

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

COREAS, *et al.*,

Petitioners-Plaintiffs,

v.

BOUNDS, *et al.*,

Respondents-Defendants.

Civil Action No.: 8:20-cv-00780

ORAL ARGUMENT REQUESTED

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

INTRODUCTION

Today's global pandemic of COVID-19, caused by the novel coronavirus, has been characterized as the worst the world has seen since 1918. Several states and countries around the world—including the State of Maryland—have put in place significant restrictions on public gatherings, and many have imposed “shelter-in-place” orders in an attempt to control the spread of the disease. Public health experts, including the Centers for Disease Control and Prevention (“CDC”), have instructed that the only effective way to reduce the risk of severe illness or death for vulnerable individuals is social distancing and improved hygiene. Such distancing and hygiene measures are impossible to achieve in crowded detention centers. For this reason, more than 3,000 medical health professionals have urgently requested that Immigration and Customs Enforcement (“ICE”) immediately release immigration detainees in their custody, and two doctors who are medical experts for the Department of Homeland Security have sent a warning to Congress that keeping immigration detainees detained poses “an imminent risk to the health and safety of immigration detainees” and to the general public.¹

Yet Respondents-Defendants (“Defendants”) continue to hold in detention thousands of individuals in facilities in Maryland and across the country, including those at severe risk of serious illness or death if they were to contract COVID-19, despite the ready availability of community-based alternatives to detention such as release on conditions or on bond. To date, nearly 350,000 individuals worldwide have been diagnosed with COVID-19, and the United States is one of the worst hit countries. Many more are likely infected, especially in the United States where testing for the virus has been extremely limited. Confirmed cases have begun to appear in several ICE

¹ Catherine E. Shoichet, *Doctors Warn of 'Tinderbox Scenario' if Coronavirus Spreads in ICE Detention*, CNN (Mar. 20, 2020), available at <https://www.cnn.com/2020/03/20/health/doctors-ice-detention-coronavirus/index.html>.

detention centers.² The Worcester County Detention Center is currently under a COVID-19 related quarantine. It is quite likely—if not certain—that many more detention centers already have unconfirmed COVID-19 cases.

People confined in prisons, jails, and detention centers, including those in ICE custody in Maryland, will find it impossible to engage in the necessary social distancing and hygiene to protect themselves from infection because people eat, sleep, and engage in activities in close proximity to each other, and basic supplies such as soap and hand sanitizer are often in short supply or completely unavailable at those facilities.³ Even with the apparent measures ICE is taking to prevent the spread of COVID-19 in its facilities, immigration detention centers are a hotbed for spread of the virus.

Under these circumstances, release is the only meaningful way to mitigate the spread of the virus among immigration detainees. For individuals who are at high risk for serious illness or death from COVID-19, protection from the virus is a matter of life or death. As of March 24, there are over 240 confirmed cases of COVID-19 in Maryland, and three deaths.⁴ In the United States, the most concentrated instance of death from the virus occurred in a confined institutional setting.⁵

² Hamed Aleaziz, *A Medical Worker At An ICE Detention Facility For Immigrants Has Tested Positive For The Coronavirus*, BuzzFeed News (Mar. 19, 2020), available at <https://www.buzzfeednews.com/article/hamedaleaziz/ice-medical-worker-coronavirus>.

³ See Ex. 4 ¶¶ 4-5 (Declaration of Eric Lopez); Ex. 5 ¶ 4 (Declaration of Eleni Bakst); Ex. 6 ¶ 4 (Declaration of Eleni Bakst).

⁴ Coronavirus Disease 2019 (COVID-19) Outbreak, Maryland Department of Health (accessed Mar. 23, 2020), available at <https://coronavirus.maryland.gov/>.

⁵ Maria Sacchetti & Jay Greene, *As Coronavirus Quietly Spread, A Nondescript Nursing Home Became The Deadliest Hot Spot in the U.S.*, The Washington Post (Mar. 7, 2020), available at https://www.washingtonpost.com/national/as-coronavirus-quietly-spread-a-nondescript-nursing-home-became-the-deadliest-hot-spot-in-the-us/2020/03/06/5d788a26-5f47-11ea-9055-5fa12981bbbf_story.html,

Petitioners-Plaintiffs (“Plaintiffs”) are individuals detained in ICE custody in Maryland who, due to their pre-existing medical conditions, are particularly vulnerable to serious illness or death if infected by the coronavirus. Maryland has seen a significant coronavirus outbreak. The Governor has declared a State of Emergency and has put in place widespread social distancing measures, including shutting down all nonessential businesses and all public gatherings. These measures are impossible to implement in a crowded detention center. The danger posed by Plaintiffs’ continued detention during the COVID-19 pandemic is “so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk” and violates their constitutional right to safety in government custody. *Helling v. McKinney*, 509 U.S. 25, 36 (1993). Without this Court’s intervention, Plaintiffs will continue to face the imminent risk of severe illness or death. Accordingly, Plaintiffs seek a temporary restraining order directing their immediate release from custody.

FACTUAL BACKGROUND

I. COVID-19 Poses a Grave Risk of Harm, Including Serious Illness or Death, to Older Adults and Those with Certain Medical Conditions.

COVID-19 is a highly contagious disease that can result in severe and widespread damage to lungs, heart, liver, or other organs. In many cases, COVID-19 results in death. Ex. 2 ¶¶ 8-9, 12 (Declaration of Ranit Mishori, MD, MHS, FAAFP). Individuals who do not die from the disease may face prolonged recovery periods, including extensive rehabilitation from neurological damage and loss of respiratory capacity. *Id.* ¶ 11. A patient’s condition can seriously deteriorate in a matter of days. *Id.* ¶ 12.

Older individuals and those with certain medical conditions face greater chances of serious illness or death from COVID-19. *Id.* ¶¶ 9-10. Certain underlying medical conditions increase the risk of serious COVID-19 disease for individuals of any age, including but not limited to lung

disease, chronic liver or kidney disease, diabetes, epilepsy, hypertension, compromised immune systems, blood disorders, inherited metabolic disorders, stroke, and pregnancy. *Id.*

Most people in higher risk categories who develop serious disease will need advanced medical support. *Id.* ¶ 11. This level of supportive care requires highly specialized equipment that is in limited supply, and an entire team of care providers, including 1:1 or 1:2 nurse to patient ratios, respiratory therapists, and intensive care physicians. *Id.* This level of support is especially difficult to provide for detained individuals. *See id.* ¶¶ 16-31.

The need for advanced medical care, including intensive care, and the likelihood of death, is much greater from COVID-19 infection than from influenza. *Id.* ¶ 9. According to recent estimates, the fatality of people infected with COVID-19 is about ten times higher than a severe seasonal influenza, even in advanced countries with highly effective health care systems. *Id.*

There is no vaccine against COVID-19, nor any known medication to prevent or treat infection from the virus. *Id.* ¶ 13. The only known effective measure to reduce the risk of severe illness or death to vulnerable individuals is to prevent them from being infected with COVID-19. *Id.* ¶ 14. Social distancing, or remaining physically separated from known or potentially infected individuals, and vigilant hygiene, including washing hands with soap and water, are the only known effective measures to prevent infection. *Id.* ¶ 15.

II. ICE's Plan for COVID-19 is Insufficient to Prevent the Spread and Management of COVID-19 in Detention Facilities.

COVID-19 appears to have already reached the Worcester County Detention Center, which is currently under indefinite quarantine. Once one person in a detention facility contracts the virus, it spreads quickly because detainees live, sleep, eat, and use the bathroom in close proximity with

others, and because “[b]ehind bars, some of the most basic disease prevention measures are against the rules or simply impossible.”⁶ *Id.* ¶¶ 19-21.

Although ICE has temporarily suspended social visitation in all detention facilities, staff, contractors, and vendors continue to arrive and leave the detention centers.⁷ *Id.* ¶ 17. Detained individuals are also frequently transported to, from, and between facilities. *Id.* Given the general lack of available testing, it is impossible for detention facilities to consistently and adequately screen detainees and staff for new, asymptomatic infection. *Id.* ¶¶ 17-18. Moreover, ICE’s official guidance on COVID-19 does not state under what conditions detainees will be tested. Instead, the only measure ICE has committed to taking is to segregate those who meet CDC criteria for epidemiologic risk of exposure to COVID-19. Even assuming ICE has adequate space in their detention facilities to segregate such individuals, isolating detainees in this manner is an ineffective way to prevent transmission because, except in specialized negative pressure rooms, air continues to flow outward from rooms to the rest of the facility. *Id.* ¶¶ 23-24. And the Maryland facilities are not equipped with the necessary isolation spaces. Ex. 4 ¶ 6 (Declaration of Eric Lopez). Since some COVID-19 carriers can be asymptomatic or not show symptoms for weeks after exposure, “screening people based on observable symptoms is just a game of catch up.” *In re Extradition of Alejandro Toledo Manrique*, No. 19-mj-71055, 2020 WL 1307109 (N.D. Cal. March 19, 2020) (ordering release on bond in part because government’s COVID-19 management plan did not “say anything about testing”).

⁶ Keri Blakinger and Beth Schwartzapfel, *When Purell is Contraband, How Do You Contain Coronavirus?*, the Marshall Project (Mar. 6, 2020), available at <https://www.themarshallproject.org/2020/03/06/when-purell-is-contraband-how-do-you-contain-coronavirus>.

⁷ *ICE Guidance on COVID-19*, U.S. Immigration and Customs Enforcement, available at <https://www.ice.gov/covid19>.

Anything short of aggressive screening and testing of detainees, staff, officials and other care and service providers who enter the facility is insufficient to contain the spread of coronavirus. Neither ICE nor the Maryland detention facilities have the resources necessary to engage in such an effort. Ex. 2 ¶¶ 18-19, 21, 23, 28, 32-38 (Mishori Decl.). Moreover, the Maryland Governor has not committed to taking any measures other than limiting visits to prisons and jails. Facilities holding immigration detainees in Maryland are not equipped to isolate individuals who contract COVID-19. *Id.* ¶¶ 23-24; Ex. 4 ¶ 6 (Lopez Decl.).

The Office of the Inspector General (“OIG”) of the Department of Homeland Security (“DHS”) even concluded in a 2019 report that ICE “does not adequately hold detention facility contractors accountable for not meeting performance standards,” “issued waivers to facilities with deficient conditions, seeking to exempt them from complying with certain standards,” and “does not adequately share information about ICE detention contracts with key officials.”⁸

Immigration detention facilities have faced outbreaks of other infectious diseases in recent years due to overcrowding, poor hygiene measures, medical negligence, and poor access to resources and medical care. Ex. 2 ¶ 28 (Mishori Decl.). As recently as last year, ICE mishandled and failed to take adequate measures to protect detainees in Virginia against outbreaks of chicken pox and mumps.⁹

ICE has publicly acknowledged the need to limit the spread of the coronavirus and the number of people in its detention centers,¹⁰ but the agency has not disclosed a plan to release

⁸ See Office of Inspector General, *ICE Does Not Fully Use Contracting Tools to Hold Detention Facility Contractors Accountable for Failing to Meet Performance Standards*, 1 (Jan. 29, 2019), available at <https://www.oig.dhs.gov/sites/default/files/assets/2019-02/OIG-19-18-Jan19.pdf>.

⁹ Emma Ockerman, *Migrant Detention Centers Are Getting Slammed with Mumps and Chickenpox*, Vice News (Jun. 14, 2019), available at https://www.vice.com/en_us/article/mb8k5q/migrant-detention-centers-are-getting-slammed-with-mumps-and-chicken-pox.

¹⁰ See Maria Sacchetti and Arelis R. Hernández, *ICE to Stop Most Immigration Enforcement Inside the U.S., Will Focus on Criminals During Coronavirus Outbreak*, The Washington Post (Mar. 18, 2020), available at

vulnerable people held in detention. According to a former high-ranking ICE official who oversaw detention programs, ICE can exercise discretion to release individuals from custody and has routinely done so to release particularly vulnerable detainees like Plaintiffs on medical grounds. Ex. 3 ¶¶ 3-15 (Declaration of Andrew Lorenzen-Strait).

Given the rapid community spread of COVID-19, variability in symptoms and the likelihood of it being spread before a patient is symptomatic, general lack of testing in the United States, and ICE's history of failure to meet adequate standards for containment and treatment of infectious diseases, Defendants cannot reliably prevent the spread of the virus in their detention facilities.

III. People Detained at Maryland Detention Facilities Face an Imminent and Substantial Risk of Contracting COVID-19.

The Worcester County and Howard County Detention Centers are located in Maryland.¹¹ As of March 24, 2020, there were over 250 COVID-19 cases in Maryland, and the numbers are rising exponentially.¹² At least three people in Maryland have so far died from the disease.¹³ At present, there is a COVID-19-related quarantine in the Worcester County Detention Center. Thus, there is an immediate and impending threat that COVID-19 will become widespread in Maryland detention centers that house immigration detainees. In fact, in the absence of widespread testing, there is no way to be certain that outbreaks are not already occurring.

In the Maryland detention centers, groups of detainees are housed together and use common spaces together, sharing tables, telephones, and bathrooms. Ex. 4 ¶¶ 4-5 (Lopez Decl.);

https://www.washingtonpost.com/national/ice-halting-most-immigration-enforcement/2020/03/18/d0516228-696c-11ea-abef-020f086a3fab_story.html.

¹¹ Detention Facility Locator, U.S. Immigration and Customs Enforcement, *available at* <https://www.ice.gov/detention-facilities>.

¹² Coronavirus Disease 2019 (COVID-19) Outbreak, Maryland Department of Health (accessed Mar. 23, 2020), *available at* <https://coronavirus.maryland.gov/>.

¹³ *Id.*

Ex. 5 ¶ 4 (Declaration of Eleni Bakst); Ex. 6 ¶ 4 (Declaration of Eleni Bakst). The dormitories in these detention centers house many individuals in close quarters, well under six feet apart. Ex. 4 ¶ 4 (Lopez Decl.); Ex. 5 ¶ 4 (Bakst Decl.); Ex. 6 ¶ 4 (Bakst Decl.). The hallways and corridors are tight and people in the hallways are constantly in very close proximity to each other. Ex. 4 ¶ 5 (Lopez Decl.); Ex. 5 ¶ 4 (Bakst Decl.); Ex. 6 ¶ 4 (Bakst Decl.). Frequent handwashing and use of alcohol-based sanitizers are generally unavailable. Ex. 4 ¶ 5 (Lopez Decl.); Ex. 5 ¶ 8 (Bakst Decl.); Ex. 6 ¶ 4 (Bakst Decl.). Bathrooms are limited in number and are not sanitized or disinfected after each use. Ex. 5 ¶ 8 (Bakst Decl.); Ex. 6 ¶ 4 (Bakst Decl.). Staff arrive and leave on a shift basis, and even asymptomatic staff could carry the infection into the facility. Ex. 2 ¶ 17 (Mishori Decl.).

Further, the detention centers are ill-equipped to manage an infectious disease outbreak. None of the facilities has 24-hour medical care and they each have very limited on-site medical facilities. Ex. 2 ¶ 37 (Mishori Decl.); Ex. 4 ¶ 7 (Lopez Decl.); Ex. 5 ¶ 7 (Bakst Decl.); Ex. 6 ¶¶ 6, 8 (Bakst Decl.). Neither facility has negative pressure isolation units, meaning that isolating infected people through solitary confinement will not prevent transmission of the disease because air continues to flow outwards from those rooms to the rest of the facility. Ex. 2 ¶¶ 23-24, 36 (Mishori Decl.); Ex. 4 ¶ 6 (Lopez Decl.). This makes both containing the illness and caring for those who have become infected much more difficult.

At present, there is an indefinite quarantine due to COVID-19 exposure in the Worcester County Detention Center. Ex. 4 ¶¶ 10-12 (Lopez Decl.). In at least one other ICE detention facility, located in New Jersey, an ICE official has been confirmed as having contracted COVID-19.¹⁴ ICE has not specified what measures were being taken to protect detainees at the facility

¹⁴ Hamed Aleaziz, *A Medical Worker at An ICE Detention Facility For Immigrants Has Tested Positive For The Coronavirus*, BuzzFeed News (Mar. 19, 2020), available at <https://www.buzzfeednews.com/article/hamedaleaziz/ice-medical-worker-coronavirus>.

and whether ICE is taking any precautionary steps to test other officials and detainees at that facility. Despite these widespread warnings, ICE and the Maryland detention facilities remain woefully unprepared and incapable of taking necessary precautions to protect people in their custody against a life-threatening illness.

According to Dr. Ranit Mishori, M.D., Senior Medical Consultant for Physicians for Human Rights and an expert in immigration detention and correctional health care, the two Maryland detention facilities “are particularly susceptible to rapid spread of the virus and are not equipped to handle a coronavirus outbreak.” Ex. 2 ¶ 32 (Mishori Decl.). Dr. Mishori concludes that an outbreak in the Maryland detention centers is “highly likely and that the consequences of rampant COVID-19 infection in the facility would be disastrous, especially for high-risk individuals like the plaintiffs in this case.” *Id.* ¶ 38.

IV. People Most Vulnerable to COVID-19 Should Be Released from ICE Detention.

The only viable public health strategy currently available in the United States is risk mitigation, and therefore immigration detainees most vulnerable to serious injury should they contract COVID-19 must be released.

Public health experts with experience in immigration detention and correctional settings have recommended the release of vulnerable detainees from custody. Dr. Mishori has concluded that “[r]eleasing people from incarceration is the best and safest way to prevent the spread of disease and reduce the threat to the most vulnerable incarcerated people,” and that “[i]mmediate release is crucial” for individuals with chronic illnesses or other preexisting conditions. *Id.* ¶¶ 45-46. Two medical experts for DHS have also sent a letter to Congress warning of the severe public

health risks of keeping individuals detained and recommending release of most persons in immigration detention.¹⁵

Releasing the most vulnerable people, such as Plaintiffs, would also reduce the burden on regional hospitals and health centers. Ex. 2 ¶ 47-48 (Mishori Decl.). In case of an outbreak at a detention center, those institutions would bear the brunt of having to treat infected individuals from detention centers and would have fewer medical resources available for the general population. *Id.* Governments worldwide have also recognized the threat posed by the spread of COVID-19 among detained and incarcerated populations and have released detainees for that reason. For example, Iran temporarily released more than 80,000 detainees to curb the spread of the virus.¹⁶ *Id.* ¶ 30. In the United States, several jurisdictions including Los Angeles and Chicago have also released detained individuals for the same reasons.¹⁷ *Id.*

V. Plaintiffs Are Vulnerable to Serious Illness or Death If Infected by COVID-19 and Must Be Released from Custody.

Plaintiffs in this case are individuals who are particularly vulnerable to serious illness or death if they contract COVID-19 and who are currently detained at the Maryland facilities as they await adjudication of their immigration cases.

¹⁵ Letter from Dr. Scott Allen and Dr. Josiah Rich, Medical Experts for DHS, to House Comm. on Homeland Sec. (Mar. 19, 2020), available at <https://www.documentcloud.org/documents/6816336-032020-Letter-From-Drs-Allen-Rich-to-Congress-Re.html#document/p4/a557238>; Catherine Shoichet, *Doctors Warn of "Tinderbox Scenario" If Coronavirus Spreads in ICE Detention*, CNN.com, (Mar. 20, 2020), available at <https://www.cnn.com/2020/03/20/health/doctors-ice-detention-coronavirus/index.html>.

¹⁶ Parisa Hafezi, *Iran Temporarily Frees 85,000 From Jail Including Political Prisoners*, Reuters (Mar. 17, 2020), available at <https://www.reuters.com/article/us-health-coronavirus-iran-prisoners/iran-temporarily-frees-85000-from-jail-including-political-prisoners-amid-coronavirus-idUSKBN21410M>.

¹⁷ Michael Rezendes & Robin McDowell, *New York City Urged to Release Detainees From Rikers Island and Other Jails After 38 Test Positive for Coronavirus*, Time.com (Mar. 22, 2020), available at <https://time.com/5807909/new-york-city-coronavirus-jails/>; Maura Dolan, Alene Tchekmedyian & Paige St. John, *California Releases More Jail Inmates Amid Coronavirus Crisis*, Los Angeles Times (Mar. 20, 2020), available at <https://www.latimes.com/california/story/2020-03-20/california-releases-more-jail-inmates-amid-coronavirus-crisis>; David Struett, *Cook County Jail Releases Several Detainees 'Highly Vulnerable' to Coronavirus*, Chicago Sun-Times, available at <https://chicago.suntimes.com/coronavirus/2020/3/17/21183289/cook-county-jail-coronavirus-vulnerable-detainees-released-covid-19>.

Mauricio Coreas. Mr. Coreas is a 52-year-old citizen of El-Salvador who is currently detained at the Howard County Detention Center. Ex. 5 ¶¶ 5-6 (Bakst Decl.). In addition to being over 50, Mr. Coreas suffers from Type 2 diabetes. *Id.* ¶ 6. Mr. Coreas is critically vulnerable to serious illness or death from COVID-19 because of his diabetes. Ex. 2 ¶ 40 (Mishori Decl.).

A [REDACTED] [REDACTED] C [REDACTED] Mr. [REDACTED] C [REDACTED] is a 54-year-old citizen of Guatemala who is currently detained at the Worcester County Detention Center. Ex. 6 ¶¶ 5-6 (Bakst Decl.). He suffers from hypertension and prostate problems, including a prior prostate infection. *Id.* ¶ 6. He takes three prescription medications to treat those conditions. *Id.* Mr. G [REDACTED] C [REDACTED] has sustained numerous traumatic injuries throughout his life to his head and other parts of his body. *Id.* ¶ 7. He has had several operations as a result. *Id.* These injuries have caused chronic pain and mental health conditions, including brain injury, memory loss, and limited cognitive functioning. *Id.*

Mr. G [REDACTED] C [REDACTED] is critically vulnerable to serious illness or death from COVID-19 because of his hypertension and his numerous physical and mental health conditions. *Id.* ¶ 10; Ex. 2 ¶ 41 (Mishori Decl.).

LEGAL STANDARD

Motions for temporary restraining orders and preliminary injunctions are governed by the same four-factor test:. Courts consider whether plaintiffs have shown: (1) a likelihood of success on the merits; (2) that they are likely to suffer irreparable harm in the absence of such relief; (3) that the balance of equities tips in plaintiffs' favor; and (4) that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008); *see also Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 188-89 (4th Cir. 2013) (en banc) (outlining *Winter* standard).

To show a likelihood of success on the merits, plaintiffs “need not show a certainty of success.” *Pashby v. Delia*, 709 F.3d 307, 321 (4th Cir. 2013).

ARGUMENT

I. Plaintiffs Are Likely to Succeed on the Merits.

a. Plaintiffs’ Continued Detention Violates Their Constitutional Right to Reasonable Safety Because It Constitutes Impermissible Punishment.

The government has an affirmative duty to provide conditions of reasonable health and safety to the people it holds in its custody. As the Supreme Court has made clear,

[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment

DeShaney v. Winnebago County Dept. of Soc. Servs., 489 U.S. 189, 199-200 (1989). Under the Fifth Amendment, those in civil detention are afforded greater protections than those imprisoned due to a criminal conviction,¹⁸ and *at least* the same protections as pretrial detainees.

Some circuits have held that civil detainees are entitled to conditions of confinement that are superior to those of criminal pretrial detainees, *see Jones v. Blanas*, 393 F.3d 918, 933-34 (9th Cir. 2004). Because a civil detainee is “entitled to ‘more considerate treatment’ than his criminally detained counterparts,” the Ninth Circuit held that “a presumption of punitive conditions arises where the individual is detained under conditions identical to, similar to, or more restrictive than those under which pretrial criminal detainees are held.” *Id.* at 932, 934 (citing *Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982)). Although the Fourth Circuit has not

¹⁸ Many of the cases discussed in this Motion involve the protections of the Eighth Amendment, which applies to those who are incarcerated pursuant to a criminal conviction. As explained below, *see infra* Sec. I.a.i, the Plaintiffs here are civil detainees and are entitled to greater protections than are convicted persons under the Eighth Amendment.

had occasion to rule on this issue, the same standard should apply in this case. Should the Court decide not to resolve this issue, Plaintiffs' claims succeed even on the higher standard set for pretrial detainees.

i. Plaintiffs, As Civil Detainees, May Not Be Punished.

Immigration detainees, even those with prior criminal convictions, are civil detainees held pursuant to civil immigration laws. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Their constitutional protections while in custody are thus derived from the Fifth Amendment, which provides protection greater than the Eighth Amendment. "Civil detainees 'are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.'" *Heyer v. United States Bureau of Prisons*, 849 F.3d 202, 209 n.5 (4th Cir. 2017) (quoting *Youngberg v. Romeo*, 457 U.S. 307, 322 (1982)); see *Brown v. Harris*, 240 F.3d 383, 388 (4th Cir. 2001) ("[T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law." (quoting *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977))). The Eighth Amendment, which applies to persons convicted of criminal offenses, allows punishment as long as it is not cruel and unusual, but the Fifth Amendment's due process protections do not allow punishment at all. *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979) ("Due process requires that a pretrial detainee not be punished."); *Nelson v. Collins*, 659 F.2d 420, 425 (4th Cir. 1981).

To establish that a particular condition or restriction of detention constitutes impermissible punishment, a petitioner must show either (1) an expressed intent to punish; or (2) a lack of a reasonable relationship to a legitimate governmental purpose, from which an intent to punish may be inferred. See *Wolfish*, 441 U.S. at 538; *Martin v. Gentile*, 849 F.2d 863, 870 (4th Cir. 1988). Absent an explicit intention to punish a pretrial detainee, a court "must evaluate the

evidence and ascertain the relationship between the actions taken against the detainee and the custodian's supporting rationale." *Williamson v. Stirling*, 912 F.3d 154, 178 (4th Cir. 2018). "That inquiry turns on whether the actions taken may validly be attributed to an alternative, nonpunitive rationale, and whether they appear 'excessive in relation to the alternative purpose assigned.'" *Id.* (citations omitted).

ii. Plaintiffs' Confinement Constitutes Punishment Because It Is Not Reasonably Related to a Legitimate Government Purpose.

The threat of serious illness and death from COVID-19 is not reasonably related to and vastly outweighs any government interest in Plaintiffs' confinement. As set forth previously, each of the Plaintiffs suffers from underlying health conditions that make them especially susceptible to severe illness or death if they contract COVID-19. Mr. Coreas suffers from diabetes, and Mr. G [REDACTED] C [REDACTED] suffers from hypertension and numerous physical and mental disabilities. The Maryland detention centers are not equipped to take adequate measures that would prevent them from contracting COVID-19. Both Mr. Coreas and Mr. [REDACTED] C [REDACTED] are critically vulnerable to severe illness or death from COVID-19. Under these circumstances, the government's decision to keep Plaintiffs detained in conditions where they are extremely vulnerable to severe illness and death from COVID-19 is clearly excessive in relation to any interest they may have in Plaintiffs' continued detention.

iii. Defendants May Not Act With Deliberate Indifference to a Substantial Risk of Harm.

In order to establish a violation of the Eighth Amendment, convicted persons must show "deliberate indifference" on the part of prison officials. *Farmer v. Brennan*, 511 U.S. 825, 828 (1994). In *Jones v. Blanas*, the Ninth Circuit held that that a civil detainee need not establish "deliberate indifference" on the part of government officials in order to make out a substantive due process claim regarding conditions of confinement. 393 F.3d at 934. The "deliberate

indifference” standard should not apply here because Plaintiffs are civil detainees who retain greater liberty protections than those charged or convicted of crimes. *See id; Youngberg*, 457 U.S. at 321-24. The Fourth Circuit has not ruled on whether the deliberate indifference standard applies to a civil detainee – and this Court should follow the Ninth Circuit and not apply it to the present case. However, if this Court decides not to resolve this issue in this case, it should find that Defendants acted with deliberate indifference to the health and safety of Plaintiffs.

The Fourth Circuit has held that a pretrial detainee necessarily “makes out a due process violation if he shows ‘deliberate indifference to serious medical needs’ . . . because no legitimate nonpunitive goal is served by a denial or unreasonable delay in providing medical treatment where the need for such treatment is apparent.” *Martin v. Gentile*, 849 F.2d 863, 871 (4th Cir. 1988) (citation omitted). In order to show that defendants violated the Eighth Amendment, a plaintiff must show that (1) the plaintiff was exposed to a substantial risk of serious harm, and (2) the defendants knew of or disregarded that substantial risk to the plaintiff’s health or safety. *Farmer v. Brennan*, 511 U.S. 825, 834, 837–38 (1994); *Thompson v. Virginia*, 878 F.3d 89, 97-98 (4th Cir. 2017).

iv. Plaintiffs Are Exposed to a Substantial Risk of Serious Harm.

For the first prong, a plaintiff “must establish a serious deprivation of his rights in the form of a serious or significant physical or emotional injury” or *substantial risk* of injury. *Danser v. Stansberry*, 772 F.3d 340, 346-47 (4th Cir. 2014). Such a claim “may be based on a defendant’s conduct in exposing an inmate to an unreasonable risk of future harm.” *Smith v. Carpenter*, 316 F.3d 178, 188 (2d Cir. 2003). Therefore, conditions that pose an unreasonable risk of future harm violate the Eighth Amendment’s prohibition against cruel and unusual punishment, and thus *a fortiori* the Fifth Amendment’s prohibition against any form of punishment, even if that harm has not yet come to pass. In *Helling v. McKinney*, 509 U.S. 25

(1993), the Supreme Court held that correctional officials may not ignore conditions that are “very likely to cause serious illness and needless suffering” in the future, and that such prospective harm may form the basis of an Eighth Amendment claim, even where the prisoner has “no serious current symptoms.” *Id.* at 33. The Court in *Helling* specifically recognized that the risk of contracting a communicable disease could constitute such an “unsafe, life-threatening condition.” *Id.* at 33; *see also id.* at 34 (citing with approval *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974), which held that prisoners were entitled to relief under the Eighth Amendment when they showed, *inter alia*, “the mingling of inmates with serious contagious diseases with other prison inmates”).

In this case, Plaintiffs face a substantial risk of severe illness or death from an outbreak of COVID-19 in Maryland detention facilities. First, there is currently a quarantine in place at the Worcester County Detention Center. Ex. 4 ¶¶ 10-12 (Lopez Decl.). Second, COVID-19 is unlike any other contagious or communicable disease to which detainees may be exposed.¹⁹ *See* Ex. 2 ¶¶ 6-15 (Mishori Decl.). Third, based on COVID-19 outbreaks in other countries and in other detention centers in the United States, it is only a matter of time until the disease spreads into detention facilities that are not yet aware of an outbreak in their facilities.²⁰ Ex. 2 ¶¶ 30-31 (Mishori Decl.). In fact, COVID-19 has already begun to spread to detention centers in the United States, with 21 detainees and 17 employees now confirmed positive for COVID-19 at

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

²⁰ *See* Hannah Summers, ‘Everyone Will Be Contaminated’: Prisons Face Strict Coronavirus Controls, *The Guardian* (Mar. 23, 2020), *available at* <https://www.theguardian.com/global-development/2020/mar/23/everyone-will-be-contaminated-prisons-face-strict-coronavirus-controls>.

Rikers Island jail in New York City.²¹ Finally, ICE’s response to COVID-19 is inadequate. ICE is not conducting the screening and testing of detainees, staff, officials, contractors, vendors and other care and service providers that is needed to contain an outbreak. Given the general lack of available testing, it would be impossible for detention facilities to consistently screen and test everyone for new, asymptomatic infection. Ex. 2 ¶¶ 17-18 (Mishori Decl.). ICE’s plan to segregate individuals who meet the CDC’s criteria for epidemiologic risk of exposure to COVID-19 is inadequate to contain an outbreak. *Id.* ¶¶ 23-24, 36. Furthermore, as the Northern District of California has recognized, “screening people based on observable symptoms is just a game of catch up” because some COVID-19 carriers can be asymptomatic or not show symptoms for weeks after exposure. *In re. Extradition of Alejandro Toledo Manrique*, No. 19-mj-71055, 2020 WL 1307109 (N.D. Cal. March 19, 2020) (ordering release on bond in part because government’s COVID-19 management plan did not “say anything about testing” for COVID-19). In fact, ICE’s preparedness plan for contagious diseases was determined to be insufficient in 2019 by DHS’s own Inspector General.²² By the time ICE recognizes that there is a coronavirus outbreak in the detention facilities in which Plaintiffs are held , it will be too late for Plaintiffs.

v. Defendants Have Disregarded a Substantial Risk of Serious Harm to Plaintiffs.

The second prong of the Eighth Amendment standard requires the plaintiff to establish that the prison or detention official involved had “a sufficiently culpable state of mind”

²¹ See *21 Inmates, 17 Employees Test Positive for COVID-19 on Rikers Island: Officials*, NBC New York (Mar. 22, 2020), available at <https://www.nbcnewyork.com/news/coronavirus/21-inmates-17-employees-test-positive-for-covid-19-on-rikers-island-officials/2338242/>.

²² See Office of Inspector General, *ICE Does Not Fully Use Contracting Tools to Hold Detention Facility Contractors Accountable for Failing to Meet Performance Standards*, 1 (Jan. 29, 2019), available at <https://www.oig.dhs.gov/sites/default/files/assets/2019-02/OIG-19-18-Jan19.pdf>.

amounting to “deliberate indifference to inmate health or safety.” *Farmer*, 511 U.S. at 834.

Evidence establishing a culpable state of mind requires actual knowledge of an excessive risk to the detainee’s safety, or evidence that detention officials were aware of facts from which an inference could be drawn that a substantial risk of serious harm exists and that the inference was drawn. *Id.* at 837. A plaintiff may “prove an official’s actual knowledge of a substantial risk ‘in the usual ways, including inference from circumstantial evidence’” so that “‘a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.’” *Raynor v. Pugh*, 817 F.3d 123, 128 (4th Cir. 2016).

It is clear that ICE has actual knowledge of the excessive risk that the coronavirus presents to the safety of those in ICE custody. ICE has created policy guidance outlining its response to the virus.²³ The agency has also announced it will delay enforcement actions to arrest fewer immigrants and use alternatives to detention as a response to the COVID-19 outbreak.²⁴ As early as February 25, 2020, Dr. Scott Allen and Dr. Josiah Rich, medical experts to the Department of Homeland Security, shared concerns about the specific risk to immigrant detainees as a result of COVID-19 with the agency. These experts warned of the danger of rapid spread of COVID-19 in immigration detention facilities and recommended release of most immigrant detainees.²⁵ In the last several weeks, ICE has received numerous letters from

²³ *ICE Guidance on COVID-19*, U.S. Immigration and Customs Enforcement, *available at* <https://www.ice.gov/covid19>.

²⁴ *See* Maria Sacchetti and Arelis R. Hernández, *ICE to Stop Most Immigration Enforcement Inside the U.S., Will Focus on Criminals During Coronavirus Outbreak*, *The Washington Post* (Mar. 18, 2020), *available at* https://www.washingtonpost.com/national/ice-halting-most-immigration-enforcement/2020/03/18/d0516228-696c-11ea-abef-020f086a3fab_story.html.

²⁵ *See, e.g.*, Letter from Dr. Scott Allen and Dr. Josiah Rich, Medical Experts for DHS, to House Comm. on Homeland Sec. (Mar. 19, 2020), *available at* <https://www.documentcloud.org/documents/6816336-032020-Letter-From-Drs-Allen-Rich-to-Congress-Re.html#document/p4/a557238>.

advocates, medical professionals, and Members of Congress emphasizing the increased risk faced by vulnerable populations in ICE detention facilities.²⁶

There have also been many news articles highlighting the risk of coronavirus outbreaks in ICE facilities.²⁷ The federal government itself has issued warnings about the particular risk of COVID-19 for those who are elderly or who have certain medical conditions, including those from which Plaintiffs suffer.²⁸ Despite the fact that ICE is aware of the substantial risk faced by Plaintiffs, all of whom have underlying medical conditions that increase their risk of serious illness or death if they contract COVID-19, ICE continues to detain Plaintiffs in conditions where there is a heightened public health risk for the spread of the virus. The measures ICE has implemented thus far are clearly inadequate; Plaintiffs have reported that they have yet to receive guidance or education about COVID-19 and they continue to live and interact in close quarters despite the risk of infection. Ex. 5 ¶ 8 (Bakst Decl.); Ex. 6 ¶ 9 (Bakst Decl.).

Thus, as the Court recognized in *Helling*, the Constitution “require[s] a remedy” that ensures protection of Plaintiffs’ safety. *Helling*, 509 U.S. at 33.

b. The Court Has Authority to Order Plaintiffs’ Release as the Sole Effective Remedy for the Constitutional Violation.

²⁶ Letter from 763 non-governmental organizations to Matthew T. Albence, Acting Director of ICE (Mar. 19, 2020), available at <https://www.detentionwatchnetwork.org/sites/default/files/ICE%20Response%20to%20Coronavirus%20for%20People%20Detained%20-%20Organizational%20Sign%20on%20Letter%20-%20Final.pdf>; Catherine E. Shoichet, *Doctors Warn of 'Tinderbox Scenario' if Coronavirus Spreads in ICE Detention*, CNN (Mar. 20, 2020), available at <https://www.cnn.com/2020/03/20/health/doctors-ice-detention-coronavirus/index.html>; Letter from Rep. Carolyn Maloney and Rep. Jamie Raskin to Acting Secretary of DHS Chad Wolf (Mar. 11, 2020), available at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2020-03-11.CBM%20and%20JR%20to%20Wolf-DHS%20re%20COVID-19.pdf>.

²⁷ See, e.g., Abigail Hauslohner, Nick Miroff & Matt Zapotosky, *Coronavirus Could Pose Serious Concern in ICE Jails, Immigration Courts*, The Washington Post (Mar. 12, 2020), available at https://www.washingtonpost.com/immigration/coronavirus-immigration-jails/2020/03/12/44b5e56a-646a-11ea-845d-e35b0234b136_story.html.

²⁸ *Are You at Higher Risk for Severe Illness?*, Centers for Disease Control and Prevention (accessed Mar. 23, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html>.

“A district court enjoys wide discretionary authority in formulating remedies for constitutional violations.” *Smith v. Bounds*, 813 F.2d 1299, 1301 (4th Cir. 1987). Moreover, “[w]hen necessary to ensure compliance with a constitutional mandate, courts may enter orders placing limits on a prison’s population.” *Brown v. Plata*, 563 U.S. 493, 511 (2011).

This principle is well-established. For example, in cases involving prisons and jails, federal courts have repeatedly ordered the release of detained persons when necessary to remedy constitutional violations caused by overcrowding. *See, e.g., Duran v. Elrod*, 713 F.2d 292, 297-98 (7th Cir. 1983), *cert. denied*, 465 U.S. 1108 (1984) (concluding that court did not exceed its authority in directing release of low-bond pretrial detainees as necessary to reach a population cap); *Mobile Cty. Jail Inmates v. Purvis*, 581 F. Supp. 222, 224-25 (S.D. Ala. 1984) (concluding that district court properly exercised remedial powers to order a prison’s population reduced to alleviate unconstitutional conditions and noting other cases); *Inmates of the Allegheny Cty. Jail v. Wecht*, 565 F. Supp. 1278, 1297 (W.D. Pa. 1983) (order to reduce overcrowding “is within our power to correct the constitutional violations”); *Brenneman v. Madigan*, 343 F. Supp. 128, 139 (N.D. Cal. 1972) (“If the state cannot obtain the resources to detain persons . . . in accordance with minimum constitutional standards, then the state simply will not be permitted to detain such persons.”).

In a published order, the Ninth Circuit *sua sponte* ordered release from immigration detention in light of the COVID-19 crisis. *See, e.g., Xochihua-Jaimes v. Barr*, No. 18-71460 (9th Cir. Mar. 23, 2020) (Order) (“[I]n light of the rapidly escalating public health crisis, which public health authorities predict will especially impact immigration detention centers, the court *sua sponte* orders that Petitioner be immediately released from detention and that removal of Petitioner be stayed pending final disposition by this court.”). Several courts have also ordered

the release of individuals in the federal criminal system. *See, e.g., United States v. Stephens*, 1:15-cr-00095 (AJN), Doc. No. 2798 (S.D.N.Y. March 19, 2020) (explaining that “the unprecedented and extraordinarily dangerous nature of the COVID-19 pandemic has become apparent” and that “inmates may be at a heightened risk of contracting COVID-19 should an outbreak develop”); *United States v. Barkman*, 3:19-cr-0052-RCJ-WGC, 2020 U.S. Dist. LEXIS 45628 (D. Nev. March 17, 2020) (modifying intermittent confinement as a condition of probation due to the COVID-19 pandemic); *In re. Extradition of Alejandro Toledo Manrique*, 2020 WL 1307109 (N.D. Cal. March 19, 2020) (ordering release on bond despite government assertions that facility has preparedness plan in place and no cases have been confirmed); *United States v. Raihan*, No. 20-cr-68 (BMC) (JO), Dkt. No. 20 at 10:12-19 (E.D.N.Y. Mar. 12, 2020) (deciding to continue a criminal defendant on pretrial release rather than remand to the Metropolitan Detention Center in part due to risk of COVID-19).

Similarly, in this case, the release of Plaintiffs from detention is the only effective remedy for the constitutional violation they face. Preventive measures, such as social distancing, may be effective in the community, but are impossible to implement in the detention setting. Ex. 2 ¶¶ 19-21, 33-36 (Mishori Decl.). Plaintiffs continue to live and undertake activities with other detainees in close quarters, and are unable to maintain the necessary hygiene and social distancing measures that could protect them from the disease. Ex. 4 ¶ 4 (Lopez Decl.); Ex. 5 ¶ 4 (Bakst Decl.); Ex. 6 ¶ 4 (Bakst Decl.).

For the foregoing reasons, Plaintiffs are likely to succeed on the merits of their claim that their continued detention violates their Fifth Amendment due process right to reasonable safety in government custody.

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

a. Plaintiffs Are Likely to Suffer Irreparable Harm Absent the Temporary Restraining Order.

Plaintiffs will suffer irreparable harm if they are not immediately released. *See Winter*, 555 U.S. at 20. A plaintiff must show that the irreparable harm she faces in the absence of relief is “neither remote nor speculative, but actual and imminent.” *Direx Israel, Ltd. v. Breakthrough Medical Group*, 952 F.2d 802, 812 (4th Cir. 1991) (citation omitted). Furthermore, the Fourth Circuit has held that “the denial of a constitutional right” itself “constitutes irreparable harm for purposes of equitable jurisdiction.” *Ross v. Meese*, 818 F.2d 1132, 1135 (4th Cir. 1987).

Plaintiffs will suffer irreparable harm absent immediate relief. Plaintiffs have underlying medical conditions that increase their likelihood of severe illness or death if they contract COVID-19. Ex. 2 ¶ 39 (Mishori Decl.); Ex. 5 ¶¶ 6-7 (Bakst Decl.); Ex. 6 ¶¶ 6-10 (Bakst Decl.). Public health experts have concluded that people with these characteristics in institutional settings such as immigration detention centers are at grave risk of severe illness and death. More than 3,000 medical health professionals have urgently requested that ICE immediately release immigration detainees in their custody, and two doctors who are medical experts for the Department of Homeland Security have sent a warning to Congress that keeping immigration detainees detained poses “an imminent risk to the health and safety of immigration detainees” and to the general public.²⁹ Finally, Plaintiffs have also established that their continued confinement violates their Fifth Amendment rights and, as such, have made a clear showing that they would be irreparably harmed if they continue to be detained.

b. The Public Interest and Balance of Equities Weigh Heavily in Plaintiffs’ Favor.

²⁹ Catherine E. Shoichet, *Doctors Warn of ‘Tinderbox Scenario’ if Coronavirus Spreads in ICE Detention*, CNN (Mar. 20, 2020), available at <https://www.cnn.com/2020/03/20/health/doctors-ice-detention-coronavirus/index.html>.

The final two factors generally “merge when the Government is the opposing party.” *Nken v. Holder*, 556 U.S. 418, 435 (2009); see *Kravitz v. U.S. Dep’t of Commerce*, 366 F. Supp. 3d 681, 755 (D. Md. 2019). The balance of harms and public interest weigh strongly in favor of granting a temporary restraining order. See *Winter*, 555 U.S. at 24. In contrast to the irreparable injury facing plaintiffs, the government will not be injured by an injunction. As the Fourth Circuit has recognized, a governmental entity “is in no way harmed by issuance of a preliminary injunction which prevents it from enforcing a regulation, which . . . is likely to be found unconstitutional. . . . Surely, upholding constitutional rights serves the public interest.” *Newsom ex rel. Newsom v. Albemarle Cty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003); *Legend Night Club v. Miller*, 637 F.3d 291, 302-03 (4th Cir. 2011) (“[T]he State . . . is in no way harmed by issuance of an injunction that prevents the state from enforcing [unlawful] restrictions.”). Because Plaintiffs’ continued detention is unconstitutional and unlawful, both the balance of the equities and the public interest weigh in favor of emergency relief.

III. The Court Should Not Require Plaintiffs to Provide Security Prior to Issuing a Temporary Restraining Order.

Federal Rule of Civil Procedure 65(c) provides that “The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.” However, “the district court retains the discretion to . . . waive the security requirement.” *Pashby v. Delia*, 709 F.3d 307, 332 (4th Cir. 2013) (citation omitted). District courts routinely exercise this discretion to require no security in cases brought by indigent and/or incarcerated people. See, e.g., *Beck v. Hurwitz*, 380 F. Supp. 3d 479, 485 (M.D. N.C. 2019) (federal prisoner); *Toussaint v. Rushen*, 553 F. Supp. 1365, 1383 (N.D. Cal.

1983) (state prisoners); *Orantes–Hernandez v. Smith*, 541 F. Supp. 351, 385 n. 42 (C.D. Cal. 1982) (detained immigrants). This Court should do the same here.

CONCLUSION

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

Dated: March 24, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2020, I electronically filed the foregoing document and accompanying memorandum of law, exhibits, and proposed order with the Clerk of the Court using the CM/ECF system. I further certify that I have mailed Respondents-Defendants a copy of this document and the accompanying proposed order via certified, first class mail on March 24, 2020. In addition, I have emailed copies of these documents to the following email addresses at the U.S. Attorney's Office for the District of Maryland:

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Dated: March 24, 2020

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