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

15 **ISSIS YOSELIN ZELAYA SAGASTUME;**
16 **MIGUEL BENITEZ; YUSUF OZDEMIR;**
17 **and JANE DOE,**

18 Plaintiff-Petitioners,

19 v.

20 **GREGORY J. ARCHAMBEAULT**, San
21 **Diego Field Office Director, Immigration**
22 **and Customs Enforcement; JAMES**
23 **DOBSON**, Otay Mesa Detention Center
24 **Officer in Charge, Immigration and Customs**
25 **Enforcement; JESUS REYNA**, Calexico
26 **Assistant Field Office Director, Immigration**
27 **and Customs Enforcement; CHRISTOPHER**
28 **J. LAROSE**, Senior Warden, Otay Mesa
Detention Center; **SIXTO MARRERO**,
Facility Administrator, Imperial Regional
Detention Facility; **MATTHEW T.**
ALBENCE, Deputy Director and Senior
Official Performing the Duties of the
Director of Immigration and Customs
Enforcement; **CHAD WOLF**, Acting
Secretary of Homeland Security,

Defendant-Respondents.

Case No. _____

**COMPLAINT AND
PETITION FOR WRIT OF
HABEAS CORPUS**

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18 *admitted pro hac vice

**application for pro hac vice forthcoming; practice limited to federal courts

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1 **INTRODUCTION**

2 1. This action challenges U.S. Immigration and Customs Enforcement
3 (“ICE”)’s continued detention of Plaintiff-Petitioners (“Plaintiffs”) in the midst of the
4 Coronavirus Disease 2019 (“COVID-19”) pandemic. Plaintiffs are people whose
5 underlying health conditions put them at an extraordinary risk of infection, serious
6 illness, and death from COVID-19. They seek immediate release from ICE custody
7 due to the urgent threat to their lives posed by COVID-19.

8 2. On March 11, 2020, the World Health Organization declared the global
9 outbreak of COVID-19, the disease caused by a novel coronavirus, a pandemic. Since
10 then, in the span of less than a month, confirmed cases of the disease in the United
11 States surged from just over a thousand to 213,144 as of April 2, 2020. 4,513 of those
12 people have died.

13 3. There is no specific treatment, vaccine, or cure for COVID-19, and no
14 one is immune. The only way to prevent the chance of serious illness or death from
15 COVID-19, especially for medically vulnerable people, is to practice scrupulous
16 hygiene and social distancing.

17 4. The United States now has the most confirmed COVID-19 cases in the
18 world, even though access to testing remains limited. California alone is announcing
19 upwards of 1,000 new cases every day.

20 5. The COVID-19 pandemic has fundamentally changed most aspects of
21 everyday life, with public and private institutions dramatically altering daily
22 operations.

23 6. In contrast, ICE has failed to meaningfully respond to protect the health
24 and safety of people in its custody.

25 7. It is effectively impossible for Plaintiffs to protect themselves against
26 COVID-19 infection in the two immigration detention centers in this District where
27 ICE is confining them: Otay Mesa Detention Center (“Otay Mesa”) and Imperial
28 Regional Detention Facility (“Imperial”).

1 8. Plaintiffs, who have underlying health conditions ranging from
2 leukemia to HIV, remain detained with the general population in both facilities despite
3 their vulnerabilities to COVID-19. They sleep in barracks-style bunks mere feet away
4 from other detainees and have no choice but to use shared communal dining, bathing,
5 and recreation areas.

6 9. Facility staff have failed to take appropriate precautions, even as
7 detainees have learned about an Otay Mesa employee who was confirmed to have
8 contracted the virus. Plaintiffs and other people detained at Otay Mesa and Imperial
9 recount an atmosphere of desperation and fear within the detention centers, as many
10 worry about contracting the virus in detention with no way to protect themselves.

11 10. During the COVID-19 pandemic, the Centers for Disease Control and
12 Prevention (“CDC”) and other public health experts advise that the only effective
13 means of limiting transmission of the virus are practicing “social distancing,” with a
14 recommended minimum of six feet between people and reduced frequency of contact,
15 and maintaining rigorous personal hygiene.

16 11. Otay Mesa and Imperial have refused Plaintiffs and other detainees
17 regular provisions of supplies necessary for recommended personal hygiene.

18 12. People in congregate environments—places where people live, eat, and
19 sleep in close proximity—face increased risk of contracting COVID-19, as already
20 evidenced by the rapid spread of the virus in cruise ships, nursing homes, and jails.

21 13. For people who are confined in Otay Mesa and Imperial, including
22 Plaintiffs, it is effectively impossible to engage in the social distancing necessary to
23 mitigate the risk of transmission.

24 14. Public health and government officials worldwide have undertaken
25 extraordinary measures to combat the spread of COVID-19, most commonly by
26 ordering people not to congregate in groups. On March 19, 2020, the State of
27 California issued a “shelter in place” order requiring people to stay at home except for
28 essential activities and to maintain social distancing to the maximum extent possible.

1 As of the filing of this complaint, about almost 300 million people in the United States
2 are under some instruction to stay home to prevent community spread of the virus.

3 15. Recognizing the urgency of present circumstances, judges, prosecutors
4 and correctional authorities across the country have been ordering releases to protect
5 individuals and the public health. Such releases not only protect the people with the
6 greatest vulnerability to serious illness and death due to COVID-19 from
7 transmission, but also contribute to greater risk mitigation for all people in custody,
8 carceral facility employees, and the surrounding community at large.

9 16. Many of California's jails and prisons have released people detained in
10 the criminal justice system to protect those people and the community from COVID-
11 19. The California Department of Corrections and Rehabilitation announced it would
12 release 3,500 inmates. Alameda County's Santa Rita Jail released approximately 250
13 people. Los Angeles County released over 1,000 people from its jails.

14 17. Law enforcement and jail officials in New Jersey, New York City,
15 Cleveland, Nashville, Houston, San Antonio, Charlotte, and numerous other
16 jurisdictions have released civil detainees and, in many cases, people serving
17 sentences for criminal convictions, in response to the threat COVID-19 poses inside
18 jails. For example, on March 22 the New Jersey Supreme Court issued a consent order
19 presumptively ordering the release of every person serving a county jail sentence by
20 no later than Thursday morning, March 26.¹

21 18. Courts across the state and country are also ordering the release of
22 people in civil immigration custody in recognition of the threat posed by COVID-19.
23 *E.g.*, *Xochihua-Jaimes v. Barr*, No. 18-71460, 2020 WL 1429877 (9th Cir. Mar. 24,
24 2020); *Castillo v. Barr*, No. CV2000605TJHAFMX, 2020 WL 1502864 (C.D. Cal.
25 Mar. 27, 2020); *Fraihat v. Wolf*, No. ED-CV2000590-TJH, ECF No. 18 (C.D. Cal.

26 ¹ Consent Order, *In the Matter of the Request to Commute or Suspend County Jail*
27 *Sentences*, No. 084230 (N.J. March 22, 2020), available at [https://www.aclu-](https://www.aclu-nj.org/files/5415/8496/4744/2020.03.22_-_Consent_Order_Filed_Stamped_Copy-1.pdf)
28 [nj.org/files/5415/8496/4744/2020.03.22 - Consent Order Filed Stamped Copy-1.pdf](https://www.aclu-nj.org/files/5415/8496/4744/2020.03.22_-_Consent_Order_Filed_Stamped_Copy-1.pdf).

1 Mar. 30, 2020); *Hernandez v. Wolf*, No. 20-cv-00617, ECF No. 17 (C.D. Cal. Apr. 1,
2 2020); *Velasquez v. Wolf*, No. 20-cv-00627, ECF No. 32 (C.D. Cal. Apr. 2, 2020);
3 *Basank v. Decker*, No. 20-cv-02518, 2020 WL 1481503 (S.D.N.Y. Mar. 26, 2020);
4 *Thakker v. Doll*, No. 20-cv-00480, ECF No. 47 (M.D. Pa. Mar. 31, 2020); *Calderon*
5 *Jimenez v. Wolf*, No. 18-cv-10225, ECF No. 507 (D. Mass. Mar. 26, 2020). These
6 orders recognize that “[t]he risk of contracting COVID-19 in tightly-confined spaces,
7 especially jails, is now exceedingly obvious” and that “public health authorities
8 predict [COVID-19] will especially impact immigration detention centers.” *Basank*,
9 2020 WL 1481503, at *6; *Xochihua-Jaimes*, 2020 WL 1429877, at *1.

10 19. On, March 18, 2020, two medical experts for the Department of
11 Homeland Security’s Office of Civil Rights and Civil Liberties (“DHS CRCL”) sent
12 a letter to Congress, writing “regarding the need to implement immediate social
13 distancing to reduce the likelihood of exposure to detainees, facility personnel, and
14 the general public, *it is essential to consider releasing all detainees who do not pose*
15 *an immediate risk to public safety.*”² On multiple occasions since at least February
16 25, 2020, these experts had sounded the alarm with the agency on the imminent risks
17 to the health of immigrant detainees and the public at large presented by COVID-19
18 unless swift mitigation measures, including decreasing the population of immigration
19 detention facilities, are taken.

20 20. Instead, ICE’s response to the pandemic has been to engage in business
21 as usual, conducting uninterrupted enforcement and detention operations.

22 21. As Californians in many cities began to shelter in their homes in
23 compliance with public health directives on Monday, March 16, 2020, ICE’s Los
24 Angeles Field Office executed pre-dawn raids to cram even more immigrants into
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26 ² Letter from Scott A. Allen, MD and Josiah Rich, MD, MPH to Congressional
27 Committee Chairpersons, dated Mar. 19, 2020 (emphasis in original),
28 <https://assets.documentcloud.org/documents/6816336/032020-Letter-From-Drs-Allen-Rich-to-Congress-Re.pdf>.

1 detention centers.³ Following public outcry, ICE claimed it would modify its
2 enforcement efforts in apparent recognition of the need to protect public health, but
3 declined to suspend arrests.⁴

4 22. The day after, however, in response to a lawsuit for the release of
5 vulnerable ICE detainees, the agency again demonstrated its failure to appreciate the
6 threats the COVID-19 pandemic presents, asserting that “Plaintiffs’ assertion that
7 detention *per se* poses an increased risk of health complications or death from
8 COVID-19 is purely speculative.”⁵ ICE’s head-in-the-sand response to the threats of
9 this pandemic will prove deadly to people in immigration detention if it is not
10 remedied through this Court’s intervention.

11 23. Inside the facilities, moreover, immigrants say that ICE is not
12 consistently taking even the less aggressive precautionary measures the agency claims
13 it is taking. To take one critical example, ICE is continuing to introduce detainees into
14 the general population, only checking new arrivals for fever—a symptom many
15 infected with COVID-19 do not have—and not performing any follow-up.

16 24. This echoes a concern of the two experts for DHS CRCL, who say that
17 “the track record of ICE facilities implementing [early screening, testing, isolation
18 and quarantine] protocols historically has been inconsistent.” Moreover, even if ICE
19 was consistently taking these precautions, the experts have explained that such efforts
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23 ³ Brittny Mejia, *With Masks at the Ready, ICE Agents Make Arrests on First Day of*
24 *California Coronavirus Lockdown*, L.A. TIMES, Mar. 17, 2020,
25 [https://www.latimes.com/california/story/2020-03-17/for-ice-agents-its-business-
as-unusual-day-after-sweeping-coronavirus-order](https://www.latimes.com/california/story/2020-03-17/for-ice-agents-its-business-as-unusual-day-after-sweeping-coronavirus-order).

26 ⁴ *ICE Guidance on COVID-19*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT,
27 <https://www.ice.gov/covid19>.

28 ⁵ Respondents-Defendants’ Opposition, *Dawson v. Asher*, Case No. 20-0409, ECF
No. 28, at 8 (W.D. Wash. Mar. 18, 2020).

1 “won’t be enough” without rapidly ‘releas[ing] those who do not pose an immediate
2 danger to public safety.’⁶

3 25. The danger posed by Plaintiffs’ detention during the COVID-19
4 pandemic is “so grave that it violates contemporary standards of decency to expose
5 anyone unwillingly to such a risk” and violates their constitutional right to safety in
6 government custody. *Helling v. McKinney*, 509 U.S. 25, 39 (1993).

7 26. Defendants cannot justify continuing to subject Plaintiffs to
8 extraordinary risk of illness with any legitimate government objective, particularly in
9 light of the alternatives available to them.

10 27. Even where ICE invokes a “mandatory” detention statute to justify an
11 individual’s confinement, the agency cannot detain that person if doing so violates the
12 Constitution.

13 28. Plaintiffs bring this action to remedy grave violations of their
14 constitutional rights that immediately threaten them with serious illness and death.
15 This court has authority to order release as the sole effective remedy to Plaintiffs’ due
16 process violations.

17 29. Unless this Court intervenes to order the releases of the Plaintiffs, they,
18 along with many other detained individuals, will face dramatically increased chances
19 of contracting COVID-19, becoming seriously ill, and dying.

20 **PARTIES**

21 30. Plaintiff Issis Yoselin Zelaya Sagastume (“Ms. Zelaya”) is an asylum
22 seeker and is currently detained at Otay Mesa. Ms. Zelaya has underlying lung disease
23 and is also anemic. Ms. Zelaya’s U.S. citizen children, aged 3 and 11, her U.S. citizen
24 sister, and her legal permanent resident brother all await her release.

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27 ⁶ See Scott Allen, Josiah Rich & Mavis Nimoh, *We Must Release Prisoners to*
28 *Lessen the Spread of Coronavirus*, WASH. POST, Mar. 17, 2020,
[https://www.washingtonpost.com/opinions/2020/03/17/we-must-release-prisoners-
lessen-spread-coronavirus/](https://www.washingtonpost.com/opinions/2020/03/17/we-must-release-prisoners-
lessen-spread-coronavirus/).

1 31. Plaintiff Miguel Benitez (“Mr. Benitez”) is an asylum seeker and is
2 currently detained at Otay Mesa. Mr. Benitez was diagnosed with chronic
3 myelogenous leukemia while in immigration custody in 2017. Mr. Benitez’s U.S.
4 citizen wife and 14-year-old son await his return home to them in the Houston, Texas
5 area.

6 32. Plaintiff Yusuf Ozdemir (“Mr. Ozdemir”) is a 49-year-old asylum
7 seeker and is currently detained at Imperial. Mr. Ozdemir is HIV positive. He and his
8 common law wife, Plaintiff Jane Doe, have been detained for over 10 months since
9 fleeing persecution in Turkey. Mr. Ozdemir hopes to pursue his asylum case outside
10 of detention, where he and his wife can better manage their HIV and protect
11 themselves from infection.

12 33. Plaintiff Jane Doe⁷ (“Ms. Doe”) is a 39-year-old asylum seeker and is
13 currently detained at Imperial. Ms. Doe has been diagnosed with HIV. Ms. Doe and
14 her common law husband are detained separately at Imperial. Like her husband, Ms.
15 Doe looks forward to being released so that they can quarantine together and protect
16 their health.

17 34. Defendant Gregory J. Archambeault is the San Diego Field Office
18 Director for ICE Enforcement and Removal Operations (“ERO”), a federal law
19 enforcement agency within the U.S. Department of Homeland Security (“DHS”). The
20 San Diego Field Office is responsible for, among other things, carrying out ICE’s
21 immigration detention operations at Otay Mesa Detention Center and Imperial
22 Regional Detention Facility. Defendant Archambeault is a legal custodian of
23 Plaintiffs. He is sued in his official capacity.

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26 ⁷ Plaintiff Jane Doe seeks to proceed under pseudonym because she would face
27 severe retaliatory harm from her persecutors in her home country, where she may
28 have to return. *See Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058,
1068 (9th Cir. 2000). Counsel for Plaintiffs will file a motion to proceed under
pseudonym and observe all related requirements.

1 35. Defendant James Dobson is the Otay Mesa Detention Center Officer in
2 Charge for ICE ERO. He is responsible for immigration detention operations at Otay
3 Mesa Detention Center. Defendant Dobson is a legal custodian of Plaintiffs. He is
4 sued in his official capacity.

5 36. Defendant Jesus Reyna is the Assistant Field Office Director for ICE
6 ERO in Calexico, California. Defendant Reyna is responsible for, among other things,
7 overseeing ICE’s immigration detention operations at Imperial Regional Detention
8 Facility. Defendant Reyna is a legal custodian of Plaintiffs. He is sued in his official
9 capacity.

10 37. Defendant Christopher J. LaRose is the Senior Warden of Otay Mesa
11 Detention Center and is employed by the private corporation CoreCivic. Defendant
12 LaRose is the immediate physical custodian of Plaintiffs. He is sued in his official
13 capacity.

14 38. Defendant Sixto Marrero is the Facility Administrator of Imperial
15 Regional Detention Facility and is employed by the private corporation Management
16 & Training Corporation. Defendant Marrero is the immediate physical custodian of
17 Plaintiffs. He is sued in his official capacity.

18 39. Defendant Matthew T. Albence is the Deputy Director and Senior
19 Official Performing the Duties of the Director of ICE. Defendant Albence is
20 responsible for ICE’s policies, practices, and procedures, including those related to
21 the detention of immigrants. Defendant Albence is a legal custodian of Plaintiffs. He
22 is sued in his official capacity.

23 40. Defendant Chad Wolf is the Acting Secretary of DHS, an agency of the
24 United States with several components responsible for enforcing United States
25 immigration laws. Defendant Wolf is a legal custodian of Plaintiffs. He is sued in his
26 official capacity.

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1 **JURISDICTION AND VENUE**

2 41. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331
3 (federal questions), 1346 (original jurisdiction), 1651 (All Writs Act), 2201–02
4 (declaratory relief), 2241 (habeas corpus), and Article I, Section 9, clause 2 of the
5 United States Constitution (the Suspension Clause). Sovereign immunity against
6 actions for relief other than money damages is waived pursuant to 5 U.S.C. § 702.

7 42. This Court may grant relief under 28 U.S.C. §§ 2241, 2243 (habeas
8 corpus), 2201–02 (declaratory relief), 1651 (All Writs Act), 5 U.S.C. § 702 (judgment
9 against U.S. officers), Federal Rule of Civil Procedure 65 (injunctive relief), as well
10 as the Fifth Amendment to the U.S. Constitution.

11 43. Venue is proper in the Southern District of California pursuant to 28
12 U.S.C. § 1391(e) and the habeas statute because Plaintiffs are detained in this district,
13 a defendant resides in this district, and a substantial part of the events or omissions
14 giving rise to Plaintiffs’ claims occurred in this district.

15 **FACTS**

16 **I. COVID-19 Poses Grave Risks of Serious Illness or Death.**

17 44. The outbreak of COVID-19, a disease caused by a novel coronavirus,
18 has reached pandemic status. Because COVID-19 is easily transmitted, and because
19 testing is increasingly available, the number of confirmed cases is expected to grow
20 exponentially in the near term. The death toll of COVID-19 in the United States is
21 already growing exponentially.

22 45. The need for care, including intensive care, and the likelihood of death,
23 is much higher from COVID-19 infection than from influenza. According to recent
24 estimates, the fatality rate of people infected with COVID-19 is about ten times higher
25 than a severe seasonal influenza, even in advanced countries with highly effective
26 health care systems. For people in the highest risk populations, the fatality rate of
27 COVID-19 infection is about 15 percent—ten times the average rate.

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1 46. All human beings share a risk of contracting, and upon contraction,
2 transmitting the virus that causes COVID-19. Any adult who contracts the virus may
3 experience life-threatening symptoms.

4 47. However, people over the age of 45 and those with certain medical
5 conditions face greater chances of serious illness or death from COVID-19. Certain
6 underlying medical conditions increase the risk of serious illness or death from
7 COVID-19 for people of any age, including lung disease, heart disease hypertension,
8 chronic liver or kidney disease, diabetes, epilepsy, compromised immune systems
9 (such as from cancer, HIV, or an autoimmune disease), blood disorders (including
10 sickle cell disease), inherited metabolic disorders, stroke, developmental delay, and
11 pregnancy.

12 48. New information regarding COVID-19 risk factors emerges daily. Other
13 categories of individuals may have conditions that predispose them to complications
14 from COVID-19, but are not yet identified by the medical literature.

15 49. For those who contract COVID-19 and survive, the virus can severely
16 damage lung tissue, which requires an extensive period of rehabilitation, and in some
17 cases cause a permanent loss of respiratory capacity. COVID-19 may also target the
18 heart muscle, causing a medical condition called myocarditis, or inflammation of the
19 heart muscle. Myocarditis can affect the heart muscle and electrical system, reducing
20 the heart's ability to pump. This reduction can lead to rapid or abnormal heart rhythms
21 in the short term, and long-term heart failure that limits exercise tolerance and the
22 ability to work. People of all ages and medical backgrounds who have experienced
23 serious cases of COVID-19 describe painful symptoms including vomiting, severe
24 diarrhea, relentless shivering, and suffocating shortness of breath.

25 50. Emerging evidence suggests that COVID-19 can also trigger an over-
26 response of the immune system, further damaging tissues in a cytokine release
27 syndrome that can result in widespread damage to other organs, including permanent
28 injury to the kidneys and neurologic injury.

1 51. These complications can manifest at an alarming pace. Individuals can
2 be presymptomatic, yet still contagious, for a period of time before their symptoms
3 rapidly escalate.

4 52. People can also spread COVID-19 but be asymptomatic. The CDC
5 estimates that as many as 25 percent of people infected with COVID-19 do not show
6 symptoms.

7 53. Most people in high risk categories who contract the virus will need
8 advanced support. This level of supportive care requires highly specialized equipment
9 that is in limited supply, and an entire team of care providers, including 1:1 or 1:2
10 nurse to patient ratios, respiratory therapists, and intensive care physicians. This level
11 of support can quickly exceed local health care resources.

12 54. People who experience serious cases of COVID-19 who do not die from
13 COVID-19 should expect a prolonged recovery, including the need for extensive
14 rehabilitation for profound reconditioning, loss of digits, neurologic damage, and the
15 loss of respiratory capacity.

16 55. There is no vaccine against COVID-19, nor is there any known
17 medication to prevent or treat infection. The only known effective measures to reduce
18 the risk for vulnerable people from injury or death from COVID-19 are to prevent
19 them from being infected in the first place, and to limit spread via social distancing
20 measures.

21 56. Social distancing or remaining physically separated from known or
22 potentially infected individuals, and vigilant sanitation and hygiene, including
23 repeatedly and thoroughly washing hands with soap and water, are the only known
24 effective measures for protecting vulnerable people from COVID-19.

25 57. In recent days, the number of reported cases of infection in many parts
26 of the country have shown a frightening increase. The death toll has similarly
27 skyrocketed, up to over four thousand from just over a hundred two weeks prior.

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1 **II. People Detained at Otay Mesa and Imperial, Including Plaintiffs, Face**
2 **Greater Risk of COVID-19 Transmission.**

3 58. Detention centers, including Otay Mesa and Imperial, are tinderboxes
4 for rapid widespread infection within and beyond the facilities. At Otay Mesa, one
5 employee was confirmed to have tested positive on March 31, 2020. After news of
6 the positive case came out, all immigration judges at Otay Mesa's immigration court
7 were told to evacuate the facility.

8 59. Outside of Otay Mesa and Imperial, ICE has already confirmed six cases
9 of COVID-19 among its detainees and five cases among detention center employees.
10 ICE has not included the confirmed case at Otay Mesa in its online statistics.⁸

11 60. In institutional settings such as immigration detention centers, people
12 who are over the age of 45, or who have medical conditions that put them at high risk
13 of illness if infected by COVID-19, are at grave risk of serious illness or death.

14 61. Because of how detention centers necessarily operate, it is almost
15 inevitable that many will experience an outbreak of COVID-19. New people are
16 introduced frequently into the detained population, exacerbating the risk that the
17 COVID-19 virus will make its way into these facilities.

18 62. In order for detention centers to operate, numerous staff, contractors,
19 and vendors also must circulate through the facilities daily.

20 63. Given the difficulty in accurately identifying people infected with
21 COVID-19, many of whom only have mild symptoms or are asymptomatic, even
22 detention centers that implement screening mechanisms like temperature checks may
23 unwittingly permit contagious individuals inside.

24 64. Immigration detention facilities have an even greater risk of infectious
25 spread because of crowding, the proportion of vulnerable people detained, and often
26 scant medical care resources. Because COVID-19 is easily spread between people in

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28 ⁸ *ICE Guidance on COVID-19*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT,
<https://www.ice.gov/covid19>.

1 close proximity, any outbreak will be nearly impossible for detention centers to
2 control once the COVID-19 virus is introduced.

3 65. The social distancing measures recommended by public health
4 authorities cannot be implemented in carceral settings, where detained people must
5 share close quarters at almost all times. And given the number of people sharing the
6 same space, keeping surfaces in detention centers adequately sanitized to prevent
7 transmission of COVID-19 is not realistic.

8 66. In particular, conditions in Otay Mesa and Imperial make it nearly
9 impossible for Plaintiffs and others like them to practice social distancing. Each
10 housing unit at Otay Mesa can contain upwards of 120 people who must sleep in
11 enclosed, cell-like rooms containing four bunks each. Even during this crisis, Otay
12 Mesa has kept at least 80 people in a single housing unit, typically with three to six
13 people per room, preventing social distancing. At Imperial, detained individuals
14 usually sleep in open “dormitory style” units containing 60 bunks, with partially
15 walled-off cubicles each containing two bunk beds. Those in disciplinary segregation
16 are housed in traditional two-person cells in which it is impossible for them to be more
17 than six feet away from each other.

18 67. People detained at both facilities endure inadequate hygiene and
19 sanitation which raises the risk of infection and an outbreak.

20 68. Toilets, sinks, and showers are shared, without disinfection between
21 each use. Detainees at both facilities frequently report not having sufficient access to
22 soap. At Otay Mesa, detainees have resorted to buying soap from the commissary
23 because facility staff did not provide enough. Hand sanitizer, if provided at all, is
24 available only through communal dispensers, which often run empty.

25 69. Food preparation and service is communal with little opportunity for
26 surface disinfection. Detainees must wait in line together to get their meals and, at
27 least at Otay Mesa, still must sit three to a table while eating, which does not allow
28 for six feet of space in between them. Outside of housing units, detainees also are

1 often clustered together in hallways, where they are made to wait in line as they are
2 moved between different areas in the facility, as well as in rooms for video
3 conferencing and immigration court hearings. Staff arrive and leave on a shift basis,
4 new detainees are introduced into shared environments daily, and there is limited
5 ability, and little effort, to adequately screen staff, contractors, and visitors for new,
6 asymptomatic infection.

7 70. ICE's belated measures to prevent the spread of COVID-19 to Otay
8 Mesa and Imperial fall miserably short of what public health professionals say is
9 required to mitigate the risk to the public at large.

10 71. Early reports from detention centers indicate that ICE has continued to
11 put detainees at unnecessary risk during the COVID-19 pandemic. One person
12 detained at Otay Mesa reported that after being told he was being transferred to a
13 different detention center, he was placed in a small, unventilated holding room with
14 approximately eight other people, two of whom were coughing and visibly ill, and
15 forced to sleep there overnight. He then was transferred on a bus with about 30 other
16 detainees, including those who had shown symptoms, to another detention center,
17 before being transferred back to Otay Mesa where he was held in a "quarantine" space,
18 though several other detainees were moved in and out of the same area. He was never
19 tested for COVID-19 and was returned to the general population ten days later.

20 72. At Imperial, detainees are grouped together as they await their non-
21 contact legal visits or asylum interviews, and the rooms used for these conversations
22 lack hand sanitizer and do not appear to be regularly cleaned. Detention center staff
23 indicated that as recently as March 27, ICE still required them to bring asylum
24 applicants to their interviews in one group of 30 or more people.

25 73. At Otay Mesa, as recently as March 20, detention center staff did not
26 wear masks or gloves and did not practice social distancing while interacting with
27 detainees, visitors, and one another. The temperature checks supposedly instituted
28 recently at Otay Mesa and Imperial are insufficient to detect COVID-19, as a sizeable

1 percentage of people who have the virus have either mild symptoms or no symptoms
2 at all, and thus would not have a fever.

3 74. Detained people do not have access to masks or gloves and are still
4 frequently moved between parts of the detention center in groups. To have video
5 visitations with their lawyers, detained people at Otay Mesa must all share the same
6 space and use phone handsets, but are seemingly not provided with sanitation supplies
7 to clean them between uses. Lawyers must pass necessary documents to their clients
8 via detention center staff, who as of March 20 were not using gloves or masks while
9 transporting items between the visitor and detainee rooms.

10 75. To make matters worse, immigration detention facilities lack adequate
11 medical infrastructure to address the spread of infectious disease and treatment of
12 people most vulnerable to illness in detention.

13 76. During the H1N1 influenza epidemic in 2009, jails and prisons were
14 sites of severe outbreaks. As recently as 2019, mumps spread throughout Otay Mesa,
15 making it the epicenter of the disease's resurgence in San Diego county. It is
16 reasonable to expect COVID-19 will also readily spread in detention centers,
17 especially when people cannot engage in proper hygiene and isolate themselves from
18 infected residents or staff.

19 77. Complaints from both Otay Mesa and Imperial reflect widespread
20 inadequacies in the provision of medical care to people in custody, even when there
21 is no ongoing public health emergency. People detained at Otay Mesa have submitted
22 complaints alleging extreme neglect by medical staff, including one case where a
23 detained person was given a potentially harmful, "antiquated" HIV treatment.⁹ People
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25
26 ⁹ Maya Srikrishnan, *Documents Allege Serious Medical Neglect Inside Otay Mesa*
27 *Detention Center*, VOICE OF SAN DIEGO, Aug. 13, 2019,
28 <https://www.voiceofsandiego.org/topics/news/documents-allege-serious-medical-neglect-inside-otay-mesa-detention-center/>.

1 detained at Imperial have reported being deprived of necessary medication and being
2 refused treatment for serious health complaints.¹⁰

3 78. Detainees with limited English ability or low literacy struggle with the
4 process of placing requests for medical attention. Even if detainees are able to submit
5 a request, they often experience significant delays in obtaining treatment.

6 79. Detention centers are integral components of the public health systems
7 in the communities in which they are located. If many contract COVID-19 in such a
8 facility they will require hospitalization in the community, threatening to overwhelm
9 the community's resources. This problem is particularly acute in rural or semi-rural
10 communities, such as Calexico, California, where Imperial is located, and the area of
11 South San Diego along the U.S.-Mexico border where Otay Mesa is located. Even in
12 ordinary times, parts of both communities have been designated as medically
13 underserved by the federal government.¹¹ In the event of an outbreak of COVID-19
14 in either Otay Mesa or Imperial, the surrounding communities would be unable to
15 provide adequate medical treatment to infected persons.

16 80. Overwhelming local public health systems will likely prevent facilities
17 from providing treatment to all who require it, increasing the likelihood that
18 individuals with serious cases will die.

19 **III. Prioritizing Release of Those Most Vulnerable to Severe Harm as a Result**
20 **of COVID-19 Will Reduce the Risk of Infection to Detainees and the Public.**

21 81. Risk mitigation is the only known strategy that can protect vulnerable
22 groups from COVID-19, and ICE has demonstrated over and over again that it is both
23 unwilling and unable to implement meaningful risk mitigation measures.
24 Accordingly, public health experts with experience in immigration detention and

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26 ¹⁰ HUMAN RIGHTS FIRST, PRISONS AND PUNISHMENT: IMMIGRATION DETENTION IN
CALIFORNIA (Jan 2019),
27 https://www.humanrightsfirst.org/sites/default/files/Prisons_and_Punishment.pdf.

28 ¹¹ Health Resources & Services Association, *MUA Find*,
<https://data.hrsa.gov/tools/shortage-area/mua-find>.

1 correctional settings have recommended that detention centers immediately reduce
2 their populations, beginning with the release of detainees most vulnerable to severe
3 cases of COVID-19.

4 82. According to infectious disease specialist and practicing physician Dr.
5 Jonathan Golob, social distancing and proper hygiene—which are infeasible in
6 institutionalized settings such as immigration detention centers—are the only known
7 effective measures for protecting vulnerable people from COVID-19.

8 83. Infectious disease epidemiologist Dr. Joseph J. Amon states that
9 prioritizing the release of individuals at high risk of severe disease is a crucial risk
10 mitigation strategy. Dr. Amon recommends that at minimum, high-risk people be
11 released from detention given the lack of a viable vaccine or effective treatment.

12 84. Dr. Amon advises that reducing the overall number of people in
13 detention centers will help facilities implement social distancing for those still
14 detained and lessen the burden of protecting the health of detainees and staff.

15 85. An outbreak would lead to large numbers of ill detainees and detention
16 center staff, putting further strain on the community’s health system, according to Dr.
17 Amon. Courts agree that release of high-risk detainees is “absolutely in the public’s
18 best interest.” *Castillo*, 2020 WL 1502864, at *6; *see also Basank*, 2020 WL 1481503,
19 at *6.

20 86. Since February, DHS’s own medical experts, who have personally
21 investigated numerous detention facilities, have urged swift mitigation measures,
22 including decreasing the number of immigrant detainees in response to COVID-19’s
23 risks of harm.

24 87. Alarmed by ICE’s failure to take appropriate action, the experts became
25 whistleblowers, writing to Congress, “regarding the need to implement social
26 distancing to reduce the likelihood of exposure to detainees, facility personnel, and
27 the general public, *it is essential to consider releasing all detainees who do not pose*
28

1 *an immediate risk to public safety.*”¹² They also made their concerns public in an op-
2 ed, explaining that screening incoming detainees and isolating groups exposed to the
3 virus “won’t be enough” without rapidly “releas[ing] those who do not pose an
4 immediate danger to public safety.”¹³

5 88. In the event that a scenario unfolds where vulnerable detainees have
6 already been exposed to COVID-19, the DHS experts recommend the release of
7 detainees to a quarantine setting outside of detention in coordination with local health
8 authorities. Dr. Amon advises that risk mitigation measures including the release of
9 high-risk detainees is the only viable public health strategy going forward.

10 **IV. Plaintiffs Are Particularly Vulnerable to Serious Illness or Death if**
11 **Infected by COVID-19.**

12 89. Plaintiff Zelaya has underlying lung disease and is anemic. Ms. Zelaya
13 often feels weak and fatigued because of her medical conditions. She tends to fall ill
14 easily and has difficulty recovering. Dr. Katherine C. McKenzie, Director of the Yale
15 Center for Asylum Medicine and a practicing physician, states that because of her
16 conditions, Ms. Zelaya is at increased risk of developing severe disease or dying if
17 infected with COVID-19.

18 90. Plaintiff Benitez has chronic myelogenous leukemia, a form of
19 hematologic (blood) cancer. While in detention, his requests for help with pain and
20 other issues related to his leukemia have often gone ignored, and in the past year he
21 was forced to wait nine months to see a cancer specialist. Dr. McKenzie states that
22 Mr. Benitez’s leukemia severely affects his ability to fight off infections. Dr. McKenzie

24 ¹² Letter from Scott A. Allen, MD and Josiah Rich, MD, MPH to Congressional
25 Committee Chairpersons, dated Mar. 19, 2020,
26 <https://assets.documentcloud.org/documents/6816336/032020-Letter-From-Drs-Allen-Rich-to-Congress-Re.pdf> (emphasis in original).

27 ¹³ See Scott Allen, Josiah Rich & Mavis Nimoh, *We Must Release Prisoners to*
28 *Lessen the Spread of Coronavirus*, WASH. POST, Mar. 17, 2020,
<https://www.washingtonpost.com/opinions/2020/03/17/we-must-release-prisoners-lessen-spread-coronavirus/>.

1 also states that Mr. Benitez would likely become critically ill and would be at
2 increased risk of death if he contracted COVID-19.

3 91. Plaintiff Ozdemir and his common law wife, Plaintiff Jane Doe, have
4 HIV. Mr. Ozdemir's HIV causes him to feel weak and tired, and he is more susceptible
5 to illness. Throughout his 10 months in detention at Imperial, Mr. Ozdemir has
6 received minimal care for his HIV. Ms. Doe has been transferred between Otay Mesa
7 and Imperial because of her medical needs. Mr. Ozdemir fears for his own safety and
8 that of his Ms. Doe because of their potential for exposure to COVID-19 while in
9 detention. Mr. Ozdemir is also 49 years old, which places him in an age group at high
10 risk for severe disease and hospitalization from COVID-19. Dr. McKenzie states that
11 both Mr. Ozdemir and Ms. Doe would be at risk of severe disease and death if they
12 contracted COVID-19 due to their HIV.

13 **LEGAL FRAMEWORK**

14 **I. Plaintiffs' Continued Detention Violates Their Constitutional Rights.**

15 92. Defendants' continued detention of Plaintiffs puts them at a high risk of
16 exposure to a highly contagious disease. By placing these highly vulnerable people in
17 the path of a rapidly escalating pandemic, Defendants are violating their due process
18 rights under the Fifth Amendment.

19 93. Immigration detainees, even those with prior criminal convictions, are
20 civil detainees whose constitutional protections while in custody derive from the Fifth
21 Amendment due process clause. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

22 94. Civil detainees, including Plaintiffs, are entitled to greater rights than
23 convicted prisoners or criminal pretrial detainees. *Jones v. Blanas*, 393 F.3d 918, 933–
24 34 (9th Cir. 2004), *cert. denied*, 546 U.S. 820 (2005); *see also King v. Cnty. of Los*
25 *Angeles*, 885 F.3d 548, 557 (9th Cir. 2018) (finding presumption of punitive, and thus
26 unconstitutional, treatment where conditions of confinement for civil detainees are
27 similar to those faced by pre-trial criminal detainees). The constitutional protections
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1 to which civil immigration detainees are entitled are more comprehensive than those
2 afforded to imprisoned people.

3 95. Even the Eighth Amendment, however, imposes on the government an
4 affirmative duty to provide conditions of reasonable health and safety to those in it
5 detains or incarcerates. “When the State takes a person into its custody and holds him
6 there against his will, the Constitution imposes upon it a corresponding duty to assume
7 some responsibility for his safety and general well-being.” *DeShaney v. Winnebago*
8 *County Dept. of Soc. Servs.*, 489 U.S. 189, 199–200 (1989). As a result, the
9 government must provide those in its custody with “food, clothing, shelter, medical
10 care, and reasonable safety.” *Id.* at 200.

11 96. Conditions that pose an unreasonable risk of future harm violate the
12 Eighth Amendment’s prohibition against cruel and unusual punishment, even if that
13 harm has not yet come to pass.

14 97. The Eighth Amendment requires that “inmates be furnished with the
15 basic human needs, one of which is ‘reasonable safety.’” *Helling v. McKinney*, 509
16 U.S. 25, 33 (1993) (quoting *DeShaney*, 489 U.S. at 200).

17 98. The Supreme Court has explicitly recognized that the risk of contracting
18 a communicable disease may constitute such an “unsafe, life-threatening condition”
19 that threatens “reasonable safety.” *Id.*

20 99. While the Eighth Amendment prohibits punishment that is “cruel and
21 unusual,” the Due Process Clause of the Fifth Amendment prohibits *any punishment*
22 *at all*. Conditions that would violate the Eighth Amendment rights of a criminal
23 prisoner are more than enough to violate the Fifth Amendment due process rights of
24 a civil detainee. Unlike an Eighth Amendment claim, there is no requirement for civil
25 detainees to prove “deliberate indifference” of government officials in order to
26 establish a due process violation.

27 100. Conditions of confinement violate the Fifth Amendment when they
28 deprive people in civil custody of a basic human need, including safety, and the risk

1 of deprivation cannot be justified by a legitimate governmental interest or is excessive
2 despite a legitimate governmental interest.

3 101. The conditions of Plaintiffs' confinement under the current
4 circumstances and as described in this Complaint violate Plaintiffs' due process rights.

5 102. Even as this public health crisis rapidly develops, courts throughout
6 the country have already recognized that continued confinement, particularly of
7 vulnerable populations, in the face of COVID-19 raises serious due process
8 concerns. *See e.g., Castillo*, 2020 WL 1502864, at *5 (“Under the Due Process
9 Clause, a civil detainee cannot be subject to the current conditions of confinement at
10 Adelanto.”); *Basank*, No. 20-cv-02518, ECF No. 11, at 13 (“Confining vulnerable
11 individuals such as Petitioners without enforcement of appropriate social distancing
12 and without specific measures to protect their delicate health ‘pose[s] an
13 unreasonable risk of serious damage to [their] future health,’ and demonstrates
14 deliberate indifference.”) (quoting *Phelps v. Kapnolas*, 308 F.3d 180, 185 (2d Cir.
15 2002)); *Thakker*, No. 20-cv-00480, ECF No. 47, at 22 (“Physical detention itself
16 will place a burden on community healthcare systems and will needlessly endanger
17 Petitioners, prison employees, and the greater community. We cannot see the
18 rational basis of such a risk.”); *United States v. Martin*, No. CR PWG-19-140-13,
19 2020 WL 1274857, at *2 (D. Md. Mar. 17, 2020) (“[T]he Due Process Clauses of
20 the Fifth or Fourteenth Amendments, for federal and state pretrial detainees,
21 respectively, may well be implicated if defendants awaiting trial can demonstrate
22 that they are being subjected to conditions of confinement that would subject them
23 to exposure to serious (potentially fatal, if the detainee is elderly and with
24 underlying medical complications) illness.”).

25 **II. ICE Has the Authority to Release Detained People in Its Custody.**

26 103. It is well within ICE's authority to comply with these constitutional
27 requirements by releasing people to remedy the conditions of confinement in Otay
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1 Mesa and Imperial that put Plaintiffs and others detained there at an unreasonably
2 high risk of contracting COVID-19.

3 104. ICE has routinely exercised this discretion to release particularly
4 vulnerable detainees like Plaintiffs. ICE has authority to exercise discretion for
5 purposes of releasing individuals with serious medical conditions from detention
6 under its humanitarian parole authority.

7 105. ICE’s discretion applies regardless of the statutory basis for a
8 noncitizen’s detention.

9 106. ICE has a range of highly effective tools at its disposal to ensure that
10 people report for hearings and appointments.

11 107. When conditions of confinement in an immigration detention facility
12 lead to uniformly unsafe conditions that rise to the level of a constitutional violation,
13 the only available remedy is to reduce levels of detention unless and until conditions
14 can be brought in line with constitutional standards. For example, in a recent case
15 challenging conditions of confinement in Border Patrol detention facilities along the
16 Arizona border, a District Court ordered that the Constitution prohibited Border Patrol
17 from continuing to detain any person to whom it did not provide a bed, shower,
18 nutritious food, and a screening by a medical professional within 48 hours of book-
19 in. *Unknown Parties v. Nielsen*, CV-15-00250-TUC-DCB, 2020 WL 813774, at *1
20 (D. Az. Feb. 19, 2020).

21 **III. As Several Other Courts Have Recognized, This Court Has the Authority**
22 **to Order Plaintiffs’ Release as the Only Effective Remedy, and Such Relief is**
23 **Appropriate Here.**

24 108. The circumstances of this case make clear that release is the only means
25 to ensure compliance with the Constitution’s prohibition against punitive detention.

26 109. The Court’s authority to order Plaintiffs’ release to ensure their
27 constitutional rights are protected is well-established. “Federal courts possess
28 whatever powers are necessary to remedy constitutional violations because they are
charged with protecting these rights.” *Stone v. City & Cnty. Of San Francisco*, 968

1 F.2d 850, 861 (9th Cir. 1992). As a result, “[w]hen necessary to ensure compliance
2 with a constitutional mandate, courts may enter orders placing limits on a prison’s
3 population.” *Brown v. Plata*, 563 U.S. 493, 511 (2011).

4 110. Courts have regularly exercised this authority to remedy constitutional
5 violations caused by overcrowding. *Duran v. Elrod*, 713 F.2d 292, 297–98 (7th Cir.
6 1983), *cert. denied*, 465 U.S. 1108 (1984) (concluding that court did not exceed its
7 authority in directing release of low-bond pretrial detainees as necessary to reach a
8 population cap).

9 111. The same principle applies here. As the constitutional principles and
10 public health experts make clear, releasing Plaintiffs is the only viable remedy to
11 ensure their safety from the threat to their health that COVID-19 poses.

12 112. Plaintiffs are people with medical conditions and/or in high risk age
13 groups who are at particularly grave risk of severe illness or death if they contract
14 COVID-19.

15 113. In the face of this great threat, social distancing and hygiene measures
16 are Plaintiffs’ only defense against COVID-19. Defendants’ actions make such
17 protective measures are exceedingly difficult, if not impossible, in the environment of
18 an immigration detention center, where Plaintiffs share toilets, sinks, and showers, eat
19 in communal spaces, and are in close contact with the many other detainees and
20 officers around them.

21 114. Defendants are subjecting Plaintiffs to unreasonable harm from
22 continued detention. Release is the only effective remedy.

23 **CLAIM FOR RELIEF**

24 **I. Violation of Fifth Amendment Right to Substantive Due Process** 25 **(Unlawful Punishment; Freedom from Cruel Treatment and Conditions of** 26 **Confinement; Denial of Reasonable Safety)**

27 115. Plaintiffs repeat and reallege all the allegations above and incorporate
28 them by reference here.

1 116. The Fifth Amendment to the U.S. Constitution guarantees that civil
2 detainees, including all immigrant detainees, may not be subjected to punishment. The
3 federal government violates this substantive due process right when it subjects civil
4 detainees to conditions of confinement that amount to punishment or create an
5 unreasonable risk to detainees' safety and health.

6 117. Defendants' conditions of confinement subject Plaintiffs to heightened
7 risk of contracting COVID-19, for which there is no vaccine, known treatment, or
8 cure. Defendants are subjecting Plaintiffs to a substantial risk of serious harm,
9 including severe illness and death.

10 **PRAYER FOR RELIEF**

11 WHEREFORE, Plaintiff-Petitioners respectfully request that the Court:

- 12 a. Issue a writ of habeas corpus and order the immediate release of
13 Plaintiffs, with appropriate precautionary public health and safety
14 measures, on the ground that their continued detention violates the Due
15 Process Clause of the Fifth Amendment;
- 16 b. In the alternative, issue injunctive relief ordering Defendants, their
17 officers, agents, servants, employees, attorneys, and all other persons in
18 active concert or participation with any of the foregoing persons to
19 immediately release Plaintiffs, with appropriate precautionary public
20 health and safety measures, on the grounds that their continued
21 detention violates the Due Process Clause of the Fifth Amendment;
- 22 c. Issue a judgment declaring that the conditions under which Defendants
23 have confined Plaintiffs and others at Otay Mesa and Imperial place
24 Plaintiffs at an unreasonable risk of contracting serious illness and
25 death, in violation of the Due Process Clause of the Fifth Amendment;
- 26 d. Grant Plaintiffs their reasonable attorneys' fees and expenses pursuant
27 to 28 U.S.C. § 2412, and other applicable law; and
- 28 e. Grant such other relief as this Court deems just and proper.

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DATED: April 03, 2020

Respectfully submitted,

ACLU FOUNDATION OF SAN
DIEGO & IMPERIAL COUNTIES

s/ Monika Y. Langarica

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