

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

ROGER ERNESTO LA O MUNOZ; JORGE
LUIS MORALES-DIAZ; HUGO SANCHEZ-
VALDES; KELVIN ARMANDO ULLOA
ESCOBAR,

Petitioners-Plaintiffs,

vs.

CHAD F. WOLF, in his official capacity as
Acting Secretary, U.S. Department of
Homeland Security; U.S. IMMIGRATION
AND CUSTOMS ENFORCEMENT;
PATRICK CONTRERAS, in his official
capacity as Field Office Director, Houston Field
Office, Enforcement and Removal Operations,
U.S. Immigration & Customs Enforcement;
WILLIAM P. BARR, in his official capacity as
Attorney General of the United States; RANDY
TATE, in his official capacity as Warden, Joe
Corley Detention Facility,

Respondents-Defendants.

Case No. 4:20-cv-2206

**MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS-PLAINTIFFS'
MOTION FOR TEMPORARY RESTRAINING ORDER**

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PRELIMINARY STATEMENT

Petitioners are civil immigration detainees who seek a temporary restraining order to secure their immediate release from unwarranted, prolonged detention at the Joe Corley Detention Facility (“JCDF”) in Conroe, Texas, in the midst of the COVID-19 pandemic.¹ These four men—three citizens of Cuba and one of Honduras, none of whom has a criminal record of any kind in any country—have each been detained by U.S. Immigration and Customs Enforcement (“ICE”) for at least six months pursuant to a discretionary detention statute, and are now trapped in a facility that has seen a surge in COVID-19 infections rivaling that of any other detention facility nationwide. As has been well-documented in the media—and by ICE itself—the virus that causes COVID-19 runs rampant in such facilities, creating a risk of harm to Petitioners that is both unconscionably high and entirely preventable. Indeed, the pandemic has wreaked particular devastation on those, like Petitioners, detained at JCDF: as of June 24, 2020, at least 42 detainees at JCDF have tested positive for COVID-19 and at least one detainee there has died as a result of the virus. And as COVID-19 cases surge in Texas, the risks that Petitioners face at JCDF are ever more acute.

Infectious disease specialists warn that no conditions of confinement can adequately mitigate or reduce the risk of harm to detainees during the COVID-19 pandemic. Packed into overcrowded, close quarters with other detainees and correctional staff; forced to share necessities like showers, toilets, sinks, and telephones with dozens of others; and deprived of basic forms of preventative hygiene such as soap, hand sanitizer, or adequate personal protective equipment, Petitioners are helpless to take the only risk-mitigation steps known to limit transmission of the virus.

Medical experts agree that reducing populations in prisons, jails, and detention centers is a necessary component of risk mitigation during the pandemic. A failure to heed public health advice

¹ Undersigned counsel has conferred with counsel for Respondents, who has stated that ICE opposes this motion.

to reduce inmate and detainee populations will not only harm the inmates and detainees, but will also have ripple effects across communities as rapid transmission of the disease taxes already overburdened hospitals and healthcare systems—indeed, it already has.

It is against this backdrop that ICE has refused to release Petitioners on parole without any meaningful explanation, despite Petitioners’ demonstrated ties to the United States and lack of any criminal record whatsoever. Faced with a global pandemic that may imminently overwhelm Texas’ healthcare system, ICE steadfastly has refused to act, despite the reality that its failure to do so exacerbates the risks faced by Petitioners and other detainees in its custody at JCDF and elsewhere.

Release from custody is the only effective means to protect Petitioners from the heightened risk they face of contracting the virus that causes COVID-19 at JCDF. Indeed, by electing to detain Petitioners indefinitely—for periods of six months or more (and counting)—despite the many factors militating in favor of their release, ICE violates Petitioners’ due process rights by showing deliberate indifference to their health and safety and by failing to provide constitutionally adequate safeguards commensurate with the deprivation of life and liberty that they face. Accordingly, Petitioners seek the only relief that remains available to them: a temporary restraining order from this Court ordering their immediate release from detention.

NATURE AND STAGE OF THE PROCEEDINGS

On June 23, 2020, Petitioners filed a Verified Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief on the grounds that their continued, prolonged detention violates their due process rights under the Fifth Amendment to the United States Constitution. *See* ECF No. 1. Petitioners—all of whom have been in custody of ICE for at least six months despite their strong ties to the United States and their lack of a criminal record—now seek a temporary restraining order requiring their immediate release from detention.

SUMMARY OF ISSUES

Petitioners seek a temporary restraining order directing Respondents to release them from detention immediately as a remedy for the ongoing violation of their Fifth Amendment due process rights that is a result of their continued, prolonged confinement at JCDF.

This Court has the authority to order Petitioners' release. Courts have broad power to fashion equitable remedies to address constitutional violations in correctional institutions, *see Hutto v. Finney*, 437 U.S. 678, 687 n.9 (1978), and "when constitutional violations of rights of individuals . . . are brought to [a court's] attention," the court is "bound to redress them," *Williams v. Edwards*, 547 F.2d 1206, 1218 (5th Cir. 1977). Federal law confers on district courts jurisdiction over petitions for habeas corpus where the petitioner is "in custody in violation of the Constitution or law or treaties of the United States." 28 U.S.C. § 2241(c)(3); *see also INS v. St. Cyr*, 533 U.S. 289, 305 (2001). And habeas is an appropriate vehicle through which noncitizen, civil immigration detainees may challenge the fact of their confinement. *See Zadvydas v. Davis*, 533 U.S. 678, 688 (2001); *see also Jennings v. Rodriguez*, 138 S. Ct. 830 (2018) (ruling on merits of petition challenging validity of indefinite mandatory detention). Moreover, while it is often challenges to the "fact or duration of confinement" that are brought in habeas proceedings, *Poree v. Collins*, 866 F.3d 235, 242-43 (5th Cir. 2017), the Supreme Court has not foreclosed the use of habeas for conditions-of-confinement claims, *see Boumediene v. Bush*, 553 U.S. 723, 792 (2008), and the Fifth Circuit has not limited habeas petitions to "fact or duration" challenges, *see Poree*, 866 F.3d at 243-44 & n.28 (describing Fifth Circuit precedent on the subject as "less clear"). Indeed, the Fifth Circuit has said that habeas is appropriate if a ruling in the petitioner's favor would "automatically entitle [the petitioner] to accelerated release." *Carson v. Johnson*, 112 F.3d 818, 821 (5th Cir. 1997). Moreover, courts across the country have ordered ICE detainees immediately released under writs of habeas corpus during

the COVID-19 pandemic. *See, e.g., Bent v. Barr*, No. 19-cv-06123, 2020 WL 1812850, at *2 (N.D. Cal. Apr. 9, 2020); *Malam v. Adducci*, No. 20-10829, 2020 WL 1672662, at *2-3 (E.D. Mich. Apr. 5, 2020); *Coreas v. Bounds*, No. TDC-20-0780, 2020 WL 1663133, at *7 (D. Md. Apr. 3, 2020).

SUMMARY OF ARGUMENT

In light of the conditions of their confinement at JCDF, and of the recent (and ongoing) explosion of COVID-19 cases in Texas, Petitioners face an imminent threat that, unless this Court orders their immediate release, they will contract the virus that causes COVID-19 and suffer grave injury or death. ICE's continued, prolonged confinement of Petitioners under a discretionary detention statute and in unsanitary, unhygienic conditions violates Petitioners constitutional due process rights and is not rationally related to any legitimate government purpose. Moreover, continued detention of Petitioners—all of whom have strong ties to the United States and none of whom has a criminal record of any kind in any country—is not in the public interest, particularly as COVID-19 cases surge in Texas and threaten to overwhelm the state's healthcare system.

STATEMENT OF FACTS

I. COVID-19 Is a Serious, Potentially Fatal Disease and Cases Are Surging in Texas

As of June 25, 2020, more than 121,800 people in the United States have died from COVID-19, the disease caused by the novel coronavirus, and more than 2.3 million have tested positive for the virus. *See* Monroe Decl., Ex. 1. In Texas, where Petitioners are detained, cases are spiking: the Texas Department of State Health Services has reported 17,036 new infections in just the last *three days*, a staggering figure that represents more than 12.9 percent of *all* infections in Texas during the entire course of the pandemic.² In fact, the last 10 days have been the 10 worst on record in Texas, as measured by new reported infections. *See id.*

² *See Case Counts (COVID-19)*, Tex. Dep't of State Health Servs., <https://bit.ly/3idN9Yu> (last visited June 25, 2020).

COVID-19 is a highly contagious infectious disease that spreads, perhaps among other means, through respiratory droplets that infected individuals emit when they cough or sneeze and through contact with surfaces or objects where the virus is present. *See* Monroe Decl., Ex. 3. Among other effects, COVID-19 may severely damage lung tissue, requiring an extensive period of rehabilitation and in some cases causing a permanent loss of respiratory capacity and/or death. *See* Monroe Decl., Ex. 5. It may also cause heart problems, including myocarditis (inflammation of the heart muscle) and/or myocardial infarction, including in individuals who do not have preexisting risk factors or comorbidities. *See* Monroe Decl., Exs. 6-7. Although the full scope of the dangers presented by COVID-19 remains uncertain, evidence increasingly suggests that the virus may send the immune system into overdrive, causing organ damage or failure and neurologic injury. *See* Monroe Decl., Ex. 8. Moreover, the virus can wreak havoc with astonishing speed—some patients who are infected begin to exhibit symptoms within two days of exposure, and their condition can deteriorate rapidly within as few as five days. *See* Monroe Decl., Exs. 4, 9.

Because there is no known treatment for the disease, much less a vaccine, the only method of preventing serious complications and/or death from COVID-19 is to prevent infection in the first place. *See* Monroe Decl., Ex. 10. To minimize the risk of infection, public health experts have urged people in the United States to take basic preventive actions, such as avoiding crowds or large groups, staying six feet away from others, keeping surfaces disinfected, frequently washing hands or using hand sanitizer, and wearing face masks and gloves in certain circumstances. *See* Monroe Decl., Exs. 10-11. Accordingly, public health officials in *all 50 states* have declared emergencies, or otherwise taken action to stop the spread of the virus. *See* Monroe Decl., Ex. 12. And although Texas was among the first states to ease those constraints, cases there presently are increasing at an alarming rate and Gov. Greg Abbott has acknowledged that the state is facing a “massive

outbreak” that may require the re-imposition of restrictions on people’s movement as authorities scramble to contain the virus and to prevent hospitals’ intensive care units (“ICUs”) from becoming overwhelmed. *See* Monroe Decl., Exs. 13, 21, 24.

II. COVID-19 Poses a Grave Risk of Harm to Petitioners

Even as cases skyrocket statewide in Texas, the situation in and around Houston, where Petitioners are detained, is particularly dire: Harris and Montgomery Counties have reported more than 27,600 of the state’s approximately 132,000 total cases (and 382 of its 2,296 deaths), and the area’s ICUs are now filled to 97 percent of capacity. *See* Texas Department of State Health Services, *supra* note 2; Monroe Decl., Ex. 22.

Moreover, COVID-19 has proven particularly pernicious in enclosed, high-density environments like detention and correctional facilities, which have become “hotbeds for the virus.” Monroe Decl., Ex. 23. Indeed, even as the United States’ overall infection rate has remained relatively constant, new infections in prisons and jails “have soared in recent weeks,” doubling since mid-May to more than 68,000, with coronavirus-related deaths also rising by 73 percent since that time. Monroe Decl., Ex. 25. According to media sources, the five largest known clusters of the virus in the United States are in correctional institutions, and Texas has reported more confirmed cases of COVID-19 (more than 7,500) among inmates and staff at its state-run facilities than any other state—or the federal government. *See id.*; Monroe Decl., Ex. 33.

ICE facilities fare no better than prisons and jails. As of June 2, 2020, ICE reported that more than half of the nearly 2,800 detainees in its custody who had been tested were confirmed to have had the virus, and ICE facilities in Texas have reported more positive cases than facilities in any other state. *See* Monroe Decl., Exs. 14-15. JCDF is no exception: as of June 24, 2020, at least 42 detainees at JCDF—or nearly *15 percent* of the overall detainee population at the facility—had tested positive for COVID-19. *See* Monroe Decl., Exs. 14-15. Tragically, at least one immigrant

being held at JCDF has died from the virus. *See* Monroe Decl., Ex. 26. That JCDF has emerged as a COVID-19 hotspot is hardly surprising in light of reports of abysmal conditions at the facility. *See* Monroe Decl., Ex. 27 (describing “inhumane conditions” at JCDF, “including poor medical care, minimal protective equipment and unsanitary and crowded dorms”).

Public health officials have long warned that prisons, jails, and detention facilities were positioned to “become vectors in the pandemic because they are often overcrowded, unsanitary places where social distancing is impractical, bathrooms and day rooms are shared by hundreds of [people], and access to cleaning supplies is tightly controlled.” Monroe Decl., Ex. 25; *see also id.* Ex. 16, at 3 (“One of the risks of detention of immigrants in congregant settings is the rapid spread of infectious diseases.”). Indeed, individuals who are incarcerated or detained have limited ability to take the precautionary steps that public health officials recommend as a means to guard against infection and spread, such as social distancing, mask wearing, regular hand washing, and use of adequate ventilation. *See, e.g., United States v. Martin*, No. 19-140-13, 2020 WL 1274857, at *2 (D. Md. Mar. 17, 2020) (“With no known effective treatment, and vaccines months (or more) away, public health officials have been left to urge the public to practice ‘social distancing,’ frequent (and thorough) hand washing, and avoidance of close contact with others (in increasingly more restrictive terms)—all of which are extremely difficult to implement in a detention facility.”). They also have no control over the movements of others with whom they live in close proximity, and they are required to share spaces and resources.

The design and operation of detention facilities, including JCDF, make it impossible for those inside to engage in the kinds of prophylactic measures recommended by public health experts. If anything, facilities that house pretrial detainees, like JCDF, are at a particularly high risk for contagion because of the substantial daily turnover among the population inside. Nor are detainees

in such facilities safe from infection by a virus that originates outside the facility itself, in light of the large number of staff, contractors, and vendors who come and go on a daily basis. Moreover, detention facilities typically are not well-equipped to contain the spread of, or to treat inmates or detainees sick with, a hyper-contagious infectious disease like COVID-19.

Accordingly, medical and public health experts agree that reducing the number of detainees is a critical component of risk mitigation in a pandemic. *See* Monroe Decl., Ex. 28. To that end, correctional systems and institutions nationwide have announced (and implemented) efforts to reduce their detained populations. *See* Monroe Decl., Ex. 29. Even ICE has recognized the importance of reducing the number of detainees in its facilities. *See* Monroe Decl., Ex. 30 (recommending release of detainees with certain medical conditions). And courts across the country have ordered inmates and detainees freed en masse, including from ICE facilities. *See, e.g., Dada v. Witte*, No. 20-cv-458, 2020 WL 2614616 (W.D. La. May 22, 2020); *Gayle v. Meade*, No. 20-21553, 2020 WL 2086482 (S.D. Fla. Apr. 30, 2020); *Roman v. Wolf*, No. 20-768, 2020 WL 1952656 (C.D. Cal. Apr. 23, 2020); *Fraihat v. ICE*, No. 19-1546, 2020 WL 1932570 (C.D. Cal. Apr. 20, 2020). As of June 25, 2020, ICE has released 490 detainees pursuant to court order. *See* Monroe Decl., Ex. 31.

And yet, problems persist, particularly in Texas (and at JCDF). Of the 490 ICE detainees released pursuant to court order as of June 25, 2020, only *two* were detained in Texas. *See* Monroe Decl., Ex. 31. That is so even though nearly *half* of all ICE detainees are detained at facilities in Texas. Monroe Decl., Ex. 32. And ICE has acknowledged that, as of June 24, 2020, 810 of the approximately 23,500 individuals currently detained in its facilities have tested positive for the virus. *See* Monroe Decl., Ex. 14.

III. Conditions at JCDF Increase the Risk to Petitioners of Infection from COVID-19

COVID-19 is spreading rapidly through correctional institutions and detention facilities, which have become incubators for the virus. As of June 16, 2020, more than 68,000 people in state and federal prisons nationwide had tested positive for COVID-19, and more than 520 had died. *See* Monroe Decl., Exs. 25, 33. ICE does not report the total number of detainees who have tested positive for COVID-19—although it was at least 1,406 as of June 2, 2020, *see* Monroe Decl., Ex. 15—but, if anything, the 810 individuals whom ICE describes as “COVID-19 positive cases currently in custody” likely understates the true scope of the virus’ reach in ICE facilities because, although that number “includes detainees who tested positive for COVID-19 and are currently in ICE custody under isolation or monitoring,” it “*excludes* detainees who previously tested positive for COVID-19 and were either returned to the general population after a discontinuation of medical monitoring/isolation or are no longer in ICE custody.” *See* Monroe Decl., Ex. 14.

Like other detention facilities, JCDF is an enclosed environment in which contagious diseases spread quickly and easily, placing immigrant detainees like Petitioners at a heightened risk of infection from the virus. Detainees at JCDF live in close quarters and are subject to security measures that make it impossible for them to take the precautionary steps that medical and public health officials recommend as a means of guarding against infection.

For example, Petitioners are unable to practice effective (and necessary) social distancing at JCDF. *See* Parker Decl. ¶¶ 6, 9. They live in small, poorly ventilated dormitories that hold as many as 36 detainees, and they sleep in bunk beds that are placed fewer than six feet apart. *See* Parker Decl. ¶¶ 9-10. They share a communal bathroom with few sinks, toilets, and showers, and they have sporadic—and inadequate—access to soap and no access to hand sanitizer, making it impossible for them to follow CDC guidance regarding frequent hand washing and personal hygiene. *See* Parker Decl. ¶¶ 7-9; Monroe Decl., Ex. 17. They have little, if any, access to personal

protective equipment like face masks and gloves, or to medical care. *See* Parker Decl. ¶¶ 6, 8, 12. And they are rarely, if ever, allowed to leave their poorly ventilated dormitories or to go outside. *See* Parker Decl. ¶ 10. Moreover, they have no control over the movements of (i) the other detainees with whom they live in close proximity and share spaces and resources, or (ii) the guards and other staff at the facility who are themselves potential carriers of the virus and who have flouted CDC guidance regarding the use of personal protective equipment such as face masks and gloves. *See* Parker Decl. ¶ 11; Monroe Decl., Exs. 18, 34, 35.

Ultimately, detainees at JCDF are deprived of the supplies necessary for them to maintain basic hygiene, let alone the supplies necessary to guard against infection from the virus that causes COVID-19, which (according to the CDC) include no-cost access to soap, running water, hand dryers or disposable paper towels, and, where possible, hand sanitizer. *See* Monroe Decl., Ex. 17. To make matters worse, ICE does not clean the bathrooms at JCDF or provide the cleaning supplies necessary to do so properly, instead requiring detainees to do it themselves—using the soap and/or shampoo that they are supposed to use for bathing. *See* Parker Decl. ¶¶ 7, 9. These crowded and unsanitary conditions increase the risk that Petitioners will be infected.

Petitioners are especially vulnerable to infection because of the particularly unsanitary and hazardous conditions at JCDF, which has a history of ignoring detainees’ concerns regarding their health and safety and of providing inadequate medical treatment. *See* Monroe Decl., Ex. 36. Detainees have described “inhumane conditions” at JCDF, including “poor medical care, minimal protective equipment and unsanitary and crowded dorms.” Monroe Decl., Ex. 27; *see also id.* Ex. 15 (noting that, at JCDF, units “with a capacity of 10 or more detainees have only one toilet”). Petitioners have echoed these sentiments, including in an op-ed by Mr. La O Munoz in the *Houston Chronicle*. *See* Monroe Decl., Ex. 2. By continuing to detain Petitioners in conditions in which

they cannot adequately protect themselves from infection (and as COVID-19 cases surge in Texas), and to do so indefinitely under a discretionary detention statute, ICE exhibits a flagrant disregard for the guidance of medical and public health officials and subjects Petitioners to imminent and irreparable harm.

IV. Release from Detention Is the Only Adequate Means of Protecting Petitioners

As even former Acting Director of ICE John Sandweg has acknowledged, release from detention is the *only* relief adequate to protect Petitioners from the risks they face from continued, prolonged detention at JCDF and to vindicate their constitutional rights. *See* Monroe Decl., Ex. 19 (“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.”).

ARGUMENT

Petitioners meet each of the four requirements for issuance of a temporary restraining order because they have shown: “(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the [temporary restraining order] is not issued, (3) that the threatened injury if the [temporary restraining order] is denied outweighs any harm that will result if [it] is granted, and (4) that the grant of a [temporary restraining order] will not disserve the public interest.” *Jones v. Tex. Dep’t of Criminal Justice*, 880 F.3d 756, 759 (5th Cir. 2018) (internal quotation marks omitted); *see also Palacios v. U.S. Dep’t of Homeland Sec.*, 407 F. Supp. 3d 691, 696-97 (S.D. Tex. 2019) (citing *Jones* and noting that the same standard applies, whether the movant seeks a temporary restraining order or a preliminary injunction). Indeed, Petitioners have demonstrated that they “will suffer ‘immediate and irreparable injury’ without injunctive relief,” thereby meriting a temporary restraining order. *Smith v. Tarrant Cnty. College Dist.*, 670 F. Supp. 2d 534, 537 (N.D. Tex. 2009) (quoting Fed. R. Civ. P. 65(b)(1)(A)).

Immediate release from detention is the only adequate means to protect Petitioners' health and safety and to vindicate their due process rights. By continuing to detain Petitioners at JCDF, ICE exposes them to a life-threatening infectious disease in a constitutionally intolerable manner, causing irreparable harm. Moreover, there is an overwhelming public interest in limiting the spread of COVID-19, both to minimize further infections and to reduce the strain on overburdened healthcare systems. Finally, the balance of equities weighs heavily in favor of Petitioners, whose health and lives are at stake.

I. Petitioners Are Likely to Succeed on the Merits

Petitioners' continued, prolonged detention at JCDF violates their due process rights under the Fifth Amendment to the United States Constitution. Civil immigration detainees are entitled to the same due process protections as pretrial detainees. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *Edwards v. Johnson*, 209 F.3d 772, 778 (5th Cir. 2000) ("We consider a person detained for deportation to be the equivalent of a pretrial detainee; a pretrial detainee's constitutional claims are considered under the due process clause instead of the Eighth Amendment."). Thus, ICE may not subject Petitioners to conditions that bear no reasonable relationship to a legitimate governmental interest. *See Cadena v. El Paso Cnty.*, 946 F.3d 717, 727 (5th Cir. 2020). Nor may ICE act with deliberate indifference toward violations of Petitioners' constitutional rights. *See id.* By continuing to detain Petitioners in conditions that do not permit adequate social distancing and do not provide for adequate hygiene, ICE fails Petitioners on both counts.

A. Petitioners' Continued Detention Bears No Reasonable Relationship to Any Legitimate Governmental Interest

It is axiomatic that "the State cannot punish a pretrial detainee." *Hare v. City of Corinth, Miss.*, 74 F.3d 633, 639 (5th Cir. 1996); *see also Bell v. Wolfish*, 441 U.S. 520, 535-37 (1979). The same is true of civil detainees. *See Cadena*, 946 F.3d at 727. And when pretrial or civil detainees'

conditions of confinement bear “no reasonable relationship to a legitimate governmental interest,” they “amount to punishment” in violation of the detainees’ due process rights. *Duvall v. Dallas Cnty., Tex.*, 631 F.3d 203, 207 (5th Cir. 2011); *see also Garza v. City of Donna*, 922 F.3d 626, 632 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 651 (2019). Moreover, the Fifth Circuit has acknowledged that knowingly detaining individuals in conditions where a highly contagious, sometimes-lethal infectious disease is present bears no reasonable relationship to a legitimate governmental purpose. *See Duvall*, 631 F.3d at 207 (accepting the parties’ stipulation to that effect regarding the presence of dangerous bacteria in a jail). Indeed, in such cases, “it is assumed that ‘by the [defendant’s] very promulgation and maintenance of the complained-of condition . . . it intended to cause the alleged constitutional deprivation.’” *Cadena*, 946 F.3d at 727 (quoting *Scott v. Moore*, 114 F.3d 51, 53 (5th Cir. 1997) (en banc)); *see also Duvall*, 631 F.3d at 207 (“[T]he law is well settled that even 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” (internal quotation marks omitted)); *Hare*, 74 F.3d at 644 (“[I]n the face of [an] inadequately controlled [communicable disease] contamination,” the government’s “continued . . . hous[ing of] inmates,” “refus[al] to install the necessary hand washing and disinfecting stations,” and “fail[ure] to use alcohol-based hand sanitizers” are “conditions of confinement.”).

Dozens of detainees at JCDF have tested positive for COVID-19, and that number is poised to rise as the virus surges in Texas. Conditions at JCDF are unsanitary. ICE has been derelict in its duties to maintain clean living conditions and to provide detainees with adequate personal protective equipment and/or cleaning supplies, and the cramped quarters make it impossible for Petitioners and other detainees to engage in social distancing or otherwise to follow the guidance

of public health officials. ICE's efforts to confine Petitioners at JCDF *indefinitely* under a discretionary detention statute in the midst of the COVID-19 pandemic and in spite of the demonstrably unhygienic conditions at the facility serves *no* legitimate governmental purpose and is not reasonably related to enforcement of the immigration laws. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("There is no sufficiently strong special justification for indefinite civil detention."). All Petitioners have strong ties to the United States, such that they are not flight risks, and none has a criminal record of any kind in any country. If ICE's interest in effectuating Petitioners' removal from the United States cannot justify indefinite detention, nor can it justify the "potentially permanent" harm (including serious injury, illness, or death) that Petitioners face at JCDF. *See id.* at 690-91. That is especially so in light of the overwhelming evidence that continuing to detain Petitioners at JCDF needlessly increases the risk that Petitioners will be exposed to, and contract, the virus that causes COVID-19.

B. By Continuing to Detain Petitioners in Unsanitary Conditions, ICE Acts with Deliberate Indifference Toward a Violation of Their Constitutional Rights

Similarly, ICE violates Petitioners' due process rights by maintaining unsanitary living conditions at JCDF that, under present circumstances, are "tantamount to the infliction of cruel and unusual punishment" because they "pose 'an unreasonable risk of serious damage' to [Petitioners'] health" and because ICE has "acted with deliberate indifference to the risk posed." *Ball v. Leblanc*, 792 F.3d 584, 592 (5th Cir. 2015) (quoting *Helling v. McKinney*, 509 U.S. 25, 33-35 (1993)).

The Supreme Court and the Fifth Circuit have recognized that the government tramples on the Constitution when it crowds prisoners (or detainees) into cells with others who have "infectious maladies," "even though the possible infection might not affect all of those exposed." *McKinney*, 509 U.S. at 33; *see also Gates v. Collier*, 501 F.2d 1291, 1300 (5th Cir. 1974) (holding that conditions of confinement violated the Constitution where "[u]nsanitary conditions [we]re rampant"

and “[s]ome inmates with serious contagious diseases [we]re allowed to mingle with the general prison population”). And the Fifth Circuit has held that deliberate indifference may be inferred from “the open and obvious nature of” conditions that pose a risk to health and safety. *Hinojosa v. Livingston*, 807 F.3d 657, 667 (5th Cir. 2015).

By continuing to detain Petitioners at JCDF—and by failing to take sufficient steps to mitigate the risk to Petitioners of infection from the virus that causes COVID-19—ICE is engaging in a “pervasive pattern of serious deficiencies,” *Shepherd v. Dallas Cnty.*, 591 F.3d 445, 454 (5th Cir. 2009), and acting with deliberate indifference to “an unreasonable risk of serious damage to [Petitioners’] health” in violation of their constitutional rights. *McKinney*, 509 U.S. at 35. Indeed, courts around the country, including this one, have recognized that “[t]he risk of contracting COVID-19 in tightly-confined spaces, especially jails, is now exceedingly obvious.” *Basank v. Decker*, No. 20-Civ-2518, 2020 WL 1481503, at *5 (S.D.N.Y. Mar. 26, 2020); *see also Ali v. U.S. Dep’t of Homeland Sec.*, No. 4:20-cv-140, 2020 WL 1666074, at *5 (S.D. Tex. Apr. 2, 2020) (“[T]imely release” of “individuals housed within detention centers,” who “remain particularly vulnerable to infections,” is “especially important now during the COVID-19 pandemic.”); *United States v. Garlock*, No. 20-cr-418, 2020 WL 1439980, at *1 (N.D. Cal. Mar. 25, 2020) (“By now it almost goes without saying that we should not be adding to the prison population during the COVID-19 pandemic if it can be avoided.”). Indeed, the Fifth Amendment does not permit civil detention to become a death sentence.

II. Petitioners Face Immediate, and Irreparable, Harm

Threat of imminent harm warrants immediate relief. But a party seeking immediate injunctive relief need only show “a significant threat” of “imminent” injury. *Humana, Inc. v. Jacobson*, 804 F.2d 1390, 1394 (5th Cir. 1986). By contrast, the party *need not* show that the threatened harm has already occurred. *See McKinney*, 509 U.S. at 33 (explaining that “a prison inmate . . . could

successfully complain about demonstrably unsafe drinking water without waiting for an attack of dysentery” and noting that “[i]t would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them”); *Gates v. Cook*, 376 F.3d 323, 339 (5th Cir. 2004) (holding that a prisoner “does not need to show that death or serious illness has yet occurred to obtain relief”). Nor must the party show “that harm is inevitable.” *Jacobson*, 804 F.2d at 1394. With these precepts in mind, several courts nationwide recently have determined that the elevated risk of infection that civil detainees face at ICE facilities constitutes irreparable harm warranting issuance of a temporary restraining order. *See, e.g., Amaya-Cruz v. Adducci*, No. 1:20-cv-789, 2020 WL 1903123 (N.D. Ohio Apr. 18, 2020); *Coronel v. Decker*, No. 20-cv-2472, 2020 WL 1487274 (S.D.N.Y. Mar. 27, 2020); *Basank*, 2020 WL 1481503, at *4 (“The risk that Petitioners will face a severe, and quite possibly fatal, infection if they remain in immigration detention constitutes irreparable harm warranting a TRO.”).

Petitioners have demonstrated that COVID-19 has infiltrated, and spread within, JCDF and that, by maintaining an overcrowded and unsanitary facility, ICE has failed to mitigate or control the risk that Petitioners face of contracting the virus while detained there. Given that the virus is highly contagious and easily communicable, and that cases in Texas presently are surging to unprecedented levels, the risk that Petitioners will become infected if they remain detained at JCDF is real—and imminent. Moreover, because COVID-19 is a life-threatening disease with no cure or vaccine, Petitioners are at great risk of serious illness or death if they do become infected. Of course, ICE’s ongoing violation of Petitioners’ constitutional due process rights is itself an irreparable injury. *See, e.g., Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 295 (5th Cir. 2012) (“When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.” (internal quotation marks omitted)).

III. The Remaining Factors Weigh Heavily in Favor of a Temporary Restraining Order

The public interest and balance of the equities overwhelmingly favor Petitioners' immediate release. First, and fundamentally, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 n.9 (5th Cir. 2014) (internal quotation marks omitted). Moreover, the public has a further interest in minimizing the spread of COVID-19, which overlaps with Petitioners' interest—both Petitioners and the public benefit from ensuring individual and community health and safety. *See 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[]"). Further, the general public—including JCDF staff and their families—benefits from the release of detainees, like Petitioners, who do not pose an immediate risk to public safety, because they are less likely to become ill outside JCDF and, thus, less likely to contribute to the burden that is already taxing the public health system in surrounding communities. *See Monroe Decl.*, Ex. 16, at 6 ("[A]cting immediately" to reduce detainee populations "will save lives of not only those detained, but also detention staff and their families, and the community-at-large.").

Finally, the balance of equities tilts heavily in favor of Petitioners' release. Whatever minimal interest Respondents may assert in Petitioners' continued detention, it is outweighed by the serious risk of illness (and, potentially, death) that Petitioners—not to mention other detainees, JCDF staff, and the public at large—face from COVID-19 if Petitioners remain detained in violation of their constitutional due process rights. Moreover, ICE has several tools available to it, beyond physical detention, to meet its enforcement goals. For example, ICE's Intensive Supervision Appearance Program relies on the use of electronic ankle monitors, biometric voice recognition software, unannounced home visits, employer verification, and in-person reporting to supervise participants and to ensure they attend court proceedings. A government-commissioned

evaluation of this program reported a 99 percent attendance rate at all immigration court hearings and a 95 percent attendance rate at final hearings. *See* Monroe Decl., Ex. 20.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant their Motion for Temporary Restraining Order and order their immediate release from detention.³

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³ As detained individuals seeking to enforce their civil rights, Petitioners request that this Court exercise its discretion not to require them to post a bond in connection with the relief they seek. *See, e.g., Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 628 (5th Cir. 1996).

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