the face of an infectious disease outbreak.”
9 Greifinger ¶ 19; Hernandez ¶¶ 23-25. Reducing the spread and severity of infection inside Mesa
10 Verde and Yuba slows, if not reduces, the number of people who will become ill enough to
11 require hospitalization, which would strain the health and economies of those medically under-
12 resourced communities. *Id.*

13 **III. DETENTION PUTS PLAINTIFFS AT AN UNCONSTITUTIONALLY HIGH**
14 **RISK OF COVID-19 AND THE EQUITIES STRONGLY FAVOR RELEASE**
15 **UNDER CURRENT EXTRAORDINARY CIRCUMSTANCES.**

16 **A. Legal Standard**

17 On a motion for a temporary restraining order, the plaintiff “must establish that he is
18 likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of
19 preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the
20 public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Stuhlbarg Int’l*
21 *Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001) (noting that preliminary
22 injunction and temporary restraining order standards are “substantially identical”). A temporary
23 restraining order may likewise issue where “serious questions going to the merits [are] raised and
24 the balance of hardships tips sharply in [plaintiff’s] favor.” *All. for the Wild Rockies v. Cottrell*,
25 632 F.3d 1127, 1131 (9th Cir. 2011) (citation omitted). To succeed under the “serious question”

26 ³⁷ See also Rich, et al., *We Must Release Prisoners to Lessen the Spread of Coronavirus*, The
27 Washington Post, Mar. 17 2020 (explaining that “[i]t is essential to understand that, despite
28 being physically secure, jails and prisons are not isolated from the community” and “people
continuously enter and leave.”).

1 test, plaintiffs must show that they are likely to suffer irreparable injury and that an injunction is
2 in the public’s interest. *Id.* at 1132.

3 **B. Plaintiffs Are Likely to Succeed on the Merits.**

4 **1. The Constitution Protects Immigrant Detainees Against Exposure to**
5 **Harmful Diseases.**

6 Immigrant detainees, even those with prior criminal convictions, are *civil* detainees held
7 pursuant to *civil* immigration laws. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Their
8 constitutional protections while in custody are derived from the Due Process Clause of the Fifth
9 Amendment, which provides protection significantly greater than the Eighth Amendment’s ban
10 on cruel and unusual punishment.

11 Even the Eighth Amendment, however, imposes on the government an affirmative duty
12 to provide conditions of reasonable health and safety to the people it holds in its custody:

13 [W]hen the State takes a person into its custody and holds him there against his
14 will, the Constitution imposes upon it a corresponding duty to assume some
15 responsibility for his safety and general well-being The rationale for this
16 principle is simple enough: when the State by the affirmative exercise of its power
17 so restrains an individual’s liberty that it renders him unable to care for himself,
18 and at the same time fails to provide for his basic human needs—e.g., food,
19 clothing, shelter, medical care, and reasonable safety—it transgresses the
20 substantive limits on state action set by the Eighth Amendment[.]

21 *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189, 199-200 (1989). Conditions
22 that pose an unreasonable risk of *future* harm violate the Eighth Amendment’s prohibition
23 against cruel and unusual punishment, even if that harm has not yet come to pass. Thus, prison
24 authorities cannot “ignore a condition of confinement that is sure or very likely to cause serious
25 illness and needless suffering the next week or month or year.” *Helling*, 509 U.S. at 33. For
26 example, inmates cannot be comingled with others having infectious maladies such as hepatitis
27 and venereal disease. *Hutto v. Finney*, 437 U.S. 678, 682 (1978); *Gates v. Collier*, 501 F.2d 1291
28 (5th Cir. 1974). An Eighth Amendment violation is established even though the plaintiff cannot
yet “prove that he is currently suffering serious medical problems caused by” the exposure.
Helling, 509 U.S. at 32.

1 The Due Process Clause of the Fifth Amendment provides even greater protection to civil
2 immigrant detainees. While the Eighth Amendment prohibits punishment that is “cruel and
3 unusual,” the Fifth Amendment’s due process protections do not allow “punishment” at all. *Bell*
4 *v. Wolfish*, 441 U.S. 520, 535 n.16 (1979) (“Due process requires that a pretrial detainee not be
5 punished.”).

6 Civil detainees are entitled to “more considerate treatment” than their criminal
7 counterparts. *Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982); *Jones v. Blanas*, 393 F.3d 918,
8 933-34 (9th Cir. 2004), *cert. denied*, 546 U.S. 820 (2005); *See also King v. Cty. of Los Angeles*,
9 885 F.3d 548, 557 (9th Cir. 2018) (finding presumption of punitive, and thus unconstitutional,
10 treatment where conditions of confinement for civil detainees are similar to those faced by pre-
11 trial criminal detainees). And while convicted persons must show “deliberate indifference” on
12 the part of prison officials to establish a violation of the Eighth Amendment, *Farmer v. Brennan*,
13 511 U.S. 825, 828 (1994), there is no such requirement for civil detainees challenging their
14 conditions of confinement. *Jones*, 393 F.3d at 934 (“[T]o prevail on a [Due Process] claim
15 regarding conditions of confinement, the confined individual *need not provide ‘deliberate*
16 *indifference’* on the part of government officials.”) (emphasis added).

17 If placing an inmate in a situation creating an elevated risk of potentially lethal infection
18 constitutes “cruel and unusual punishment” in violation of the Eighth Amendment, as was found
19 in *Hutto* and *Gates*, placing a civil detainee in a situation presenting a serious risk of lethal
20 infection is certainly unconstitutional in violation of the Fifth Amendment.³⁸

21
22 ³⁸ Notably, the risk of infection need not depend on a current positive test for COVID-19. *Cf. In*
23 *the Matter of the Extradition of Alejandro Toledo Manrique*, 2020 WL 1307109, at *1 (“The
24 Court is glad to hear that there are currently no reported cases of COVID-19 at Maguire, but is
25 unsure what that means if people are not being tested. And, . . . symptoms of COVID-19 can
26 begin to appear 2-14 days after exposure, so screening people based on observable symptoms is
27 just a game of catch up. That’s why the Bay Area is on lockdown. We don’t know who’s
28 infected. Accordingly, the government’s suggestion that [petitioner] should wait until there is a
confirmed outbreak of COVID-19 in [the detention facility] before seeking release, . . . is
impractical. By then it may be too late.”); Golob ¶ 7 (“A lack of proven cases of COVID-19 in
the context of a lack of testing is functionally meaningless for determining if there is a risk of
COVID-19 transmission in a community or institution.”).

1 **2. The Harm to Plaintiffs from the Threat of COVID-19 is Excessive in**
2 **Relation to the Government’s Interest, in Violation of Substantive**
3 **Due Process.**

4 A condition of confinement for a civil immigration detainee violates the Fifth
5 Amendment “if it imposes some harm to the detainee that significantly exceeds or is independent
6 of the inherent discomforts of confinement and is not reasonably related to a legitimate
7 governmental objective or is excessive in relation to the legitimate governmental objective.”
8 *Unknown Parties v. Johnson*, No. CV-15-00250-TUC-DCB, 2016 WL 8188563, at *5 (D. Ariz.
9 Nov. 18, 2016), *aff’d sub nom. Doe v. Kelly*, 878 F.3d 710 (9th Cir. 2017) (*citing Kingsley v.*
10 *Hendrickson*, 135 S. Ct. 2466, 2473-74 (2015)). As Dr. Keller concluded, Plaintiffs are each “at
11 risk of severe effects of COVID-19 if infected, because of their underlying medical conditions,
12 their advanced age, or both.” Keller ¶ 24. The risk of serious illness or death from COVID-19
13 unquestionably exceeds “the inherent discomforts of confinement.” *Id.* In normal times,
14 crowding and close quarters, the sharing of toilets, sinks, and showers, and communal food
15 preparation and service may be considered uncomfortable. But in light of COVID-19, these
16 conditions present a deadly threat to Plaintiffs’ lives. *See supra* Section II.B-E.

17 This threat vastly outweighs any government interest in Plaintiffs’ confinement. Because
18 immigration proceedings are civil and non-punitive, “[t]here is no sufficiently strong special
19 justification . . . for indefinite civil detention.” *Zadvydas*, 533 U.S. at 690. If the government’s
20 interest in effectuating removal and protecting the community cannot justify indefinite detention,
21 it surely cannot justify the “potentially permanent” medical harm and death that Plaintiffs could
22 face. *See id.* at 690-91; *cf. D’Alessandro v. Mukasey*, 628 F. Supp. 2d 368, 399 (W.D.N.Y. 2009)
23 (considering immigrant’s age and “constellation of serious, debilitating, and progressive health
24 problems” to weigh against flight risk concerns and interest in continued detention).

25 That criminal justice authorities have released masses of people from jails to prevent
26 COVID-19 harms further indicates that Plaintiffs’ confinement violates due process. *See supra*
27 Section II.A. The relatively higher COVID-19 danger that Plaintiffs now face renders their
28 custody unconstitutional. *See Unknown Parties v. Nielsen*, CV-15-00250-TUC-DCB, 2020 WL

1 813774, *7 (D. Ariz., Feb. 19, 2020) (holding that Border Patrol conditions of confinement
2 presumptively violated due process because they were more restrictive than conditions for
3 pretrial detainees in jails and prisons).

4 Plaintiffs are likely to prevail regardless of the particular detention authority that
5 Defendants might invoke. Even for those plaintiffs subject to “mandatory” detention under 8
6 U.S.C. § 1226(c), the due process violation presented by these exceptional circumstances would
7 override any general detention mandate. *See Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (explaining
8 U.S. Constitution’s role as “supreme law of the land”); *In re Brichard Securities Litigation*, 788
9 F. Supp. 1098, 1112 (N.D. Cal. 1992) (“[C]oncerns” about legislative intent “cannot override the
10 Constitution.”). Indeed, the Ninth Circuit recently noted in another immigration detention case
11 that due process overrides § 1226(c) in certain common circumstances. *See Rodriguez v. Marin*,
12 909 F.3d 252, 256 (9th Cir. 2018) (“We have grave doubts that any statute that allows for
13 arbitrary prolonged detention without any process is constitutional or that those who founded our
14 democracy precisely to protect against the government’s arbitrary deprivation of liberty would
15 have thought so.”). In any event, ICE has released detainees held pursuant to § 1226(c) for
16 humanitarian reasons, *See Lorenzen-Strait* ¶ 11, and cannot then object that such relief here
17 would be problematic.³⁹ The exceptional risk COVID-19 poses to Plaintiffs exceeds any interest
18 Defendants might otherwise have in their detention.⁴⁰

19
20 ³⁹ Plaintiffs acknowledge that some of them have prior criminal convictions for which they have
21 already served their criminal sentences. Plaintiffs anticipate that Defendants may seize on these
22 convictions to argue against release, but prior convictions have no bearing on the question of
23 whether their conditions of civil confinement violate their constitutional rights. Past convictions
24 alone also cannot show that a person *currently* poses an “identified and articulable threat to an
25 individual or the community.” *United States v. Salerno*, 481 U.S. 739, 751 (1987) (finding Bail
26 Reform Act to be constitutional on its face only because it was narrowly drawn and contained
27 rebuttable presumptions in favor of detention for certain people accused of serious crimes, as
28 opposed to categorical detention mandates). In any event, conditions of release could mitigate
any danger Defendants might fear would be caused by release. *See infra* Section III.C.2.

⁴⁰ Another district court recently denied a TRO to immigration detainees who sought release
because of COVID-19. *See Dawson v. Asher*, Case No. 20-cv-409, 2020 WL 1304557 (W.D.
Wash. Mar. 19, 2020). That case was wrongly decided and rested on a materially distinguishable
record. The *Dawson* court accepted ICE’s claims that its preventive measures were adequate. But
the DHS medical-expert whistleblowers’ have since shown that those measures are insufficient
absent the release of detainees to enable necessary social distancing and isolation. Moreover,

1 **3. The Court Has Authority to Order Plaintiffs’ Release as the Sole**
2 **Effective Remedy for the Constitutional Violation.**

3 In this case, the release of Plaintiffs from detention is the only effective remedy for the
4 constitutional violation they face. Cf. *Stone v. City & Cty. of San Francisco*, 968 F.2d 850, 861
5 (9th Cir. 1992) (“Federal courts possess whatever powers are necessary to remedy constitutional
6 violations because they are charged with protecting these rights.”). Yesterday, the Ninth Circuit
7 sua sponte ordered the “immediate” release of an immigration detainee, “[i]n light of the rapidly
8 escalating public health crisis, which public health authorities predict will especially impact
9 immigration detention centers[.]” *Xochihua-Jaimes v. Barr*, -- F.3d --, No. 18-71460 (9th Cir.,
10 March 23, 2020) (for publication).⁴¹ Here too, release is the only way to address the
11 constitutional violations Plaintiffs face. Preventive measures that may be effective in the
12 community, such as maintaining a distance of six feet from other persons and frequent
13 disinfection, are simply not possible in the detention setting.

14 Risk mitigation is the only viable public health strategy available to limit
15 transmission of infection, morbidity and mortality in immigration detention
16 centers, and to decrease the likely public health impact outside of the detention
17 centers. Even with the best-laid plans to address the spread of COVID-19 in
18 detention facilities, the release of individuals, prioritizing the most medically
19 vulnerable individuals, is a key part of a risk mitigation strategy.

20 Greifinger ¶ 22.

21 Release is also the typical habeas remedy. *See Munaf v. Geren*, 553 U.S. 674, 693 (2008).
22 As the Supreme Court recently stated, a detainee may seek expedited relief from unconstitutional
23 conditions of confinement through habeas. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1863 (2017)

24 Plaintiffs’ declarations here show that ICE is not consistently undertaking the measures it cited in
25 *Dawson*. For example, the agency is introducing new detainees into the general population
26 without any mandatory quarantine period and not placing detainees “who meet the CDC criteria
27 for epidemiologic risk of exposure to COVID-19 ... separately from the general population” or
28 ensuring those exhibiting COVID-19 symptoms are placed “in a single medical housing room.”
See ICE Guidance on COVID-19, <https://www.ice.gov/covid19>. Finally, the Ninth Circuit’s
order in *Xochihua-Jaimes*, based on public health authorities’ consensus that the escalating crisis
“will especially impact immigration detention centers,” directly undermines the *Dawson* court’s
approach of waiting for an outbreak before ordering release.

⁴¹ The Ninth Circuit ordered the detainee’s immediate release even though that person’s felony
criminal history would have subjected them to “mandatory” detention under § 1226(c).

1 (noting that “the habeas remedy, if necessity required its use, would have provided a faster and
2 more direct route to relief” for detainees because “[a] successful habeas petition would have
3 required officials to place respondents in less-restrictive conditions immediately”). Moreover, the
4 principle that a federal court may release individuals to remedy unconstitutional conditions is
5 well established. *See Brown v. Plata*, 563 U.S. 493, 511 (2011) (“When necessary to ensure
6 compliance with a constitutional mandate, courts may enter orders placing limits on a prison’s
7 population.”); *Duran v. Elrod*, 713 F.2d 292, 297-98 (7th Cir. 1983), *cert. denied*, 465 U.S. 1108
8 (1984) (concluding that court did not exceed its authority in directing release of low-bond
9 pretrial detainees as necessary to reach a population cap).

10 Courts in this District and elsewhere have also recognized the severe harm that the risk of
11 COVID-19 transmission poses to detainees, and released them from confinement or modified
12 their conditions of probation accordingly. *See, e.g., In the Matter of the Extradition of Alejandro*
13 *Toledo Manrique*, 2020 WL 1307109, at *1 (Hixson, M. J.) (ordering release of vulnerable 74-
14 year-old on bail in light of “risk of serious illness or death if he remains in custody”); *United*
15 *States v. Barkman*, No. 3:19-cr-0052-RCJ-WGC, 2020 U.S. Dist. LEXIS 45628 *3, 8 (D. Nev.
16 March 17, 2020) (modifying conditions of probation to suspend requirement of intermittent
17 confinement where jail “simply lack[s] the resources necessary to engage in aggressive screening
18 and testing of inmates” and concluding that “we must take every necessary action to protect
19 vulnerable populations and the community at large”); *United States v. Stephens*, No. 15-cr-95
20 (AJN), 2020 WL 1295155, at *1 (S.D.N.Y. Mar. 19, 2020) (granting reconsideration of bail
21 determination and ordering release of criminal defendant previously found to be inappropriate
22 for release on danger grounds because of risk posed by COVID-19 in detention); *United States v.*
23 *Raihan*, No. 20-cr-68, ECF. No. 20, at 10:12-19 (E.D.N.Y. Mar. 12, 2020) (continuing defendant
24 on pretrial release rather than remanding him in part due to recognition that “[t]he more people
25 we crowd into that facility, the more we’re increasing the risk to the community”).

26 This Court and other courts also regularly grant outright release to immigrants in civil
27 custody when continued detention would violate their due process rights. *See Jimenez v. Wolf*,

1 No. 19-cv-07996-NC, 2020 WL1082648 (N.D. Cal. 2020) (granting motion to enforce habeas of
2 immigrant detainee charged with drug trafficking and convicted of accessory after the fact and
3 ordering release of petitioner with appropriate conditions of supervision); *Ramos v. Sessions*, 293
4 F.Supp.3d 1021, 1030-31 (N.D. Cal. Mar. 13, 2018); (same for immigrant detainee with two
5 prior DUI convictions); *Sales v. Johnson*, No. 16-cv-01745-EDL, 2017 WL 6855827, at *6
6 (N.D. Cal. 2017) (same for immigrant detainee with prior second-degree murder conviction);
7 *Judalang v. Chertoff*, 562 F.Supp.2d 1119 (S.D. Cal. 2008) (same for immigrant detainee with
8 prior voluntary manslaughter conviction). This case should be no different.⁴²

9 **C. The Remaining Factors Weigh Heavily in Favor of Granting a Temporary**
10 **Restraining Order.**

11 **1. Plaintiffs Are Likely to Suffer Irreparable Harm Absent the**
12 **Temporary Restraining Order.**

13 The Ninth Circuit has made clear that “the deprivation of constitutional rights
14 unquestionably constitutes irreparable injury.” *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir.
15 2012) (internal quotation marks omitted). The dangerous conditions of detention that Plaintiffs
16 face also constitute irreparable harm supporting injunctive relief. *See Padilla v. U.S. Immigration*
17 *& Customs Enforcement*, 387 F.Supp.3d 1219, 1231 (W.D. Wash. 2019) (recognizing that
18 “substandard physical conditions, [and] low standards of medical care” in immigration detention
19 constitute irreparable harm justifying injunctive relief); *See also Hernandez v. Sessions*, 872 F.3d
20 976, 995 (9th Cir. 2017) (explaining the “irreparable harms imposed on anyone subject to
21 immigration detention” including the “evidence of subpar medical and psychiatric care in ICE
22 detention facilities”). The Ninth Circuit also has recognized that irreparable harm exists where

23
24 ⁴² ICE presently has, and routinely exercises, the discretion to release particularly vulnerable
25 individuals from custody on humanitarian grounds. Lorenzen-Strait ¶¶ 3-8; 8 U.S.C. §§
26 1182(d)(5); 1226(a), 1231(a)(3), 8 C.F.R. § 212.5(b)(1). Importantly, ICE’s discretion applies
27 regardless of the statutory basis for the noncitizen’s detention. *Id.* ¶ 11 (“[I]ndividuals held under
28 mandatory detention, pursuant to [8 U.S.C. § 1226(c)], were also eligible for release”). In
particular, ICE has taken into consideration factors such as whether the detainees faced a
heightened risk of medical harm in detention, *id.* ¶¶ 5-7, and would release individuals where
appropriate medical care was not available in custody, *id.* ¶ 9.

1 government actions threaten an individual’s health. *See M.R. v. Dreyfus*, 663 F.3d 1100, 1111
2 (9th Cir. 2011), *as amended by* 697 F.3d 706 (9th Cir 2012); *Indep. Living Cent. of S. California,*
3 *Inc. v. Shewry*, 543 F.3d 1047, 1050 (9th Cir. 2008) (recognizing that Medi-Cal beneficiaries
4 would suffer irreparable harm where new policy would limit their access to pharmaceuticals).
5 The conditions of Plaintiffs’ detention threaten not only their health, but their lives.

6 **2. The Public Interest and Balance of Equities Weigh Heavily in**
7 **Plaintiffs’ Favor.**

8 Both the balance of equities and the public interest heavily favor the Plaintiffs. “[I]t is
9 always in the public interest to prevent the violation of a party’s constitutional rights.”
10 *Melendres*, 695 F.3d at 1002 (quotation omitted). Moreover, there can be no public interest in
11 exposing vulnerable persons to increased risks of severe illness and death. “Faced with . . .
12 preventable human suffering, [the Ninth Circuit] ha[s] little difficulty concluding that the balance
13 of hardships tips decidedly in plaintiffs’ favor.” *Hernandez v. Sessions*, 872 F.3d 976, 996 (9th
14 Cir. 2017) (*quoting Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983)).

15 It is in both the Defendants’ and the broader public interest to release detainees with
16 particular medical vulnerabilities. The release of people most vulnerable to COVID-19 reduces
17 the overall health risk for detainees and facility staff alike at Mesa Verde and Yuba. Stern ¶¶ 10-
18 13; *See also Allen & Rich Ltr.* at 5 (“*it is essential to consider releasing all detainees who do not*
19 *pose an immediate risk to public safety*”) (emphasis in original). ICE has an interest in
20 preventing any potential spread of COVID-19 in its detention facilities, particularly because
21 detainees face great difficulty engaging in proper hygiene and social distancing in a detention
22 environment. *Id.* ¶ 9. Immigration detention facilities face greater risk of infectious spread
23 because of crowding, the high percentage of detained people vulnerable to serious illness in the
24 event of COVID-19 transmission, and limited availability of medical care. Greifinger ¶¶ 26-27.
25 Public health officials have explained that even with the best-laid plans, the release of vulnerable
26 individuals is key to the risk mitigation strategy of any detention facility because it reduces the
27 total number of detainees, allows for greater social distancing, and prevents overloading the
28

1 work of detention staff. Stern ¶¶ 11-12; Greifinger ¶ 21. Plaintiffs’ release not only imposes
2 minimal harm to the government, but also furthers ICE’s interests in maintaining a healthy and
3 orderly environment at Mesa Verde and Yuba.

4 Last, releasing Plaintiffs is clearly in the broader public’s interest. Here, “the impact of [a
5 temporary restraining order] reaches beyond the parties, carrying with it a potential for public
6 consequences.” *Hernandez*, 872 F.3d at 996 (quotation omitted). An outbreak of COVID-19
7 could put significant pressure on or exceed the capacity of local health infrastructure. Stern ¶ 6.
8 The COVID-19 outbreak has already resulted in the need for unprecedented public health
9 measures and caused a strain on local health care systems. Greifinger ¶ 12. The release of people
10 most vulnerable to serious illness from COVID-19 reduces the health and economic burden on
11 the local community and health infrastructure at large. Greifinger ¶ 28; Stern ¶ 13; *See also*
12 *Hernandez*, 872 F.3d at 996-97 (“[T]he general public’s interest in efficient allocation of the
13 government’s fiscal resources favors granting [relief]”).

14 To the extent the equities weigh in favor of some restraint on Plaintiffs’ liberty, that can
15 be achieved through fashioning reasonable release conditions, which might include electronic
16 monitoring. *See e.g., Hernandez*, 872 F.3d at 995 (finding that ICE had put forth no evidence
17 regarding the administrative burdens of considering alternatives to detention). Such conditions
18 are routine in both criminal and immigration release settings and are effective. A government-
19 contracted evaluation of a program that featured monitoring instead of immigration detention
20 reported a 99% attendance rate at all immigration court hearings and a 95% attendance rate at
21 final hearings. *See U.S. Gov’t Accountability Office, GAO-15-26, Alternatives to Detention:
22 Improved Data Collection and Analyses Needed to Better Assess Program Effectiveness* 10-11
23 (Nov. 2014). Another program studied in 2011 saw fewer than 1% of participants removed from
24 the program due to arrest by another law enforcement agency. *See Jennings v. Rodriguez*, 2016
25 WL 6276890, at *36-37 (U.S. 2016) (Brief of Amicus Curiae).

1 **3. The Court Should Not Require Plaintiffs to Provide Security Prior to**
2 **Issuing a Temporary Restraining Order.**

3 “Rule 65(c) invests the district court with discretion as to the amount of security required,
4 if any.” *Jorgensen v. Cassidy*, 320 F.3d 906, 919 (9th Cir. 2003) (internal quotation marks and
5 citation omitted). District courts routinely exercise this discretion to require no security in cases
6 brought by indigent and/or incarcerated people. *See, e.g., Toussaint v. Rushen*, 553 F. Supp.
7 1365, 1383 (N.D. Cal. 1983) (state prisoners); *Orantes–Hernandez v. Smith*, 541 F. Supp. 351,
8 385 n. 42 (C.D. Cal. 1982) (detained immigrants). This Court should do the same here.

8 **IV. CONCLUSION**

9 Plaintiffs’ motion for a temporary restraining order should be granted.

11 Dated: March 23, 2020

Respectfully submitted,

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