

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI**

Juana GONZALEZ MORALES, Abdallah
KHAMIS, Dwight MUNDLE, Edinahi
ZACARIAS CABRERA,

Petitioners-Plaintiffs,

v.

SHAWN GILLIS, *in his official capacity as
Warden,*
Adams County County Detention Center
20 Hobo Fork Road
Natchez, MS 39120;

DIANNE WITTE, *in her official capacity as
Interim New Orleans Field Office Director,*
U.S. Immigration and Customs Enforcement
1250 Poydras, Suite 325
New Orleans, LA 70113;

TONY PHAM, *in his official capacity as Senior
Official Performing the Duties of the Director of
the U.S. Immigration and Customs Enforcement,*
U.S. Immigration and Customs Enforcement
500 12th St., S.W.
Washington, DC 20536;

IMMIGRATION AND CUSTOMS
ENFORCEMENT,
500 12th St., S.W.
Washington, DC 20536;

Respondents-Defendants.

**PETITION FOR A WRIT OF
HABEAS CORPUS AND
COMPLAINT FOR
INJUNCTIVE AND
DECLARATORY RELIEF**

Civil Action No. 5:20-cv-181-DCB-MTP

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September 15, 2020

**PETITION FOR A WRIT OF HABEAS CORPUS AND COMPLAINT FOR
INJUNCTIVE RELIEF**

INTRODUCTION

1. This case presents a request for immediate relief on behalf of four Petitioner-Plaintiffs (“Plaintiffs”), who are highly vulnerable to serious injury and death if they contract COVID-19, the lethal disease that is sweeping the globe. Respondent-Defendants (“Defendants”) are holding Plaintiffs in Adams County Detention Center (“ACDC”), a civil immigration detention facility in Natchez, Mississippi. COVID-19 feeds on precisely the unsafe, congregate conditions in which Plaintiffs are being held, putting Plaintiffs at imminent risk of contracting the disease.

2. The risks and consequences of COVID-19 cannot be overstated. COVID-19 is a global pandemic. As of September 15, 2020, more than 29 million individuals worldwide have

had confirmed diagnoses of COVID-19, 925,000 of whom have died.¹ In the United States, there have been more than 6.4 million confirmed cases and more than 193,000 deaths.² By the time the Court reads this complaint, there will be more diagnoses, more hospitalizations, and more death, with no end in sight.

3. As of September 15, 2020, there were almost 90,000 COVID-19 cases in Mississippi, 877 within Adams County.³ ICE acknowledges that 32 people are currently under isolation or monitoring for COVID-19 within ACDC.⁴

4. The ACDC facility is under the jurisdiction and direction of the regional ICE Field Office located in New Orleans, which has jurisdiction over detention facilities in Mississippi, Louisiana and Alabama. The overall number of infections in ICE detention are dire: 5686 have tested positive, with 616 of those still in custody and 171 currently detained in the New Orleans ICE Field Office alone.⁵ Because ICE does not engage in regular testing, all of these numbers must be assumed to be far higher. The New Orleans ICE Field Office regularly transfers individuals from facilities within its jurisdiction to ACDC and continues to make such transfers and to receive transfers from other parts of the United States throughout the COVID-19 pandemic.⁶

¹ World Health Organization, *WHO Coronavirus Disease (COVID-19) Dashboard* (Sep. 15, 2020), available at https://covid19.who.int/?gclid=CjwKCAjwzIH7BRAbEiwAoDxxToPaJk8nRmsV2Q9PG10M7tuVH2-vPgm3ae5pEuBbE0f0nJzeOjnNHhoCm8IQAvD_BwE.

² Centers for Disease Control and Prevention, *Cases in U.S.* (Sep. 12, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

³ Mississippi Department of Health, *Coronavirus Disease 2019 (COVID-19)* (Sep. 15, 2020), available at https://msdh.ms.gov/msdhsite/_static/14,0,420.html.

⁴ Immigration and Customs Enforcement, *ICE Guidance on COVID-19, ICE Detainee Statistics* (Sep. 11, 2020), available at <https://www.ice.gov/coronavirus>.

⁵ *Id.*

⁶ See, e.g. Emily Kassie & Barbara Marcolini, *'It Was Like a Time Bomb': How ICE Helped Spread the Coronavirus*, *The New York Times*, (Jul. 10, 2020), available at <https://www.nytimes.com/2020/07/10/us/ice-coronavirus-deportation.html>; Yeganeh Torbati, Dara Lind & Jack Gillum, *In a 10-Day Span, ICE Flew This Detainee Across the Country Nine Times*, *ProPublica* (Mar. 27, 2020),

5. Adams County, where ACDC is located, has had 877 confirmed cases and 32 reported deaths.⁷ The spread of coronavirus cases in detention, jail and prison systems has been staggering, posing threats not only to those detained but also to staff and the communities in which they live.⁸ Immediate relief is warranted to protect those particularly vulnerable to the most severe effects of COVID-19.

6. Plaintiffs fear for their lives because they have medical conditions that make them vulnerable to serious injury or death should they be infected with COVID-19. And for good reason: they are trapped in a facility that can only be described as a breeding ground for the disease. Despite warnings and pleas for release from public health experts and advocates, Defendants have chosen to continue to confine Plaintiffs in close proximity, without adequate soap and/or hand sanitizer; to admit and transfer large numbers of individuals from facilities where COVID-19 is rampant; to refuse to implement cleaning and protection procedures adequate to combat COVID-19; and to resist releasing even the most medically vulnerable individuals. The conditions and treatment at ACDC have created a dangerous situation that threatens their lives, as well as the well-being of staff, others in the surrounding community, and the general public.

7. There is no known treatment for or vaccine against COVID-19, and there is no known cure. The only known effective measures to reduce the risk of infection are social

available at <https://www.propublica.org/article/coronavirus-ice-flights-detainee-sirous-asgari> (documenting transfer of man through several facilities, including those within jurisdiction of New Orleans Field Office).

⁷ Mississippi Department of Health, *Coronavirus Disease 2019 (COVID-19)* (Sep. 15, 2020), available at https://msdh.ms.gov/msdhsite/_static/14,0,420.html.

⁸ Editorial Board, *Coronavirus cases in prisons are exploding. More people need to be let out*, The Washington Post, (Aug. 21 2020), available at

https://www.washingtonpost.com/opinions/coronavirus-cases-in-prisons-are-exploding-more-people-need-to-be-let-out/2020/08/21/711b7b9a-e306-11ea-8dd2-d07812bf00f7_story.html; Mica Rosenberg, *Nearly 1000 U.S.*

immigration detention center employees test positive for coronavirus, Reuters (Jul. 13, 2020), available at

<https://www.reuters.com/article/us-health-coronavirus-usa-immigration/nearly-1000-u-s-immigration-detention-center-employees-test-positive-for-coronavirus-idUSKCN24E2V3>.

distancing, vigilant hygiene, and widespread testing.. Yet social distancing is rarely practiced at ACDC, where detained people are in constant close contact with each other and with facility staff. Vigilant hygiene is similarly unavailable at ACDC and the facility tests only the most symptomatic individuals who affirmatively report those symptoms.

8. From the beginning of the pandemic, federal court rulings ordering release have explained the health risks—to those who are detained, staff, and the outside community at large—created by large prison and detention populations. *See, e.g., Fraihat v. Wolf*, No. ED CV 20-00590 TJH (KSx) (C.D. Cal. Mar. 30, 2020) (ordering release of individual from immigration detention facility because COVID-19 “can spread uncontrollably with devastating results in a crowded, closed facility”); *Jimenez v. Wolf*, No. 18-10225-MLW (D. Mass. Mar. 26, 2020) (ordering release of detained immigrant in the midst of the COVID-19 pandemic and noting that “being in a jail enhances risk” and that in jail “social distancing is difficult or impossible”); *Basank v. Decker*, 449 F. Supp. 3d 205 (S.D.N.Y. 2020) (ordering the release of ten people from three immigration detention facilities in New Jersey because “confining vulnerable individuals . . . without enforcement of appropriate social distancing and without specific measures to protect their delicate health ‘pose[s] an unreasonable risk of serious damage to [their] future health’”) (internal citation omitted); *Thakker v. Doll*, No. 1:20-cv-00480-JEJ, 2020 WL 1671563, at *8 (M.D. Pa. Mar. 31, 2020) (ordering release of 13 people from three immigration detention facilities in Pennsylvania because “preventative measures” against the “grave consequences” of COVID-19 cannot be practiced in “tightly confined, unhygienic spaces”); *United States v. Ramos*, No. 18-CR-300009-FDS, 2020 WL 1478307, at *1 (D. Mass. Mar. 26, 2020) (stating that “it is not possible for a medically vulnerable inmate . . . to isolate himself in this institutional setting as recommended by the CDC, and guards and newly arrested individuals must enter the

facility on a daily basis”); *Coronel v. Decker*, 449 F. Supp. 3d 274, 281 (S.D.N.Y. 2020) (noting that “being in immigration detention places petitioners at significantly higher risk of contracting COVID-19”); *United States v. Kennedy*, 449 F. Supp. 3d 713, 716 (E.D. Mich. 2020) (stating that the CDC “acknowledged that correctional detention facilities ‘present unique challenges for control of COVID-19 transmission among incarcerated/detained persons, staff, and visitors.’”).

9. As the coronavirus has spread, it has become clear that prisons, jails and detention centers have become major vectors of COVID-19, with extraordinarily high percentages of detained people testing positive for the disease in facilities that have conducted widespread testing.⁹ As a result, law enforcement officials nationwide have released thousands of individuals in both civil and criminal detention and incarceration, because of the threat COVID-19 poses inside jails, prisons, and detention centers. On March 22, Attorney General William Barr issued a directive to the Board of Prisons urging reduction of the prison population through the use of home confinement, and on April 3, he urged “dispatch” and particular prioritization for three federal prison facilities, including the Federal Correctional Institution in Oakdale, Louisiana.¹⁰ California is currently planning releases of up to 17,600 persons from its prison system.¹¹ On August 25, 2020, Kentucky commuted the sentences of 646 people because

⁹ See, e.g., Coronavirus in the U.S.: Latest Map and Case Count, *New York Times*, (Sep. 15, 2020), available at <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html#clusters> (showing ten of the top ten clusters of coronavirus in correctional facilities, with several immigration detention centers among the top 100 clusters).

¹⁰ See William Barr, *Prioritization of Home Confinement as Appropriate in Response to COVID-19 Pandemic* (Mar. 26, 2020), Department of Justice, <https://www.politico.com/f/?id=00000171-1826-d4a1-ad77-fda671420000>; William Barr, *Increasing Use of Home Confinement at Facilities Most Affected by COVID-19*, Department of Justice (Apr. 3, 2020), <https://www.politico.com/f/?id=00000171-4255-d6b1-a3f1-c6d51b810000>.

¹¹ See, e.g., Tracey Tulley, *About 20% of N.J. Prisoners Could Be Released to Avoid Virus*, *New York Times*, Jul. 30 2020, <https://www.nytimes.com/2020/07/30/nyregion/New-jersey-inmate-release-Covid.html>; *17,600 California inmates may be released early due to COVID-19, officials say*, Associated Press (Aug. 6, 2020), available at <https://abc30.com/california-prisons-coronavirus-updates-state-prison-inmates-released/6357785/>; Kevin Dayton, *Inmates Are Released as COVID-19 Spreads Inside Hawaii’s Largest Jail*, *Honolulu Civil Beat* (Aug. 20, 2020), available at <https://www.civilbeat.org/2020/08/inmates-are-released-as-covid-19-spreads-inside-hawaiis-largest-jail/>.

of COVID-19 concerns.¹² Other states, like West Virginia, Michigan, and Maryland have required universal testing or limited transfers in its jails and prison systems.¹³

10. The spread of coronavirus is not limited to those detained, but has also reached staff who live in the communities where prisons, jails and detention centers are located. As of September 8, 2020, more than 26,495 prison and jail staff across the country – in addition to 121,217 incarcerated people– have tested positive for the coronavirus.¹⁴

11. Releases thus not only protect the people with the greatest vulnerability to serious illness and death from COVID-19, they also protect all those in custody or working in a prison, jail, or detention center, and reduce the burden on the surrounding region's health care infrastructure, as they lessen the likelihood that an overwhelming number of people will become seriously ill from COVID-19 at the same time. This is particularly significant here, as the Natchez area has very limited health care infrastructure and that infrastructure is seriously taxed by COVID-19.¹⁵

¹² 646 more Kentucky inmates released from prison to prevent COVID-19 spread, WLKY (Aug. 25, 2020), available at

<https://www.msn.com/en-us/news/crime/646-more-kentucky-inmates-released-from-prison-to-prevent-covid-19-spread/ar-BB18mRaO>

¹³ COVID-19 UPDATE: Gov. Justice orders all corrections facility inmates and employees statewide to be tested for COVID-19, West Virginia Office of the Governor (May 28, 2020), available at

<https://governor.wv.gov/News/press-releases/2020/Pages/COVID-19-UPDATE-Gov.-Justice-orders-all-corrections-facilities-fully-tested.aspx>; COVID-19 Updates, Maryland Department of Public Safety and Correctional Services, Aug. 24, 2020, available at <https://news.maryland.gov/dpscs/covid-19/>; Grace Blair, *Executive order slowing movement in prisons and jails*, FOX UP (Aug. 24, 2020), available at

<https://www.uppermichiganssource.com/2020/08/24/executive-order-slowing-movement-in-prisons-and-jails/>.

¹⁴ *A State-by-State Look at Coronavirus in Prisons*, The Marshall Project (Sep. 11, 2020), available at

<https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons#staff-cases>.

¹⁵ See *Hospitals reaching capacity, considering contingency plans*, Natchez Democrat, Jul. 28, 2020,

<https://www.natchezdemocrat.com/2020/07/28/covid-19-task-force-hospitals-reaching-capacity-considering-contingency-plans/>; Scott Hawkins, *Mayoral candidate expresses virus concerns about prison*, Mar. 30, 2020,

<https://www.natchezdemocrat.com/2020/03/30/mayoral-candidate-expresses-virus-concerns-about-prison/>; Gaby del Valle and Jack Herrera, *'Like Petri Dishes for the Virus': ICE Detention Centers Threaten the Rural South*, Politico, May 5, 2020,

<https://www.politico.com/news/magazine/2020/05/05/coronavirus-ice-detention-rural-communities-186688>.

12. Despite ample warning of the risks to those detained, Defendants' response to the threats the pandemic poses to immigrants in detention has been abysmal and haphazard. To date, at least seven people have died of COVID-19 while in immigration detention.¹⁶ ICE's head-in-the-sand response to the threats of this pandemic will prove deadly to Plaintiffs if it is not remedied through this Court's intervention.

13. Inside ACDC and other facilities in the New Orleans Field Office's jurisdiction, Defendants are not consistently adhering to the measures the ICE claims it is taking. Defendants have violated CDC guidelines by bringing new individuals into ACDC from other regional facilities that have had significant outbreaks, implementing an insufficient testing, contact tracing, and isolation regime, and failing to ensure social distancing, education regarding COVID-19, and sufficient distribution of hygiene products.

14. As a result of these failures, confirmed active positive COVID-19 cases have risen from 2 on June 3, 2020, when this Court denied a temporary restraining order in *Tamayo Espinoza v. Gillis*, No. 5:20-CV-106-DCB-MTP, 2020 WL 2949779, at *6 (S.D. Miss. June 3, 2020), to 4 on July 27, 2020, to 32 today, with a total of 74 confirmed cases over the course of the pandemic.¹⁷

15. Plaintiffs are in civil immigration detention and cannot be subject to any form of punitive detention. But they are at risk of serious injury and death because of Defendants'

¹⁶ Camilo Montoya-Galvez, *Third immigrant detained by ICE dies after contracting coronavirus*, CBS News (July 13, 2020), available at <https://www.cbsnews.com/news/third-immigrant-dies-in-ice-custody-after-contracting-the-coronavirus/>; American Immigration Lawyers' Association, *Deaths in Adult Detention Centers*, AILA Doc. 16050900 (Aug. 7, 2020, Aug. 12, 2020, & Sep. 1, 2020), available at <https://www.aila.org/infonet/deaths-at-adult-detention-centers> (reporting COVID-19-caused deaths of 72-year-old James Hill on August 5, 2020; 70-year-old Jose Guillen Vega on August 10, 2020; and 50-year-old Fernando Sabonger-Garcia on August 28, 2020).

¹⁷ Immigration and Customs Enforcement, *ICE Guidance on COVID-19, ICE Detainee Statistics* (updated Jul. 28 2020), <https://web.archive.org/web/20200729081229/https://www.ice.gov/coronavirus#tab>; Immigration and Customs Enforcement, *ICE Guidance on COVID-19, ICE Detainee Statistics*, Sep. 11, 2020, available at <https://www.ice.gov/coronavirus>.

reckless choices and the conditions at ACDC. They cannot justify continuing to subject Plaintiffs to extraordinary risk of illness and death with any legitimate government objective, particularly in light of the alternatives available to them to supervise Plaintiffs. The danger posed by Plaintiffs' detention during the current outbreak of COVID-19 is "so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk" and violates their constitutional right to safety in government custody. *Helling v. McKinney*, 509 U.S. 25, 36 (1993) (emphasis in original). Plaintiffs bring this action to remedy grave violations of their constitutional rights that imminently threaten them with serious illness and death.

16. Accordingly, we request that this Court order Respondents to immediately release Petitioners so that they can take proper precautions to protect themselves from COVID-19. In the alternative, we request that this Court order a health inspection of ACDC at the earliest possible date and then order Respondent to order Defendants to immediately reform conditions at ACDC through a plan to be implemented pursuant to the results of that inspection.

17. Without this Court's intervention, Plaintiffs, along with many other detained individuals and their entire communities, will face dramatically increased chances of contracting COVID-19, becoming seriously ill, and dying.

JURISDICTION AND VENUE

18. This action arises under the Due Process Clauses of the Fifth Amendment to the United States Constitution, the federal habeas corpus statute, 28 U.S.C. § 2241, and the Rehabilitation Act, 29 U.S.C. § 701 *et seq.*

19. This Court has subject-matter jurisdiction pursuant to 28 U.S.C. § 2241 (habeas corpus), 28 U.S.C. § 1331 (federal question), and Article I, Section 9, clause 2 of the United States Constitution (the Suspension Clause).

20. Venue is proper in the Southern District of Mississippi pursuant to 28 U.S.C. § 2241(d) and pursuant to 28 U.S.C. § 1391(b) and (e). Plaintiffs are in the legal custody of Defendant Dianne Witte, who is the Interim ICE New Orleans Field Office Director. The New Orleans Field Office is responsible for carrying out ICE's immigration detention operations at all Louisiana, Mississippi, and Alabama detention centers that house detained immigrants. The ACDC facility in which Plaintiffs are detained, and over which Defendant Gillis is the custodian, is located in this District.

PARTIES

Plaintiffs

21. Plaintiff Juana Gonzalez Morales is a 37-year-old woman and Guatemalan national who is currently detained by ICE at ACDC. She suffers from [REDACTED] and is therefore at high risk of severe illness or death if she contracts COVID-19. If released, she will reside in Willimantic, Connecticut with her husband and children.

22. Plaintiff Abdallah Khamis is a 46-year-old [REDACTED] who is detained at ACDC. He suffers from [REDACTED] [REDACTED] and is therefore at high risk of severe illness or death if he contracts COVID-19. If released, he will reside in Hutchinson, Kansas with his wife.

23. Plaintiff Dwight Mundle is a 35-year-old man and Jamaican national who is currently detained by ICE ACDC. He suffers from [REDACTED] for which he takes medication. He also suffers from [REDACTED] [REDACTED] He is therefore at high risk of severe illness or death if he contracts COVID-19. If released, he will reside with his son's mother in New York, New York.

24. Plaintiff Edinahi Zacarias Cabrera is a 32-year-old woman and Mexican national who is currently detained by ICE at ACDC. She suffers from [REDACTED] [REDACTED]. She is therefore at high risk of severe illness or death if she contracts COVID-19. If released, she will reside in Kearns, Utah with her cousin.

Defendants

25. Defendant Shawn Gillis is the Warden of ACDC, where Plaintiffs Gonzalez Morales, Khamis, Mundle, and Zacarias Cabrera are detained. Defendant Gillis is a legal custodian of Plaintiffs. He is sued in his official capacity.

26. Defendant Dianne Witte is the Interim ICE New Orleans Field Office Director. The New Orleans Field Office is responsible for carrying out ICE's immigration detention operations at all Louisiana, Mississippi, and Alabama detention centers that house detained immigrants, including all of Plaintiffs. Defendant Witte is a legal custodian of Plaintiffs. She is sued in her official capacity.

27. Defendant Tony Pham Senior Official Performing the Duties of the Director of ICE. Defendant Pham is responsible for ICE's policies, practices, and procedures, including those relating to the detention of immigrants. Defendant Pham is a legal custodian of Plaintiffs. He is sued in his official capacity.

28. Defendant ICE is a federal law enforcement agency within the Department of Homeland Security. ICE is responsible for the criminal and civil enforcement of immigration laws, including the detention and removal of immigrants. Enforcement and Removal Operations ("ERO"), a division of ICE, manages and oversees the immigration detention system. Defendant ICE is a legal custodian of Plaintiffs.

FACTUAL BACKGROUND

A. COVID-19 Is an Unprecedented and Lethal Global Pandemic.

29. COVID-19 is a disease caused by a novel coronavirus that has reached global pandemic status and has killed more than 193,000 people in the United States alone. Nationally, CDC projections indicate that over 200 million individuals in the United States could be infected with COVID-19 over the course of the epidemic without effective public health intervention, with as many as 1.7 million deaths in the worst projections.¹⁸ More than 6.4 million people have been infected across the United States in just the first few months since the outbreak began.¹⁹

30. COVID-19 is a highly contagious airborne disease that is easily transmitted through respiratory droplets, especially when one is within six feet of an infected individual. Its symptoms include fever, coughing, and shortness of breath.²⁰

31. People can also spread COVID-19 but be asymptomatic,²¹ making testing or seclusion of only those who are symptomatic an ineffective solution.

32. COVID-19 can result in respiratory failure, kidney failure, and death. Infected individuals who do not die from the disease can face serious damage to the lungs, heart, liver, or other organs, resulting in prolonged recovery periods, including extensive rehabilitation from neurological damage and loss of respiratory capacity. As many as 78% of patients who recover from COVID-19 reported to have cardiac abnormalities, and 60% showed heart inflammation.²²

¹⁸ James Glanz, et al., *Coronavirus Could Overwhelm U.S. without Urgent Action, Estimates Say*, N.Y. Times (Mar. 20, 2020), available at <https://www.nytimes.com/interactive/2020/03/20/us/coronavirus-model-us-outbreak.html>; Sheri Fink, *Worst-Case Estimates for U.S. Coronavirus Deaths*, N.Y. Times (Mar. 13, 2020), available at <https://www.nytimes.com/2020/03/13/us/coronavirus-deaths-estimate.html>.

¹⁹ Centers for Disease Control and Prevention, *Cases in U.S.* (Sep. 12, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>

²⁰ Centers for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19)* (updated May 13, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>.

²¹ Jason Gale, *Coronavirus Cases Without Symptoms Spur Call for Wider Tests*, Bloomberg (Mar. 22, 2020), available at <https://www.bloomberg.com/news/articles/2020-03-22/one-third-of-coronavirus-cases-may-show-no-symptom-scm-p-reports>.

33. COVID-19 can also severely damage lung tissue and cause widespread damage to other organs. These complications can manifest at an alarming pace. Patients can show the first symptoms of infection in as little as two days after exposure, and their condition can seriously deteriorate in as little as five days or sooner.

34. Younger and healthy individuals who contract COVID-19 may require supportive care. And those who develop serious complications need advanced support, including highly specialized equipment that is in very limited supply, and an entire team of care providers giving 24-hour care, including 1:1 or 1:2 nurse to patient ratios, respiratory therapists, and intensive care physicians. This level of support is especially difficult to provide to detained individuals, particularly at unsafe and under-resourced ICE detention facilities.

35. The need for care, including intensive care, and the likelihood of death, is much higher from COVID-19 infection than from influenza. According to recent estimates, the fatality of people infected with the coronavirus is about ten times higher than a severe seasonal influenza, even in advanced countries with highly effective health care systems.

36. There is no vaccine against COVID-19, nor is there any known medication to prevent or cure infection from the virus. The only known effective measure to reduce the risk of severe illness or death to vulnerable individuals is to prevent them from being infected with the coronavirus. Social distancing, or remaining physically separated from known or potentially infected individuals, and vigilant hygiene, including frequently washing hands with soap and water and disinfecting commonly touched areas, and widespread periodic testing are the only known effective measures to prevent infection. In addition, those who are symptomatic, or who

²² Adrianna Rodriguez, *Heart damage found in coronavirus patients months after recovering from COVID-19*, USA Today (July 30, 2020), available at <https://www.usatoday.com/story/news/health/2020/07/30/covid-19-patients-suffer-heart-injury-months-after-recovery-study/5536249002/>.

have come into contact with others who have tested positive for the virus, are advised to self-quarantine, removing themselves entirely from physical contact with others to prevent spread of the virus for a period of up to 14 days.

37. These practices are not in place ACDC, which tests only a small fraction of its population and where large numbers of people are housed in close quarters in congregate settings, with minimal access to showers, toilets, water, personal hygiene and cleaning supplies.

B. COVID-19 is Exceedingly Dangerous for Individuals Like Plaintiffs, Who Have Significant Underlying Health Conditions.

38. Older people and individuals with certain medical conditions face dramatically higher chances of serious illness or death from COVID-19. Certain underlying medical conditions increase the risk of serious COVID-19 disease for individuals of any age, including lung disease, chronic liver or kidney disease, diabetes, epilepsy, hypertension, compromised immune systems, blood disorders, inherited metabolic disorders, stroke, and pregnancy.

39. Individuals detained in immigration detention centers are also more susceptible to experiencing complications from infectious diseases than the population at large. This is especially true for individuals with underlying conditions such as diabetes, asthma, lung disease, kidney disease, or other illness.

40. Plaintiffs in this case are individuals who are particularly vulnerable to serious illness or death if infected by COVID-19 and who are currently detained at ACDC.

41. Juana Gonzalez Morales suffers from [REDACTED], which qualify as disabilities under the Rehabilitation Act.

42. Abdallah Khamis suffers from [REDACTED]
[REDACTED] which qualifies as a disability under the Rehabilitation Act.

43. Dwight Mundle suffers from [REDACTED] which qualifies as a disability under the Rehabilitation Act.

44. Edinahi Zacarias Cabrera suffers from [REDACTED] which qualify as disabilities under the Rehabilitation Act.

C. ACDC is Experiencing an Outbreak of COVID-19, Cannot Meet Public Health Standards to Prevent Widespread Infections, and is Deliberately Indifferent to the Known Health Risks

45. ACDC is located in Natchez, Mississippi and falls under the jurisdiction of the New Orleans ICE Field Office directed by Defendant Witte. States in the Mississippi Delta region are experiencing a significant coronavirus outbreak, and public officials have put in place a number of significant restrictions on public gatherings, including by closing down schools, bars, restaurants, and other public places, limiting the size of public gatherings, and, in some cases, issuing ‘shelter in place’ orders, requiring residents to remain in their homes.

46. On April 13, 2020, there were 2,781 confirmed COVID-19 cases in Mississippi.²³ Today that number is over 90,000 including 877 residents of Adams County.²⁴ The number of infected people rose dramatically during the summer, with more than 900 new cases reported each day and nearly 1000 people hospitalized in Mississippi hospitals every day from July 20, 2020 to mid-August.²⁵ New confirmed cases remain high, with 254 new cases and 12 new deaths reported in the 24-hour period ending September 12, 2020.²⁶ To date, at least 2,734 Mississippians have died.²⁷ Hospitals in Natchez reached capacity by the end of July and there

²³ Mississippi Department of Health, *Coronavirus Disease 2019 (COVID-19)* (Apr. 13, 2020), available at https://web.archive.org/web/20200413090506/https://msdh.ms.gov/msdhsite/_static/14,0,420.html.

²⁴ Mississippi Department of Health, *Coronavirus Disease 2019 (COVID-19)* (Sep. 15, 2020), available at https://msdh.ms.gov/msdhsite/_static/14,0,420.html.

²⁵ Mississippi Department of Health, *COVID-19 Hospitalizations Reported by MS Hospitals*, July 20, 2020-August 9, 2020 (Aug. 10, 2020), available at https://msdh.ms.gov/msdhsite/_static/resources/8634.pdf.

²⁶ Mississippi State Department of Health, *COVID-19 in Mississippi* (Sep. 12, 2020), available at https://msdh.ms.gov/msdhsite/_static/14,0,420.html#Mississippi

are only 148 available intensive care unit beds in the state, none of which are located in Natchez or its surrounding communities.²⁸

47. Detained individuals at ACDC are housed in close quarters and in large groups. They use common spaces together, sharing tables, telephones, and bathrooms. The hallways are tight, and people in the hallways are constantly in very close proximity to each other. Bathrooms with small numbers of showers are used by large numbers of people and are not sanitized or disinfected after each use. Staff arrive and leave on a shift basis, and even asymptomatic staff could carry the infection into the facility. Many guards, staff, and even medical personnel do not wear masks or gloves, and at Adams detained individuals were not provided with clean masks on a regular basis.

48. Detained individuals are left to clean the sleeping areas, bathrooms, and common areas with spray bottles and re-used rags at ACDC. Detained people are not provided with protective equipment to clean. Additionally, alcohol-based hand sanitizers are unavailable at ACDC, but there is no effort to educate detained people about frequency or method. Supplies of soap and shampoo are limited, and ACDC and once supplies run out, Plaintiffs are required to buy soap from the commissary.

49. Because of conditions like these, outbreaks of infectious diseases are extremely common in confined detention centers such as these and have resulted in the hospitalization or death of some individuals. Detained persons like Plaintiffs face inherent challenges to protect themselves from COVID-19 infection because they live, sleep, and use the bathroom in close

²⁷ Mississippi Department of Health, *Coronavirus Disease 2019 (COVID-19)* (Sep. 15, 2020), available at https://msdh.ms.gov/msdhsite/_static/14,0,420.html.

²⁸ Mississippi Department of Health, *Interactive Chart: Mississippi COVID-19 Hospitalizations* (updated Sep. 11, 2020), available at https://msdh.ms.gov/msdhsite/_static/14,21994,420,873.html, Scott Hawkins, *COVID-19 Task Force: Hospitals reaching capacity, considering contingency plans*, Natchez Democrat (Jul. 28, 2020), <https://www.natchezdemocrat.com/2020/07/28/covid-19-task-force-hospitals-reaching-capacity-considering-contingency-plans/>

proximity with others, and because “[b]ehind bars, some of the most basic disease prevention measures are against the rules or simply impossible.”²⁹ Individuals who are detained cannot protect themselves by social distancing and vigilant hygiene as they could in the community. Congregate settings such as ICE detention centers allow for rapid spread of infectious diseases that are transmitted person to person, especially those that—like COVID-19—are transmitted by droplets through coughing and sneezing. Indeed, more than 40 percent of reported Mississippi COVID-19 deaths have occurred in the congregate settings of long-term nursing homes.³⁰

50. Moreover, ICE’s detention centers are also ill-equipped to manage an infectious disease outbreak. At least six individuals have died of COVID-19 in ICE detention since March, three of them in July and August alone.³¹

51. ACDC does not have negative pressure isolation units, meaning that it does not have the capacity to truly isolate spread of the disease through airborne respiratory droplets. Putting infected individuals in solitary confinement is an ineffective way to prevent transmission of the disease because air continues to flow outwards from those rooms to the rest of the facility.

52. Further, like other facilities in the jurisdiction of the New Orleans Field Office, ACDC has continued to allow new detained people to enter and leave the facility, exposing those within the detention centers to close contact with potential new carriers. For example, Plaintiff Zacarias Cabrera was transferred with a group of other women from a detention facility in Texas to ACDC on or about March 15, 2020. Several groups of detained men, and a new group of detained women have since arrived at the facility.

²⁹ Keri Blakinger & Beth Schwartzapfel, *When Purell is Contraband, How Do You Contain Coronavirus?*, The Marshall Project (Mar. 6, 2020), available at

<https://www.themarshallproject.org/2020/03/06/when-purell-is-contraband-how-do-you-contain-coronavirus>.

³⁰ Mississippi Department of Health, *Coronavirus Disease 2019 (COVID-19)* (Sep. 15, 2020), available at https://msdh.ms.gov/msdhsite/_static/14,0,420.html.

³¹ American Immigrant Lawyers Association, *Deaths at Adult Detention Centers* (Sep. 1, 2020), available at <https://www.aila.org/infonet/deaths-at-adult-detention-centers>.

53. The coronavirus has spread widely inside U.S. prisons, jails, and detention centers. A study conducted by UCLA researchers found infection rates of incarcerated people to be 5.5 times the rate of those in the United States generally, with deaths occurring at three times the rate of those outside the federal and state prison systems.³² The spread of the disease has not been limited to those confined. In early May, more than 5000 corrections officers had tested positive for COVID-19³³; by September 8, more than 26,000 had been reported to test positive.³⁴ On April 15, 2020, ICE had reported that 89 detained people and 21 staff at ICE facilities have confirmed cases of COVID-19.³⁵ Now, ICE reports that 188 public employees of ICE have tested positive, but with no reporting of testing among the employees of private prison contractors who operate the majority of ICE detention centers, this number certainly understates the spread of the illness at facilities like ACDC, which is operated by CoreCivic.

54. The spread of coronavirus among immigration detention facilities within the jurisdiction of the ICE's New Orleans Field Office, including ACDC, has been particularly acute. These facilities remain woefully unprepared and incapable of taking necessary precautions to protect people in their custody against a life-threatening illness.

D. ICE's Response to COVID-19 Is Insufficient to Prevent the Spread of This Life-Threatening Disease and Is Contrary to the CDC Infectious Disease Guidance ICE is Required to Follow.

³² Brendan Saloner, Kalind Parish, Julie Ward, et al., *COVID-19 Cases and Death in Federal and State Prisons*, *Journal of the American Medical Association* (Jul. 8, 2020), available at <https://jamanetwork.com/journals/jama/fullarticle/2768249>; Tonya Simpson, *Coronavirus infecting America's prison inmates five times more than outside, new study finds*, ABC News (Jul. 8, 2020), available at <https://abcnews.go.com/Health/coronavirus-infecting-americas-prison-inmates-times-ucla-study/story?id=7166808> 6.

³³ Luke Barr, *More than 5000 corrections officers have contracted COVID-19*, ABC News (May 5, 2020), available at <https://abcnews.go.com/US/5000-corrections-officers-contracted-covid-19/story?id=70520117>.

³⁴ *A State-by-State Look at Coronavirus in Prisons*, The Marshall Project (Sep. 11, 2020), available at <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons>.

³⁵ Immigration and Customs Enforcement, *ICE Guidance on COVID-19, ICE Detainee Statistics* (updated Apr. 15 2020), <https://web.archive.org/web/20200415202330/https://www.ice.gov/coronavirus>.

55. ICE sets standards for facilities that detain individuals in ICE custody, including ACDC. These Performance-Based National Detention Standards govern ICE’s treatment of detained people at ACDC and mandate that Centers for Disease Control and Prevention (“CDC”) guidelines for the prevention and control of infectious and communicable diseases shall be followed.”³⁶

56. On March 23, 2020, the CDC issued the first of several interim guidance documents for detention facilities, most recently updated on July 22, 2020. Detention facilities include “federal and state prisons, local jails, and detention centers.”³⁷

57. The CDC guidance states that “[i]ncarcerated/detained persons live, work, eat, study, and recreate within congregate environments, heightening the potential for SARS-COV-2 to spread once introduced” and warns that “[t]here are many opportunities for SARS-COV-2 to be introduced into a correctional or detention facility, including daily staff movements” and “transfer of incarcerated/detained persons between facilities and systems, to court appearances.”

³⁸ Indeed the guidance takes particular note that “jails and detention centers... have high turnover, admitting new entrants daily who may have been exposed to SARS-CoV-2 in the surrounding community or other regions.”³⁹

58. As the CDC guidance acknowledges, “[s]ocial distancing options within correctional and detention settings may be limited due to crowded living conditions,” mandates that facilities “[e]nsure that sufficient stocks of hygiene supplies, cleaning supplies, PPE, and medical supplies... are on hand and available... provide a no-cost supply of soap to

³⁶ Immigration and Customs Enforcement, ICE Performance-Based Detention Standards 2011 (“PBNDs”), available at <https://www.ice.gov/detention-standards/2011>.

³⁷ Centers for Disease Control and Prevention, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities* (updated Jul. 14 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/index.html>.

³⁸ *Id.*

³⁹ *Id.*

incarcerated/detained persons, sufficient to allow frequent hand washing...” and emphasizes the need for social distancing as a mechanism for preventing the transmission of COVID-19.⁴⁰

59. In response to COVID-19 threats, ICE’s issued its COVID-19 Pandemic Response Requirements (“PRR”) outlining safety recommendations for detention facilities.⁴¹ These requirements will not protect Plaintiffs as they do not address imminent shortages of medical supplies and staffing or education of detained people and staff about the virus, among other critical issues. Nor do they implement all CDC guidelines for the management of the novel coronavirus in correctional and detention settings.

60. For example, the PRR that facilities “adhere to CDC recommendations for cleaning and disinfection during the COVID-19 response.”⁴² But the CDC guidelines for correctional and detention facilities urge that “that “staff and incarcerated/detained people performing cleaning wear PPE.”⁴³ Cleaning staff, typically detained people themselves, are not provided with personal protective equipment (“PPE”) for cleaning at ACDC. ICE further states that “social distancing may not be possible in congregate settings such as detention facilities,” and instead, it recommends a number of alternative measures including directing detained people to “avoid congregating in groups of 10 or more, employing social distancing strategies at all times.”⁴⁴ This is not possible at ACDC.

61. The ICE Protocols do not even offer an effective way to determine who has the virus. Since many COVID-19 carriers can be asymptomatic or not show symptoms for weeks

⁴⁰ *Id.*

⁴¹ Immigration and Customs Enforcement, *ERO COVID-19 Pandemic Response Requirements* (Jul. 28, 2020), available at <https://www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities.pdf>.

⁴² PRR at 15-16

⁴³ Centers for Disease Control and Prevention, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities* (updated Jul. 22, 2020), available at

<https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>.

⁴⁴ PRR at 20-12.

after exposure, “screening people based on observable symptoms is just a game of catch up.” *In re. Extradition of Alejandro Toledo Manrique*, 445 F. Supp. 3d 421, 422-23 (N.D. Cal. 2020) (ordering release on bond in part because the government’s management plan did not “say anything about testing”). Absent widespread, periodic testing, the prevalence of the coronavirus is likely to be far greater than ICE reports, because “the virus is able to spread undetected among populations, given its long incubation period and asymptomatic presentation in some individuals.” *Vazquez Barrera v. Wolf*, 4:20-CV-1421, 2020 WL 1904497 at *6 (S.D. Tex. Apr. 17, 2020) (ordering release of medically vulnerable individual from ICE detention).

62. Anything short of aggressive periodic screening and testing of all detained individuals, staff, officials and other care and service providers who enter the facility is insufficient to prevent infection. The CDC recommends testing for all close contacts of those who have tested positive for COVID-19 in jails and detention centers, all vulnerable people living with people with COVID-19 symptoms, and periodic mass testing of settings in which vulnerable populations are held close quarters for extended periods⁴⁵ In order to test close contacts, a detention facility must engage in contact tracing, or the practice of isolating, monitoring, and testing those who have been within six feet of an infected individual for more than 15 minutes.⁴⁶

63. However, though ACDC did one mass test of its detained population in early September, 2020, ICE’s general policy is to only test and isolate those who are highly

⁴⁵ Centers for Disease Control and Prevention, *Overview of testing for SARS-CoV-2* (updated Aug. 21, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/hcp/testing-overview.html>; Centers for Disease Control and Prevention, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, updated Jul. 22, 2020, available at <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>.

⁴⁶ Centers for Disease Control and Prevention, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities* (updated Jul. 22, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>.

symptomatic even though presymptomatic, mildly symptomatic, and asymptomatic people with COVID-19 but can still transmit the virus. On information and belief, Defendants do not contact trace, separate close contacts of COVID-19 positive individuals, or have any plan to test its detained population or staff periodically.

64. Isolation of highly symptomatic people is generally an ineffective way to prevent transmission of COVID-19 because air continues to flow outward from rooms to the rest of the facility and because asymptomatic people also transmit the disease.

65. In ACDC, some housing units have nearly 90 people crowded in close quarters at one time, and staff often fails to wear masks. There is no space for social distancing, with sick people isolated rarely if ever. Dorms are cleaned only once per day, sometimes without disinfectant, and detained people sometimes do not have enough soap to wash hands. Food is provided on dirty plates and utensils, and the water is not clean. Against the advice of public health officials, ICE conducted at least 268 transfers of individuals among its detention centers in April, May and June,⁴⁷ including numerous transfers into ACDC.

66. In ACDC, ICE has failed to provide enough cleaning materials or frequency of cleaning to prevent spread of illness from surfaces; has not provided gloves or protective gear for detained people or most staff. ACDC has provided masks, but did not instruct detained people how and when to wear or disinfect them, in violation of CDC guidelines.

67. In June 18, 2020, the DHS Office of the Inspector General (“OIG”) found that ICE facilities struggled with their inability to practice social distancing among detainees, and to isolate or quarantine individuals who may be infected with COVID-19” and “expressed concerns

⁴⁷ Mica Rosenberg, Kristina Cooke, & Reade Levinson, *U.S. immigration officials spread coronavirus with detainee transfers*, Reuters (Jul 17, 2020), available at <https://www.reuters.com/article/us-health-coronavirus-immigration-detent/us-immigration-officials-spread-coronavirus-with-detainee-transfers-idUSKCN24I1G0>.

with the availability of staff, as well as protective equipment for staff, if an outbreak of COVID-19 occurred in the facility.”⁴⁸

68. ICE has even publicly acknowledged the need to limit the spread of the virus and the number of people in its detention centers, announcing that it will delay enforcement actions to arrest fewer immigrants and will use alternatives to detention as a response to the COVID-19 outbreak for new people they arrest in the field.⁴⁹

69. Given the rapid spread of COVID-19, the likelihood of spread before a person infected with the virus is symptomatic, ICE’s repeated failure to meet adequate standards for controlling infectious disease outbreaks in its facilities, the failure of ACDC to conduct periodic universal testing, the continuing transfer into ACDC from other facilities, and current conditions at ACDC, Defendants have failed to prevent the spread of COVID-19 within ACDC.

E. Public Health Experts Have Urged Reform and Release

70. As early as February 25, 2020, Dr. Scott Allen and Dr. Josiah Rich, medical experts to the DHS, shared concerns with the agency about the specific risk to detained immigrants as a result of COVID-19. These experts warned of the danger of rapid spread of the coronavirus in immigration detention facilities. In a whistleblower letter to Congress, Dr. Allen and Dr. Rich recommended “[l]imiting transport and transfer of immigrant detainees” and consideration releasing all detainees in high risk medical groups such as older people and those with chronic diseases” They concluded that “acting immediately will save lives not of only those detained, but also detention staff and their families, and the community-at-large.”⁵⁰

⁴⁸ DHS Office of Inspector General, *Early Experiences with COVID-19 at ICE Detention Facilities*, OIG-19-18 (Jun. 18, 2020), available at <https://www.oig.dhs.gov/sites/default/files/assets/2020-06/OIG-20-42-Jun20.pdf>

⁴⁹ Maria Sacchetti and Arelis R. Hernández, *ICE to stop most immigration enforcement inside the U.S., will focus on criminals during coronavirus outbreak*, The Washington Post (Mar. 18, 2020), available at https://www.washingtonpost.com/national/ice-halting-most-immigration-enforcement/2020/03/18/d0516228-696c-11ea-abef-020f086a3fab_story.html.

71. In June, Dr. Allen and Dr. Rich testified before Congress that ICE detention facilities should engage in universal testing as “there is no reason there should be a lesser standard for correctional and detention facilities [than in nursing homes], especially as control of outbreaks in all congregate environments impact the public’s health.”⁵¹ Other experts agree.⁵²

72. ICE has the authority to release individuals from custody on medical grounds and has routinely exercised its authority to release particularly vulnerable detained individuals like Plaintiffs. The former Acting Director of ICE, John Sandweg, has stated that “ICE can, and must, reduce the risk [COVID-19] poses to so many people, and the most effective way to do so is to drastically reduce the number of people it is currently holding.”⁵³

LEGAL FRAMEWORK

A. Plaintiffs have a Substantive Due Process Right to Protection from Serious Illness and Potentially Lethal Harm.

73. Because Plaintiffs are in federal civil immigration detention, their constitutional rights flow from the procedural and substantive guarantees of the Fifth Amendment. *Hare v. City of Corinth, Miss.*, 74 F.3d 633, 639 (5th Cir. 1996).

74. When the government holds individuals in its custody, it assumes the affirmative obligation to provide for their basic human needs, including medical care, reasonable safety, and protection from harm. *DeShaney v. Winnebago County Dep’t of Social Servs.*, 489 U.S. 189, 200

⁵⁰ Letter from Scott A. Allen, MD and Josiah Rich, MD, MPH to Congressional Committee Chairpersons (dated Mar. 19, 2020), available at <https://assets.documentcloud.org/documents/6816336/032020-Letter-From-Drs-Allen-Rich-to-Congress-Re.pdf>.

⁵¹ Written Statement of Dr. Scott A. Allen, MD to U.S. Senate Committee on the Judiciary, (dated Jun. 2, 2020), available at <https://www.judiciary.senate.gov/imo/media/doc/Scott%20Allen%20Testimony.pdf>

⁵² Shannon Firth, *COVID-19 Testing Lags in Prisons and Jails*, Medpage Today (May 8, 2020), available at <https://www.medpagetoday.com/infectiousdisease/covid19/86391>.

⁵³ John Sandweg, *I Used to Run ICE. We Need to Release the Nonviolent Detainees*, The Atlantic Monthly (Mar. 22, 2020), available at <https://www.theatlantic.com/ideas/archive/2020/03/release-ice-detainees/608536/>; Camilo Montoya-Galvez, “Powder kegs”: Calls grow for ICE to release immigrants to avoid coronavirus outbreak, CBS News (Mar. 19, 2020), available at <https://www.cbsnews.com/news/coronavirus-ice-release-immigrants-detention-outbreak/>.

(1989); *Hare*, 74 F.3d at 650. A government “transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause” when it fails to satisfy its “affirmative duty to protect.” *DeShaney*, 489 U.S. at 200.

75. “Under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.” *Hare*, 74 F.3d at 651. *See also Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). Therefore, persons detained civilly, including in immigration detention like Plaintiffs, are entitled to “more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.” *Youngberg v. Romeo*, 457 U.S. 307, 322 (1982); *In re Kumar*, 402 F. Supp. 3d 377, 384 (W.D. Tex. 2019). A person detained civilly has due process rights that are “at least as great as the Eighth Amendment protections available to a convicted prisoner.” *Hare*, 74 F.3d at 639 (citations omitted).

76. Courts have held that an immigration detainee’s due process rights should be evaluated at an even higher standard than that of pretrial detainees. *In re Kumar*, 402 F. Supp. 3d at 384; *Jones v. Blanas*, 393 F.3d 918, 933 (9th Cir. 2004). But at the very least, the standard applicable in the pretrial criminal detention context applies here.

77. The government violates the due process rights of a person in civil detention when the conditions of his or her confinement “amount[s] to punishment.” *Garza v. City of Donna*, 922 F.3d 626, 632 (5th Cir. 2019), *cert. denied sub nom. Garza v. City of Donna, Texas*, 140 S. Ct. 651 (2019). If “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 the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees.” *Bell v. Wolfish*, 441 U.S. 520, 539 (1979); *accord Hare*, 74 F.3d at 640.

78. To show that a condition of confinement amounts to punishment, the detained person need not demonstrate an official subjectively or maliciously intends to punish; instead “intent may be inferred from the decision to expose the detainee to an unconstitutional condition.” *Shepherd v. Dallas Cty.*, 591 F.3d 445, 452 (5th Cir. 2009). “[E]ven where a State may not want to subject a detainee to inhumane conditions of confinement or abusive jail practices, its intent to do so is nevertheless presumed when it incarcerates the detainee in the face of such known conditions and practices.” *Hare*, 74 F.3d at 644. “A pervasive pattern of serious deficiencies” that subjects a detainee to the risk of serious injury, illness or death “amounts to unconstitutional punishment.” *Shepherd*, 591 F.3d at 454. Such a pattern is evidenced by, for example, failing to provide adequate means to control a known risk of serious infections. *Duvall v. Dallas Cty., Tex.*, 631 F.3d 203, 208 (5th Cir. 2011).

79. In addition, it is cruel and unusual punishment under the Eighth Amendment, and therefore necessarily a violation of the Fifth Amendment’s Due Process Clause that is applicable here, for a federal official to show “deliberate indifference to a substantial risk of serious harm” to a detainee. *Doe v. Robertson*, 751 F.3d 383, 385 (5th Cir. 2014) (citing *Farmer v. Brennan*, 511 U.S. 825 (1994)); *Hare*, 74 F.3d at 649. This occurs, for example, when officials “know[] of and disregard[] an excessive risk to inmate health or safety.” *Doe*, 751 F.3d at 388.

80. A detained person “does not need to show that death or serious illness has yet occurred to obtain relief,” instead, they need only “show that the conditions pose a substantial risk of harm to which... officials have shown a deliberate indifference.” *Gates v. Cook*, 376 F.3d 323, 339 (5th Cir. 2004). Federal custodians may not ignore “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*, 509 U.S. at 33.

81. Specifically, housing detained persons in crowded conditions where they are at risk of infectious disease is unconstitutional, even when it “is not alleged that the likely harm would occur immediately and even though the possible infection might not affect all of those exposed.” *Helling*, 509 U.S. at 33 (citing *Hutto v. Finney*, 437 U.S. 678, 682 (1978)). Nor can officials “be deliberately indifferent to the exposure of inmates to a serious, communicable disease on the ground that the complaining inmate shows no serious current symptoms.” *Helling*, 509 U.S. at 33.

82. Despite their awareness of the rapid spread of COVID-19, the importance of social distancing and sanitary practices for its prevention, the threat that it poses to the lives of those who, like Plaintiffs, have certain underlying medical conditions, and the impossibility of protecting Plaintiffs who are held at ACDC, Defendants continue to detain Plaintiffs. This amounts to a punitive condition of confinement or, at the very least, deliberate indifference to a substantial risk of serious harm to Plaintiffs – either of which suffices to show a due process violation and compels an order of release.

B. ICE’S Detention of Plaintiffs Under Current Conditions at ACDC is Excessive.

83. Non-criminal confinement “constitutes a significant deprivation of liberty that requires due process protection,” and, thus, the government “must have ‘a constitutionally adequate purpose for the confinement.’” *Jones v. United States*, 463 U.S. 354, 361 (1983) (quoting *O’Connor v. Donaldson*, 422 U.S. 563, 574 (1975)); see also *Foucha*, 504 U.S. at 80 (“We have always been careful not to ‘minimize the importance and fundamental nature’ of the individual’s right to liberty.” (quoting *United States v. Salerno*, 481 U.S. 739, 750 (1987))).

84. Due process requires that the nature and duration of a noncriminal confinement bear “some reasonable relation to the purpose for which the individual is committed.” *Jackson v. Indiana*, 406 U.S. 715, 738 (1972); *Brown v. Taylor*, 911 F.3d 235, 243 (5th Cir. 2018).

85. The only legitimate purpose, consistent with due process, for federal civil immigration detention is to prevent flight risk and ensure the detained person’s attendance for a legal hearing adjudicating their status or potential removal, or to otherwise ensure the safety of the community. *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001).

86. The purpose of ensuring attendance at a merits hearing is fundamentally eviscerated where detained persons, such as Plaintiffs are exposed to coronavirus, symptomatic, seriously ill, or even dead. Each Plaintiff has a severe medical ailment and is immunocompromised. Given that the only established method to protect oneself from the virus is to self-isolate, the likelihood of a post-release danger to the community from elderly or ill persons is infinitesimal and cannot justify the maximal deprivation of liberty – detention – with a resulting risk of serious illness or death. Continued detention in such circumstances is arbitrary restraint entirely inconsistent with the principle of proportionality at the heart of due process.

87. Once an otherwise valid basis for detention no longer applies, substantive due process requires the state to release the detained person. *Foucha*, 504 U.S. at 86 (ordering petitioner’s release from commitment to mental institution because there was no longer any evidence of mental illness); *Kansas v. Hendricks*, 521 U.S. 346, 363-64 (1997) (upholding statute requiring civil confinement for sex offenders in part because it provided for immediate release once an individual no longer posed a threat to others).

88. Typically, courts may order Defendants to ameliorate unlawful conditions of confinement. *See e.g. Zepeda Rivas v. Jennings*, No. 20-CV-02731-VC, 2020 WL 4554646, at

*1 (N.D. Cal. Aug. 6, 2020) (ordering periodic universal testing, limiting transfers, and maintaining a dormitory to segregate positive COVID-19 cases at ICE facility); *Savino v. Souza*, No. CV 20-10617-WGY, 2020 WL 2404923, at *11 (D. Mass. May 12, 2020) (ordering widespread testing and halt to transfer at ICE facility); *Gayle v. Meade*, No. 20-21553-CIV, 2020 WL 2086482, at *7 (S.D. Fla. Apr. 30, 2020) (ordering population reduction and mandatory soap and mask distribution).

C. Habeas Is a Broad, Flexible Remedy That Authorizes Courts to Order Release from Unlawful Detention Conditions as Law and Equity Requires.

89. Plaintiffs seek relief under the federal habeas statute, 28 U.S.C. § 2241, which is itself infused with long-standing common law equitable principles. *See* 28 U.S.C. § 2241(c)(3) (the writ extends to those prisoners “in custody in violation of the Constitution or laws or treaties of the United States”). “Habeas is at its core a remedy for unlawful executive detention.” *Munaf v. Geren*, 553 U.S. 674, 693 (2008).

90. Habeas invests in federal courts broad, equitable authority to “dispose of the matter as law and justice require,” 28 U.S.C. § 2243, as the “very nature of the writ demands that it be administered with the initiative and flexibility.” *Harris v. Nelson*, 394 U.S. 286, 292 (1969); *see Boumediene v. Bush*, 553 U.S. 723, 780 (2008) (“Habeas is not ‘a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose.’”) (quoting *Jones v. Cunningham*, 371 U.S. 236, 243 (1963)).

91. Accordingly, the illegality of custody under the “Constitution or laws . . . of the United States” may stem from the fact of detention and the duration of detention – what is often referred to as the “historical core” of habeas – and, as courts have recognized, for unlawful placement or conditions of detention. *See Wilwording v. Swenson*, 404 U.S. 249, 251 (1971) (habeas challenging “living conditions and disciplinary measures” is “cognizable in federal

habeas corpus”); *See also Aamer v. Obama*, 742 F.3d 1023, 1031-38 (2014) (surveying history, purpose and Supreme Court jurisprudence and “the weight of the reasoned precedent in the federal Courts of Appeal” relating to habeas and concluding “habeas corpus tests not only the fact but also the form of detention.”). Here, because Plaintiffs seek relief from detention conditions that cannot be remediated or improved, their challenge cannot be deemed a challenge to conditions of confinement of the kind that some courts find lie outside of habeas; because the only available remedy in these circumstances is release, their claims challenge the unlawful fact of detention and sits at the core of habeas.

92. A court is fully empowered to remediate the particular illegality here – an outbreak of lethal and unavoidable virus that threatens petitioners and violates their constitutional rights to be free from arbitrary and punitive detention – by ordering their release. Habeas corpus is, “above all, an adaptable remedy,” *Boumediene*, 553 U.S. at 780, and federal courts retain “broad discretion in conditioning a judgment granting habeas relief . . . ‘as law and justice require.’” *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987) (quoting 2243). That authority includes an order of release, *Boumediene*, 553 U.S. at 779, so as “to insure that miscarriages of justice within [the writ’s] reach are surfaced and corrected.” *Harris*, 395 U.S. at 291.

93. Many district courts in the Fifth Circuit have found jurisdiction and to bring COVID-19 related release claims through habeas. *See e.g. Tamayo Espinoza*, 2020 WL 2949779, at *2 (“Here, the requested relief, immediate release from detention, permits the petitioners to proceed with their habeas petition.”); *Gatu Njuguna v. Staiger*, No. 6:20-CV-00560, 2020 WL 3425289, at *5 (W.D.La. Jun. 3, 2020) (“Because Petitioner challenges the validity of his continued confinement and because he seeks immediate release from confinement as the remedy, his claims were properly brought under 28 U.S.C. § 2241”); *Dada v. Witte*, No. 1:20-CV-00458,

2020 WL 2614616, at *1 (W.D. La. May 22, 2020); *Vazquez Barrera*, 2020 WL 1904497, at *4 (S.D. Tex. Apr. 17, 2020). Some have ordered relief when amelioration of unlawful conditions was impossible or would come too late to prevent serious harm to COVID-19 infection. See *Dada*, 2020 WL 2614616, at *3; *Vazquez Barrera*, 2020 WL 1904497, at *8; *Menjivar v. Staiger*, No. 6:20-cv-00807-MJJ-PJH, ECF No. 22 (W.D. La. Sep. 2, 2020) (Report and Recommendation).

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF: VIOLATION OF FIFTH AMENDMENT RIGHT TO SUBSTANTIVE DUE PROCESS

94. Plaintiffs reallege and incorporate by reference the foregoing paragraphs.

95. The Due Process Clause of the Fifth Amendment guarantees persons in civil immigration detention the right to reasonable safety and to be free from punitive conditions of confinement, and requires that the government have a constitutionally adequate, non-punitive purpose for continued detention. These requirements are violated when a condition of detention is not reasonably related to a legitimate government objective, when conditions are excessive in relation to that objective, and when government officials are deliberately indifferent to a substantial risk of harm to the detainee.

96. Defendants continue to detain Plaintiffs, whose underlying health conditions render them particularly vulnerable to contracting COVID-19, spreading it to others, and suffering serious injury or death as a result.

97. The conditions of detention at ACDC increase Plaintiffs' risk of contracting COVID-19. There have been cases of COVID-19 reported in the parishes or counties where each of these facilities are located. Defendants have not, and could not possibly, implement social

distancing measures that are required to prevent the rapid spread of COVID-19 in these facilities. Defendants also have not implemented any adequate hygiene practices as recommended by the CDC.

98. Defendants have failed in their obligation to adequately protect Plaintiffs from exposure to COVID-19. This puts Plaintiffs at a substantial risk of serious illness or death.

99. Defendants know about the prevalence of COVID-19 in Louisiana, and the risk that it poses to individuals with certain underlying conditions. Under these circumstances, Plaintiffs' continued detention by Defendants amounts to deliberate indifference to a substantial risk of harm to Plaintiffs.

100. Defendants' exposure of Plaintiffs to this substantial risk of serious illness or death amounts to punishment.

101. Plaintiffs' ongoing confinement lacks a reasonable relationship to any legitimate government purpose. Plaintiffs do not pose a danger or a flight risk, and these considerations alone are insufficient to countervail the severe risk of severe illness or even death that Plaintiffs face if they are not released.

102. Absent judicial relief in the form of release from detention, Plaintiffs are suffering and will continue to suffer irreparable harm.

**SECOND CLAIM FOR RELIEF:
HABEAS AUTHORITY TO ORDER RELEASE FROM UNLAWFUL DETENTION**

103. Plaintiffs reallege and incorporate by reference the foregoing paragraphs.

104. The Court has broad, equitable authority under the habeas statute, 28 USC 2241, 2243 and the common law, to dispose of Petitioners-Plaintiffs' cases as law and justice require, based on the unique facts and circumstances of their cases, in order to remedy Petitioners' unlawful conditions of detention.

105. The Court should exercise this authority to grant Plaintiffs' habeas corpus petition and to fashion any and all additional relief, necessary to effectuate Plaintiffs' expeditious release from unlawful detention. In the absence of such relief, Plaintiffs are suffering and will continue to suffer irreparable harm.

**THIRD CLAIM FOR RELIEF:
VIOLATION OF THE REHABILITATION ACT (FAILURE TO PROVIDE
REASONABLE ACCOMMODATION TO PERSONS WITH DISABILITIES)**

106. Plaintiffs reallege and incorporate by reference the foregoing paragraphs.

107. Section 504 of the Rehabilitation Act requires federal agencies to provide "reasonable accommodations" to individuals with disabilities so they can fully participate in benefits administered by these agencies. 29 U.S.C. § 794(a).

108. DHS regulations implementing the Rehabilitation Act mandate that "[n]o qualified individual with a disability in the United States, shall, by reason of his or her disability, be excluded from participation in, be denied benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the Department." 6 C.F.R. § 15.30; *see also* 29 U.S.C. § 794(a). The regulations implementing Section 504 prohibit entities receiving federal financial assistance from utilizing "criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the recipient's program or activity with respect to handicapped persons." 34 C.F.R. § 104.4(b)(4).

109. The removal process is a benefit administered by DHS and Plaintiffs are entitled to participate in the removal process. The services, programs, and activities within the detention centers where DHS detains Plaintiffs receive substantial federal financial assistance.

110. Plaintiffs' underlying medical conditions qualify as disabilities for purposes of the Rehabilitation Act, 29 U.S.C. § 705(2)(B); 42 U.S.C. § 12102.

111. By exposing them to a heightened risk of contracting COVID-19, Defendants are preventing Plaintiffs from participating in the removal process by reason of their disability. Likewise, Defendants deny Plaintiffs participation in facility programs such as the law library and the recreational yard because of the constant outbreaks that have necessitated quarantines. Further Plaintiffs must make the choice between exposing themselves to crowded conditions in the cafeteria and legal call area and reaping the benefits of those programs. For example, Plaintiff Khamis was placed in a solitary confinement cell for two weeks because Defendants transferred him to another detention center and then brought him back to ACDC.

112. By failing to take account of their special vulnerability to severe illness or death if they were to contract COVID-19, Defendants are preventing Plaintiffs from participating in the removal process by reason of their disability.

113. By failing to provide Plaintiffs adequate protection from COVID-19 through the only effective means to reduce the risk of severe illness or death, Defendants have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of removal proceedings and the services, programs, and activities within the detention centers with respect to Plaintiffs.

114. The best and most reasonable accommodation that would mitigate Plaintiffs' disability is release from detention. Defendants have failed to implement this reasonable accommodation, which would not be unduly burdensome nor require a fundamental alteration in programs and activities of the detention center. In the alternative, reforms specified by an independent health expert may allow Plaintiffs to participate in programs.

115. Defendants' ongoing detention of Plaintiffs constitutes discrimination because it is either disparate treatment of, or at the very least has a disparate impact on, people with qualifying disabilities who are at severe risk of serious illness or death if they were to contract COVID-19.

116. For these reasons, Defendants' ongoing detention of Plaintiffs violates the Rehabilitation Act.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that this Court:

a. Issue a writ of habeas corpus and order Plaintiffs' immediate release or placement in community-based alternatives to detention such as conditional release, with appropriate precautionary public health measures, on the ground that their continued detention violates the Due Process Clause and/or the Rehabilitation Act;

b. In the alternative, issue a temporary restraining order or preliminary and permanent injunctive relief ordering Defendants to immediately release Plaintiffs or place them in community-based alternatives to detention such as conditional release, with appropriate precautionary public health measures, on the ground that their continued detention violates the Due Process Clause and/or the Rehabilitation Act;

c. In the alternative, order a health inspection of ACDC at the earliest possible date and order Respondent to order Defendants to immediately reform conditions at ACDC through a plan to be implemented pursuant to the results of that inspection.

d. Award Plaintiffs all costs incurred in maintaining this action, including reasonable attorneys' fees under the Equal Access to Justice Act, as amended, 5 U.S.C. § 504 and 28 U.S.C. § 2412, and on any other basis justified by law; and

e. Grant Plaintiffs any other and further relief this Court deems just and proper.

Dated: September 15, 2020
Natchez, Mississippi

Respectfully submitted,

/s/

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