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13 **UNITED STATES DISTRICT COURT**
14 **CENTRAL DISTRICT OF CALIFORNIA**

15 KELVIN HERNANDEZ ROMAN,
16 BEATRIZ ANDREA FORERO
CHAVEZ, MIGUEL AGUILAR
17 ESTRADA, on behalf of themselves and
all others similarly situated,

18 Petitioners-Plaintiffs,

19 v.

20 CHAD F. WOLF, Acting Secretary, U.S.
Department of Homeland Security;
21 MATTHEW T. ALBENCE, Deputy
Director and Senior Official Performing
22 the Duties of the Director, U.S.
Immigration and Customs Enforcement;
23 DAVID MARIN, Director of the Los
Angeles Field Office, Enforcement and
24 Removal Operations, U.S. Immigration
and Customs Enforcement; and JAMES
25 JANECKA, Warden, Adelanto ICE
Processing Center,

26 Respondents-Defendants.
27
28

) Case No. 5:20-cv-00768

) **ADELANTO COVID**

) **KELVIN HERNANDEZ
ROMAN'S EX PARTE
APPLICATION FOR
TEMPORARY RESTRAINING
ORDER**

1 Pursuant to Rule 65(b) of the Federal Rules of Civil Procedure and Local
2 Rule 65-1, Plaintiff-Petitioner Kelvin Hernandez Roman hereby moves this court
3 for emergency relief in the form of a temporary restraining order directing that he
4 be immediately released from his current confinement at the Adelanto ICE
5 Processing Center, under appropriate conditions as may be deemed necessary by
6 the Court, in light of the serious risks to his health and safety posed by the current
7 COVID-19 pandemic. This Application is supported by the accompanying
8 Memorandum of Points and Authorities, Petition for Writ of Habeas Corpus and
9 Complaint for Injunctive and Declaratory Relief, and by Declarations and Exhibits
10 filed contemporaneously.

11 On April 13, at 10:13 am, counsel for Plaintiffs emailed Assistant United
12 States Attorney Joanne Osinoff to advise of this Ex Parte Application for
13 Temporary Restraining Order. Ms. Osinoff informed counsel for Plaintiffs that the
14 United States Attorney's Office intends to oppose this application.

15
16 Respectfully submitted,

17
18 Dated: April 13, 2020

/s/ Amanda Barnett
AMANDA BARNETT
Counsel for Plaintiffs-Petitioners

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25 and Customs Enforcement; and JAMES
26 JANECKA, Warden, Adelanto ICE
Processing Center,

27 Respondents-Defendants.
28

) Case No. 5:20-cv-00768

) **ADELANTO COVID**

) **PLAINTIFF KELVIN**
) **HERNANDEZ ROMAN'S**
) **MEMORANDUM OF POINTS**
) **AND AUTHORITIES IN**
) **SUPPORT OF MOTION FOR**
) **TEMPORARY RESTRAINING**
) **ORDER**

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1 **I. INTRODUCTION**

2 Petitioner-Plaintiff Kelvin Hernandez Roman (“Plaintiff”) is a civil detainee
 3 in the Adelanto ICE Processing Center (“Adelanto”). Plaintiff is a class
 4 representative of the Proposed Class seeking a preliminary injunction. While the
 5 motion for preliminary class-wide relief is pending, Plaintiff seeks a temporary
 6 restraining order granting his release from Adelanto.

7 This Court has recognized the gravity of the threat posed by continued
 8 detention at Adelanto and held that “[u]nder the Due Process Clause, a civil detainee
 9 cannot be subject to the current conditions of confinement at Adelanto.” *Castillo v.*
 10 *Barr*, No. CV 20-00605 TJH, 2020 WL 1502864 (“*Castillo TRO*”), at *5 (C.D. Cal.
 11 Mar. 27, 2020). Accordingly, the Court has issued temporary restraining orders and
 12 released at least two dozen individuals and placed them under appropriate conditions
 13 of confinement outside of Adelanto.¹

14 _____
 15 ¹ See, e.g., *Castillo v. Barr* (“*Castillo TRO*”), No. CV 20-00605 TJH (AFMx),
 16 2020 WL 1502864, at *11 (C.D. Cal. Mar. 27, 2020) (ordering two detainees
 17 released); TRO and Order to Show Cause at 12, *Fraihat v. Wolf* (“*Fraihat TRO*”),
 18 No. ED-CV2000590-TJH (C.D. Cal. Mar. 30, 2020) (ordering a detainee released);
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 23 2, *Munoz v. Wolf*, Case No. EDCV 20-00625 TJH (SHKx) (C.D. Cal. Apr. 2,
 24 2020), ECF No. 14; *Robles Rodriguez v. Wolf*, No. 5:20-CV-00527 (C.D. Cal. Apr.
 25 3, 2020) ECF Nos. 35-39, 42-43 (granting temporary restraining orders on behalf
 26 of six Adelanto detainees); TRO and Order to Show Cause at 2, *Perez Cruz v.*
 27 *Barr*, Case No. EDCV 20-00668 TJH (C.D. Cal. Apr. 3, 2020), ECF No. 8; TRO
 28 and Order to Show Cause at 2, *Singh v. Barr*, Case No. EDCV 20-00653 TJH
 (C.D. Cal. Apr. 3, 2020), ECF No. 11; TRO and Order to Show Cause at 2, *Nguyen*
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 No. 5:20-cv-00702 (TJH) (C.D. Cal. Apr. 8, 2020), ECF No. 12; TRO and Order to
 Show Cause, *Moreno v. Wolf*, Case No. 5:20-cv-00718 (TJH) (C.D. Cal. Apr. 9,
 2020), ECF No. 13.

1 Plaintiff is similarly situated to these other Adelanto detainees. He also suffers
 2 from asthma, making him at particular risk if he contracts COVID-19. The Court
 3 should grant Plaintiff's release pending the determination of the class-wide
 4 preliminary injunction.

5 **II. FACTS²**

6 **A. COVID-19 Poses Grave Risk Of Harm To Plaintiff**

7 COVID-19 is a deadly pandemic. In the short time since the first cases
 8 emerged in Wuhan, China, late last year, COVID-19 has spread around the globe at
 9 breakneck speed. Because humans have never been exposed to this virus, they have
 10 not developed any immunities or protective responses, and thus everyone is at risk
 11 of infection.³ In fact, although certain characteristics such as advanced age or
 12 underlying health conditions exacerbate the risk of death or serious illness from
 13 COVID-19, early CDC data shows nearly 40% of COVID-19 patients hospitalized
 14 in the U.S. have been between the ages of 18 and 54. Decl. of Dr. Todd Schneberk
 15 in Supp. of Mot. for a Prelim. Inj. ("Schneberk Decl.") ¶¶ 14, 16. In New York,
 16 approximately one-third of the patients between the ages of 30 and 39 who died from
 17 COVID-19 did not appear to have any risk factors, Schneberk Decl. ¶ 17, and
 18 physicians treating COVID-19 have noted the "randomness" with regard to which
 19 young people are unable to survive contraction of the illness.⁴

20 There is no vaccine, antiviral treatment, or cure for COVID-19. The disease
 21 is believed to spread through "droplets" that can be transmitted during close

22
 23 ² Plaintiff incorporates by reference the factual background discussed in the
 24 accompanying Memorandum in Support of Plaintiffs' Motion for a Preliminary
 Injunction.

25 ³ See Melissa Davey, *What is a pandemic and does it change the approach to*
coronavirus?, The Guardian (Mar. 14, 2020),
 26 [https://www.theguardian.com/world/2020/mar/14/what-is-a-pandemic-](https://www.theguardian.com/world/2020/mar/14/what-is-a-pandemic-coronavirus-covid-19)
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27 ⁴ Chris Mooney, Brady Dennis and Sarah Kaplan, *Hundreds of young Americans*
have now been killed by the coronavirus, data shows, Washington Post (Apr. 8,
 28 2020), [https://www.washingtonpost.com/health/2020/04/08/young-people-](https://www.washingtonpost.com/health/2020/04/08/young-people-coronavirus-deaths/)
[coronavirus-deaths/](https://www.washingtonpost.com/health/2020/04/08/young-people-coronavirus-deaths/).

1 interpersonal contact of about six feet. Decl. of Dr. Robert B. Greifinger in Supp. of
2 Mot. for a Prelim. Inj. (“Greifinger Decl.”) ¶ 5; Schneberk Decl. ¶¶ 7–8. And
3 evidence shows individuals infected with COVID-19 can transmit it to others even
4 if they have no symptoms. Schneberk Decl. ¶ 9. Because of its highly contagious
5 nature, the only known effective measure to reduce the risk of injury or death from
6 COVID-19 is to prevent people from being infected in the first place. Greifinger
7 Decl. ¶ 4. In the absence of a comprehensive testing regime, “social distancing,” or
8 maintaining six feet of separation at all times from other people, is the *only* effective
9 means of stopping the spread of the disease in the long run. Greifinger Decl. ¶ 4;
10 Schneberk Decl. ¶ 39.

11 **B. Plaintiff Kelvin Hernandez Roman Faces an Imminent and**
12 **Substantial Risk of Contracting COVID-19 in Adelanto**

13 Dr. Greifinger explains that “[j]ails and detention centers are congregate
14 environments where the risk of infection and infectious spread is extremely high.”
15 Greifinger Decl. ¶ 12. At Adelanto, as in other similar environments, there is a
16 heightened risk of infection due to the lack of adequate hygiene and the inability of
17 detainees to practice social distancing. *Id.* ¶¶ 13–15; *see also* Schneberk Decl. ¶ 38
18 (“Because of the structure and conditions at Adelanto, detainees face a dramatically
19 reduced ability to protect themselves by social distancing than they would in the
20 community, and therefore face a significantly higher risk of being exposed to and
21 infected by contagious diseases like COVID-19.”). Defendants’ own medical subject
22 matter experts have recognized that conditions like those present currently at
23 Adelanto amount to a “tinderbox scenario” for the rapid spread of COVID-19. *See*
24 Letter from Drs. Scott A. Allen & Josiah Rich to Rep. Bennie Thompson, et al. (Mar.
25 19, 2020), available at [https://www.documentcloud.org/documents/6816336-](https://www.documentcloud.org/documents/6816336-032020-Letter-From-Drs-Allen-Rich-to-Congress-Re.html#document/p4/a557238)
26 [032020-Letter-From-Drs-Allen-Rich-to-Congress-Re.html#document/p4/a557238](https://www.documentcloud.org/documents/6816336-032020-Letter-From-Drs-Allen-Rich-to-Congress-Re.html#document/p4/a557238);
27 *see also* Schneberk Decl. ¶¶ 23–35; Greifinger Decl. ¶¶ 12–18.

28 Similar conditions have led to disastrous results in other congregate facilities.

1 In three weeks across March and April, the jail at Rikers Island in New York jumped
 2 from no cases among inmates to 273 cases, a higher rate of infection than in the most
 3 infected places in the world; four corrections staff members and one inmate have
 4 died. Suppl. Greifinger Decl. ¶ 13. The Cook County Jail has likewise seen an
 5 alarming rise in cases: the Jail went from two confirmed inmate cases on March 23,
 6 2020, to 234 confirmed inmate cases on April 7, 2020; one inmate has died. *Id.* ¶ 14.
 7 As of April 13, 2020, there were at least 72 confirmed cases among detainees in ICE
 8 custody, including twelve at the Otay Mesa Detention Center in San Diego.⁵
 9 According to detainees and their lawyers, officials at Otay Mesa initially refused to
 10 give masks to detainees unless they signed a waiver releasing the prison contractor
 11 from liability.⁶

12 Dr. Greifinger details the numerous ways in which ICE’s response to the
 13 significant challenge of dealing with a pandemic in a detention setting has been
 14 “wholly inadequate.” Greifinger Decl. ¶¶ 17–24. The descriptions of other class
 15 members and individuals recently released from Adelanto confirm ICE’s utter
 16 failure to protect those who are detained there. Despite the crowded, communal
 17 facilities, detainees have no access to masks. *See* Decl. of Paola Rayon Vite in Supp.
 18 of Mot. for a Prelim. Inj. (“Rayon Vite Decl.”) ¶ 13; Decl. of Luis Lopez Salgado in
 19 Supp. of Mot. for a Prelim. Inj. (“Lopez Salgado Decl.”) ¶¶ 20, 21; Decl. of
 20 Charleston Edward Dacoff in Supp. of Mot. for a Prelim. Inj. (“Dacoff Decl.”) ¶¶
 21 28, 29; Decl. of Ruth Calvillo in Supp. of Mot. for a Prelim. Inj. (“Calvillo Decl.”)
 22 ¶¶ 20, 22.⁷ Guards and medical staff generally do not wear masks, though they

23
 24 ⁵ U.S. Immigration and Customs Enforcement, *Confirmed Cases*, ICE Guidance on
 COVID-19 (last updated Apr. 13, 2020, 11:43 a.m.),
<https://www.ice.gov/coronavirus> (click on “Confirmed Cases”).

25 ⁶ Kate Morissey, *Detainees at Otay Mesa Detention Centers were offered masks,*
 26 *but only if they signed contracts*, San Diego Tribune (Apr. 10, 2020),
[https://www.sandiegouniontribune.com/news/immigration/story/2020-04-10/otay-](https://www.sandiegouniontribune.com/news/immigration/story/2020-04-10/otay-mesa-detention-center-gets-masks-but-asks-detainees-to-sign-contract-first)
 27 [mesa-detention-center-gets-masks-but-asks-detainees-to-sign-contract-first](https://www.sandiegouniontribune.com/news/immigration/story/2020-04-10/otay-mesa-detention-center-gets-masks-but-asks-detainees-to-sign-contract-first).

28 ⁷ ICE has placed severe restrictions on attorneys’ ability to access their clients at
 Adelanto, including limitations on in-person visits unless attorneys bring their own

1 frequently stand in close proximity to detained individuals. *See* Calvillo Decl. ¶¶ 13,
2 20–21; Lopez Salgado Decl. ¶ 19; Rayon Vite Decl. ¶ 13; *see also* Schneberk Decl.
3 ¶ 29. Staff arrive and leave on a shift basis, and new detainees continue to arrive at
4 the facility, but there is no attempt to test staff or detainees for asymptomatic
5 infection. Schneberk Decl. ¶ 29; Greifinger Decl. ¶ 22; Dacoff Decl. ¶ 32; *see also*
6 Valdez Decl. ¶ 14. Even detainees who are experiencing symptoms of COVID-19,
7 such as fever and cough, are not tested. Declaration of Jose Hernandez Velasquez
8 (“Hernandez Velasquez Decl.”) ¶ 18; *accord* Rayon Vite Decl. ¶¶ 18–19; Dacoff
9 Decl. ¶ 32.

10 Plaintiff’s experience has been no different. Plaintiff has not been able to
11 practice social distancing because there is not enough space in his cell. Decl. of Lesly
12 Gaona (“Gaona Decl.”) ¶ 15. Moreover, all detainees, including Plaintiff, share
13 toilets, sinks, and showers with others in their dormitories and pods, without
14 disinfection after each use. Schneberk Decl. ¶ 28; Rayon Vite Decl. ¶¶ 9–11; Lopez
15 Salgado Decl. ¶¶ 11–14; Dacoff Decl. ¶¶ 8–13; Robles Rodriguez Decl. ¶¶ 9–11.
16 Showers are typically crowded with people and placed so closely together that, when
17 standing in one shower stall, “you could reach out your hand and press the button
18 for the shower adjacent to yours.” Dacoff Decl. ¶¶ 14; 18. Again, in the opinions of
19 Plaintiffs’ medical experts, it is not possible “to achieve adequate social distancing

20 _____
21 personal protective equipment, which is obviously in very short supply. *See*
22 Motion for TRO at 10-17, *Torres v. Nielsen*, Case No. 18-cv-02602 (C.D. Cal),
23 Dkt. No. 127-1 (describing current limitations on attorney-client communication at
24 Adelanto and seeking emergency relief to ensure detainees maintain basic access to
25 counsel during the COVID-19 pandemic); Decl. of Gabriel Valdez (“Valdez
26 Decl.”) ¶ 26, *Robles Rodriguez v. Wolf*, Case No. 5:20-cv-00627-TJH-GJS (C.D.
27 Cal. Apr. 7, 2020), ECF No. 45-1. In addition, ICE currently provides no effective
28 way for attorneys to conduct confidential calls with clients detained at Adelanto.
See Mot. for TRO at 10-17, *Torres v. Nielsen*, Case No. 18-cv-02602 (C.D. Cal.
Mar. 26, 2020), ECF No. 127-1. A temporary restraining order requiring that the
government take steps to improve access to counsel at Adelanto was granted on
April 11, 2020. *Torres v. Nielsen*, Case No. 18-cv-02602 (C.D. Cal. Apr. 11,
2020), ECF No. 144. As a result, and because of the urgency of the situation, in
lieu of declarations from Plaintiffs-Petitioners themselves, the attorneys
representing Plaintiff-Petitioners in their administrative removal proceedings have
provided declarations describing the facts of their cases.

1 and hygiene in communal bathroom[s]” unless “people [are] at least six feet apart at
2 all times” and the “facilities [are] thoroughly disinfected after each use”—which is
3 impossible if 72 people are confined to single shower area. Schneberk Decl. ¶ 28;
4 *see also* Greifinger Decl. ¶ 26.

5 Absent Court intervention, Plaintiff will not be able to practice social
6 distancing while detained in Adelanto. The Government has expressed in numerous
7 filings before this Court that it has no intention of engaging in meaningful social
8 distancing at Adelanto, dismissing such practices as “idealized safety
9 precaution[s].”⁸ ICE’s practice and attitude is an aberration. Multiple jurisdictions,
10 including Los Angeles, CA, Chicago, IL, Harris County, TX, New York City, and
11 the entire states of New Jersey and Iowa have released thousands of people from
12 *criminal* custody, acknowledging the grave threat that an outbreak in jails and
13 detention centers poses.⁹ Other public officials have likewise called for the release
14 of eligible individuals from detention. For example, the former Acting Director of
15 ICE, John Sandweg, has advocated releasing individuals to combat the spread of
16 COVID-19 in detention centers, and has stated “ICE has the operational capacity to
17 quickly and drastically reduce the population of civil immigration detainees.”
18 Motion for TRO Ex. 19, Sandweg Decl. ¶ 9, *Thompson v. Tsoukaris*, Case No. 1:20-
19 cv-01449-SDG (N.D. Ga. Apr. 3, 2020), ECF No. 4-20.

20 C. Plaintiff Hernandez Roman

21 Kelvin Hernandez Roman is a 31-year old citizen of El Salvador. Decl. of
22 Erika Roman in Supp. of Mot. for a Prelim. Inj. (“Roman Decl.”) ¶ 8. He has been
23 detained in Adelanto since July 2019. *Id.* ¶ 6. Mr. Roman has been diagnosed with
24 asthma and prescribed an inhaler. Gaona Decl. ¶ 12. Approximately four times a
25 year he has a severe asthma attack, requiring trips to the emergency room. *Id.* ¶ 12.

26 ⁸ Reply to Order to Show Cause (“*Robles Rodriguez Gov’t Reply*”) at 12, *Robles*
27 *Rodriguez v. Wolf*, No. 5:20-cv-00627-TJH (C.D. Cal. Apr. 8, 2020), ECF No. 45.

28 ⁹ *See Responses to COVID-19 pandemic*, Prison Policy Initiative (Apr. 10, 2020),
<https://www.prisonpolicy.org/virus/virusresponse.html#releases> (collecting
instances where jails and prisons have released detainees due to COVID-19).

1 He has had trouble getting treatment for his asthma at Adelanto. *Id.* ¶ 13. Recently,
2 when he woke in the night with trouble breathing, officers refused to take him to a
3 doctor until the next morning. *Id.* When his inhaler ran out it took about 4-5 days to
4 get a new one. *Id.* ¶ 14. If Mr. Roman is released, he will live with his U.S. citizen
5 wife and three young children. *Id.* ¶ 16. He will be able to self-quarantine for 14 days
6 in a separate room, using a separate bathroom. *Id.*

7 Mr. Hernandez Roman's criminal history consists of two 2016 convictions for
8 false imprisonment and misdemeanor child endangerment. Roman Decl. ¶ 11. Mr.
9 Hernandez Roman's wife explains that the convictions arose from an incident in
10 which, following an argument between herself and her husband, he drove her car
11 one block while their daughter and her friend were inside, then parked and
12 immediately brought their daughter and the car keys back to her. Gaona Decl. ¶¶ 3-
13 8. Mr. Hernandez Roman did not hurt or threaten anyone during the incident, for
14 which he served eight days in jail. *Id.* He has since completed 25 parenting classes
15 and is committed to being a good, responsible father to his children. Roman Decl. ¶
16 13, Exh. B.

17 **III. LEGAL STANDARD**

18 Plaintiffs are entitled to a temporary restraining order if they show: (1) a
19 likelihood of success on the merits; (2) they are likely to suffer irreparable harm in
20 the absence of relief; (3) the balance of equities tips in their favor; and, (4) an
21 injunction is in the public interest. *See Winter v. Nat. Res. Def. Council, Inc.*, 555
22 U.S. 7, 20 (2008); *Stuhlberg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832,
23 839 n.7 (9th Cir. 2001) (noting that preliminary injunction and temporary restraining
24 order standards are "substantially identical"). The Ninth Circuit employs a sliding
25 scale approach, in which a stronger showing of one element may offset a weaker
26 showing of another. *See Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012).
27 Thus, a temporary restraining order may issue where "serious questions going to the
28 merits [are] raised and the balance of hardships tips sharply in [plaintiffs'] favor."

1 *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (citation
2 omitted) (alteration in original). To succeed under the “serious question” test,
3 plaintiffs must show that they are likely to suffer irreparable injury and that an
4 injunction is in the public’s interest. *Id.* at 1132.

5 **IV. ARGUMENT**

6 In multiple orders over the past two weeks, this Court has recognized that
7 “[u]nder the Due Process Clause, a civil detainee cannot be subject to the current
8 conditions of confinement at Adelanto.” *Castillo* TRO, at *5. Those conditions
9 include “sleeping rooms housing four or six detainees with shared sinks, toilets and
10 showers,” potentially infected guards who “regularly rotate through the various
11 holding areas several times a day” without always donning protective equipment,
12 and “meal times” where detainees “line up together, sometimes only inches apart, in
13 the cafeteria.” *Castillo* TRO at *2, *see also Fraihat* TRO at 4–5.

14 The conditions within Adelanto are fundamentally unchanged. Plaintiff here
15 is in even greater danger today than the detainees this Court has already released
16 because the spread of COVID-19 in the area—where facility staff commute from
17 daily—has dramatically increased in recent days. Plaintiff is entitled to—and
18 desperately requires—relief for the same reasons as the individuals this Court has
19 already released. The TRO should be granted.

20 **A. Plaintiff is Likely to Succeed on the Merits**

21 **1. Plaintiff’s Continued Detention at Adelanto Violates The** 22 **Fifth Amendment Right to Reasonable Safety in** 23 **Government Custody**

24 Individuals confined by the government have a right to health and safety. *See*
25 *Youngberg v. Romeo*, 457 U.S. 307, 315–16 (1982). “The rationale for this principle
26 is simple enough: when the State by the affirmative exercise of its power so restrains
27 an individual’s liberty that it renders him unable to care for himself, and at the same
28 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

1 by the Eighth Amendment and the Due Process Clause.” *DeShaney v. Winnebago*
2 *Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 200 (1989).

3 Thus, a plaintiff establishes “a due process violation” if the Government
4 “affirmatively placed them in danger,” and “acted with deliberate indifference to a
5 known or obvious danger in subjecting them to that danger.” *Hernandez v. City of*
6 *San Jose*, 897 F.3d 1125, 1137 (9th Cir. 2018). A plaintiff need not show that the
7 relevant government officials are “subjectively aware that their [actions are]
8 unreasonable,” only that “a reasonable official in the circumstances would have
9 appreciated the high degree of risk involved.” *Gordon v. Cty. of Orange*, 888 F.3d
10 1118, 1124–25 (9th Cir. 2018). This standard requires “something akin to reckless
11 disregard.” *Id.* In systemic cases, such as this, deliberate indifference can be shown
12 by evidence of “systematic or gross deficiencies in staffing, facilities, equipment, or
13 procedures.” *Hernandez v. County of Monterey*, 305 F.R.D. 132, 152–53, 155 n. 138
14 (N.D. Cal. 2015). The key question in such cases is whether systemic deficiencies
15 “taken as whole” subject people to a “substantial risk of serious harm.” *See Brown*
16 *v. Plata*, 563 U.S. 493, 505 n.3 (2011).

17 Furthermore, it is well-settled that a detainee’s constitutional protections
18 extend to “future harm,” including a “condition of confinement that is sure or very
19 likely to cause serious illness and needless suffering the next week or month or year.”
20 *Helling v. McKinney*, 509 U.S. 25, 33 (1993). Constitutional violations therefore can
21 arise from “the exposure of inmates to a serious, communicable disease” even if “the
22 complaining inmate shows no serious current symptoms” and “even though the
23 possible infection might not affect all those exposed.” *Id.*; *see also Castillo* TRO, at
24 *4; *Hutto v. Finney*, 437 U.S. 678, 682–83, 687 (1978) (risk of exposing inmates to
25 communicable diseases such as hepatitis and venereal disease violates the Eighth
26 Amendment); *DeGidio v. Pung*, 920 F.2d 525, 526, 533 (8th Cir. 1990) (inadequate
27 screening and control procedures in response to tuberculosis outbreak violated the
28 Eighth Amendment).

1 Here, as this Court has already recognized, COVID-19 poses a substantial risk
2 of serious harm to Plaintiffs, and Defendants’ response to that imminent risk
3 constitutes reckless disregard for their safety. As this Court explained in its *Castillo*
4 TRO order, “[t]he law is clear”:

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

13 *Castillo* TRO, at *6 (internal citations omitted). After carefully surveying the
14 conditions at Adelanto, this Court held that “[u]nder the Due Process Clause, a civil
15 detainee cannot be subject to the current conditions of confinement at [the facility].”
16 *Id.* at *5. Relying on this holding, this Court has subsequently granted release to
17 more than two dozen additional detained individuals—recognizing the *continuing*
18 inadequacy of the conditions of confinement at Adelanto.

19 In its TRO orders, this Court noted at least four specific conditions that made
20 detainees at Adelanto vulnerable to COVID-19: (1) detainees were not kept “at least
21 6 feet apart from others at all times”; (2) they lived in “sleeping rooms housing four
22 or six detainees with shared sinks, toilets and showers”; (3) they had “meal times”
23 where they “line[d] up together, sometimes only inches apart, in the cafeteria”; and
24 (4) they were forced to interact with potentially infected guards who “regularly rotate
25 through the various holding areas several times a day” without protective equipment.
26 *Castillo* TRO, at *2; *Fraihat* TRO at *11, *4–5. *None* of these conditions have been
27 remedied, and Plaintiff is still subject to them. Plaintiff’s continued detention is
28 necessarily unlawful.

2. Defendants’ COVID-19 Response Subjects Plaintiff to Punitive Conditions in Violation of the Fifth Amendment

1 The conditions of Plaintiff’s detention during the COVID-19 pandemic also
2 constitute impermissible punishment in violation of the Fifth Amendment’s Due
3 Process Clause. Plaintiff is a civil detainee, and as such is entitled to “more
4 considerate treatment” and may not be subjected to punitive conditions. *See Jones*
5 *v. Blanas*, 393 F.3d 918, 931 (9th Cir. 2004) (citing *Youngberg v. Romeo*, 457 U.S.
6 307, 321–22 (1982)); *cf. Bell v. Wolfish*, 441 U.S. 520, 536–37 (1979) (holding that
7 pretrial detainees may be held in custody “so long as those conditions and
8 restrictions [of confinement] do not amount to punishment”).

9 To establish a violation of the Fifth Amendment under this doctrine, plaintiffs
10 need not show that Respondents intended to subject them to punishment. *See Pierce*
11 *v. Cty. of Orange*, 526 F.3d 1190, 1205 (9th Cir. 2008). Rather, a rebuttable
12 presumption of punitiveness arises in two circumstances: (1) “where the individual
13 is detained under conditions identical to, similar to, or more restrictive than those
14 under which pretrial criminal detainees are held,” *Jones*, 393 F.3d at 934, or (2)
15 where those conditions “are employed to achieve objectives that could be
16 accomplished in so many alternative and less harsh methods,” *id.* at 932. If plaintiffs
17 establish one of these presumptions, “the burden shifts to the defendant to show (1)
18 legitimate, non-punitive interests justifying the conditions of [the detained person’s]
19 confinement and (2) that the restrictions imposed . . . [are] not excessive in relation
20 to these interests.” *King v. County of Los Angeles*, 885 F.3d 548, 557 (9th Cir. 2018)
21 (internal quotation marks omitted).

22 Here, Plaintiff is likely to establish that Defendants violated—and continue to
23 violate—Plaintiff’s constitutional rights. First, by systemically failing to implement
24 the only known effective practice to reduce the risk of contracting COVID-19—
25 effective social distancing—Defendants subjects Plaintiff to conditions that are
26 “more restrictive than those under which pretrial criminal detainees are held.” *See*
27 *Jones*, 393 F.3d at 934. Indeed, throughout the country, jails and prisons have
28

1 released hundreds of *criminal* detainees for this reason.¹⁰ In sharp contrast, the
 2 limited measures in place at Adelanto all but assure a COVID-19 outbreak will one
 3 day occur, and ICE has not sought to release *any* detainees at Adelanto based on the
 4 threat of COVID-19 transmission.

5 Second, Plaintiff also satisfies *Jones*'s alternative test for establishing
 6 unconstitutionally punitive conditions, because the "restrictions [imposed during the
 7 COVID-19 outbreak] are 'employed to achieve objectives that could be
 8 accomplished in so many alternative and less harsh methods.'" *See Torres v. U.S.*
 9 *Dep't of Homeland Sec.*, 411 F. Supp. 3d 1036, 1065 (C.D. Cal. 2019) (quoting
 10 *Jones*, 393 F.3d at 932). As this Court explained in *Castillo*, "[t]he risk that" those
 11 released from Adelanto "will flee, given the current global pandemic, is very low,
 12
 13

14 ¹⁰ *See, e.g., US Jails Begin Releasing Prisoners to Stem COVID-19 Infections*,
 15 BBC News (Mar. 19, 2020), <https://www.bbc.com/news/world-us-canada-51947802>; Salvador Hernandez, *Los Angeles is Releasing Inmates Early and*
 16 *Arresting Fewer People Over Fears of the Coronavirus in Jails*, BuzzFeed News
 17 [https://www.buzzfeednews.com/article/salvadorhernandez/los-angelescoronavirus-](https://www.buzzfeednews.com/article/salvadorhernandez/los-angelescoronavirus-inmates-early-release)
 18 *inmates-early-release*; Julia Marsh & Ben Feuerherd, *NYC to release 40*
 19 *coronavirus-prone inmates from Rikers as early as today*, New York Post (Mar.
 20 19, 2020), [https://nypost.com/2020/03/19/nyc-to-release-40-coronavirus-prone-](https://nypost.com/2020/03/19/nyc-to-release-40-coronavirus-prone-inmates-from-rikers-as-early-as-today/)
 21 *inmates-from-rikers-as-early-as-today/*; Ryan Autullo, *Travis County Judges*
 22 *Releasing Inmates to Limit Coronavirus Spread*, Statesman (Mar. 16, 2020, 6:12
 23 PM), [https://www.statesman.com/news/20200316/travis-county-judges-releasing-](https://www.statesman.com/news/20200316/travis-county-judges-releasing-inmates-to-limit-coronavirus-spread)
 24 *inmates-to-limit-coronavirus-spread*; *San Diego & Sheriff to Release Inmates to*
 25 *Reduce Vulnerable Jail Population*, CBS News 8 (Mar. 21, 2020, 11:33 AM),
 26 [https://www.cbs8.com/article/news/health/coronavirus/san-diego-da-sheriff-to-](https://www.cbs8.com/article/news/health/coronavirus/san-diego-da-sheriff-to-release-inmates-to-reduce-vulnerable-jail-population/509-75730ca5-445a-4811-9024-6aeb1d9c2777)
 27 *release-inmates-to-reduce-vulnerable-jail-population/509-75730ca5-445a-4811-*
 28 *9024-6aeb1d9c2777*; Letter from Mike McGrath, Chief Just., Sup. Ct. of Mont., to
 Mont. Dist. Ct. Judges (Mar. 20, 2020),
[https://courts.mt.gov/Portals/189/virus/Ltr%20to%20COLJ%20Judges%20re%20C](https://courts.mt.gov/Portals/189/virus/Ltr%20to%20COLJ%20Judges%20re%20COVID-19%20032020.pdf?ver=2020-03-20-115517-333)
VID-19%20032020.pdf?ver=2020-03-20-115517-333; Ryan Deto & Ollie
 Gratzinger, *Allegheny County Jail plans to release some medically vulnerable*
inmates, but advocacy groups say it's not enough, Pittsburgh City Paper (Mar. 19,
 2020), [https://www.pghcitypaper.com/pittsburgh/allegheny-county-jail-plans-to-](https://www.pghcitypaper.com/pittsburgh/allegheny-county-jail-plans-to-releasesome-medically-vulnerable-inmates-but-advocacy-groups-say-its-notenough/Content?oid=16978582)
releasesome-medically-vulnerable-inmates-but-advocacy-groups-say-its-
notenough/Content?oid=16978582; *Cook County Jail Releases Detainees "Highly*
Vulnerable" to Coronavirus, NBC Chicago (Mar. 17, 2020),
[https://www.nbcchicago.com/news/local/cookcounty-jail-releases-detainees-](https://www.nbcchicago.com/news/local/cookcounty-jail-releases-detainees-highly-vulnerable-to-coronavirus/2238813/)
highly-vulnerable-to-coronavirus/2238813/.

1 and reasonable conditions can be fashioned to ensure their future appearance at
2 deportation proceedings.” *Castillo*, 2020 WL 1502854, at *5.

3 ICE has a range of highly effective tools at its disposal to ensure that
4 individuals report for court hearings and other appointments, including conditions
5 of supervision. *See Thaker v. Doll*, Case No. 20-cv-00480, *20–*21 (M.D. Pa. Mar.
6 31, 2020) (noting “that ICE has a plethora of means *other than* physical detention at
7 their disposal by which they may monitor civil detainees and ensure that they are
8 present at removal proceedings, including remote monitoring and remote check-
9 ins”); Decl. of Andrew Lorenzen-Strait in Supp. of Mot. for TRO ¶ 15, *Robles*
10 *Rodriguez v. Wolf*, Case No. 5:20-cv-627-TJH-GJS (C.D. Cal. Mar. 30, 2020), ECF
11 No. 22 (noting that a “government-contracted evaluation of [ICE’s Intensive
12 Supervision Appearance Program¹¹] reported a 99% attendance rate at all
13 immigration court hearings and a 95% attendance rate at final hearings”). For
14 example, ICE’s conditional supervision program, called ISAP (Intensive
15 Supervision Appearance Program), “relies on the use of electronic ankle monitors,
16 biometric voice recognition software, unannounced home visits, employer
17 verification, and in-person reporting to supervise participants to ensure supervision.”
18 *Id.* at 19. That program is so effective that a “government-contracted evaluation of
19 this program reported a 99% attendance rate at all immigration court hearings.” *Id.*
20 Under the circumstances, there is no reasonable basis to continue Plaintiff’s
21 confinement during the height of the pandemic.

22 3. The Court Has Authority to Order Plaintiff’s Release

23
24
25

26 ¹¹ The Intensive Supervision Appearance Program, or ISAP, “relies on the use of
27 electronic ankle monitors, biometric voice recognition software, unannounced
28 home visits, employer verification, and in-person reporting to supervise
participants.” Decl. of Andrew Lorenzen-Strait in Supp. of Mot. for TRO ¶ 15,
Robles Rodriguez v. Wolf, Case No. 5:20-cv-627-TJH-GJS (C.D. Cal. Mar. 30,
2020), ECF No. 22.

1 As this Court recognized in *Castillo*, Plaintiffs’ immediate release is within
2 this Court’s power. “Federal courts possess whatever powers are necessary to
3 remedy constitutional violations because they are charged with protecting these
4 rights.” *Stone v. City & Cty. of San Francisco*, 968 F.2d 850, 861 (9th Cir. 1992).
5 As a result, “[w]hen necessary to ensure compliance with a constitutional mandate,
6 courts may enter orders placing limits on a prison’s population.” *Brown v. Plata*,
7 563 U.S. 493, 511 (2011). This falls within the Court’s broad power to fashion
8 equitable remedies to address constitutional violations in government confinement.
9 *Hutto*, 437 U.S. at 687 n.9. Moreover, as this Court has explained, “[t]he risk that
10 [Plaintiffs], here, will flee, given the current global pandemic, is very low, and
11 reasonable conditions can be fashioned to ensure their future appearance at
12 deportation proceedings.” *Castillo* TRO, at *5. It will be safer for everyone –
13 Plaintiff, Adelanto detainees and staff, and the surrounding community – if Plaintiff
14 is released.

15 **B. Plaintiff Satisfies the Remaining Factors for a Temporary**
16 **Restraining Order**

17 **1. Exposure to a Lethal Virus Which Lacks Any Vaccine,**
18 **Treatment, or Cure Constitutes Irreparable Harm**

19 As this Court explained in *Castillo* and *Frailhat*, “[i]t is well established that
20 the deprivation of constitutional rights unquestionably constitutes irreparable
21 injury.” *Castillo* TRO, at *6 (citing *Hernandez v. Sessions*, 872 F.3d 976, 994 (9th
22 Cir. 2017)), *Frailhat* TRO at *11 (citing same). That alone satisfies this factor.

23 Moreover, the Ninth Circuit recently recognized that dangerous and unsafe
24 conditions of detention, such as those Plaintiff faces, also constitute irreparable harm
25 supporting injunctive relief. *Padilla v. U.S. Immigration & Customs Enforcement*,
26 No. 19-35565, 2020 WL 1482393, at *9 (9th Cir. Mar. 27, 2020) (recognizing that
27 “substandard physical conditions, [and] low standards of medical care” in
28 immigration detention constitute irreparable harm justifying injunctive relief). And
the Ninth Circuit has also recognized that there is irreparable harm where

1 government actions threaten to worsen an individual’s health. *See M.R. v. Dreyfus*,
2 663 F.3d 1100, 1111 (9th Cir. 2011), *as amended by* 697 F.3d 706 (9th Cir 2012).
3 Each of these reasons supports immediate relief here. The fatality rate for people
4 infected with COVID-19 is estimated to be more than thirty times higher than the
5 seasonal flu.¹² For those who survive, infection can permanently damage the lungs
6 and other major organs. Schneberk Decl. ¶ 22. Once COVID-19 is introduced into a
7 congregate environment like a detention center, it spreads “like wildfire.” Greifinger
8 Decl. ¶ 13; Schneberk Decl. ¶ 42. And the risk is getting closer. Experts have
9 concluded that “[e]ach day we wait to act increases the danger of serious illness or
10 death due to COVID-19 for not only detainees and staff at Adelanto, but for millions
11 of Southern Californians.” Schneberk Decl. ¶ 43; *see* Greifinger Decl. ¶¶ 19, 23.
12 There is no serious dispute the irreparable harm factor is satisfied.

13 **2. The Public Interest and Balance of Equities Weigh Heavily** 14 **in Plaintiff’s Favor**

15 Here, as in the cases where this Court has already granted relief, “[t]he balance
16 of the equities tip sharply in favor” of Plaintiff. *Castillo* TRO, at *6, *Fraihat* TRO
17 at *11. While plaintiffs “face irreparable harm to their constitutional rights and
18 health,” “there is no harm to the Government when a court prevents the Government
19 from engaging in unlawful practices.” *Castillo* TRO, at *6, *Fraihat* TRO at *11.
20 Indeed, “[f]aced with . . . preventable human suffering, [the Ninth Circuit] ha[s] little
21 difficulty concluding that the balance of hardships tips decidedly in plaintiffs’
22 favor.” *Hernandez*, 872 F.3d at 996 (quoting *Lopez v. Heckler*, 713 F.2d 1432, 1437
(9th Cir. 1983)).

23 Moreover, it is in both the *Defendants’* and the broader public interest to
24 reduce the threat of an imminent COVID-19 outbreak at Adelanto. ICE has an
25 interest in preventing any potential spread of COVID-19 in its detention facility,
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27 ¹² Jo Craven McGinty, *Why Doesn’t Flu Tank Economy Like Covid-19?*, Wall
28 Street Journal (Apr. 10, 2020), <https://www.wsj.com/articles/why-doesnt-flu-tank-economy-like-covid-19-11586511000>.

1 which may then affect guards, visitors, attorneys, and others who may potentially
2 interact with detainees. And an outbreak of COVID-19 at Adelanto would doubtless
3 put significant pressure on or exceed the capacity of local health infrastructure.
4 Greifinger Decl. ¶ 14; *see* Schneberk Decl. ¶ 26. As this Court succinctly explained:

5 The public has a critical interest in preventing the further spread of the
6 coronavirus. An outbreak at Adelanto would, further, endanger all of us
7 – Adelanto detainees, Adelanto employees, residents of San Bernardino
8 County, residents of the State of California, and our nation as a whole.

8 *Castillo* TRO, at *6.

9 Thus, Plaintiff’s release would not only impose minimal harm to the
10 government, it would also reduce the healthcare and economic burden on the local
11 community and health infrastructure at large.

12 **V. CONCLUSION**

13 The Court should grant Plaintiff’s motion for a temporary restraining and
14 direct Plaintiffs’ immediate release from Adelanto.

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16 Dated: April 13, 2020

Respectfully submitted,

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18 LATHAM & WATKINS LLP

19 /s/ Amanda Barnett
20 AMANDA BARNETT
21 Counsel for Plaintiffs
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