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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. \_\_\_\_\_

**MEMORANDUM OF POINTS**  
**AND AUTHORITIES IN**  
**SUPPORT OF PLAINTIFF-**  
**PETITIONERS' MOTION**  
**FOR EMERGENCY**  
**TEMPORARY**  
**RESTRAINING ORDER**

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5	<i>Arizona Dream Act Coal. v. Brewer,</i>	
6	757 F.3d 1053 (9th Cir. 2014).....	23
7	<i>Basank v. Decker,</i>	
8	No. 20-cv-2518, 2020 WL 1481503 (S.D.N.Y. Mar. 26, 2020).....	3, 21
9	<i>Bell v. Wolfish,</i>	
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11	<i>Brown v. Plata,</i>	
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13	<i>Calderon Jimenez v. Wolf,</i>	
14	No. 18-10225-MLW (D. Mass. Mar. 26, 2020).....	3, 21
15	<i>Cancino Castellar v. McAleenan,</i>	
16	388 F. Supp. 3d 1218 (S.D. Cal. 2019).....	16
17	<i>Castillo v. Barr,</i>	
18	No. 20-cv-00605-TJH-AFMx, 2020 WL 1502864, (C.D. Cal. Mar. 27, 2020) ...	2,
19	18, 19, 20, 24	
20	<i>Cooper v. Aaron,</i>	
21	358 U.S. 1 (1958).....	19
22	<i>Coronel v. Decker,</i>	
23	No. 20-cv-2472, 2020 WL 1487274 (S.D.N.Y. Mar. 27, 2020).....	3, 20
24	<i>D’Alessandro v. Mukasey,</i>	
25	628 F. Supp. 2d 368 (W.D.N.Y. 2009).....	19
26	<i>DeShaney v. Winnebago County Dept. of Soc. Servs.,</i>	
27	489 U.S. 189 (1989).....	17
28	<i>Doe v. Kelly,</i>	
	878 F.3d 710 (9th Cir. 2017).....	16, 18
	<i>Does I thru XXIII v. Advanced Textile Corp.,</i>	

1	214 F.3d 1058 (9th Cir. 2000).....	13
2	<i>Duran v. Elrod</i> ,	
3	713 F.2d 292 (7th Cir. 1983).....	21
4	<i>Fraihat v. Wolf</i> ,	
5	No. 20-cv-00590-TJH (C.D. Cal. Mar. 30, 2020).....	2
6	<i>Gates v. Collier</i> ,	
7	501 F.2d 1291 (5th Cir. 1974).....	17
8	<i>Helling v. McKinney</i> ,	
9	509 U.S. 25 (1993).....	2, 17
10	<i>Hernandez v. Sessions</i> ,	
11	872 F.3d 976 (9th Cir. 2017).....	22, 23, 24
12	<i>Hutto v. Finney</i> ,	
13	437 U.S. 678 (1978).....	17
14	<i>In re Brichard Securities Litigation</i> ,	
15	788 F. Supp. 1098 (N.D. Cal. 1992).....	20
16	<i>In the Matter of the Extradition of Alejandro Toledo Manrique</i> ,	
17	Case No. 19-mj-71055, 2020 WL 1307109 (N. D. Cal. Mar.ch 19, 2020).....	5, 21
18	<i>Indep. Living Cent. of S. California, Inc. v. Shewry</i> ,	
19	543 F.3d 1047 (9th Cir. 2008).....	23
20	<i>Jennings v. Rodriguez</i> ,	
21	2016 WL 6276890 (U.S. 2016).....	15
22	<i>Jimenez v. Wolf</i> ,	
23	No. 19-cv-07996-NC, 2020 WL1082648 (N.D. Cal. 2020).....	22
24	<i>Jones v. Blanas</i> ,	
25	393 F.3d 918 (9th Cir. 2004).....	16, 17
26	<i>Judalang v. Chertoff</i> ,	
27	562 F.Supp.2d 1119 (S.D. Cal. 2008).....	22
28	<i>King v. Cty. of Los Angeles</i> ,	
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	<i>Kingsley v. Hendrickson</i> ,	
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1	<i>M.R. v. Dreyfus</i> ,	
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2	<i>Melendres v. Arpaio</i> ,	
3	695 F.3d 990 (9th Cir. 2012).....	22, 23
4	<i>Padilla v. U.S. Immigration &amp; Customs Enforcement</i> ,	
5	No. 19-35565, 2020 WL 1482393 (9th Cir. Mar. 27, 2020) .....	22
6	<i>Pimentel v. Dreyfus</i> ,	
7	670 F.3d 1096 (9th Cir. 2012).....	15
8	<i>Ramos v. Sessions</i> ,	
9	293 F.Supp.3d 1021(N.D. Cal. Mar. 13, 2018) .....	22
10	<i>Rodriguez v. Marin</i> ,	
11	909 F.3d 252 (9th Cir. 2018).....	20
12	<i>Sales v. Johnson</i> ,	
13	No. 16-cv-01745-EDL, 2017 WL 6855827 (N.D. Cal. 2017).....	22
14	<i>Stone v. City &amp; Cty. of San Francisco</i> ,	
15	968 F.2d 850 (9th Cir. 1992).....	20
16	<i>Thakker v. Doll</i> ,	
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18	<i>United States v. Barkman</i> ,	
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20	<i>United States v. Raihan</i> ,	
21	No. 20-cr-68, (E.D.N.Y. Mar. 12, 2020).....	21
22	<i>United States v. Stephens</i> ,	
23	No. 15-cr-95 (AJN), 2020 WL 1295155 (S.D.N.Y. Mar. 19, 2020) .....	21
24	<i>Unknown Parties v. Johnson</i> ,	
25	No. CV-15-00250-TUC-DCB, 2016 WL 8188563 (D. Ariz. Nov. 18, 2016).....	18
26	<i>Warsoldier v. Woodford</i> ,	
27	418 F.3d 989 (9th Cir. 2005).....	22
28	<i>Winter v. Nat. Res. Def. Council, Inc.</i> ,	
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1	<i>Xochihua-Jaimes v. Barr</i> ,	
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2	<i>Youngberg v. Romeo</i> ,	
3	457 U.S. 307(1982) .....	16
4	<i>Zadvydas v. Davis</i> ,	
5	533 U.S. 678 (2001) .....	16, 19
6	<i>Zepeda v. I.N.S.</i> ,	
7	753 F.2d 719 (9th Cir. 1983).....	23
8	<b>Other Authorities</b>	
9	Alene Tchekmedyan, et al., <i>L.A. County releasing some inmates from jail to</i>	
10	<i>combat coronavirus</i> , L.A. Times (March 16, 2020),	
11	<a href="https://www.latimes.com/california/story/2020-03-16/la-jail-population-arrests-down-amid-coronavirus">https://www.latimes.com/california/story/2020-03-16/la-jail-population-arrests-</a>	
12	<a href="https://www.latimes.com/california/story/2020-03-16/la-jail-population-arrests-down-amid-coronavirus">down-amid-coronavirus</a> .....	5
13	Board of Correction City of New York, <i>Letter from BOC re NYC Jails and Covid-</i>	
14	<i>19</i> (March 19, 2020) available at	
15	<a href="https://www1.nyc.gov/assets/boc/downloads/pdf/News/covid-19/Letterfrom-BOC-re-NYC-Jails-and-COVID-19-2020-03-21.pdf">https://www1.nyc.gov/assets/boc/downloads/pdf/News/covid-19/Letterfrom-</a>	
16	<a href="https://www1.nyc.gov/assets/boc/downloads/pdf/News/covid-19/Letterfrom-BOC-re-NYC-Jails-and-COVID-19-2020-03-21.pdf">BOC-re-NYC-Jails-and-COVID-19-2020-03-21.pdf</a> .....	5
17	Cal. Gov., Exec. Order No. N-33-20 (Mar. 19, 2020),	
18	<a href="https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf">https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf</a> .....	4
19	<i>Coronavirus Disease 2019</i> , Centers for Disease Control and Prevention,	
20	<a href="https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html">https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html</a> .....	3
21	David Smith, <i>US surpasses China for highest number of confirmed Covid-19 cases</i>	
22	<i>in the world</i> , The Guardian (Mar. 27, 2020),	
23	<a href="https://www.theguardian.com/world/2020/mar/26/coronavirus-outbreak-us-latest-trump">https://www.theguardian.com/world/2020/mar/26/coronavirus-outbreak-us-latest-</a>	
24	<a href="https://www.theguardian.com/world/2020/mar/26/coronavirus-outbreak-us-latest-trump">trump</a> . .....	1
25	Doris Meissner, “Exercising Prosecutorial Discretion,” Immigration and	
26	Naturalization Services (Nov. 17, 2000).....	14
27	<i>Eligibility Criteria for Enrollment into the Intensive Supervision Appearance</i>	
28	<i>Program (ISAP) and the Electronic Monitoring Device Program (EMD)</i> , U.S.	
	Immigration and Customs Enforcement (May 11, 2005),	
	<a href="https://www.ice.gov/doclib/foia/dro_policy_memos/dropolicymemoeligibilityfordroisapandemdprograms.pdf">https://www.ice.gov/doclib/foia/dro_policy_memos/dropolicymemoeligibilityfor-</a>	
	<a href="https://www.ice.gov/doclib/foia/dro_policy_memos/dropolicymemoeligibilityfordroisapandemdprograms.pdf">droisapandemdprograms.pdf</a> .....	15
	Frank Bajak, ICE Shuttters Helpful Family Management Program Amid Budget	
	Cuts, June 9, 2017, <a href="https://www.csmonitor.com/USA/Foreign-">https://www.csmonitor.com/USA/Foreign-</a>	

1 Policy/2017/0609/ICE-shutters-helpful-family-management-program-amid-  
2 budget-cuts ..... 15

3 Ganesh Setty and Kara Scannell, *New Jersey will release low-level offenders from*  
4 *jail to prevent coronavirus spread*, CNN (Mar. 24, 2020),  
5 [https://www.cnn.com/2020/03/24/us/new-jersey-low-level-offenders-release-](https://www.cnn.com/2020/03/24/us/new-jersey-low-level-offenders-release-coronavirus/index.html)  
6 [coronavirus/index.html](https://www.cnn.com/2020/03/24/us/new-jersey-low-level-offenders-release-coronavirus/index.html)..... 5

7 Gig Conaughton, *County Officials Give COVID-19 Update in Wake of Governor’s*  
8 *“Stay Home” Order*, County News Center (Mar. 20, 2020),  
9 [https://www.countynewscenter.com/county-officials-update-covid-19-in-wake-](https://www.countynewscenter.com/county-officials-update-covid-19-in-wake-of-governors-stay-home-order/)  
10 [of-governors-stay-home-order/](https://www.countynewscenter.com/county-officials-update-covid-19-in-wake-of-governors-stay-home-order/) ..... 4

11 ICE Enforcement and Removal Operations, “Directive 11071.1: Assessment and  
12 Accommodations for Detainees with Disabilities” (Dec. 15, 2016)..... 14

13 *ICE Guidance on COVID-19* (“ICE Guidance”), U.S. Immigration & Customs  
14 Enforcement, [www.ice.gov/covid19](http://www.ice.gov/covid19)..... 6

15 Jeh Charles Johnson, “Policies for the Apprehension, Detention and Removal of  
16 Undocumented Immigrants,” U.S. Department of Homeland Security (Nov. 20,  
17 2014), available at <https://www.dhs.gov/sites/default/files/publications/14> ..... 14

18 Josiah Rich, Scott Allen & Mavis Noah, *We Must Release Prisoners to Lessen the*  
19 *Spread of Coronavirus*, The Washington Post, Mar. 17 2020,  
20 [https://www.washingtonpost.com/opinions/2020/03/17/we-must-release-](https://www.washingtonpost.com/opinions/2020/03/17/we-must-release-prisoners-lessen-spreadcoronavirus/)  
21 [prisoners-lessen-spreadcoronavirus/](https://www.washingtonpost.com/opinions/2020/03/17/we-must-release-prisoners-lessen-spreadcoronavirus/) ..... 9

22 Kate Morrissey and Andrea Lopez-Villafana, *Employee at Otay Mesa Detention*  
23 *Center tests positive for COVID-19*, The San Diego Union Tribune (Mar. 31,  
24 2020), [https://www.sandiegouniontribune.com/news/immigration/story/2020-03-](https://www.sandiegouniontribune.com/news/immigration/story/2020-03-31/employee-at-otay-mesa-detention-center-being-tested-for-covid-19-after-showing-symptoms)  
25 [31/employee-at-otay-mesa-detention-center-being-tested-for-covid-19-after-](https://www.sandiegouniontribune.com/news/immigration/story/2020-03-31/employee-at-otay-mesa-detention-center-being-tested-for-covid-19-after-showing-symptoms)  
26 [showing-symptoms](https://www.sandiegouniontribune.com/news/immigration/story/2020-03-31/employee-at-otay-mesa-detention-center-being-tested-for-covid-19-after-showing-symptoms) ..... 9

27 Maura Dolan, et al., *California releases more jail inmates amid coronavirus crisis*,  
28 *L.A. Times* (March 20, 2020), [https://www.latimes.com/california/story/2020-03-](https://www.latimes.com/california/story/2020-03-20/california-releases-more-jail-inmates-amid-coronavirus-crisis)  
29 [20/california-releases-more-jail-inmates-amid-coronavirus-crisis](https://www.latimes.com/california/story/2020-03-20/california-releases-more-jail-inmates-amid-coronavirus-crisis)..... 5

30 Paige St. John, *As coronavirus spreads, California prisons plan to release 3,500*  
31 *inmates early*, San Diego Union Tribune (Mar. 31, 2020),  
32 [https://www.sandiegouniontribune.com/news/california/story/2020-03-](https://www.sandiegouniontribune.com/news/california/story/2020-03-31/coronavirus-california-release-3500-inmates-prisons)  
33 [31/coronavirus-california-release-3500-inmates-prisons](https://www.sandiegouniontribune.com/news/california/story/2020-03-31/coronavirus-california-release-3500-inmates-prisons) ..... 4

34 *People who are at higher risk for severe illness*, Centers for Disease Control and



1 Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/people-at-higher-risk.html>..... 10

2 Quinn Wilson, *KCSO: Inmate releases based on mitigating spread of COVID-19,*

3 *reserved for non-violent offenders*, Bakersfield Californian (March 19, 2020),

4 [https://www.bakersfield.com/news/breaking/kcso-inmate-releases-based-on-](https://www.bakersfield.com/news/breaking/kcso-inmate-releases-based-on-mitigating-spreadof-covid-/article_10ffc8a2-6a3d-11ea-b7b5-7b06de300554.html)

5 [mitigating-spreadof-covid-/article\\_10ffc8a2-6a3d-11ea-b7b5-7b06de300554.html](https://www.bakersfield.com/news/breaking/kcso-inmate-releases-based-on-mitigating-spreadof-covid-/article_10ffc8a2-6a3d-11ea-b7b5-7b06de300554.html)

..... 5

6 Report to Congressional Committees, *Alternative to Detention, Improved Data and*

7 *Collection and Analysis Needed to Better Assess Program Effectiveness,*

8 *Government Accountability Office (2014)*..... 14

9 U.S. Gov’t Accountability Office, GAO-15-26, *Alternatives to Detention:*

10 *Improved Data Collection and Analyses Needed to Better Assess Program*

11 *Effectiveness 10-11 (Nov. 2014)*, available at

12 <https://www.gao.gov/assets/670/666911.pdf>. .... 15

13 U.S. Immigration and Customs Enforcement, “*Detention Reform,*” (last updated

14 *July 24, 2018)*, <https://www.ice.gov/detention-reform#tab1> ..... 14

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1 **I. INTRODUCTION**

2 Plaintiffs are people held in civil immigration detention by Immigration and  
3 Customs Enforcement (“ICE”) at Otay Mesa Detention Center (“Otay Mesa”) and  
4 Imperial Regional Detention Facility (“Imperial”). while they await final disposition  
5 of their immigration cases. Each Plaintiff suffers from underlying medical  
6 conditions, including HIV, leukemia, and chronic lung disease, and faces a  
7 heightened risk of serious illness or death if they contract Coronavirus Disease 2019  
8 (“COVID-19”). They seek immediate release from ICE custody due to the urgent  
9 threat to their lives, especially in light of recent confirmation that an employee at  
10 Otay Mesa has already tested positive for the virus.

11 COVID-19 is a contagious disease that has spread like wildfire throughout the  
12 United States and the world. The number of confirmed cases and deaths rises  
13 exponentially by the day. There is no specific treatment, vaccine, or cure for COVID-  
14 19, and no one is immune. The only way to prevent the chance of serious illness or  
15 death from COVID-19, especially for medically vulnerable people, is to practice  
16 scrupulous hygiene and social distancing. Plaintiffs are held in conditions where this  
17 hygiene and social distancing are impossible.

18 The COVID-19 pandemic has had widespread universal impact, claiming  
19 thousands of lives and fundamentally transforming basic elements of daily life in  
20 unprecedented ways. This is especially true in the United States, where confirmed  
21 cases now exceed those in any other country.<sup>1</sup> In response, authorities nationwide  
22 have taken painful but necessary decisions to close high-density settings of all sorts—  
23 schools, workplaces, government buildings, restaurants, and cultural institutions to  
24 avoid risking lives. In recognition of the tremendous public health risk, California

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25  
26 <sup>1</sup> David Smith, *US surpasses China for highest number of confirmed Covid-19*  
27 *cases in the world*, The Guardian (Mar. 27, 2020),  
28 <https://www.theguardian.com/world/2020/mar/26/coronavirus-outbreak-us-latest-trump>.

1 prisons and jails have already released thousands of people incarcerated in the  
2 criminal legal system and federal courts have ordered the releases of civil detainees  
3 in ICE custody. Defendants’ agencies, including ICE, have failed to take adequate  
4 measures to protect the health and safety of people in its custody. The Eighth  
5 Amendment protects imprisoned people against “a condition of confinement that is  
6 sure or very likely to cause serious illness and needless suffering the next week or  
7 month or year.” *Helling v. McKinney*, 509 U.S. 25, 33 (1993). As civil detainees,  
8 Plaintiffs enjoy greater protections under the Fifth Amendment than prisoners do  
9 under the Eighth Amendment. Plaintiffs are likely to prevail on claims that  
10 Defendants’ actions are unconstitutional. There is no legitimate justification for  
11 continued detention in light of the risks to Plaintiffs’ lives.

12 The irreparable harm as a result of death or serious illness cannot be overstated.  
13 Public health experts agree that the spread of COVID-19 to immigration detention  
14 facilities is inevitable, that Plaintiffs will experience serious injury or death if  
15 infected, and that reducing the number of people detained, starting with those who  
16 are most vulnerable, serves the public interest by reducing the risk of widespread  
17 infection in closed environments that will overwhelm demands on local health care  
18 infrastructures. In the past week, the federal district court for the Central District of  
19 California has found that a number of medically vulnerable immigrant detainees were  
20 likely to succeed on the merits of their due process challenge to ongoing ICE  
21 detention and ordered their immediate release. *See, e.g., Castillo v. Barr* (“*Castillo*  
22 *TRO*”), No. 20-cv-00605-TJH-AFMx, 2020 WL 1502864, at \*6 (C.D. Cal. Mar. 27,  
23 2020); *Fraihat v. Wolf*, TRO and Order to Show Cause, No. 20-cv-00590-TJH, at  
24 \*12 (C.D. Cal. Mar. 30, 2020).

25 These are just two of a growing number of cases throughout the country in  
26 which federal courts have ordered the release of vulnerable detainees. The Ninth  
27 Circuit ordered, *sua sponte*, the release of an immigrant petitioner “[i]n light of the  
28 rapidly escalating public health crisis, which public health authorities predict will

1 especially impact immigration detention centers.” *Xochihua-Jaimes v. Barr*, No. 18-  
2 71460, 2020 WL 1429877, at \*1 (9th Cir. Mar. 24, 2020). District courts in numerous  
3 jurisdictions have ordered the release of noncitizens in immigration detention due to  
4 the threat to their health and lives that COVID-19 poses. *See, e.g., Thakker v. Doll*,  
5 No. 20-cv-00480 (M.D. Pa. Mar. 31, 2020) (granting TRO releasing medically  
6 vulnerable immigration detainees from custody due to the dangers of COVID-19);  
7 *Coronel v. Decker*, No. 20-cv-2472, 2020 WL 1487274 (S.D.N.Y. Mar. 27, 2020)  
8 (ordering release of four medically vulnerable immigrant plaintiffs held in New York  
9 and New Jersey detention centers due to threat of COVID-19); *Basank v. Decker*,  
10 No. 20-cv-2518, 2020 WL 1481503, at \*1 (S.D.N.Y. Mar. 26, 2020) (same, for ten  
11 immigrant plaintiffs who “suffer[] from chronic medical conditions, and face[] an  
12 imminent risk of death or serious injury in immigration detention if exposed to  
13 COVID-19”); *Calderon Jimenez v. Wolf*, No. 18-10225-MLW Dkt. 507 (D. Mass.  
14 Mar. 26, 2020) (Att. B) (ordering grant of bail for an immigrant detainee held in  
15 Plymouth County, Massachusetts because “being in jail enhances risk”). Under these  
16 circumstances, this Court should join the chorus of others across the country that have  
17 responded to this grave public health crisis by ordering Plaintiffs’ immediate release.

## 18 **II. FACTS**

### 19 **A. COVID-19 Is Extremely Dangerous, But ICE Has Failed to Meaningfully** 20 **Protect People in its Custody From Contracting the Virus.**

21 COVID-19 has reached global pandemic status, exhibiting rapid escalation  
22 and devastating impact. As of April 02, 2020, it has claimed 4,513 lives in the United  
23 States and has infected 213,144 people.<sup>2</sup> Although these figures grow exponentially  
24 every day, they are likely an underestimate due to the lack of availability of testing.  
25 Declaration of Dr. Jonathan Louis Golob (“Golob Decl.”) ¶ 2; Declaration of Dr.  
26 Joseph Amon (“Amon Decl.”) ¶ 5. The Centers for Disease Control and Prevention

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27 <sup>2</sup> *Coronavirus Disease 2019*, Centers for Disease Control and Prevention,  
28 <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>

1 (“CDC”) projects that over 200 million people in the United States could become  
2 infected, and as many as 1.5 million could die, without proper public health  
3 intervention. Golob Decl. ¶ 10. The potential consequences to higher risk people are  
4 severe: in the highest risk populations, the fatality rate is about 15%, and for high  
5 risk patients who do not die, prolonged recovery is likely necessary, including  
6 extensive rehabilitation, loss of digits, neurologic damage, and loss of respiratory  
7 capacity. Golob Decl. ¶ 4. There is no known cure or vaccine for COVID-19; the  
8 only known effective measures to reduce risk of death or injury for vulnerable people  
9 are avoiding contagion by practicing social distancing and proper hygiene. Golob  
10 Decl. ¶ 8. The threats to life wrought by COVID-19 have caused state and local  
11 governments to take drastic measures to preserve public health, despite  
12 overwhelming economic impacts. In San Diego County, government officials banned  
13 gatherings of 10 or more and later encouraged people to not gather in groups of any  
14 size.<sup>3</sup> On March 19, 2020, the state of California issued an executive order, ordering  
15 all California residents to shelter in place.<sup>4</sup> As of April 2, at least 297 million people  
16 in at least 38 states, 48 counties, 14 cities, the District of Columbia, and Puerto Rico  
17 are being directed to stay home. Amon Decl. ¶ 13.

18 California’s jails and prisons have also responded in unprecedented manners.  
19 California released 3,500 people from state prisons.<sup>5</sup> Many of the state’s largest jails  
20 have released people detained in the criminal legal system to protect those people  
21 and the community from COVID-19. Alameda County’s Santa Rita Jail released 250

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22 <sup>3</sup> Gig Conaughton, *County Officials Give COVID-19 Update in Wake of Governor’s*  
23 *“Stay Home” Order*, County News Center (Mar. 20, 2020),  
24 <https://www.countynewscenter.com/county-officials-update-covid-19-in-wake-of-governors-stay-home-order/>

25 <sup>4</sup> Cal. Gov., Exec. Order No. N-33-20 (Mar. 19, 2020),  
26 <https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf>

27 <sup>5</sup> Paige St. John, *As coronavirus spreads, California prisons plan to release 3,500*  
28 *inmates early*, San Diego Union Tribune (Mar. 31, 2020),  
<https://www.sandiegouniontribune.com/news/california/story/2020-03-31/coronavirus-california-release-3500-inmates-prisons>

1 people;<sup>6</sup> Los Angeles County released more than 1,000;<sup>7</sup> Kern County has released  
2 dozens.<sup>8</sup> The New York Board of Corrections called for “bold urgent action” to  
3 “drastically reduce the [] jail population.”<sup>9</sup> The Supreme Court of New Jersey issued  
4 an order creating a presumption of release for every person serving a sentence in New  
5 Jersey’s county jails.<sup>10</sup> “These are extraordinary times,” Magistrate Judge Thomas S.  
6 Hixson recently observed, in ordering the release of an individual on bail after taking  
7 into account his risk of vulnerability to COVID-19. *In the Matter of the Extradition*  
8 *of Alejandro Toledo Manrique*, Case No. 19-mj-71055, 2020 WL 1307109, at \*1 (N.  
9 D. Cal. Mar.ch 19, 2020).

10 On March 19, 2020, two medical subject matter experts for the U.S.  
11 Department of Homeland Security’s (“DHS”) Office of Civil Rights and Civil  
12 Liberties wrote to Congress that, in order “to implement immediate social distancing  
13 to reduce the likelihood of exposure to detainees, facility personnel, and the general

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14 <sup>6</sup> See Maura Dolan, et al., *California releases more jail inmates amid coronavirus*  
15 *crisis*, L.A. Times (March 20, 2020),  
16 [https://www.latimes.com/california/story/2020-03-20/california-releases-more-jail-](https://www.latimes.com/california/story/2020-03-20/california-releases-more-jail-inmates-amid-coronavirus-crisis)  
[inmates-amid-coronavirus-crisis](https://www.latimes.com/california/story/2020-03-20/california-releases-more-jail-inmates-amid-coronavirus-crisis)

17 <sup>7</sup> See Alene Tchekmedyan, et al., *L.A. County releasing some inmates from jail to*  
18 *combat coronavirus*, L.A. Times (March 16, 2020),  
19 [https://www.latimes.com/california/story/2020-03-16/la-jail-population-arrests-](https://www.latimes.com/california/story/2020-03-16/la-jail-population-arrests-down-amid-coronavirus)  
[down-amid-coronavirus](https://www.latimes.com/california/story/2020-03-16/la-jail-population-arrests-down-amid-coronavirus)

20 <sup>8</sup> See Quinn Wilson, *KCSO: Inmate releases based on mitigating spread of COVID-*  
21 *19, reserved for non-violent offenders*, Bakersfield Californian (March 19, 2020),  
22 [https://www.bakersfield.com/news/breaking/kcso-inmate-releases-based-on-](https://www.bakersfield.com/news/breaking/kcso-inmate-releases-based-on-mitigating-spreadof-covid-/article_10ffc8a2-6a3d-11ea-b7b5-7b06de300554.html)  
[mitigating-spreadof-covid-/article\\_10ffc8a2-6a3d-11ea-b7b5-7b06de300554.html](https://www.bakersfield.com/news/breaking/kcso-inmate-releases-based-on-mitigating-spreadof-covid-/article_10ffc8a2-6a3d-11ea-b7b5-7b06de300554.html)

23 <sup>9</sup> Board of Correction City of New York, *Letter from BOC re NYC Jails and Covid-*  
24 *19* (March 19, 2020) available at  
25 [https://www1.nyc.gov/assets/boc/downloads/pdf/News/covid-19/Letterfrom-BOC-](https://www1.nyc.gov/assets/boc/downloads/pdf/News/covid-19/Letterfrom-BOC-re-NYC-Jails-and-COVID-19-2020-03-21.pdf)  
[re-NYC-Jails-and-COVID-19-2020-03-21.pdf](https://www1.nyc.gov/assets/boc/downloads/pdf/News/covid-19/Letterfrom-BOC-re-NYC-Jails-and-COVID-19-2020-03-21.pdf)

26 <sup>10</sup> Ganesh Setty and Kara Scannell, *New Jersey will release low-level offenders*  
27 *from jail to prevent coronavirus spread*, CNN (Mar. 24, 2020),  
28 [https://www.cnn.com/2020/03/24/us/new-jersey-low-level-offenders-release-](https://www.cnn.com/2020/03/24/us/new-jersey-low-level-offenders-release-coronavirus/index.html)  
[coronavirus/index.html](https://www.cnn.com/2020/03/24/us/new-jersey-low-level-offenders-release-coronavirus/index.html)

1 public, it is essential to consider releasing all detainees who do not pose an immediate  
2 risk to public safety.” Ltr. from Scott A. Allen, MD and Josiah Rich, MD, MPH to  
3 Cong’l Cmte. Chairpersons (Mar. 19, 2020) (“Allen & Rich Ltr.”) (Exh. A to  
4 Langarica Declaration.). ICE’s responses, in contrast, have failed to meaningfully  
5 take into account COVID-19’s risks to immigrants and community at large. As  
6 Californians began sheltering in place in compliance with public health directives,  
7 ICE’s Los Angeles Field Office executed pre-dawn home raids to force even more  
8 immigrants into ICE detention centers. Following public outcry, ICE issued a  
9 statement recognizing the need for alternatives to detention for new arrestees to  
10 protect public health, but has inexplicably refused to apply that same logic to its  
11 current detainees.<sup>11</sup>

12 **B. People in ICE Detention Face Heightened Risk of Contagion.**

13 People in congregate environments—places where people live, eat, and sleep  
14 in close proximity—face increased danger of contracting COVID-19, as evinced by  
15 the rapid spread of the virus in cruise ships and nursing homes. Golob Decl. ¶ 12.  
16 As a result, governments have called for a suspension of activities that take place in  
17 congregate environments. Amon Decl. ¶ 13. In California, as of March 19, state  
18 government officials banned issued a “stay at home” order. *Id.*

19 Detention centers pose a “heightened public health risk to the spread of  
20 COVID-19, even greater than other non-carceral institutions.” *Id.* at ¶ 16.  
21 Immigration detention facilities are closed environments, much like cruise ships,  
22 where the proportion of vulnerable people is high, medical care is scant, and  
23 conditions are crowded. *Id.* at ¶ 17. Living conditions force people to live in close  
24 quarters and share toilets, sinks, and showers; and food preparation is communal. *Id.*  
25 This is particularly problematic because “while hand washing and disinfecting  
26 surfaces is advisable, the main strategy for limiting disease transmission is social

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27 <sup>11</sup> See *ICE Guidance on COVID-19*, U.S. Immigration & Customs Enforcement,  
28 [www.ice.gov/covid19](http://www.ice.gov/covid19).

1 distancing and [] for such distancing to be effective it must occur before individuals  
2 display symptoms.” *Id.* at ¶ 12. Detention centers further offer little opportunity for  
3 surface disinfection; and staff arrive and leave on a shift basis. *Id.* at ¶ 17. Dr. Amon  
4 opines that under such circumstances, facilities will not be able to prevent  
5 transmission of the virus once it is introduced. Amon Decl. ¶ 20. Dr. Golob, who  
6 specializes in infectious diseases and internal medicine, notes that it is reasonable to  
7 expect COVID-19 will readily spread in detention centers, particularly when  
8 detainees cannot engage in proper hygiene and isolation. Golob Decl. ¶¶ 1, 13.

9 During the H1N1 influenza epidemic in 2009, jails and prisons were sites of  
10 severe outbreaks of viral infection. Golob Decl. ¶ 13. There have already been  
11 COVID-19 outbreaks in jails, prisons, and detention centers. Amon Decl. ¶ 25. To  
12 make matters worse, transfers of people subject to immigration detention, which are  
13 frequent, could cause infection within certain ICE detention centers to quickly spread  
14 throughout the entire immigration detention system. Allen & Rich Ltr. at 4. Indeed,  
15 experts have warned that ICE detention centers can act as tinderboxes for the rapid  
16 spread of infectious diseases within and beyond the facilities. *Id.* at 3-4.

17 **C. Current Conditions at Otay Mesa and Imperial Underscore ICE’s Failure  
18 to Take Necessary Precautions.**

19 Witnesses’ experiences inside Otay Mesa and Imperial confirm experts’  
20 projections. They document Plaintiffs’ vulnerability to COVID-19 at Otay Mesa and  
21 Imperial and ICE’s failure to meaningfully respond to the COVID-19 crisis.  
22 Plaintiffs, who are detained at Otay Mesa and Imperial, often do not have access to  
23 soap, hand sanitizer, masks, or gloves. Declaration of Shannon Englert in support of  
24 Issis Yoselin Zelaya Sagastume (“Zelaya Decl.”) ¶ 11; Declaration of Kathrine  
25 Russell in support of Miguel Benitez (“Benitez Decl.”) ¶ 15; Declaration of Crystal  
26 Felix in support of Yusuf Ozdemir and Jane Doe (“Ozdemir and Doe Decl.”) ¶ 15;  
27 Declaration of Dorien Ediger-Seto (“Ediger Decl.”) ¶ 8; Declaration of Elizabeth  
28 Lopez (“Lopez Decl.”) ¶ 6; Declaration of Joshua Jones (“Jones Decl.”) ¶ 46. Staff  
do not regularly wear masks or gloves, despite many of them monitoring and



1 interacting with detainees and members of the general public throughout the day.  
2 Benitez Decl. ¶ 15; Ediger Decl. ¶ 9; Lopez Decl. ¶ 13.

3 Plaintiffs and lawyers continue to report conditions at Otay Mesa that make  
4 practice social distancing impossible within both facilities. Communal living is  
5 standard at Otay Mesa and Imperial, with detainees typically sleeping in cells that  
6 they share with two to five others. Ediger Decl. ¶ 5. Bunks in the cells make  
7 maintaining a six foot distance difficult. *Id.* One lawyer reports that a client shares a  
8 cell with five others. *Id.* at 28. Sinks, showers, and toilets are generally shared, and  
9 meals are communal. Ozdemir and Doe Decl. ¶ 14; Zelaya Decl. ¶ 11; Benitez Decl.  
10 ¶ 15; Lopez Decl. ¶ 5; Ediger Decl. ¶ 5; Jones Decl. ¶ ¶ 42-43.<sup>12</sup> Detainees from  
11 different housing units often join each other for meals. Ediger Decl. ¶ 6. Moreover,  
12 in both detention centers, officers move detainees frequently between units and  
13 spaces in groups, having to stand and walk close to each other during the movements.  
14 *Id.* at ¶ 12. Transfers in and out of the detention centers also continue to be  
15 commonplace, even during the pandemic, with detainees having to wait for long  
16 periods at a time in shared booking areas in close proximity to others. *Id.* at ¶ 13. One  
17 individual, who was subject to a transfer from Otay Mesa to another detention facility  
18 and back without explanation, was forced to stay in a small room with approximately  
19 eight others in the booking area overnight. *Id.* at ¶ 14. Two of the other men in the  
20 small room were coughing and visibly sick and the room had poor air circulation. *Id.*

21 The reported conditions inside Otay Mesa and IRDF Imperial should come as  
22 no surprise. According to the DHS whistleblower experts, “the track record of ICE  
23 facilities implementing [early screening, testing, isolation and quarantine] protocols  
24 historically has been inconsistent.” Allen & Rich Ltr. Moreover, even if ICE was  
25 consistently taking these precautions, the DHS experts explain that they “won’t be

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26 <sup>12</sup> The Jones Declaration refers to three different facilities, one of which is “CCA.”  
27 CCA is the Otay Mesa Detention Center, which is operated by CoreCivic, formerly  
28 Corrections Corporation of America (“CCA”). Both criminal defendants and  
noncitizens in ICE custody are held there.

1 enough” without rapidly “releas[ing] those who do not pose an immediate danger to  
2 public safety.”<sup>13</sup> Additionally, according to Dr. Amon’s training and decades of  
3 professional experience in public health, ICE’s recently updated guidance in response  
4 to COVID-19 is “entirely inadequate to prevent or mitigate the rapid transmission of  
5 COVID-19 in detention settings.” Amon Decl. ¶¶ 21-22. The protocols fail to address  
6 widespread community infection, imminent shortages of medical supplies and  
7 staffing, and education of detained people and staff. *Id.* at 22. Importantly, there is  
8 no guidance in the protocol to identify high-risk patients or steps to protect them from  
9 contracting COVID-19.” *Id.* The measures fail to properly take into account  
10 presymptomatic transmission and people who have already been exposed to COVID-  
11 19. *Id.* In Dr. Amon’s opinion, the protocol “lacks anticipation of what has already  
12 started elsewhere and will soon impact these facilities, including widespread  
13 infection of both detainees and staff with a massive impact on the level of staffing  
14 and capacity for clinical care. *Id.*

15 Under these conditions, it is only a matter of time before the virus enters and  
16 spreads through both facilities. As of March 31, 2020, one Otay Mesa employee is  
17 confirmed to have tested positive for COVID-19 after showing symptoms.<sup>14</sup>  
18 Detainees report observing people in the detention centers exhibiting COVID-19  
19 symptoms and being told that units are in isolation because of coronavirus. Jones  
20 Decl. ¶ 53. These reports are particularly troubling, given “[i]f COVID-19 enters into  
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22 <sup>13</sup> Josiah Rich, Scott Allen & Mavis Noah, *We Must Release Prisoners to Lessen*  
23 *the Spread of Coronavirus*, The Washington Post, Mar. 17 2020,

24 [https://www.washingtonpost.com/opinions/2020/03/17/we-must-release-prisoners-  
lessen-spreadcoronavirus/](https://www.washingtonpost.com/opinions/2020/03/17/we-must-release-prisoners-<br/>lessen-spreadcoronavirus/).

25 <sup>14</sup> In response, all immigration judges were ordered evacuated from Otay Mesa.  
26 Kate Morrissey and Andrea Lopez-Villafana, *Employee at Otay Mesa Detention*  
27 *Center tests positive for COVID-19*, The San Diego Union Tribune (Mar. 31, 2020),  
28 [https://www.sandiegouniontribune.com/news/immigration/story/2020-03-  
31/employee-at-otay-mesa-detention-center-being-tested-for-covid-19-after-  
showing-symptoms](https://www.sandiegouniontribune.com/news/immigration/story/2020-03-<br/>31/employee-at-otay-mesa-detention-center-being-tested-for-covid-19-after-<br/>showing-symptoms).

1 the immigration detention facilities, these facilities will likely be unable to address  
2 the infections spread and the needs of infected individuals due to a lack of testing and  
3 insufficient physical and medical infrastructure.” Amon Decl. ¶ 28.

4 **D. Public Health Experts Agree that People At Risk of Serious Illness or**  
5 **Death Due to COVID-19 Should Be Released from ICE Detention.**

6 People 54 years old or older are at higher risk of severe disease or death from  
7 COVID-19, while people 45 years old and older are high risk for severe disease.  
8 Amon Decl. ¶ 9. The CDC has concluded that certain underlying medical conditions  
9 increase the risk of serious COVID-19 symptoms for people of any age. These  
10 include lung disease, heart disease, chronic liver or kidney disease, diabetes,  
11 epilepsy, compromised immune systems (such as from cancer, HIV, or an  
12 autoimmune disease), blood disorders (including sickle cell disease), inherited  
13 metabolic disorders, stroke, developmental delay, and pregnancy.<sup>15</sup> Golob Decl. ¶ 3.  
14 For people with these risk factors, the consequences of COVID-19 can be severe,  
15 including temporary or permanent damage to the heart, lungs, and kidneys, or death.  
16 Golob Decl. ¶¶ 4; 7. Patients in high-risk categories who do not die from COVID-19  
17 may have prolonged serious illness. Declaration of Dr. Katherine C. McKenzie  
18 (“McKenzie Decl.”) ¶ 10.

19 The need for care, including intensive care, and the likelihood of lasting  
20 complications and death is about ten times higher from COVID-19 infection than  
21 from influenza. Golob Decl. ¶ 4. For people in the highest risk populations, the  
22 fatality rate of COVID-19 infection is about fifteen percent, or one in seven. *Id.* Most  
23 people in higher risk categories who develop severe effects medical complications  
24 due to of COVID-19 will need advanced supportive care to survive, requiring highly

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25 <sup>15</sup> This list is evolving. On March 23, 2020, the CDC updated its previous list as to  
26 who is at higher risk of serious illness if they were to contract COVID-19. *See*  
27 *People who are at higher risk for severe illness*, Centers for Disease Control and  
28 Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/people-at-higher-risk.html>

1 specialized equipment that is in limited supply, and an entire team of care providers,  
2 including 1:1 or 1:2 nurse to patient ratios, respiratory therapists, and intensive care  
3 physicians. Golob Decl. ¶ 6.<sup>16</sup> Large numbers of ill individuals will strain the medical  
4 infrastructures in the communities surrounding detention centers, particularly those  
5 in rural counties. Amon Decl. ¶ 38; McKenzie Decl. ¶ 20. Once infection spreads  
6 throughout a detention center, overwhelming the facility’s limited resources, the  
7 burden will shift to local medical facilities, which will likely not be able to provide  
8 care to all infected people with grave cases, increasing the likelihood of death. Amon  
9 Decl. ¶ 38.

10 Because risk mitigation is the only known strategy that can protect vulnerable  
11 groups from COVID-19, and because it is virtually impossible to engage in the  
12 necessary social distancing and hygiene required to mitigate the risk of transmission  
13 in a congregate environment, public health experts agree that “the most effective  
14 mitigation strategy” is to reduce crowding by releasing detainees from custody. Allen  
15 & Rich Ltr. at 5 (“*it is essential to consider releasing all detainees who do not pose*  
16 *an immediate risk to public safety*”) (emphasis in original). Release of high-risk  
17 people from detention is especially important given the heightened risks to their  
18 health and safety and given the lack of a viable vaccine for prevention or effective  
19 treatment at this stage. Amon Decl. ¶ 43. Put simply: “ICE must release all people  
20 with risk factors to prevent serious illness including death.” Amon Decl. ¶ 22.

21 Releasing high risk detainees will also mitigate the possible effects on the  
22 public health systems of the surrounding communities. Reducing the population in a  
23 facility allows for greater social distancing, which Dr. Amon recognizes as the “main  
24 strategy for limiting disease transmission.” Amon Decl. ¶ 12. Yet that strategy is not  
25 viable in detained settings. Amon Decl. ¶ 17. Releasing individuals will also allow

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26  
27 <sup>16</sup> Even some younger and healthier people who contract COVID-19 may require  
28 supportive care, which includes supplemental oxygen, positive pressure ventilation,  
and in extreme cases, extracorporeal mechanical oxygenation. Golob Decl. ¶ 5.

1 for easier provision of preventive measures such as handwashing and disinfecting  
2 surfaces, which are also advisable, for remaining detainees. Amon Decl. ¶ 12. As  
3 detailed in Plaintiff declarations, access to hygiene supplies inside Otay Mesa and  
4 Imperial supplies is currently inconsistent at best and impossible at worse. *Supra* Pt.  
5 II.C. These measures will protect Plaintiffs, remaining detainees, and ICE and  
6 detention center employees, along with their families and contacts.

7 Moreover, detention facilities are integral parts of the public health  
8 infrastructures of their surrounding communities. Releasing individuals from  
9 Imperial and Otay Mesa will avoid straining and overwhelming medical  
10 infrastructures in their surrounding counties. Amon Decl. ¶ 38. “If infection spreads  
11 throughout the detention center, overwhelming the center’s own limited resources,  
12 the burden of caring for these individuals will shift to local medical facilities.” *Id.*

### 13 **E. Plaintiffs Are At Risk of Serious Illness or Death.**

14 Dr. Katherine C. McKenzie reviewed the medical conditions that Plaintiffs  
15 report having been diagnosed with and concluded that each of them is “have chronic  
16 medical conditions that increase their risk of severe COVID-19 disease as outlined  
17 by the CDC.” McKenzie Decl. ¶ 22.

18 Issis Yoselin Zelaya Sagastume is detained at Otay Mesa and has underlying  
19 lung disease and anemia. Zelaya Decl. ¶¶ 4, 9; McKenzie Decl. ¶ 24. Her condition  
20 causes her to feel weak and fatigued. Zelaya Decl. at ¶ 11. She becomes ill easily and  
21 has difficulty recovering. *Id.* She is very concerned for her well-being. *Id.* Despite  
22 detention center staff acknowledging that she is at risk, they have not given her the  
23 resources she needs to take preventative measures, including gloves, masks, hand  
24 sanitizer, disinfectant. Zelaya Decl. at ¶ 10, 11. She also is not able to engage in social  
25 distancing. Zelaya Decl. at 11. Ms. Zelaya lives in constant fear of contracting  
26 COVID-19 and has high levels of anxiety. Zelaya Decl. at ¶ 12. She is at increased  
27 risk of developing severe COVID-19 disease and dying from it, and is also likely to  
28 require hospitalization and potentially intensive care if she is infected. McKenzie

1 Decl. ¶ 24.

2 Miguel Benitez has chronic myelogenous leukemia, a condition that a doctor  
3 said might end his life in around five years—three years ago. Benitez Decl. ¶ 9. He  
4 is currently detained in Otay Mesa Detention Facility. *Id.* at ¶ 5. Chronic  
5 myelogenous leukemia is a form of cancer and a blood disorder, both of which  
6 indicate high risk of serious illness and death from COVID-19. Amon Decl. ¶ 7, 8.  
7 His providers have explained that his immune system does not work as well as others  
8 because of his cancer. Benitez Decl. ¶ 11. A weakened immune system also puts him  
9 at high risk of serious illness and death. Amon Decl. ¶ 8. Despite the gravity of his  
10 condition, Mr. Benitez had to wait nine months in detention before he could consult  
11 an oncologist while at Otay Mesa. Benitez Decl. ¶ 12. Aside from allergy medication,  
12 he has received no treatment for it, and no monitoring. Benitez Decl. at ¶ 10. Mr.  
13 Benitez cannot maintain proper hygiene in detention. When he runs out of soap—  
14 which happens often, since he is only allowed one small bar at a time—he has to wait  
15 for a replacement. Benitez Decl. at ¶ 15. He does not have access to a mask or hand  
16 sanitizer. *Id.* Especially since he learned that staff members tested positive for  
17 COVID-19, Mr. Benitez is extremely anxious that he could get COVID-19. Benitez  
18 Decl. at ¶ 14. Mr. Benitez’s leukemia makes it likely that he would become critically  
19 ill if infected, and places him at increased risk of death. McKenzie Decl. ¶ 23. He  
20 fears that he would not survive and that he would never see his 12-year-old son Mikey  
21 again. Benitez Decl. at ¶¶ 8, 14.

22 Yusuf Ozedmir and Jane Doe<sup>17</sup>, a common law married couple, are both living  
23 with HIV. Ozdemir and Doe Decl. ¶ 3. They are currently detained at Imperial. *Id.*  
24 As a result of their HIV diagnoses, they are at greater risk of having weakened  
25 immune systems, which makes them especially vulnerable to serious illness and

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26 <sup>17</sup> 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 death from COVID-19. Ozdemir and Doe Decl. at ¶ 13; Amon Decl. ¶ 8; McKenzie  
2 Decl. ¶¶ 25, 26. Mr. Ozdemir is detained in a large room with 64 other people in close  
3 quarters, with shared toilets, sinks, and showers. Ozdemir and Doe Decl. ¶ 14. It is  
4 impossible to practice social distancing. *Id.* Mr. Ozdemir is terrified for his own  
5 safety and that of his wife. Ozdemir and Doe Decl. at ¶ 17.

#### 6 **F. ICE Has Discretion to Release Detainees for Medical Reasons.**

7 ICE has a track record of releasing vulnerable detainees like Plaintiffs,  
8 especially for medical reasons.<sup>18</sup> Under ICE policies, individuals who have suffered  
9 from serious physical or mental illness, who were disabled, elderly, pregnant, or  
10 nursing, or whose detention was not otherwise in the public interest, were considered  
11 for release.<sup>19</sup> When deciding whether to release medically-vulnerable detainees from  
12 custody, ICE considered whether the detainees had any physical or mental condition  
13 that would make them more susceptible to medical harm while in ICE custody.<sup>20</sup>

14 ICE has a range of highly effective tools at its disposal to ensure that  
15 individuals report for court hearings and other appointments, including conditions of  
16 supervision.<sup>21</sup> For example, ICE’s conditional supervision program, called ISAP

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17 <sup>18</sup> *See, e.g.*, U.S. Immigration and Customs Enforcement, “Detention Reform,” (last  
18 updated July 24, 2018), <https://www.ice.gov/detention-reform#tab1> (referencing  
19 use of risk classification assessment tools that “require[] ICE officers to determine  
20 whether there is any special vulnerability that may impact custody and  
21 classification determinations”); ICE Enforcement and Removal Operations,  
22 “Directive 11071.1: Assessment and Accommodations for Detainees with  
23 Disabilities” (Dec. 15, 2016), at 9 (providing for release as an option for detainees  
24 with disabilities); Doris Meissner, “Exercising Prosecutorial Discretion,”  
25 Immigration and Naturalization Services (Nov. 17, 2000), at 11 (citing “aliens with  
26 a serious health concern” as a trigger for the favorable exercise of discretion).

27 <sup>19</sup> *See* Jeh Charles Johnson, “Policies for the Apprehension, Detention and Removal  
28 of Undocumented Immigrants,” U.S. Department of Homeland Security (Nov. 20,  
2014), available at  
[https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf)  
29 [discretion.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf), at 5 (indicating that detention resources should not be used for  
30 people who are elderly, disabled, pregnant, nursing, or seriously ill).

<sup>20</sup> Plaintiffs do not argue that they can force ICE to exercise discretionary authority  
to release them. Rather, the point is that historically, ICE practice has been to  
release at risk detainees.

<sup>21</sup> Report to Congressional Committees, Alternative to Detention, Improved Data  
and Collection and Analysis Needed to Better Assess Program Effectiveness,  
Government Accountability Office (2014),

1 (Intensive Supervision Appearance Program), relies on the use of electronic ankle  
2 monitors, biometric voice recognition software, unannounced home visits, employer  
3 verification, and in-person reporting to supervise participants.<sup>22</sup> A government-  
4 contracted evaluation of this program reported a 99% attendance rate at all  
5 immigration court hearings and a 95% attendance rate at final hearings.<sup>23</sup> Another  
6 program studied in 2011 saw fewer than 1% of participants removed from the  
7 program due to arrest by another law enforcement agency. *See Jennings v. Rodriguez*,  
8 2016 WL 6276890, at \*36–37 (U.S. 2016) (Brief of 43 Social Science Researchers  
9 and Professors as *Amici Curiae* in Support of Respondents).

### 10 **III. LEGAL STANDARD**

11 To obtain a preliminary injunction, Plaintiffs must establish (1) they are likely  
12 to succeed on the merits; (2) they are likely to suffer irreparable harm; (3) the balance  
13 of equities favors them; and (4) an injunction is in the public interest. *Winter v. Nat.*  
14 *Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The Ninth Circuit employs a sliding  
15 scale approach, under which a stronger showing of one element may offset a weaker  
16 showing of another. *See Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012).

17 Plaintiffs meet the standard because they are likely to prevail on the merits of  
18 this case and they will suffer irreparable harm, potentially including death, in the  
19 absence of relief. The balance of hardships is clearly in their favor, and the public  
20 interest favors an injunction requiring the government to follow the law.

21 \_\_\_\_\_  
22 <https://www.gao.gov/assets/670/666911.pdf>.11; Frank Bajak, ICE Shuttles Helpful  
23 Family Management Program Amid Budget Cuts, June 9, 2017,  
[https://www.csmonitor.com/USA/Foreign-Policy/2017/0609/ICE-shuttles-helpful-  
family-management-program-amid-budget-cuts](https://www.csmonitor.com/USA/Foreign-Policy/2017/0609/ICE-shuttles-helpful-family-management-program-amid-budget-cuts).

24 <sup>22</sup> *Eligibility Criteria for Enrollment into the Intensive Supervision Appearance*  
25 *Program (ISAP) and the Electronic Monitoring Device Program (EMD)*, U.S.  
26 Immigration and Customs Enforcement (May 11, 2005),  
[https://www.ice.gov/doclib/foia/dro\\_policy\\_memos/dropolicymemoeligibilityfordr  
oisapandemdprograms.pdf](https://www.ice.gov/doclib/foia/dro_policy_memos/dropolicymemoeligibilityfordroisapandemdprograms.pdf).

27 <sup>23</sup> *See* U.S. Gov't Accountability Office, GAO-15-26, *Alternatives to Detention:*  
28 *Improved Data Collection and Analyses Needed to Better Assess Program*  
*Effectiveness 10-11* (Nov. 2014), available at  
<https://www.gao.gov/assets/670/666911.pdf>.



1 **IV. ARGUMENT**

2 **A. Plaintiffs Are Likely To Succeed On the Merits.**

3 *1. Plaintiffs’ Continued Civil Immigration Detention Violates Their*  
4 *Due Process Rights.*

5 Plaintiffs are likely to establish that Defendants’ actions violate their Due  
6 Process rights by forcing Plaintiffs to live under conditions that expose them to  
7 infectious disease with potentially lethal consequences. Courts have already found  
8 continued detention of highly vulnerable people during the COVID-19 pandemic to  
9 violate civil detainees’ Fifth Amendment due process rights. *See, e.g., Castillo TRO*  
10 *at \*6.* The recent confirmation that a staff member at Otay Mesa has COVID-19  
11 places Ms. Zelaya and Mr. Benitez at even greater risk and makes it clear that it is  
12 only a matter of time before the virus enters both detention facilities.

13 Immigration detainees are civil detainees protected by the Due Process Clause  
14 of the Fifth Amendment. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Civil  
15 detainees are entitled to greater rights than criminal detainees or convicted prisoners.  
16 *Jones v. Blanas*, 393 F.3d 918, 931 (9th Cir. 2004); *cf. Cancino Castellar v.*  
17 *McAleenan*, 388 F. Supp. 3d 1218, 1234 (S.D. Cal. 2019); *Youngberg v. Romeo*, 457  
18 U.S. 307, 321–22 (1982); *See also King v. Cty. of Los Angeles*, 885 F.3d 548, 557  
19 (9th Cir. 2018) (finding presumption of punitive, and thus unconstitutional, treatment  
20 where conditions of confinement for civil detainees are similar to those faced by  
21 pretrial criminal detainees). Such civil detention may not “amount to punishment of  
22 the detainee.” *Bell v. Wolfish*, 441 U.S. 520, 535 (1979); *see also Kingsley v.*  
23 *Hendrickson*, 135 S. Ct. 2466, 2473–74 (2015). When analyzing whether a custodian  
24 has imposed a condition that amounts to punishment, courts must inquire whether the  
25 detention condition is “reasonably related to a legitimate governmental objective.”  
26 *Doe v. Kelly*, 878 F.3d 710, 720 (9th Cir. 2017) (quoting *Bell*, 441 U.S. at 539).  
27 Where that condition is “arbitrary or purposeless,” the government violates an  
28 immigrant detainee’s rights. *Id.* (quoting *Bell*, 441 U.S. at 539).

The Due Process Clause provides protection significantly greater than the

1 Eighth Amendment’s ban on cruel and unusual punishment.<sup>24</sup> Even the Eighth  
2 Amendment, however, imposes on the government an affirmative duty to provide  
3 conditions of reasonable health and safety to the people it incarcerates. The  
4 government violates the Eight Amendment when it takes a person into its custody  
5 such that they are unable to care for themselves but “fails to provide for his basic  
6 human needs—e.g, food, clothing, shelter, medical care, and reasonable safety.”  
7 *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189, 199–200 (1989).  
8 Conditions that pose an unreasonable risk of future harm violate the Eighth  
9 Amendment’s prohibition against cruel and unusual punishment, even if that harm  
10 has not yet come to pass. Thus, the government cannot “ignore a condition of  
11 confinement that is sure or very likely to cause serious illness and needless suffering  
12 the next week or month or year.” *Helling*, 509 U.S. at 32 (1993). For example,  
13 inmates cannot be comingled with others having “infectious maladies” such as  
14 hepatitis and venereal disease. *Hutto v. Finney*, 437 U.S. 678, 682 (1978); *Gates v.*  
15 *Collier*, 501 F.2d 1291 (5th Cir. 1974). Such comingling establishes an Eighth  
16 Amendment violation even if the plaintiff cannot yet “prove that he is currently  
17 suffering serious medical problems caused by” the exposure. *Helling*, 509 U.S. at 32.

18 Here, Plaintiffs have submitted ample evidence demonstrating the extent to  
19 which Defendants are putting them at unreasonable risk of future harm due to their  
20 risk of exposure and potential complications due to their underlying medical  
21 conditions. Plaintiffs are incapable of engaging in adequate physical distancing; they  
22 do not have consistent access to basic hygiene supplies; and detention center staff are  
23 not consistently observed practicing proper hygiene or care. *Supra* Pt. II.C. The  
24 detention centers have additionally demonstrated a consistent failure to provide

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25 <sup>24</sup> While the Eighth Amendment prohibits punishment against criminal detainees  
26 that is “cruel and unusual,” the Fifth Amendment’s due process protections do not  
27 allow “punishment” at all. *Bell*, 441 U.S. at 535 n.16 (“Due process requires that a  
28 pretrial detainee not be punished.”). Unlike in an Eighth Amendment claim, there is  
no requirement for civil detainees challenging their conditions of confinement  
under the Fifth Amendment to prove “deliberate indifference” on the part of  
government officials. *Jones*, 393 F.3d at 934.

1 Plaintiffs reliable medical care despite their underlying grave illnesses. Medical staff  
2 at Otay Mesa have repeatedly ignored Mr. Benitez’s requests for treatment for pain  
3 and other issues despite his leukemia diagnosis and doctors’ projections that he might  
4 need a transplant and has a limited time to live. Benitez Decl. ¶¶ 9-10. Conditions at  
5 Otay and Imperial cannot be seen as sufficient to ensure the safety of those in their  
6 custody by preventing the introduction of COVID-19 or prevent its rapid  
7 transmission among both detainees and staff. *See, e.g.*, Amon Decl. ¶¶ 40, 42, 46.

8 Conditions that violate the Eighth Amendment are more than enough to violate  
9 a civil detainee’s Fifth Amendment due process rights. If subjecting an inmate to an  
10 elevated risk of potentially lethal infection constitutes “cruel and unusual  
11 punishment” in violation of the Eighth Amendment, subjecting a civil detainee to  
12 serious risk of lethal infection is unconstitutional in violation of the Fifth  
13 Amendment. Indeed, in the wake of COVID-19, a Court has already held “[a] civil  
14 detainee’s constitutional rights are violated if a condition of his confinement places  
15 him at substantial risk of suffering serious harm, such as the harm caused by a  
16 pandemic.” *Castillo* TRO at 6.

17 2. *The Harm to Plaintiffs from the Threat of COVID-19 is Excessive in*  
18 *Relation to the Government’s Interest, in Violation of Substantive*  
*Due Process.*

19 A condition of civil immigration confinement violates the Fifth Amendment  
20 “if it imposes some harm to the detainee that significantly exceeds or is independent  
21 of the inherent discomforts of confinement and is not reasonably related to a  
22 legitimate governmental objective or is excessive in relation to the legitimate  
23 governmental objective.” *Unknown Parties v. Johnson*, No. CV-15-00250-TUC-  
24 DCB, 2016 WL 8188563, at \*5 (D. Ariz. Nov. 18, 2016), *aff’d* sub nom. *Doe v. Kelly*,  
25 878 F.3d 710 (9th Cir. 2017) (citing *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473-  
26 74 (2015)).

27 Older adults and people who have serious underlying medical conditions,  
28 including HIV, lung disease, and those with compromised immune systems due to

1 cancer treatment, like Plaintiffs, are at higher risk of severe disease and death if they  
2 contract COVID-19, which is more likely to occur in immigration detention. Amon  
3 Decl. ¶¶ 8, 39, 40. This threat vastly outweighs any government interest in Plaintiffs’  
4 confinement. Because immigration proceedings are civil and non-punitive, “[t]here  
5 is no sufficiently strong special justification . . . for indefinite civil detention.”  
6 *Zadvydas*, 533 U.S. at 690. If the government’s interest in effectuating removal and  
7 protecting the community cannot justify indefinite detention, it cannot justify the  
8 “potentially permanent” medical harm and death that Plaintiffs could face. *See id.* at  
9 690–91; *cf. D’Alessandro v. Mukasey*, 628 F. Supp. 2d 368, 399 (W.D.N.Y. 2009)  
10 (considering immigrant’s age and “constellation of serious, debilitating, and  
11 progressive health problems” to weigh against flight risk concerns and interest in  
12 continued detention).

13 Further, as the Court in *Castillo* noted in granting the request for a temporary  
14 restraining order in that case, “[t]he risk that Petitioners, here, will flee, given the  
15 global pandemic, is very low, and reasonable conditions can be fashioned to ensure  
16 their future appearance at deportation proceedings.” *Castillo* TRO at 10. The Court  
17 also noted that while they had criminal histories, the civil detainee Plaintiffs in that  
18 case had already completed their criminal sentences. The same is true here; any  
19 interest Defendants assert to justify detaining the Plaintiffs in this case are gravely  
20 outweighed by the Plaintiffs’ risks of lethal contagion and they are further mitigated  
21 by the fact that they are civil detainees who are unlikely to flee under the current  
22 circumstances.

23 *3. The Detention Statute Pursuant to Which ICE Claims to Detain*  
24 *Plaintiffs is Irrelevant to the Substantive Due Process Analysis.*

25 Plaintiffs are likely to prevail regardless of the detention authority that  
26 Defendants have invoked. Even for Plaintiffs who the government alleges are subject  
27 to “mandatory” detention under any statute, the due process violation presented by  
28 these exceptional circumstances override any general detention mandate. *See Cooper*  
*v. Aaron*, 358 U.S. 1, 18 (1958) (explaining U.S. Constitution’s role as “supreme law

1 of the land”); *In re Brichard Securities Litigation*, 788 F. Supp. 1098, 1112 (N.D.  
2 Cal. 1992) (“[C]oncerns” about legislative intent “cannot override the  
3 Constitution.”). “It is clear, of course, that no Act of Congress can authorize a  
4 violation of the Constitution.” *Almeida-Sanchez v. United States*, 413 U.S. 266, 272  
5 (1973). Indeed, the Ninth Circuit recently noted that due process overrides § 1226(c)  
6 in certain common circumstances. *See Rodriguez v. Marin*, 909 F.3d 252, 256 (9th  
7 Cir. 2018) (“We have grave doubts that any statute that allows for arbitrary prolonged  
8 detention without any process is constitutional or that those who founded our  
9 democracy precisely to protect against the government’s arbitrary deprivation of  
10 liberty would have thought so.”). Defendants cannot rely on a claim of “mandatory”  
11 detention to justify continued detention under these circumstances in violation of  
12 Plaintiffs’ due process rights.

13 4. *As Several Other Courts Have Recognized, This Court Has Authority*  
14 *to Order Plaintiffs’ Release as the Only Effective Remedy for the*  
15 *Constitutional Violation.*

16 Plaintiffs’ release from detention is within this Court’s power and is the only  
17 effective remedy for the constitutional violations Plaintiffs face. “Federal courts  
18 possess whatever powers are necessary to remedy constitutional violations because  
19 they are charged with protecting these rights.” *Cf. Stone v. City & Cty. of San*  
20 *Francisco*, 968 F.2d 850, 861 (9th Cir. 1992). Federal courts across the country have  
21 already ordered the immediate release of immigration detainees confined under  
22 similar circumstances. *See, e.g., Xochihua-Jaimes*, 2020 WL 1429877 (“[i]n light of  
23 the rapidly escalating public health crisis, which public health authorities predict will  
24 especially impact immigration detention centers[.]”); *Castillo* TRO (granting  
25 temporary restraining order seeking release of immigration detainees held at  
26 Adelanto Detention Center and ordering the government to “forthwith and without  
27 delay, release Petitioners”); *Coronel*, 2020 WL 1487274 (ordering release of four  
28 medically vulnerable immigration detainees due to threat of COVID-19); *Thakker*,  
No. 20-cv-00480, ECF No. 47 (same for 13 medically vulnerable petitioners);

1 *Basank*, 2020 WL 1481503 (same for 10 medically vulnerable petitioners); *Calderon*  
2 *Jimenez*, No. 18-10225-MLW, Dkt. 507 (ordering grant of bail for an immigrant  
3 detainee held in Plymouth County, Massachusetts because “being in jail enhances  
4 risk”). Courts have also ordered release from confinement and modifications of  
5 supervised release in non-civil immigration detention contexts but under  
6 circumstances similarly related to COVID-19 risks and public health  
7 considerations.<sup>25</sup>

8 A detainee may seek expedited relief from unconstitutional conditions of  
9 confinement through habeas, as the cases above demonstrate. Moreover, the principle  
10 that a federal court may release individuals to remedy unconstitutional conditions is  
11 well established. *See Brown v. Plata*, 563 U.S. 493, 511 (2011) (“When necessary to  
12 ensure compliance with a constitutional mandate, courts may enter orders placing  
13 limits on a prison’s population.”); *Duran v. Elrod*, 713 F.2d 292, 297–98 (7th Cir.  
14 1983), cert. denied, 465 U.S. 1108 (1984) concluding that court did not exceed its  
15 authority in directing release of low-bond pretrial detainees as necessary to reach a  
16 population cap).

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17 <sup>25</sup> *See also In the Matter of the Extradition of Alejandro Toledo Manrique*, 2020  
18 WL 1307109, at \*1 (Hixson, M. J.) (ordering release of vulnerable 74-year-old on  
19 bail in light of “risk of serious illness or death if he remains in custody”); *United*  
20 *States v. Barkman*, No. 3:19-cr-0052-RCJ-WGC, 2020 U.S. Dist. LEXIS 45628, at  
21 \*3, 8 (D. Nev. March 17, 2020) (modifying conditions of probation to suspend  
22 requirement of intermittent confinement where jail “simply lack[s] the resources  
23 necessary to engage in aggressive screening and testing of inmates” and concluding  
24 that “we must take every necessary action to protect vulnerable populations and the  
25 community at large”); *United States v. Stephens*, No. 15-cr-95 (AJN), 2020 WL  
26 1295155, at \*1 (S.D.N.Y. Mar. 19, 2020) (granting reconsideration of bail  
27 determination and ordering release of criminal defendant previously found to be  
28 inappropriate for release on danger grounds because of risk posed by COVID-19 in  
detention); *United States v. Raihan*, No. 20-cr-68, ECF. No. 20, at 10:12-19  
(E.D.N.Y. Mar. 12, 2020) (continuing defendant on pretrial release rather than  
remanding him in part due to recognition that “[t]he more people we crowd into  
that facility, the more we’re increasing the risk to the community”).

1 Courts also regularly order outright release of immigration detainees when  
2 continued detention would violate their due process rights. See *Jimenez v. Wolf*, No.  
3 19-cv-07996-NC, 2020 WL1082648 (N.D. Cal. 2020) (granting motion to enforce  
4 habeas of immigrant detainee charged with drug trafficking and convicted of  
5 accessory after the fact and ordering release of petitioner with appropriate conditions  
6 of supervision); *Ramos v. Sessions*, 293 F.Supp.3d 1021, 1030-31 (N.D. Cal. Mar.  
7 13, 2018); (same for immigrant detainee with two prior DUI convictions); *Sales v.*  
8 *Johnson*, No. 16-cv-01745-EDL, 2017 WL 6855827, at \*6 (N.D. Cal. 2017) (same  
9 for immigrant detainee with prior second-degree murder conviction); *Judalang v.*  
10 *Chertoff*, 562 F.Supp.2d 1119 (S.D. Cal. 2008) (same for immigrant detainee with  
11 prior voluntary manslaughter conviction).

12 This Court has authority to order release. Indeed, it is the only effective remedy  
13 for the constitutional violations Plaintiffs face. Preventive measures that may be  
14 effective in the community, such as maintaining a distance of six feet from other  
15 persons and frequent disinfection, are simply not possible in the detention setting.  
16 Amon Decl. ¶ 41.

17 **B. The Remaining Factors Weight Heavily in Favor of Granting a  
18 Temporary Restraining Order**

19 *1. Plaintiffs Are Likely to Suffer Irreparable Harm Absent a Temporary  
20 Restraining Order*

21 It is well established that the deprivation of constitutional rights constitutes  
22 irreparable injury. See *Hernandez v. Sessions*, 872 F.3d 976, 994 (9th Cir. 2017);  
23 *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012); *Warsoldier v. Woodford*,  
24 418 F.3d 989, 1001–02 (9th Cir. 2005). The Ninth Circuit recently recognized that  
25 dangerous conditions of detention also constitute irreparable harm supporting  
26 injunctive relief. *Padilla v. U.S. Immigration & Customs Enforcement*, No. 19-  
27 35565, 2020 WL 1482393, at \*9 (9th Cir. Mar. 27, 2020); see also *Hernandez*, 872  
28 F.3d at 995 (recognizing the “irreparable harms imposed on anyone subject to  
immigration detention” including the “evidence of subpar medical and psychiatric

1 care in ICE detention facilities”). The Ninth Circuit also has recognized that  
2 irreparable harm exists where government actions threaten an individual’s health. *See*  
3 *M.R. v. Dreyfus*, 663 F.3d 1100, 1111 (9th Cir. 2011), as amended by 697 F.3d 706  
4 (9th Cir 2012); *Indep. Living Cent. of S. California, Inc. v. Shewry*, 543 F.3d 1047,  
5 1050 (9th Cir. 2008) (recognizing that Medi-Cal beneficiaries would suffer  
6 irreparable harm where new policy would limit access to pharmaceuticals).

7 Here, continued detention threatens Plaintiffs’ health and lives. All have  
8 underlying medical conditions that predispose them to contracting the virus and/or  
9 life-threatening complications in the event of contagion.; McKenzie Decl. ¶22; Amon  
10 Decl. ¶ 39. The fatality rate for people in Plaintiffs in the highest risk category is 15  
11 percent, and those in the same category who survive face permanent damage and  
12 prolonged recovery. Golob Decl. ¶ 4. The urgency for Ms. Zelaya and Mr. Benitez,  
13 who are detained at Otay Mesa, is particularly high in light of the recent confirmation  
14 of an Otay Mesa employee testing positive for COVID-19. The deprivation of  
15 constitutional rights and threats to life that Plaintiffs face unequivocally constitute  
16 irreparable harm.

17 *2. The Public Interest and Balance of Equities Weigh Heavily in*  
18 *Plaintiffs’ Favor.*

19 Given the “preventable human suffering” at issue, the “balance of hardships  
20 tips decidedly in plaintiffs’ favor.” *Hernandez*, 872 F.3d at 996. The government  
21 “cannot reasonably assert that it is harmed in any legally cognizable sense” by being  
22 compelled to follow the law. *Zepeda v. I.N.S.*, 753 F.2d 719, 727 (9th Cir. 1983). The  
23 balance of equities thus favors preventing the violation of “requirements of federal  
24 law.” *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014).  
25 Finally, it is always in the public interest to prevent violations of fundamental rights.  
26 *Melendres*, 695 F.3d at 1002.

27 Here, “the impact of [a temporary restraining order] reaches beyond the  
28 parties, carrying with it a potential for public consequences.” *Hernandez*, 872 F.3d  
at 996 (quotation omitted). It is in both the Defendants’ and the broader public



1 interest to release detainees with particular medical vulnerabilities. Releasing  
2 Plaintiffs will reduce their risk of death in addition to the overall health risk for  
3 remaining detainees and facility staff at Otay Mesa and Imperial. Allen & Rich Ltr.  
4 at 5. In addition to preventing Plaintiffs’ loss of life, ICE has an interest in preventing  
5 any potential spread of COVID-19 in its detention facilities. As discussed above and  
6 by Plaintiffs’ experts, immigration detention facilities face greater risk of infectious  
7 spread because of crowding, the high percentage of detained people vulnerable to  
8 serious illness in the event of COVID-19 transmission, and limited availability of  
9 medical care. Amon Decl. ¶ 41. Public health officials have explained that “even with  
10 the best-laid plans to address the spread of COVID-19 in detention facilities, the  
11 release of individuals who can be considered at high-risk. . . is a key part of a risk  
12 mitigation strategy.” Amon Decl. ¶ 43.

13 As the Court in *Castillo* explained, “The public has a critical interest in  
14 preventing the further spread of the coronavirus. An outbreak at [the detention center]  
15 would, further, endanger all of us – [detention center] detainees, [detention center]  
16 employees, residents of San Bernardino County, residents of the State of California,  
17 and our nation as a whole.” *Castillo* TRO at 11. Plaintiffs’ release not only imposes  
18 minimal harm to the government, but protects the community at large. Releasing  
19 Plaintiffs is clearly in the broader public’s interest.

20 To the extent the equities weigh in favor of some restraint on Plaintiffs’ liberty,  
21 that can be achieved through fashioning reasonable release conditions, which might  
22 include electronic monitoring. *See e.g., Hernandez*, 872 F.3d at 995 (finding that ICE  
23 had put forth no evidence regarding the administrative burdens of considering  
24 alternatives to detention). Such conditions are routine in both criminal and  
25 immigration release settings and are effective.<sup>26</sup>

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<sup>26</sup> As Plaintiffs were filing this case on the Court’s ECF system, news broke of a  
second Otay Mesa staff member and Otay Mesa detainee testing positive for  
COVID-19. *See* Kate Morrissey, *Immigrant detainee, second employee at Otay  
Mesa Detention Center test positive for COVID-19*, The San Diego Union Tribune,  
Apr. 3, 2020,

1 **V. CONCLUSION**

2 For the foregoing reasons, the Court should issue a temporary restraining order  
3 directing Defendants to immediately release Plaintiffs from Otay Mesa and Imperial.

4  
5 Respectfully submitted,

6 DATED: April 03, 2020

7 ACLU FOUNDATION OF SAN  
8 DIEGO & IMPERIAL COUNTIES

9 **s/ Monika Y. Langarica**

10 MONIKA Y. LANGARICA

11 KIMBERLY GRANO

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26 <https://www.sandiegouniontribune.com/news/immigration/story/2020-04-03/immigrant-detainee-and-second-employee-at-otay-mesa-detention-center-test-positive-for-covid-19>. This information, if true, only increases the urgency of the  
27 matter and the public interest favoring release. Plaintiffs will update the Court with  
28 additional information once they learn more.