

**UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF LOUISIANA  
LAFAYETTE DIVISION**

ACHE, *et al.*,

*Petitioner-Plaintiffs,*

v.

WITTE, *et al.*,

*Respondent-Defendants.*

Civil Action No.: 6:20-cv-01320

Judge Robert R. Summerhays  
Magistrate Judge Patrick J. Hanna

**ORAL ARGUMENT REQUESTED**

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**JENA PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF THEIR  
MOTION FOR A TEMPORARY RESTRAINING ORDER**

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## INTRODUCTION

The threat of COVID-19 is showing no signs of abating; it already made one alarming resurgence throughout Louisiana, and state health officials predict another dangerous spike to coincide with the fall flu season, which is now beginning.<sup>1</sup> Thirteen petitioners -- nine detained at the LaSalle Ice Processing Center (“LIPC” or “Jena”) in Jena, Louisiana (“Jena Petitioners”) and four detained at the Pine Prairie ICE Processing Center (“PPIPC” or “Pine Prairie”) in Pine Prairie, Louisiana (“Pine Prairie Petitioners”) have filed this suit, seeking urgent relief from this Court arising from the serious risk of infection, illness and possible death from COVID-19. These facilities have already shown themselves to be unable or unwilling to protect medically vulnerable persons from infection and harm.

Specifically, and most urgently, there is currently a growing and dangerous outbreak at Jena, where now eight people have been infected. As a result of this clear and present threat to their safety and lives, the Jena Petitioners file this motion for a temporary restraining order requesting immediate release from detention, in light of the likelihood of demonstrating that continued detention at LIPC creates an unconstitutional risk of harm to the Jena Petitioners that cannot be remedied in any manner short of release.

The four Pine Prairie petitioners face harm no less grave, but ICE is not reporting any active COVID-19 cases at Pine Prairie. However, accounts from people detained there cast serious doubt on the validity and credibility of ICE’s reporting. Until Petitioners have full information about the nature of the risks and remedial measures the Respondents are taking to protect them from

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<sup>1</sup> Sam Karlin, *What we know about coronavirus in Louisiana: A few trends have emerged as schools open*, The Advocate (Oct. 3, 2020), [https://www.theadvocate.com/baton\\_rouge/news/coronavirus/article\\_6a74664a-04ed-11eb-b81b-070cb4d53f12.html](https://www.theadvocate.com/baton_rouge/news/coronavirus/article_6a74664a-04ed-11eb-b81b-070cb4d53f12.html); *The Flu Season*, CDC, <https://www.cdc.gov/flu/about/season/flu-season.htm>.

infection and illness, they do not move for immediate release; rather, by separate motion, they seek expedited discovery in the form of a site inspection by a correctional health expert.

For months, public health experts have warned that the only effective way to reduce the risk of contracting COVID-19 is sustained social distancing, vigilant hygiene, widespread testing and contact tracing, and avoiding prolonged indoor exposure to infected persons. Nevertheless, Respondents have not effectively enabled any of those actions at Jena – even after a court in this District released several people from Jena, citing its failures to implement many of those basic protections, failures which persist to this day.<sup>2</sup> Because such measures are difficult to achieve in ICE detention facilities, health care professionals – including two of the Department of Homeland Security’s own medical experts – have urgently called for the release of detained immigrants, particularly elderly or medically vulnerable ones.<sup>3</sup> And, even though it has been six months since the onset of this pandemic, it is far from being controlled. Recent spikes in cases in Louisiana are particularly alarming and pose exacerbated risk to vulnerable individuals and Louisiana’s public health system in light of the oncoming flu season. Nevertheless, Respondents continue to detain Petitioners in Jena, where infection is all but inevitable, despite the ready availability of release, including under their own reliable community-based alternatives to detention.

For the Jena Petitioners, protection from the virus is a matter of life or death. The danger posed by their continued detention during the pandemic 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). Absent this

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<sup>2</sup> See Report and Recommendation, *Dada v. Witte*, No. 1:20-CV-00458, 2020 WL 2614616, at \*30-38 (W.D. La. Apr. 30, 2020), ECF No. 17.

<sup>3</sup> Catherine E. Shoichet, *Doctors Warn of ‘Tinderbox Scenario’ if Coronavirus Spreads in ICE Detention*, CNN (Mar. 20, 2020), <https://www.cnn.com/2020/03/20/health/doctors-ice-detention-coronavirus/index.html>.



Court's immediate intervention, the Jena Petitioners will be irreparably harmed by Respondents' ongoing failure to implement even the most basic social distancing, hygiene, and testing measures, to end transfers into LIPC, and to release those who cannot be protected from COVID-19. Release is the only meaningful way to protect the Jena Petitioners from grave, irreparable harm, and this Court, like many others that have already acted, is fully authorized to order it.

### **FACTUAL BACKGROUND**

#### **I. COVID-19 Is an Unprecedented and Lethal Global Pandemic Which Continues Today to Pose a Grave Risk to Public Health.**

COVID-19 is a highly contagious disease easily transmitted through respiratory droplets, viral residue on surfaces, or aerosolized emissions caused by breathing, speaking, coughing, or sneezing.<sup>4</sup> It can result in severe and widespread damage to lungs, heart, liver, or other organs and in many cases results in death.<sup>5</sup> No vaccine or treatment can yet prevent COVID-19, so the only effective measures to reduce risk of infection are engaging in stringent social distancing, vigilant hygiene, and avoiding prolonged stays in poorly ventilated indoor environments containing infected individuals.<sup>6</sup> Experts are warning of another spike in cases in the United States in the fall: Louisiana State Health Officer Jimmy Guidry recently predicted another spike in Louisiana during flu season.<sup>7</sup>

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<sup>4</sup> *Transmission of SARS-CoV-2: implications for infection prevention precautions*, World Health Organization (July 9, 2020), <https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions>; Decl. Dr. Anjali Niyogyi, MD, MPH ¶ 14, ECF No. 3-4. Dr. Niyogyi is an Associate Professor of Internal Medicine at Tulane University Medical School. She supervises residents on the inpatient wards at University Medical Center in New Orleans where she regularly treats COVID-19 cases. She is also the founder and director of the Formerly Incarcerated Transitions Clinic in New Orleans, which provides care for incarcerated populations.

<sup>5</sup> *What we know (so far) about the long-term health effects of Covid-19*, Advisory Board (June 2, 2020), <https://www.advisory.com/daily-briefing/2020/06/02/covid-health-effects>.

<sup>6</sup> *Transmission of SARS-CoV-2: implications for infection prevention precautions*, World Health Organization (July 9, 2020), <https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions>

<sup>7</sup> Sam Karlin, *What we know about coronavirus in Louisiana: A few trends have emerged as schools open*, The Advocate (Oct. 3, 2020),



## II. COVID-19 is Exceedingly Dangerous for Individuals Like Petitioners, Who Have Underlying Health Concerns.

Older individuals and those with certain underlying medical conditions have an increased risk of serious illness or death should they contract COVID-19.<sup>8</sup> The Jena Petitioners' conditions make them particularly susceptible to COVID-19 complications. Petitioner Perez Carpio suffers from uncontrolled hypertension and asthma.<sup>9</sup> Petitioner Castillo Gonzalez has diabetes.<sup>10</sup> Petitioner Reyes Mieres suffers from uncontrolled asthma.<sup>11</sup> Petitioner Atemafac has uncontrolled hypertension and potential kidney disease.<sup>12</sup> Petitioner Ndungmbowo has hypertension.<sup>13</sup> Petitioner Durchien has hepatitis B and possibly liver failure.<sup>14</sup> Petitioner Moma suffers from hypertension.<sup>15</sup> Petitioner Ndelela suffers from hepatitis B and possible liver failure.<sup>16</sup> Petitioner Awanayah suffers from hypertension.<sup>17</sup> All of the Jena Petitioners are at risk of contracting COVID-19 at Jena because, according to ICE, there are currently five confirmed COVID-19 cases there.<sup>18</sup>

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[https://www.theadvocate.com/baton\\_rouge/news/coronavirus/article\\_6a74664a-04ed-11eb-b81b-070cb4d53f12.html](https://www.theadvocate.com/baton_rouge/news/coronavirus/article_6a74664a-04ed-11eb-b81b-070cb4d53f12.html).

<sup>8</sup>*People with Certain Medical Conditions*, Centers for Disease Control and Prevention (“CDC”), (updated Oct. 6, 2020), [https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html?CDC\\_AA\\_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fgroups-at-higher-risk.html](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fgroups-at-higher-risk.html).

<sup>9</sup> Decl. Erick Perez Carpio ¶ 2, ECF No. 3-20; Niyogi Decl. ¶ 36(a), ECF No. 3-4.

<sup>10</sup> Decl. Alien Castillo Gonzalez ¶ 2, ECF No. 3-9; Niyogi Decl. ¶ 36(b), ECF No. 3-4.

<sup>11</sup> Decl. Odlanier Reyes Mieres ¶ 2, ECF No. 3-11; Niyogi Decl. ¶ 36(d), ECF No. 3-4.

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<sup>13</sup> Decl. Paulinus Doh Ndungmbowo, ¶ 2, ECF No. 3-15; Niyogi Decl. ¶ 36(g), ECF No. 3-4.

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<sup>16</sup> Decl. Yannick Alpha Ndelela, ¶ 2, ECF No. 3-12; Niyogi Decl. ¶ 36(k), ECF No. 3-4.

<sup>17</sup> Decl. Bertrand Atenekara Awanayah, ¶ 2, ECF No. 3-8; Niyogi Decl. ¶ 36(j), ECF No. 3-4.

<sup>18</sup> *ICE Guidance on COVID-19, ICE Detainee Statistics*, ICE (updated Oct. 9, 2020), <https://www.ice.gov/coronavirus>. Indeed, this risk is far from speculative – counsel has just learned that one of the Jena Petitioners, Paulinus Doh Ndungmbowo, contracted COVID-19 in the week-and-a-half that he’s been at Jena, and is recovering.

### III. Jena Does Not and Cannot Prevent Widespread Infection.

LIPC is located in Jena, Louisiana. As of October 7, 2020, there were over 170,000 confirmed COVID-19 cases in Louisiana, with over 5,400 deaths.<sup>19</sup> As of October 7, 2020, ICE reports that at least 40 individuals detained at Jena and 1,025 within the area of responsibility of the New Orleans ICE Field Office, which regularly transfers people between Jena and the other area detention centers, have tested positive for COVID-19, with seven active cases currently at Jena.<sup>20</sup>

Congregate jail environments like Jena present a particularly high risk of outbreaks. Conditions in these facilities make it impossible to practice social distancing. At least fourteen people at ICE detention centers, 9 detained people and 5 guards, have died of COVID-19 so far, with the most recent, tragically, in Louisiana, at the Winn Detention Center.<sup>21</sup> Specifically, Respondents have not and cannot ensure mitigation of COVID-19 at Jena, particularly given the steady rate of transfers into Jena from other facilities.

Most striking is the fact that the very same problems that Magistrate Judge Joseph H. L. Perez-Montes of this District found existed at Jena five months ago still persist today. *See* Report

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<sup>19</sup> *Coronavirus (COVID-19)*, Louisiana Department of Health (updated Oct. 7, 2020), <http://ldh.la.gov/coronavirus/>.

<sup>20</sup> *ICE Guidance on COVID-19, ICE Detainee Statistics*, ICE (Oct. 7, 2020), <https://www.ice.gov/coronavirus>; *See e.g.* Lisa Riordan Seville and Hannah Rappleye, *ICE keeps transferring detainees around the country, leading to COVID-19 outbreaks*, NBC News (May 31, 2020), <https://www.nbcnews.com/politics/immigration/ice-keeps-transferring-detainees-around-country-leading-covid-19-outbreaks-n1212856>; Yeganeh Torbati, Dara Lind & Jack Gillum, *In a 10-Day Span, ICE Flew This Detainee Across the Country Nine Times*, ProPublica (Mar. 27, 2020), <https://www.propublica.org/article/coronavirus-ice-flights-detainee-sirous-asgari>.

<sup>21</sup> *Deaths at Adult Detention Centers*, American Immigrant Lawyers Association (Aug. 12, 2020), <https://www.aila.org/infonet/deaths-at-adult-detention-centers>; Noah Lanard, *A Fourth Guard at an ICE Detention Center Has Died of COVID-19*, Mother Jones (June 10, 2020), <https://www.motherjones.com/politics/2020/06/a-fourth-guard-at-an-ice-detention-center-has-died-of-covid-19/>; *Eloy ICE Guard Dies From COVID-19 Cases Up Dramatically-in-CG*; Pinal Central (updated Sept. 4, 2020), [https://www.pinalcentral.com/covid-19/elay-ice-guard-dies-from-covid-19-cases-up-dramatically-in-cg/article\\_1a6e0047-a90d-55c7-90ac-bbaca157e430.html](https://www.pinalcentral.com/covid-19/elay-ice-guard-dies-from-covid-19-cases-up-dramatically-in-cg/article_1a6e0047-a90d-55c7-90ac-bbaca157e430.html).

and Recommendation, *Dada v. Witte*, No. 1:20-CV-00458, 2020 WL 2614616, at \*30-38 (W.D. La. Apr. 30, 2020), ECF No. 17. There, Magistrate Judge Perez Montes found failures at LIPC regarding hygiene, mask-wearing, cleaning, and social distancing – all of which continue to be serious problems at LIPC, even months later.

### A. Social Distancing

The Centers for Disease Control and Prevention (“CDC”) describes social distancing as “a cornerstone of reducing transmission” and instructs Respondents to explain to detained people “social distancing and its importance for preventing COVID-19.”<sup>22</sup> However, social distancing is impossible at Jena. Petitioners are held in crowded conditions, with up to 90 people sharing one dorm and sleeping three feet from each other in rows of bunk beds.<sup>23</sup> Detained people are also forced to share tables, toilets, showers, and phones in their dorm in close quarters with others.<sup>24</sup> Because there are no lids on toilets, there is a risk of aerosolized fecal transmission of COVID.<sup>25</sup> In Jena, food is served in the dorms, and social distancing is not possible. Detained individuals are forced to wait for food in crowded lines and to eat between within arm’s reach of each other.<sup>26</sup> Petitioner Durchien was threatened with solitary confinement when he attempted to eat in a

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<sup>22</sup> *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, CDC (updated July 22, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>.

<sup>23</sup> Decl. Erick Perez Carpio (9/25/2020, “Perez Carpio Suppl. Decl.”) ¶ 6, attached at Exhibit T; Decl. Bertrand Atenekara Awanayah (9/29/2020, “Awanayah Suppl. Decl.”) ¶ 3, attached as Exhibit U; Decl. Alien Castillo Gonzalez (9/25/2020, “Castillo Gonzalez Suppl. Decl.”) ¶ 3, attached as Exhibit V; Decl. Odlanier Reyes Mieres (9/25/2020, “Reyes Mieres Suppl. Decl.”) ¶ 4, attached as Exhibit W; Decl. Priso Dalle Durchien (9/28/2020, “Durchien Suppl. Decl.”) ¶ 5, attached as Exhibit X; Decl. Paulinus Doh Ndungmbowo (9/28/2020, “Ndungmbowo Suppl. Decl.”) ¶ 3, attached as Exhibit Y; Decl. Yannick Alpha Ndelela (9/28/2020, “Ndelela Suppl. Decl.”) ¶ 6, attached Exhibit Z; Decl. Hyson Sama Moma (9/28/2020, “Moma Suppl. Decl.”) ¶ 4, attached as Exhibit AA; Decl. Fogap Ivo Atemafac (9/29/2020, “Atemafac Suppl. Decl.”) ¶ 4, attached as Exhibit BB.

<sup>24</sup> Perez Carpio Suppl. Decl. ¶ 9; Castillo Gonzalez Suppl. Decl. ¶ 3; Reyes Mieres Suppl. Decl. ¶ 4; Durchien Suppl. Decl. ¶ 7; Ndungmbowo Suppl. Decl. ¶ 4; Moma Suppl. Decl. ¶ 5.

<sup>25</sup> Ndungmbowo Suppl. Decl. ¶ 4; Niyogi Decl. ¶ 15, ECF No. 3-4.

<sup>26</sup> Perez Carpio Suppl. Decl. ¶ 7; Castillo Gonzalez Suppl. Decl. ¶ 3; Reyes Mieres Suppl. Decl. ¶ 4; Durchien Suppl. Decl. ¶ 6; Atemafac Suppl. Decl. ¶ 5.

socially distanced manner.<sup>27</sup> In the medical unit as well, Petitioners are forced to wait in close quarters with others.<sup>28</sup> To whatever extent there are social distancing rules, those rules are not enforced.<sup>29</sup> For example, Petitioners Awanayah, Durchien, Moma, and Atemafac report that when some people were trying to socially distance while going out to the yard, the guards made them crowd back together.<sup>30</sup> These practices lead to exposure to a higher concentration of virus particles from infected individuals, which “increases the risk of contracting the virus, and may also lead to symptomatic or more severe disease.”<sup>31</sup>

### B. Masks

The CDC recommends that Respondents “[e]ncourage all staff and incarcerated/detained persons to wear a cloth face covering as much as safely possible” and “[p]rovide cloth face coverings at no cost to incarcerated/detained individuals and launder them routinely.”<sup>32</sup> However, staff at Jena often do not wear masks, or do not wear them consistently and/or properly, even if they spend their shifts working within the dorms or in the medical unit.<sup>33</sup> Petitioners were not initially given masks upon their arrival at Jena; at least one was told that the facility did not have any.<sup>34</sup> Petitioner Castillo Gonzalez brought five masks with him before he was transferred to Jena,

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<sup>27</sup> Durchien Suppl. Decl. ¶ 6.

<sup>28</sup> Ndelela Suppl. Decl. ¶ 4.

<sup>29</sup> Castillo Gonzalez Suppl. Decl. ¶ 4; Ndelela Suppl. Decl. ¶ 7.

<sup>30</sup> Awanayah Suppl. Decl. ¶ 7; Durchien Suppl. Decl. ¶ 9; Moma Suppl. Decl. ¶ 6; Atemafac Suppl. Decl. ¶ 9.

<sup>31</sup> Nyogyi Decl. ¶ 29(d),(f).

<sup>32</sup> *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, CDC (updated July 22, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>.

<sup>33</sup> Awanayah Suppl. Decl. ¶ 3; Perez Carpio Suppl. Decl. ¶ 8; Castillo Gonzalez Suppl. Decl. ¶ 6; Reyes Mieres Suppl. Decl. ¶ 6; Durchien Suppl. Decl. ¶ 3; Ndungmbowo Suppl. Decl. ¶ 6; Ndelela Suppl. Decl. ¶¶ 3, 7, 9; Moma Suppl. Decl. ¶ 7; Atemafac Suppl. Decl. ¶ 7.

<sup>34</sup> Awanayah Suppl. Decl. ¶ 5; Perez Carpio Suppl. Decl. ¶ 8; Castillo Gonzalez Suppl. Decl. ¶ 6; Reyes Mieres Suppl. Decl. ¶ 6; Ndungmbowo Suppl. Decl. ¶ 6; Atemafac Suppl. Decl. ¶ 6.

and the guards confiscated them all.<sup>35</sup> Respondents eventually gave Petitioners masks days later,<sup>36</sup> but did not mandate their use or provided instructions on how to wash or use the masks safely, so most detained people do not wear the masks despite the crowding within the dorms.<sup>37</sup> This leads to inconsistent mask usage that increases risk of transmission.<sup>38</sup>

### C. Transfers

The CDC recommends that Respondents should “[s]uspend all transfers of incarcerated/detained persons to and from other jurisdictions and facilities (including work release), unless necessary for medical evaluation, medical isolation/quarantine, health care, extenuating security concerns, release, or to prevent overcrowding.”<sup>39</sup> However, Respondents continue to transfer large numbers of detained people into Jena.<sup>40</sup> Indeed, ICE is an outlier among law enforcement agencies in its insistence on continuing to regularly transfer people between detention centers. The federal Bureau of Prisons has generally restricted transfers during the pandemic,<sup>41</sup> as has the Louisiana Department of Corrections.<sup>42</sup>

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<sup>35</sup> Castillo Gonzalez Suppl. Decl. ¶ 6.

<sup>36</sup> Awanayah Suppl. Decl. ¶ 5; Perez Carpio Suppl. Decl. ¶ 8; Castillo Gonzalez Suppl. Decl. ¶ 6; Ndungmbowo Suppl. Decl. ¶ 6; Atemafac Suppl. Decl. ¶ 6.

<sup>37</sup> Awanayah Suppl. Decl. ¶¶ 3, 8; Perez Carpio Suppl. Decl. ¶ 8; Reyes Mieres Suppl. Decl. ¶ 6; Ndungmbowo Suppl. Decl. ¶ 6.

<sup>38</sup> Niyogi Decl. ¶ 35(a), (f), ECF No. 3-4.

<sup>39</sup> *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, CDC (updated July 22, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>.

<sup>40</sup> See Lisa Riordan Seville and Hannah Rappleye, *ICE keeps transferring detainees around the country, leading to COVID-19 outbreaks*, NBC News (May 31, 2020), <https://www.nbcnews.com/politics/immigration/ice-keeps-transferring-detainees-around-country-leading-covid-19-outbreaks-n1212856>; 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>; Castillo Gonzalez Suppl. Decl. ¶ 4; Reyes Mieres Suppl. Decl. ¶ 5.

<sup>41</sup> Federal Bureau of Prisons, *BOP Implementing Modified Operations*, available at [https://www.bop.gov/coronavirus/covid19\\_status.jsp](https://www.bop.gov/coronavirus/covid19_status.jsp).

<sup>42</sup> La. Dep’t of Public Safety & Corrections, *Summary of COVID-19 Response* (Apr. 9, 2020), available at <https://doc.louisiana.gov/wp-content/uploads/2020/04/DOC-Summary-of-COVID-19-Response-for-WEBSITE.pdf>.

The Jena Petitioners were all previously detained at Pine Prairie and were transferred together to Jena, along with roughly 80 others over the course of two days.<sup>43</sup> Their transfer illustrates why the CDC has called for a suspension of transfers. The Jena Petitioners were packed into a full bus for hours; there was no possibility of social distancing. Only a few of the detained people were wearing masks, and the guards were wearing masks under their chins, when they were wearing them at all.<sup>44</sup> Upon arriving at Jena, Petitioners were not isolated by themselves, but were placed in dorms with people already in them, many of whom had also recently been transferred to Jena, and even arrested from the street.<sup>45</sup> This is a dangerous practice, however, because it mixes people who are in different quarantine cohorts; indeed, simply adding more people to what appear to be general purpose ‘quarantine dorms’ runs counter to CDC guidance, which explicitly instructs facilities: “Do not add more individuals to an existing quarantine cohort after the 14-day quarantine clock has started.”<sup>46</sup>

#### **D. Hygiene**

The CDC recommends that Respondents “[e]nsure that sufficient stocks of hygiene supplies, cleaning supplies, PPE, and medical supplies” and instruct detained people to avoid touching their eyes, nose, or mouth without cleaning their hands first and to practice good cough

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<sup>43</sup> Awanayah Suppl. Decl. ¶ 1; Castillo Gonzalez Suppl. Decl. ¶ 2; Reyes Mieres Suppl. Decl. ¶ 1; Durchien Suppl. Decl. ¶ 1; Ndungmbowo Suppl. Decl. ¶ 1; Ndelela Suppl. Decl. ¶ 1; Moma Suppl. Decl. ¶ 1; Atemafac Suppl. Decl. ¶ 1.

<sup>44</sup> Awanayah Suppl. Decl. ¶ 1; Perez Carpio Suppl. Decl. ¶ 2; Castillo Gonzalez Suppl. Decl. ¶ 2; Reyes Mieres Suppl. Decl. ¶ 1; Durchien Suppl. Decl. ¶ 1; Ndungmbowo Suppl. Decl. ¶ 1; Ndelela Suppl. Decl. ¶ 1; Moma Suppl. Decl. ¶ 1.

<sup>45</sup> Awanayah Suppl. Decl. ¶¶ 2-4; Perez Carpio Suppl. Decl. ¶ 6; Castillo Gonzalez Suppl. Decl. ¶ 3; Durchien Suppl. Decl. ¶ 5; Ndungmbowo Suppl. Decl. ¶ 3; Ndelela Suppl. Decl. ¶ 6; Moma Suppl. Decl. ¶ 4; Atemafac Suppl. Decl. ¶ 4.

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

and sneeze etiquette and hand hygiene.<sup>47</sup> However shortages of soap (requiring detained people to buy soap)<sup>48</sup> and cleaning supplies persist at Jena. Petitioners Castillo Gonzalez and Ndelela report that the soap dispensers are empty.<sup>49</sup> Detained people are left to clean the dorms themselves, but must obtain supplies to clean and disinfect from the guards, which means that cleaning is often sporadic.<sup>50</sup> Often the guards report that they do not have any cleaning or disinfecting supplies, leaving Petitioners and other detained people to clean such high contact surfaces as tables, sinks, toilets, and showers with water alone.<sup>51</sup> Additionally, Respondents have provided only cursory, if any instruction regarding hygiene and safety practices, including regarding proper handwashing, proper mask wearing, and proper cleaning and disinfecting.<sup>52</sup> Without regular access to hygiene supplies and education regarding hygiene, “the virus can easily spread through the facility, from detainee to detainee, or detainee to guard, and vice versa.”<sup>53</sup>

### **E. Testing and Isolation**

The CDC recommends testing for all close contacts of those who have tested positive for COVID-19, including those without symptoms, and consideration of widespread and periodic testing of asymptomatic individuals in high-risk settings.<sup>54</sup> However, ICE’s policy is to only test and isolate those who are highly symptomatic even though mildly symptomatic or asymptomatic

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<sup>47</sup> *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, CDC (updated July 22, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>.

<sup>48</sup> Castillo Gonzalez Suppl. Decl. ¶ 7.

<sup>49</sup> Castillo Gonzalez Suppl. Decl. ¶ 7; Ndelela Suppl. Decl. ¶ 8.

<sup>50</sup> Carpio Perez Suppl. Decl. ¶ 9; Castillo Gonzalez Suppl. Decl. ¶ 7; Durchien Suppl. Decl. ¶ 7; Ndungmbowo Suppl. Decl. ¶ 4; Ndelela Suppl. Decl. ¶ 8; Moma Suppl. Decl. ¶ 5; Atemafac Suppl. Decl. ¶ 8.

<sup>51</sup> Awanayah Suppl. Decl. ¶ 6; Ndungmbowo Suppl. Decl. ¶ 4; Atemafac Suppl. Decl. ¶ 8.

<sup>52</sup> Awanayah Suppl. Decl. ¶ 8; Perez Carpio Suppl. Decl. ¶ 10; Castillo Gonzalez Suppl. Decl. ¶ 8; Durchien Suppl. Decl. ¶ 8; Ndungmbowo Suppl. Decl. ¶ 6; Ndelela Suppl. Decl. ¶ 8; Moma Suppl. Decl. ¶ 9; Atemafac Suppl. Decl. ¶ 7.

<sup>53</sup> Niyogi Decl. ¶ 35(b), (c), (f), ECF No. 3-4.

<sup>54</sup> *Overview of testing for SARS-CoV-2*, CDC (updated Jul 2, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/testing-overview.html>



people with COVID-19 can still transmit the virus. Jena cannot isolate positive cases and test close contacts if it cannot successfully identify infected individuals.<sup>55</sup>

The CDC also recommends explaining to detained people “the importance of reporting symptoms to staff” and “the purpose of quarantine and medical isolation.”<sup>56</sup> The CDC also requires that Respondents “[e]nsure that medical isolation for COVID-19 is distinct from punitive solitary confinement of incarcerated/detained individuals, both in name and in practice.”<sup>57</sup> Many Petitioners, however, report that they have never received any instruction regarding reporting symptoms.<sup>58</sup> Given the existence of an active COVID-19 outbreak in Jena, the facility’s inherent structural limitations, and Respondent’s refusal to adhere to CDC guidelines, COVID-19 will become even more widespread throughout Jena.

#### **IV. The Consensus of Public Health Experts is That Individuals Most Vulnerable to COVID-19 Should Immediately Be Released.**

Public health experts with experience addressing detention issues have recommended the release of vulnerable individuals.<sup>59</sup> Two DHS medical experts formally warned Congress of the severe public health risks of keeping individuals detained and recommended release of most persons in immigration detention, stating that “acting immediately will save lives not of only those detained, but also detention staff and their families, and the community-at-large.”<sup>60</sup> Other public

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<sup>55</sup> One court recently ruled that there should be more widespread and regular testing of medically vulnerable individuals. *Fraihat v. ICE*, No. EDCV 19-1546 JGB (SHKx), ECF No. 240 (C.D. Cal. Oct. 7, 2020).

<sup>56</sup> *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, CDC (updated July 22, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>.

<sup>57</sup> *Id.*

<sup>58</sup> Awanayah Suppl. Decl. ¶ 8; Perez Carpio Suppl. Decl. ¶ 10; Castillo Gonzalez Suppl. Decl. ¶ 8; Ndungmbowo Suppl. Decl. ¶ 6; Moma Suppl. Decl. ¶ 9; Atemafac Suppl. Decl. ¶ 7.

<sup>59</sup> One court recently ruled that medically vulnerable people should only be detained in extreme cases. *Fraihat v. ICE*, No. EDCV 19-1546 JGB (SHKx), ECF No. 240 (C.D. Cal. Oct. 7, 2020).

<sup>60</sup> Letter from Dr. Scott Allen and Dr. Josiah Rich, to House Comm. on Homeland Sec. (Mar. 19, 2020), <https://www.documentcloud.org/documents/6816336-032020-Letter-From-Drs-Allen-Rich-to-Congress-Re.html#document/p4/a557238>.

health experts have criticized ICE for “withholding the release of medically-vulnerable individuals” and urged releases of those with comorbidities.<sup>61</sup> A former Acting Director of ICE 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.”<sup>62</sup>

### ARGUMENT

Under Rule 65 of the Federal Rules of Civil Procedure, a movant is entitled to temporary restraining order to preserve the status quo—here, the health and lives of the Jena Petitioners—by showing: (1) a substantial likelihood of success on the merits of their claims for relief; (2) a substantial threat of irreparable injury absent the injunction; (3) that the threatened injury outweighs any damage that injunction may cause the opposing party; and (4) that the injunction will not disserve public interest. *Lake Charles Diesel, Inc. v. General Motors Corp*, 328 F.3d 192, 195 (5th Cir. 2003). The Court likewise has wholly independent authority under habeas corpus, 28 U.S.C. § 2241, to order immediate release from unconstitutional confinement.

The Jena Petitioners are particularly vulnerable to severe illness and death and are likely to be exposed COVID-19 at Jena. The serious risk they face to their health is the clearest form of irreparable harm that the law recognizes. In contrast, Respondents can identify no sufficiently countervailing interest in continuing to subject those in *civil* immigration detention to such a grave health risk, particularly when effective alternatives to detention are available. Because subjecting

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<sup>61</sup> See e.g. Parsa Erfani, Caroline Lee, et. al, *A Systematic Approach To Mitigate The Spread Of COVID-19 In Immigration Detention Facilities*, Health Affairs (June 17, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20200616.357449/full/>; *Public Health Experts, Medical Doctors, Prison Experts, and Former ICE Officials Urge Releases from Immigration Detention Facilities to Control the Spread of COVID-19*, Human Rights First (Apr. 17, 2020), <https://www.humanrightsfirst.org/resource/public-health-experts-medical-doctors-prison-experts-and-former-ice-officials-urge-releases>.

<sup>62</sup> John Sandweg, *I Used to Run ICE. We Need to Release the Nonviolent Detainees*, The Atlantic Monthly (Mar. 22, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/release-ice-detainees/608536/>.

persons in civil immigration detention to such dangerous conditions of confinement is punitive, the Jena Petitioners are likely to succeed on the merits of their substantive due process claims

**I. This Court Has Jurisdiction Over the Jena Petitioners’ Motion Pursuant to Habeas and the Court’s Inherent Equitable Power.**

The Court has ample authority under 28 U.S.C. § 2241 and *independently* under Rule 65 to issue the release of detained persons—a remedy that has been ordered by numerous courts across the country. 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).

While it is clear in this Circuit that habeas authorizes challenges to the fact or duration of detention, there is more ambiguity about whether habeas – as compared to traditional civil rights remedies against state officials such as 42 U.S.C. § 1983 – authorizes challenges to conditions of confinement. *See Poree v. Collins*, 866 F.3d 235, 244 (5th Cir. 2017) (observing that “the Supreme Court has not foreclosed” habeas challenges for conditions claims and “declin[ing] to address whether habeas is available only for fact or duration claims.”); *Wilwording v. Swenson*, 404 U.S. 249, 251 (1971) (habeas challenging “living conditions and disciplinary measures” is “cognizable in federal habeas corpus”).

In any event, this habeas petition does not challenge conditions of confinement in the way this purported distinction imagines. Petitioners are not seeking judicial intervention in order to alleviate harsh conditions; it is precisely because there is no judicial possibility of remediating their unconstitutional confinement that they are challenging the very *fact* of their confinement. As such, they seek “relief from unlawful imprisonment or custody.” *Pierre v. United States*, 525 F.2d 933, 935-36 (5th Cir. 1976); *see Gatu Njuguna v. Staiger*, No. 6:20-CV-00560, 2020 WL 3425289, at \*5 (W.D. La. June 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”); *Tamayo Espinoza v. Gillis*, No. 5:20-CV-106-DCB-MTP, 2020 WL 2949779, at \*2 (S.D. Miss. June 3, 2020) (“Here, the requested relief, immediate release from detention, permits the petitioners to proceed with their habeas petition.”); *Dada v. Witte*, No. 1:20-CV-00458, 2020 WL 2614616, at \*1 (W.D. La. May 22, 2020); *Vazquez Barrera v. Wolf*, No. 4:20-CV-1241, 2020 WL 1904497, at \*4 (S.D. Tex. Apr. 17, 2020). Habeas confers “broad discretion in conditioning a judgment granting habeas relief . . . ‘as law and justice require’.” *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987) (quoting 28 U.S.C. § 2243). That authority includes an order of release, *Boumediene v. Bush*, 553 U.S. 723, 779 (2008), so as “to insure that miscarriages of justice . . . are surfaced and corrected.” *Harris*, 394 U.S. at 291.

Separately, under Rule 65 and a court’s inherent equitable authority to remedy unconstitutional government conduct, courts may issue “orders placing limits on a prison’s population.” *Brown v. Plata*, 563 U.S. 493, 511 (2011); *see also Duran v. Elrod*, 713 F.2d 292, 297- 98 (7th Cir. 1983), *cert. denied*, 465 U.S. 1108 (1984) (affirming order releasing low-bond individuals in pretrial detention as necessary to reach a population cap); *Mobile Cty. Jail Inmates v. Purvis*, 581 F. Supp. 222, 224-26 (S.D. Ala. 1984) (exercising remedial powers to order a prison’s population reduced to alleviate unconstitutional conditions).

## **II. The Jena Petitioners Will Suffer Irreparable Harm in the Absence of a Temporary Restraining Order.**

“Perhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered.” *Monumental Task Comm., Inc. v. Foxx*, 157 F. Supp. 3d 573, 582–83 (E.D. La. 2016), *aff’d sub nom. Monumental Task Comm., Inc. v. Chao*, 678 F. App’x 250 (5th Cir. 2017) (quotations omitted). The Fifth Circuit requires only a “substantial threat” of

irreparable injury, *DSC Commc'ns Corp. v. DGI Techs., Inc.*, 81 F.3d 597, 600 (5th Cir.1996), which is defined as “harm for which there is no adequate remedy at law,” such as monetary damages. *Daniels Health Scis., L.L.C. v. Vascular Health Scis., L.L.C.*, 710 F.3d 579, 585 (5th Cir. 2013).

Without emergency relief from this Court, the Jena Petitioners face a substantial threat of imminent and irreparable injury, including death—harms no court can otherwise remediate. *See Turner v. Epps*, 842 F. Supp. 2d 1023, 1028 (S.D. Miss. 2012), *vacated on other grounds*, 460 Fed. App'x 322 (5th Cir. 2012), (referring to “death itself” as the “single most irreparable harm of all”); *Chambers v. Coventry Health Care of Louisiana, Inc.*, 318 F. Supp. 2d 382 (E.D. La. 2004) (irreparable harm found where late detection of cancer could lead to death). Short of death, Petitioners are at grave risk of contracting or exacerbating severe and potentially long-term medical conditions,<sup>63</sup> which also establishes irreparable harm. *See, e.g., M.R. v. Dreyfus*, 697 F.3d 706, 729 (9th Cir. 2012); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996); *see also Unknown Parties v. Johnson*, No. CV-15-00250-TUC (DCBx), 2016 WL 8188563, at \*15 (D. Ariz. Nov. 18, 2016), *aff'd sub nom Doe v. Kelly*, 878 F.3d 710 (9th Cir. 2017) (irreparable harm where evidence demonstrated “medical risks associated with . . . being exposed to communicable diseases”). Short of release, there are no sufficient measures—preventative or palliative—that Respondents can implement to protect the Jena Petitioners.

Petitioners can also demonstrate irreparable harm through a showing, *see infra* Section III, that Respondents have violated their constitutional rights. *See Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 295 (5th Cir. 2012).

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<sup>63</sup> *What we know (so far) about the long-term health effects of Covid-19*, Advisory Board (June 2, 2020), <https://www.advisory.com/daily-briefing/2020/06/02/covid-health-effects>.

### III. The Jena Petitioners Are Likely To Succeed On Their Due Process Claims.

When the State holds individuals in its custody, the Constitution imposes an obligation to provide for their basic human needs, including medical care and reasonable safety. *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 199–200 (1989).

The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.

*Id.* (citations omitted); *accord Hare v. City of Corinth, Miss.*, 135 F.3d 320, 326 (5th Cir. 1998).

Because they are in civil detention, Petitioners have a right to be free from punitive conditions of detention. A person in civil immigration detention has due process rights that are similar to those of a person detained in pretrial detention prior to adjudication of guilt. *Edwards v. Johnson*, 209 F.3d 772, 778 (5th Cir. 2000).<sup>64</sup> While the Eighth Amendment protects individuals in prison from “cruel and unusual” punishment, due process mandates that those in civil detention not be punished at all. *Hare*, 74 F.3d at 639. Once civil detention becomes punitive, substantive due process requires release. *See Foucha v. Mississippi*, 504 U.S. 71, 86 (1992) (ordering petitioner's release from commitment to mental institution because there was no longer any evidence of mental illness); *Zadvydas v. Davis*, 533 U.S. 678, 694 (2001).

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<sup>64</sup> Some courts have held that individuals in immigration detention have greater protections than those in pretrial detention because immigration detention does not implicate penological interests associated with criminal confinement or suspicion. *In re Kumar*, 402 F. Supp. 3d 377, 384 (W.D. Tex. 2019); *Jones v. Blanas*, 393 F.3d 918, 933 (9th Cir. 2004). The *Kumar* court applied the *Youngberg* civil commitment standard to the immigration detention context, which asks whether “Defendants’ conduct was ‘such a substantial departure from accepted professional judgment, practice, or standards in the care and treatment of this Petitioner.’” *Youngberg v. Romeo*, 457 U.S. 307, 314 (1982). There can be *no* professional medical or penological judgment that could reasonably support the continued detention of medically compromised individuals in immigration detention in crowded, precarious conditions that subject them to a high risk of contagion, illness or death.

A condition of detention amounts to impermissible punishment when it “is not reasonably related to a legitimate goal,” if it is “excessive” in relation to a legitimate goal, or if it is otherwise “arbitrary or purposeless”—then “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, 538-39 (1979). To make this showing, an individual in detention need not demonstrate subjective or malicious intent to punish. *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 an individual in detention to the risk of serious injury or death likewise amounts to punishment. *Shepherd*, 591 F.3d at 454.

In *Shepherd*, the Fifth Circuit found that a “jail’s evaluation, monitoring, and treatment of inmates with chronic illness was [...] grossly inadequate due to poor or non-existent procedures and understaffing of guards and medical personnel,” that “serious injury and death were the inevitable results of the jail’s gross inattention to the needs of inmates with chronic illness,” and that this amounted to punishment. 591 F.3d at 454. Similarly, in *Duvall v. Dallas Cty., Tex.*, the Fifth Circuit affirmed a finding that Dallas County had an unconstitutionally punitive custom or policy when it failed to take necessary measures to eradicate Methicillin-Resistant *Staphylococcus Aureus* (MRSA) in its jail. 631 F.3d 203, 208-209 (5th Cir. 2011).

Indeed, many district courts, including courts in the Fifth Circuit, have found that continuing to hold medically vulnerable individuals in ICE detention centers in the midst of COVID-19 outbreaks violates due process. *See e.g.*, Report and Recommendation, *Menjivar v.*



*Staiger*, No. 6:20-CV-00807 SEC P (W.D. La. Sept. 2, 2020), ECF No. 22; *Dada*, 2020 WL 2614616, at \*1 (releasing high-risk detained immigrants in ICE detention facilities across Louisiana due to COVID-19 risks); *Vazquez Barrera* 2020 WL 1904497, at \*10; (releasing detained immigrants in a Texas facility due to COVID-19 risk); *Basank v. Decker*, No. 1:20-cv-02518-AT, 2020 WL 1481503 (S.D.N.Y. Mar. 26, 2020) (ordering 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”); *Frailhat 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”); *United States v. Ramos*, No. 18-CR-300009-FDS, 2020 WL 14778307, at \*1 (D. Mass. Mar. 25, 2020) (“[I]t 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”).<sup>65</sup>

Continuing to detain Petitioners in conditions that impose a substantial risk of illness or death is excessive in relation to the legitimate purpose for their detention. The Supreme Court has held that immigration detention is permissible to ensure the immigrant’s participation in their

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<sup>65</sup> Courts maintain this authority to order those detained in violation of their due process rights released, notwithstanding 8 U.S.C. § 1226(c). See *Cabral v. Decker*, 331 F. Supp. 3d 255, 259 (S.D.N.Y. 2018) (collecting cases).

removal proceedings, to prevent flight, and to otherwise protect the community. *Zadvydas*, 533 U.S. at 690 (2001); *Demore v. Kim*, 538 U.S. 510, 528 (2003). However, for individuals who are at high risk for serious illness or death from COVID-19, protection from the virus is a matter of life or death. Yet Respondents continue to detain Petitioners while an outbreak rages inside Jena, in part because of Respondents' refusal and inability to follow CDC guidelines and in part because of the particularly tenacious nature of COVID-19 itself. This fate is excessive given the alternatives.

Respondents can assure Petitioners' appearance in proceedings and for removal by placing them in ICE's intensive supervision programs, which boast attendance rates over 90 percent.<sup>66</sup> Nor is there any significant fear of danger to the community in this case as Petitioners lack criminal history. And, as explained below, community safety does not require their continued detention—instead, it compels the opposite.

Given the cramped, unsanitary, and irremediable conditions at Jena, Petitioners face a substantial risk of contracting COVID-19. Once they are exposed, they are all vulnerable to severe illness or death, either because of their age, or their underlying medical conditions. Continued detention of Petitioners is an imminent threat to their lives that is clearly excessive in relation to any purported government goal, and therefore amounts to punishment.

#### **IV. The Balance Of The Equities And The Public Interest Favor the Jena Petitioners' Release.**

Where, as here, the Government is a party to the case, the third and fourth injunction factors—the balance of the equities and the public interest—merge. *Nken v. Holder*, 556 U.S. 418,

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<sup>66</sup> See, e.g., *Immigration: Progress and Challenges in the Management of Immigration Courts and Alternatives to Detention Program*, U.S. Government Accountability Office (Sept. 18, 2018), <https://www.gao.gov/products/GAO-18-701T>; *Alternatives To Detention: Improved Data Collection and Analyses Needed to Better Assess Program Effectiveness*, U.S. Government Accountability Office (Nov. 13, 2014), <https://www.gao.gov/products/GAO-15-26>.

435 (2009). As an initial matter, the public interest is served by the protection of constitutional rights. *See Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996).

In addition, an injunction would also protect public health and safety, paramount considerations that weigh heavily in favor of an injunction. *See Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 472 (5th Cir. 2017); *see also Grand River Enterprises Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 169 (2d Cir. 2005) (referring to “public health” as a “significant public interest”); *Pashby v. Delia*, 709 F.3d 307, 331 (4th Cir. 2013) (“the public interest in this case lies with safeguarding public health”)

The balance of equities strongly tilts in Petitioners’ favor as the public is served by preventing further outbreak at Jena. The Southern District of Texas correctly explained the public interest in release from ICE detention as follows:

An outbreak among the MPC detainee population will inevitably spread through the surrounding community, as MPC staff members, who live outside the detention facility, will be exposed to sick detainees. Additionally, an outbreak in MPC will put additional strain on hospitals and health care resources in the community, which are already straining to care for the community at large during the pandemic.

*Vazquez Barrera*, 2020 WL 1904497, at \*7; *see also Thakker*, 2020 WL 1671563 at \*9 (“Efforts to stop the spread of COVID-19 and promote public health are clearly in the public’s best interest, and the release of these fragile Petitioners from confinement is one step further in a positive direction.”). To that point, a May 2020 study released in the *Journal of Urban Health* found that “granting ICE detainees widespread release from an unsafe environment by returning them to the community” would “minimize negative health outcomes in the communities that support ICE’s detention facilities with health care resources.”<sup>67</sup>

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<sup>67</sup> Irvine, Michael *et al.*, *Modeling COVID-19 and Its Impacts on U.S. Immigration and Customs Enforcement (ICE) Detention Facilities*, 2020, *Journal of Urban Health* (May 15, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7228433/>.

Even if release did not benefit the government, however, the risk of catastrophic medical consequences to Petitioners would still tilt the equities in their favor. *See Hernandez v. Sessions*, 872 F.3d 976, 996 (9th Cir. 2017) (“Faced with such a conflict between financial concerns and preventable human suffering, we have little difficulty concluding that the balance of hardships tips decidedly in Petitioners’ favor.”).

**V. The Court Should Not Require the Jena Petitioners To Provide Security Prior To Issuing A Temporary Restraining Order.**

Federal Rule of Civil Procedure 65(c) provides that a court “may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.” The Fifth Circuit has determined that “the amount of security required pursuant to Rule 65(c) ‘is a matter for the discretion of the trial court,’” and that “the court ‘may elect to require no security at all.’” *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 628 (5th Cir. 1996) (quoting *Corrigan Dispatch Company v. Casa Guzman*, 569 F.2d 300, 303 (5th Cir. 1978)).

District courts routinely exercise this discretion to require no security in cases brought by indigent and/or incarcerated people. *See, e.g., Cole v. Livingston*, No. 4:14-CV-1698, 2016 U.S. Dist. LEXIS 80345, at \*23 (S.D. Tex. June 21, 2016) (state prisoners), *vacated on other grounds, Yates v. Collier*, 677 F. App’x 915 (5th Cir. 2017); *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 385 n. 42 (C.D. Cal. 1982) (detained immigrants). This Court should do the same here.

**CONCLUSION**

For the foregoing reasons, the Jena Petitioners respectfully request that this Court grant the motion for a temporary restraining order and order their immediate release from custody.

Dated: October 9, 2020

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 9, 2020, I electronically filed the foregoing document and accompanying motion, exhibits, and proposed order with the Clerk of the Court using the CM/ECF system. I further certify that I spoke with AUSA E. Henry Byrd, IV on the telephone and advised him of this filing on October 9, 2020, prior to its filing. In addition, I will email copies of these documents to AUSAs Jerry Edwards and E. Henry Byrd, IV at the following email addresses at the U.S. Attorney's Office for the Western District of Louisiana:

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Dated: October 9, 2020

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