

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI**

Juana GONZALEZ MORALES; Abdallah
KHAMIS; Dwight MUNDLE; Edinahi
ZACARIAS CABRERA

Plaintiff-Petitioners,

v.

Shawn GILLIS, *et al.*,

Respondent-Defendants.

Civil Action No.: 5:20-cv-00181-DCB-MTP

ORAL ARGUMENT REQUESTED

Judge David C. Bramlette
Magistrate Judge Michael T. Parker

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

TABLE OF CONTENTS

INTRODUCTION	1
FACTUAL BACKGROUND	2
I. COVID-19 Is an Unprecedented and Lethal Global Pandemic	2
II. COVID-19 is Exceedingly Dangerous for Individuals Like Plaintiffs, Who Have Underlying Health Concerns	3
III. ACDC Does Not and Cannot Prevent Widespread Infection.	3
A. Social Distancing	5
B. Masks	6
C. Transfers	6
D. Hygiene	7
E. Testing and Isolation	8
ARGUMENT	11
I. Plaintiffs Will Suffer Irreparable Harm In the Absence of a Temporary Restraining Order	11
II. Plaintiffs Are Likely to Succeed On Their Due Process Claims	13
III. The Balance Of The Equities And The Public Interest Favor Plaintiffs	16
CONCLUSION	18

INTRODUCTION

Public health experts have warned that the only effective way to reduce the risk of contracting COVID-19 is regular widespread testing and contact tracing, vigilant social distancing and hygiene, and avoiding prolonged indoor exposure to infected persons. Respondent-Defendants (“Defendants”) have not effectively taken any of those actions at Adams County Detention Center (“ACDC”) and continue to detain Petitioner-Plaintiffs (“Plaintiffs”) there in conditions that make infection all but inevitable.

Plaintiffs are four individuals detained at ACDC, who, due to their medical conditions, are particularly vulnerable to serious illness or death if infected by COVID-19. It is impossible to engage in necessary distancing and hygiene practices at ACDC because detained people are confined in tight proximity to others in a space with poor sanitary conditions and ventilation.

For Plaintiffs, protection from the virus is a matter of life or death and the danger posed by their 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). Protection from infection with the coronavirus is not possible without a clear understanding of how widespread infection is at the facility. Though ACDC conducted a mass test of people detained there on September 1, 2020, they have failed to report the results to those detained inside or engage in contact tracing, isolation, and testing of close contacts of those who tested positive. Nor has ACDC implemented any plan to surveil the spread of COVID-19 within the facility by conducting these mass tests regularly. ACDC has also failed to follow critical CDC guidelines for prevention of infection in correctional settings such as limiting transfers, providing sufficient hygiene supplies, and enforcing social distancing. As a result of these

failures, confirmed active positive COVID-19 cases have risen from 2 on June 3, 2020, when this Court denied a temporary restraining order in *Tamayo Espinoza v. Gillis*, No. 5:20-CV-106-DCB-MTP, 2020 WL 2949779, at *6 (S.D. Miss. June 3, 2020), to 4 on July 27, 2020, to 36 on September 15.¹ Defendants have failed to stem COVID-19's tide at ACDC.

Absent this Court's immediate intervention, Plaintiffs—and the surrounding community—will be irreparably harmed by Defendant's ongoing failure to conduct regular testing, isolate those who test positive, end transfers into ACDC, and release those who cannot be protected from COVID-19. Preventing constitutional violations while also minimizing the spread of a deadly virus is in the public interest. Accordingly, this Court should enter a temporary restraining order ordering Defendants to immediately conduct periodic widespread testing, to abide by all CDC guidelines, and to stop all inter-facility transfers into and out of ACDC until such time as such transfers may take place without a risk to the health and safety of residents and staff at ACDC. Alternatively or in conjunction with the above, this Court should order a health inspection of the ACDC at the earliest possible date, and a plan for implementing reforms based on the results of that inspection.

FACTUAL BACKGROUND

I. COVID-19 Is an Unprecedented and Lethal Global Pandemic.

COVID-19 is a highly contagious disease easily transmitted through respiratory droplets, viral residue on surfaces, or aerosolized emissions caused by breathing, speaking, coughing, or sneezing.² It can result in severe and widespread damage to lungs, heart, liver, or other organs

¹ Immigration and Customs Enforcement, *ICE Guidance on COVID-19, ICE Detainee Statistics*, updated Jul. 28 2020, <https://web.archive.org/web/20200729081229/https://www.ice.gov/coronavirus#tab>; Immigration and Customs Enforcement, *ICE Guidance on COVID-19, ICE Detainee Statistics*, Sep. 15, 2020, <https://www.ice.gov/coronavirus>.

² World Health Organization, *Transmission of SARS-CoV-2: implications for infection prevention precautions*, Jul. 9, 2020, <https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-preventi>

and in many cases results in death.³ No vaccine or treatment can yet prevent COVID-19, so the only effective measures to reduce risk of infection are engaging in stringent social distancing, vigilant hygiene, and avoiding prolonged stays in poorly ventilated indoor environments containing infected individuals.⁴

II. COVID-19 is Exceedingly Dangerous for Individuals Like Plaintiffs, Who Have Underlying Health Conditions.

Older individuals and those with certain underlying medical conditions such as [REDACTED] have an increased risk of serious illness or death should they contract COVID-19.⁵ Plaintiffs' conditions make them particularly susceptible to COVID-19 complications. Plaintiff Gonzalez Morales [REDACTED] [REDACTED].⁶ Plaintiff Khamis [REDACTED].⁷ Plaintiff Mundle [REDACTED].⁸ Plaintiff Zacarias Cabrera [REDACTED] [REDACTED].⁹

III. ACDC Does Not and Cannot Prevent Widespread Infection.

ACDC is located in Natchez, Mississippi. As of September 15, 2020, there were 90,523 confirmed COVID-19 cases in Mississippi, 863 in Adams County; 2,734 Mississippians have

on-precautions; Declaration of Dr. Anjali Niyogi, MD, MPH ¶ 14; attached at Exhibit A. Dr. Niyogi is an Associate Professor of Internal Medicine at Tulane University Medical School. She supervises residents on the inpatient wards at University Medical Center in New Orleans where she regularly diagnoses and manages COVID-19 cases. She is also the founder and director of the Formerly Incarcerated Transitions Clinic in New Orleans, which provides care for incarcerated populations.

³ *What we know (so far) about the long-term health effects of Covid-19*, Advisory Board, Jun. 2, 2020,

<https://www.advisory.com/daily-briefing/2020/06/02/covid-health-effects>

⁴ World Health Organization, *Transmission of SARS-CoV-2: implications for infection prevention precautions*, Jul. 9, 2020,

<https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions>

⁵ Centers for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19): People with Certain Medical Conditions*, updated Sep. 11, 2020,

<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>.

⁶ Declaration of Juana Gonzalez Morales ¶ 2; attached at Exhibit B; Niyogi Decl. ¶ 30(c).

⁷ See Declaration of Abdallah Khamis ¶ 2; attached at Exhibit C; Niyogi Decl. ¶ 30(a) [REDACTED]

⁸ Declaration of Dwight Mundle ¶ 2; attached at Exhibit D; Niyogi Decl. ¶ 30(b).

⁹ Declaration of Edinahi Zacarias Cabrera ¶ 2; attached at Exhibit E; Niyogi Decl. ¶ 30(d).

died, 32 of them in Adams County.¹⁰ Hospitals in Natchez reached capacity by the end of July and there are no available intensive care unit beds anywhere closer than almost two hours away in Jackson, Mississippi.¹¹ As of September 15, 2020, ICE reports that at least 78 individuals detained at ACDC and 893 within the area of responsibility of the New Orleans ICE Field Office, which regularly transfers people between ACDC and the other area detention centers, have tested positive for COVID-19 over the course of the pandemic.¹²

Congregate jail environments like ACDC present a particularly high risk of outbreaks, exemplified by ICE's Winn Correctional Center, which has seen 199 confirmed COVID-19 cases, and the three people who died of COVID-19 at Yazoo City Federal Correctional Institution.¹³ Conditions in these facilities make it impossible to practice social distancing. At least 12 people at ICE detention centers, 7 detained people and 5 guards, have died of COVID-19

¹⁰ Mississippi Department of Health, *Coronavirus (COVID-19): Cumulative Cases and Deaths by County*, Sep. 13, 2020, https://msdh.ms.gov/msdhsite/_static/14.0.420.html#Mississippi.

¹¹ Mississippi Department of Health, Interactive Chart: Mississippi COVID-19 Hospitalizations, updated Sep. 13, 2020, https://msdh.ms.gov/msdhsite/_static/14.21994.420.873.html; Scott Hawkins, *COVID-19 Task Force: Hospitals reaching capacity, considering contingency plans*, Natchez Democrat, Jul. 28, 2020, <https://www.natchezdemocrat.com/2020/07/28/covid-19-task-force-hospitals-reaching-capacity-considering-contingency-plans/>

¹² Immigration and Customs Enforcement, *ICE Guidance on COVID-19, ICE Detainee Statistics*, Sep. 15, 2020, <https://www.ice.gov/coronavirus>; Lisa Riordan Seville and Hannah Rapple, *ICE keeps transferring detainees around the country, leading to COVID-19 outbreaks*, NBC News, May 31, 2020, <https://www.nbcnews.com/politics/immigration/ice-keeps-transferring-detainees-around-country-leading-covid-19-outbreaks-n1212856>; Yeganeh Torbati, Dara Lind & Jack Gillum, *In a 10-Day Span, ICE Flew This Detainee Across the Country* *Nine Times*, ProPublica, Mar. 27, 2020, <https://www.propublica.org/article/coronavirus-ice-flights-detainee-sirous-asgari>.

¹³ Immigration and Customs Enforcement, *ICE Guidance on COVID-19, ICE Detainee Statistics*, Sep. 15, 2020, <https://www.ice.gov/coronavirus>; Alissa Zhu, *Three inmates dead of coronavirus at federal Mississippi prison in Yazoo City*, Jun. 8, 2020, <https://lailluminator.com/2020/07/12/fifty-percent-of-Mississippi-inmate-covid-19-tests-are-positive-experts-say-thats-too-high/>.

so far.¹⁴ Defendants have not mitigated the spread of COVID-19 at ACDC, particularly given the steady rate of transfers into ACDC from other facilities.

A. Social Distancing

The Centers for Disease Control and Prevention (“CDC”) describes social distancing as “a cornerstone of reducing transmission” and instructs Defendants to explain to detained people “social distancing and its importance for preventing COVID-19.”¹⁵ Under current conditions, social distancing is impossible at ACDC. Plaintiffs are held in crowded spaces, with up to 92 people sharing one dorm and sleeping three feet from each other in bunk beds.¹⁶ Detained people are also forced to share microwaves, tables, and phones in their dorm in close quarters with others.¹⁷ Because there are no lids on toilets, there is a risk of aerosolized fecal transmission of COVID.¹⁸ Apart from crowded dorms, social distancing is not possible in the cafeteria where detained individuals are forced to wait for food in crowded lines and to eat between one and three feet away from each other.¹⁹ In the medical unit as well, Plaintiffs are forced to wait in close quarters with others.²⁰ Plaintiff Khamis was transferred to another detention center and back to ACDC and spent more than 24 hours in close quarters with detained people from all over the county.²¹ To whatever extent there are social distancing rules, those rules are not enforced.²²

¹⁴ American Immigrant Lawyers Association, *Deaths at Adult Detention Centers*, Sep. 1, 2020, <https://www.aila.org/infonet/deaths-at-adult-detention-centers>; Noah Lanard, *A Fourth Guard at an ICE Detention Center Has Died of COVID-19*, Mother Jones, Jun. 10, 2020, <https://www.motherjones.com/politics/2020/06/a-fourth-guard-at-an-ice-detention-center-has-died-of-covid-19/>; *Eloy ICE Guard Dies From COVID-19 Cases Up Dramatically-in-CG*; Pinal Central, updated Jul. 26, 2020, https://www.pinalcentral.com/covid-19/eloy-ice-guard-dies-from-covid-19-cases-up-dramatically-in-cg/article_1a6e0047-a90d-55c7-90ac-bbaca157e430.html

¹⁵ Centers for Disease Control and Prevention, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, updated Jul. 22, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>.

¹⁶ Khamis Decl. ¶ 3; Mundle Decl. ¶.

¹⁷ Gonzalez Morales Decl. ¶ 4; Khamis Decl. ¶¶ 3,5; Mundle Decl. ¶ 4; Zacarias Cabrera Decl. ¶ 3.

¹⁸ Niyogi Decl. ¶ 15.

¹⁹ Gonzalez Morales Decl. ¶ 4; Khamis Decl. ¶ 3; Mundle Decl. ¶ 4; Zacarias Cabrera Decl. ¶ 4.

²⁰ Gonzalez Morales Decl. ¶ 5; Mundle Decl. ¶ 5; Zacarias Cabrera Decl. ¶ 5.

²¹ Khamis Decl. ¶¶ 11-12.

Though some guards have tested positive, they do not attempt to keep their distance.²³ Though the facility itself is under capacity, total capacity is irrelevant when dorms are crowded because other housing units are tied up for use quarantining individuals.²⁴ These practices lead to exposure to a higher concentration of virus particles from infected individuals, which “increases the risk of contracting the virus, and may also lead to symptomatic or more severe disease.”²⁵

B. Masks

The CDC recommends that Defendants “[e]ncourage all staff and incarcerated/detained persons to wear a cloth face covering as much as safely possible” and “[p]rovide cloth face coverings at no cost to incarcerated/detained individuals and launder them routinely.”²⁶ However, staff at ACDC often do not wear masks, even if they spend their shifts working within the dorms or in the medical unit.²⁷ Defendants gave Plaintiffs masks, but did not adequately train Plaintiffs on their use or provide instructions on how to wash or use masks safely, so most detained people do not wear the masks despite the crowding within the dorms.²⁸ This leads to inconsistent mask usage that increases risk of transmission.²⁹

C. Transfers

The CDC recommends that Defendants should “[s]uspend all transfers of incarcerated/detained persons to and from other jurisdictions and facilities (including work release), unless necessary for medical evaluation, medical isolation/quarantine, health care, extenuating security concerns, release, or to prevent overcrowding.”³⁰ However, despite the

²² Gonzalez Morales Decl. ¶ 3; Khamis Decl. ¶ 3; Mundle Decl. ¶ 4; Zacarias Cabrera Decl. ¶ 5.

²³ Mundle Decl. ¶ 4.

²⁴ Khamis Decl. ¶ 10; Mundle Decl. ¶ 3.

²⁵ Niyogi Decl. ¶ 29(d),(f).

²⁶ Centers for Disease Control and Prevention, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, CDC, updated Jul. 22, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>.

²⁷ Gonzalez Morales Decl. ¶ 7; Khamis Decl. ¶ 4; Zacarias Cabrera Decl. ¶ 6.

²⁸ Gonzalez Morales Decl. ¶ 7; Khamis Decl. ¶ 8; Mundle Decl. ¶ 8; Zacarias Cabrera Decl. ¶ 7.

²⁹ Niyogi Decl. ¶ 29(a),(f).

various waves of COVID-19 outbreaks at ACDC, Defendants continue to transfer large numbers of detained people into ACDC.³¹ Now, Defendant concedes that they have brought their 30 known positive cases at ACDC via transfer.³² Indeed, outbreaks within the ICE New Orleans Field Office Area of Responsibility began when ICE transferred a confirmed COVID-19 case into a detention center.³³

New arrivals who have arrived on different dates are quarantined together.³⁴ Inexplicably, those who test positive have been kept in the same dorms as those who do not.³⁵ ACDC has not sometimes isolated new arrivals in its quarantine dorms or tested them for COVID-19.³⁶ Plaintiffs share the same medical unit and utilize the same medical staff as those quarantined, and Defendants have not asserted in other cases that they separate staff from quarantined units or test staff for COVID-19.

D. Hygiene

The CDC recommends that Defendants “[e]nsure . . . sufficient stocks of hygiene supplies, cleaning supplies, PPE, and medical supplies” and instruct detained people to avoid touching their eyes, nose, or mouth without cleaning their hands first and to practice good cough and sneeze etiquette and hand hygiene.³⁷ However, shortages of soap and cleaning supplies

³⁰ Centers for Disease Control and Prevention, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, updated Jul. 22, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>.

³¹ See Gaby del Valle and Jack Herrera, ‘*Like Petri Dishes for the Virus*’: ICE Detention Centers Threaten the Rural South, *Politico*, May 5, 2020, <https://www.politico.com/news/magazine/2020/05/05/coronavirus-ice-detention-rural-communities-186688>

(detailing transfer of 200 detained people into ACDC); Declaration of Christopher Chestnut, ECF No. 19-1, ¶ 3, *Chin v. Gillis*, 5:20-cv-93-KS-MTP (S.D. Miss. Jun. 18, 2020), attached as Exhibit F; Khamis Decl. ¶ 12; Mundle Decl. ¶ 3; Zacarias Cabrera Decl. ¶ 10

³² Hagan Decl. ¶ 8.

³³ Maria Clark, *ICE detainee tests positive for COVID-19 in Pine Prairie, Mississippi*, *The Daily Advertiser*, Apr. 2, 2020, <https://www.theadvertiser.com/story/news/american-south/2020/04/03/coronavirus-ice-detainee-tests-positive-pine-prairie-Mississippi/2946110001/>.

³⁴ *Id.*

³⁵ Chestnut Decl. ¶ 3; Niyogi Decl. ¶ 23(e).

³⁶ Niyogi Decl. ¶ 23(g).

persist at ACDC and Defendants have provided only cursory instruction, and then only in English, regarding hygiene and safety practices.³⁸ Without regular access to soap and cleaning supplies and education regarding hygiene, “the virus can easily spread through the facility, from detainee to detainee, or detainee to guard, and vice versa.”³⁹

E. Testing and Isolation

The CDC recommends quarantine and testing for people in jails and detention centers who have had close contact with a person with COVID-19 infection, including those without symptoms.⁴⁰ The CDC also recommends that settings in which vulnerable populations are kept in close quarters “should adopt measures to facilitate the early identification of infected individuals, including initial testing of everyone in the setting, periodic (e.g., weekly) testing of everyone in the setting, and testing of new or returning entrants into the setting” and that particular COVID-19 vulnerabilities who live with people who have COVID-19 symptoms should be tested.⁴¹

In August 2020, the CDC published a study finding that testing of all detained people in a jail “irrespective of symptoms, combined with periodic retesting, can identify infections and support prevention of widespread transmission in correctional and detention environments.”⁴² Likewise, the White House, CDC, and FDA all advise that once people test

³⁷ Centers for Disease Control and Prevention, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, updated Jul. 22, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>.

³⁸ Gonzalez Morales Decl. ¶ 8; Khamis Decl. ¶¶ 6,7,9; Mundle Decl. ¶¶ 6,7; Zacarias Cabrera Decl. ¶ 8.

³⁹ Niyogi Decl. ¶ 29(b),(c),(f).

⁴⁰ Centers for Disease Control and Prevention, *Overview of testing for SARS-CoV-2*, updated Aug. 24, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/testing-overview.html>.

⁴¹ Centers for Disease Control and Prevention, *Overview of testing for SARS-CoV-2*, updated Aug. 24, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/testing-overview.html>.

⁴² See Liesl M. Hagan, MPH1; Samantha P. Williams, PhD1; Anne C. Spaulding, MD, *et. al*, *Mass Testing for SARS-CoV-2 in 16 Prisons and Jails — Six Jurisdictions, United States, April–May 2020*, Centers for Disease Control and Prevention Morbidity and Mortality Weekly Report, Aug. 21, 2020, <https://www.cdc.gov/mmwr/volumes/69/wr/mm6933a3.htm>

positive, authorities should engage in “contact tracing,” or the identification and testing of close contacts of positive cases, “can help prevent or contain outbreaks, especially within ... congregate living settings in which the residents are particularly vulnerable to rapid spread.” *Savino*, 2020 WL 2404923, at *6.⁴³

Here, though ACDC tested most or all detained people in early September, ACDC does not appear to be engaging in any contact tracing or isolation of close contacts. Most detained people have not received the results of their tests.⁴⁴ Though Defendants removed and placed into COVID-19 quarantine people from the dorms of Plaintiff Gonzalez Morales, Khamis and Zacarias Cabrera and the dorms around Plaintiff Mundle, they have made no effort to separate those who were exposed to the suspected cases from those who were not.⁴⁵ Nor has any effort been made to periodically test vulnerable individuals such as Plaintiffs. Apart from this one-time mass test, ACDC policy has been, untethered to CDC guidance, to testing only those who present a fever of 100.4 degrees *and* flu-like symptoms *and* have already tested negative for the flu.⁴⁶ Also, ACDC does not appear to test everyone it quarantines.⁴⁷ ICE also does not appear to test people before transferring them into ACDC, even when they are being transferred from facilities with known COVID-19 cases.

Though Plaintiff Khamis was confined in close quarters with individuals who tested positive in June of 2020, he was not tested for COVID-19 until September.⁴⁸ Nor does there appear to be any COVID-19 testing of ACDC staff, even those who regularly treat COVID-19 patients at ACDC.⁴⁹ ACDC cannot isolate positive cases and test close contacts if it cannot

⁴³ Quoting White House, CDC & FDA, *Testing Blueprint 3 & n.1*, Apr. 27, 2020, <https://www.whitehouse.gov/wp-content/uploads/2020/04/Testing-Blueprint.pdf>.

⁴⁴ Gonzalez Morales Decl. ¶ 10; Khamis Decl. ¶ 14; Mundle Decl. ¶ 10; Zacarias Cabrera Decl. ¶ 13.

⁴⁵ Gonzalez Morales Decl. ¶ 10; Khamis Decl. ¶ 14; Zacarias Cabrera Decl. ¶¶ 11-12.

⁴⁶ *Id.* ¶ 7.

⁴⁷ Niyogi Decl. ¶ 29(e).

⁴⁸ Khamis Decl. ¶ 10.

successfully identify infected individuals.⁵⁰ And it is impossible to identify all infected individuals without adequate testing.

The CDC also recommends explaining to detained people “the importance of reporting symptoms to staff” and “the purpose of quarantine and medical isolation.”⁵¹ Specifically, the CDC requires that Defendants “[e]nsure that medical isolation for COVID-19 is distinct from punitive solitary confinement of incarcerated/detained individuals, both in name and in practice.”⁵² This, plainly, has not happened here as Plaintiffs Gonzalez Morales, Mundle, and Zacarias Cabrera have never been educated about reporting or isolation.⁵³ Plaintiff Khamis was told to report a fever only after people in his dorm tested positive for COVID-19.⁵⁴

Further, the CDC recommends that suspected COVID-19 cases are isolated from general population dorms and that infected individuals are placed in “negative pressure rooms,” which are used to prevent airborne spread of the virus from rooms containing infected individuals to other parts of the building.⁵⁵ However, ACDC does not have negative pressure rooms and uses regular housing units to hold those infected, thereby recirculating air contaminated with COVID-19 from quarantine dorms to the rest of the facility.⁵⁶ Given the existence of an active COVID-19 outbreak in ACDC, the lack of periodic widespread testing, the facility’s inherent structural limitations, and Defendant’s refusal to adhere to CDC guidelines, COVID-19 will become even more pervasive throughout ACDC.

⁴⁹ Declaration of Shawn Gillis, ECF No. 15-3, ¶ 9, *Tamayo Espinoza*, 5:20-cv-00106-DCB-MTP (S.D. Miss Apr. 30, 2020), attached at Exhibit G.

⁵⁰ Niyogi Decl. ¶ 29(e).

⁵¹ Centers for Disease Control and Prevention, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, updated Jul. 22, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>.

⁵² *Id.*

⁵³ Gonzalez Morales Decl. ¶ 4; Mundle Decl. ¶ 7; Zacarias Cabrera Decl. ¶ 7.

⁵⁴ Khamis Decl. ¶ 10.

⁵⁵ Centers for Disease Control and Prevention, *Interim Infection Prevention and Control Recommendations for Healthcare Personnel During the Coronavirus Disease 2019 (COVID-19) Pandemic*, updated Jul. 15, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/infection-control-recommendations.html>

⁵⁶ Hagan Decl. ¶ 8; Niyogi Decl. ¶ 22.

ARGUMENT

Under Rule 65 of the Federal Rules of Civil Procedure, a movant is entitled to temporary restraining order to preserve the status quo—here, the health and lives of Plaintiffs—by showing: (1) a substantial likelihood of success on the merits of their claims for relief; (2) a substantial threat of irreparable injury absent the injunction; (3) that the threatened injury outweighs any damage that injunction may cause the opposing party; and (4) that the injunction will not disserve public interest. *Lake Charles Diesel, Inc. v. General Motors Corp.*, 328 F.3d 192, 195 (5th Cir. 2003).

Plaintiffs are particularly vulnerable to severe illness and death and are likely to be exposed to COVID-19 at ACDC. The serious risk they face to their health is the clearest form of irreparable harm that the law recognizes. In contrast, Defendants can identify no sufficiently countervailing interest in continuing to subject those in *civil* immigration detention to such a grave health risk without periodic widespread testing to identify vulnerabilities and a halt to all transfers to eliminate further spread. Because subjecting persons in civil immigration detention to such dangerous conditions of confinement is punitive, Plaintiffs are likely to succeed on the merits of their substantive due process claims.

I. Plaintiffs Will Suffer Irreparable Harm in the Absence of a Temporary Restraining Order.

The “single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered.” *Trinity USA Operating, L.L.C. v. Barker*, 844 F. Supp. 2d 781, 786 (S.D. Miss. 2011) (quotations omitted). A Plaintiff must prove a “substantial threat” of irreparable injury, which is “harm for which there is no adequate remedy at law.” *Daniels Health Scis., L.L.C. v. Vascular Health Scis., L.L.C.*, 710 F.3d 579, 585 (5th Cir. 2013).

Without emergency relief from this Court, Plaintiffs face a substantial threat of imminent and irreparable injury, including death—harms no court can otherwise remediate. *See Turner v. Epps*, 842 F. Supp. 2d 1023, 1028 (S.D. Miss. 2012), *vacated on other grounds*, 460 Fed. App'x 322 (5th Cir. 2012), (referring to “death itself” as the “single most irreparable harm of all). Short of death, Plaintiffs are at grave risk of contracting or exacerbating severe and potentially long-term medical conditions⁵⁷, which also establishes irreparable harm. *See, e.g., M.R. v. Dreyfus*, 697 F.3d 706, 729 (9th Cir. 2012); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996); *see also Unknown Parties v. Johnson*, No. CV-15-00250-TUC (DCBx), 2016 WL 8188563, at *15 (D. Ariz. No. 18, 2016), *aff'd sub nom Doe v. Kelly*, 878 F.3d 710 (9th Cir. 2017) (irreparable harm where evidence demonstrated “medical risks associated with . . . being exposed to communicable diseases”). Given the possibilities of asymptomatic and pre-symptomatic spread and ACDC’s failure to properly isolate people who have tested positive, Defendants are not able to keep COVID-positive individuals away from Plaintiffs. Likewise, until Defendants follow CDC guidelines regarding mask usage, social distancing, and hygiene, COVID-19 will continue spreading through ACDC. Finally, Defendants’ practice of transferring of detained people in and out of ACDC must be halted in order to prevent further staff infection and greater concentrations of aerosolized COVID-19 particles circulating through the facility ventilation system. As Defendants have not implemented any of these measures, Plaintiffs are at immediate risk of irreparable harm.

Plaintiffs also face irreparable harm because their constitutional rights are being violated. *See infra* Section III; *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 295 (5th Cir. 2012).

⁵⁷ *What we know (so far) about the long-term health effects of Covid-19*, Advisory Board, Jun. 2, 2020, <https://www.advisory.com/daily-briefing/2020/06/02/covid-health-effects>

II. Plaintiffs Are Likely To Succeed On Their Due Process Claims.

When the State holds individuals in its custody, the Constitution imposes an obligation to provide for their basic human needs, including medical care and reasonable safety. *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 199–200 (1989).

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 and the Due Process Clause.

Id. (citations omitted); *accord Hare v. City of Corinth, Miss.*, 135 F.3d 320, 326 (5th Cir. 1998).

Because they are in civil detention, Plaintiffs have a right to be free from punitive conditions of confinement. A person in civil immigration detention has due process rights that are similar to those of a person detained in pretrial detention prior to adjudication of guilt. *Edwards v. Johnson*, 209 F.3d 772, 778 (5th Cir. 2000).⁵⁸ While the Eighth Amendment protects individuals in prison from “cruel and unusual” punishment, due process mandates that those in civil detention not be punished at all. *Hare*, 74 F.3d at 639. Once civil detention becomes punitive, substantive due process requires release. *See Foucha v. Louisiana*, 504 U.S. 71, 86 (1992) (ordering Plaintiff’s release from commitment to mental institution because there was no longer any evidence of mental illness); *Zadvydas v. Davis*, 533 U.S. 678, 694 (2001).

A condition of detention amounts to impermissible punishment when “it is not reasonably related to a legitimate goal,” if it is “excessive” in relation to a legitimate goal,” or if it is

⁵⁸ Some courts have held that individuals in immigration detention have greater protections than those in pretrial detention because immigration detention does not implicate penological interests associated with criminal confinement or suspicion. *In re Kumar*, 402 F. Supp. 3d 377, 384 (W.D. Tex. 2019); *Jones v. Blanas*, 393 F.3d 918, 933 (9th Cir. 2004). The *Kumar* court applied the *Youngberg* civil commitment standard to the immigration detention context, which asks whether “Defendants’ conduct was ‘such a substantial departure from accepted professional judgment, practice, or standards in the care and treatment of this Petitioner.’” *Youngberg v. Romeo*, 457 U.S. 307, 314 (1982). There can be *no* professional medical or penological judgment that could reasonably support the continued detention of medically compromised individuals in immigration detention in crowded, precarious conditions that subject them to a high risk of contagion, illness or death.

otherwise “arbitrary or purposeless”—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees.” *Bell v. Wolfish*, 441 U.S. 520, 539 (1979). To make this showing, an individual in detention need not demonstrate the Defendant’s subjective or malicious intent to punish. *Shepherd v. Dallas Cty.*, 591 F.3d 445, 452 (5th Cir. 2009). “[E]ven where a State may not want to subject a detainee to inhumane conditions of confinement or abusive jail practices, its intent to do so is nevertheless presumed when it incarcerates the detainee in the face of such known conditions and practices.” *Hare*, 74 F.3d at 644. “A pervasive pattern of serious deficiencies” that subjects an individual in detention to the risk of serious injury or death likewise amounts to punishment. *Shepherd*, 591 F.3d at 454.

In *Shepherd*, the Fifth Circuit found that a “jail’s evaluation, monitoring, and treatment of inmates with chronic illness was [...] grossly inadequate due to poor or non-existent procedures and understaffing of guards and medical personnel,” that “serious injury and death were the inevitable results of the jail’s gross inattention to the needs of inmates with chronic illness,” and that this amounted to punishment. 591 F.3d at 454. Similarly, in *Duvall v. Dallas Cty., Tex.*, the Fifth Circuit affirmed a finding that Dallas County had an unconstitutionally punitive custom or policy when it failed to take necessary measures to eradicate Methicillin-Resistant *Staphylococcus Aureus* in its jail. 631 F.3d 203, 208-209 (5th Cir. 2011).

Indeed, many district courts, including courts in the Fifth Circuit have found that continuing to hold individuals in ICE detention centers during COVID-19 outbreaks violates due process and ordered release of detained people inside. *See e.g., Dada v. Witte*, No. 1:20-CV-00458, 2020 WL 2614616, at *1 (W.D. La. May 22, 2020) (ordering release of high-risk detained immigrants in ICE detention facilities across Louisiana due to COVID-19

risks); *Menjivar v. Staiger*, No. 6:20-cv-00807-MJJ-PJH, ECF No. 22 (W.D. La. Sep. 2, 2020) (Report and Recommendation) (recommending release of detained person from Louisiana detention center because of COVID-19 risk)⁵⁹; *Vazquez Barrera v. Wolf*, No. 4:20-CV-1241, 2020 WL 1904497, at *10 (S.D. Tex. Apr. 17, 2020); (ordering release of detained immigrants from Montgomery Processing Center due to COVID-19 risk); *Basank v. Decker*, 449 F. Supp. 3d 205, 215 (S.D.N.Y. 2020) (holding that “[c]onfining vulnerable individuals . . . without enforcement of appropriate social distancing and without specific measures to protect their delicate health ‘pose[s] an unreasonable risk of serious damage to [their] future health’”) (internal citation omitted); *Thakker v. Doll*, No. 1:20-cv-00480-JEJ, 2020 WL 1671563, at *8 (M.D. Pa. Mar. 31, 2020) (finding that “unsanitary conditions, which include overcrowding and a high risk of COVID-19 transmission” cannot be rationally related to a legitimate government objective); *United States v. Ramos*, No. 18-CR-300009-FDS, 2020 WL 1478307, at *1 (D. Mass. Mar. 26, 2020) (stating that “it is not possible for a medically vulnerable inmate . . . to isolate himself in this institutional setting as recommended by the CDC, and guards and newly arrested individuals must enter the facility on a daily basis”).⁶⁰ A court may also order Defendants to ameliorate unlawful conditions of confinement. *See, e.g., Zepeda Rivas v. Jennings*, No. 20-CV-02731-VC, 2020 WL 4554646, at *1 (N.D. Cal. Aug. 6, 2020) (ordering periodic universal testing, limiting transfers, and maintaining a dormitory to segregate positive COVID-19 cases at ICE facility); *Savino v. Souza*, No. CV 20-10617-WGY, 2020 WL 2404923, at *11 (D. Mass. May 12, 2020) (ordering widespread testing and halt to transfers at ICE facility); *Gayle v. Meade*, No. 20-21553-CIV, 2020 WL 2086482, at *7 (S.D. Fla. Apr. 30, 2020) (ordering population reduction and mandatory distribution of masks and soap).

⁵⁹ Attached at Exhibit H.

⁶⁰ Courts maintain this authority to order those detained in violation of their due process rights released, notwithstanding § 1226(c). *See Cabral v. Decker*, 331 F. Supp. 3d 255, 259 (S.D.N.Y. 2018) (collecting cases).

Continuing to detain Plaintiffs in conditions that impose a substantial risk of illness or death is excessive in relation to the legitimate purpose for their detention. The Supreme Court has held that immigration detention is permissible to ensure the immigrant's participation in their removal proceedings, to prevent flight, and to otherwise protect the community. *Zadvydas*, 533 U.S. at 690 (2001); *Demore v. Kim*, 538 U.S. 510, 528 (2003). However, 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. Yet Defendants continue to hold Plaintiffs in ACDC while the outbreak rages inside, and Defendants have failed to take basic measures to control that outbreak.

Given the cramped, unsanitary conditions at ACDC and Defendants' willful failure to uncover the extent of the COVID-19 spread within the facility, Plaintiffs face a substantial risk of contracting the virus. Once they are exposed, they are all vulnerable to severe illness or death, either because of their age, or their underlying medical conditions. Continued detention without widespread, periodic testing, a halt to transfers, and immediate amelioration of conditions is an imminent threat to their lives that is clearly excessive in relation to any purported government goal, and therefore amounts to punishment.

III. The Balance Of The Equities and the Public Interest Favor Plaintiffs.

Where, as here, the Government is a party to the case, the third and fourth injunction factors—the balance of the equities and the public interest—merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). As an initial matter, the public interest is served by the protection of constitutional rights. *See Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996).

In addition, an injunction would also protect public health and safety, paramount considerations that weigh heavily in favor of an injunction. *See Planned Parenthood of Gulf*

Coast, Inc. v. Gee, 862 F.3d 445, 472 (5th Cir. 2017); *see also Grand River Enterprises Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 169 (2d Cir. 2005) (referring to “public health” as a “significant public interest”); *Pashby v. Delia*, 709 F.3d 307, 331 (4th Cir. 2013) (“the public interest in this case lies with safeguarding public health”).

The balance of equities strongly tilts in Plaintiffs’ favor as the public is served by identifying the true extent of COVID-19 infection and preventing further outbreak at ACDC. The Southern District of Texas correctly explained the public interest in preventing outbreak in ICE detention as follows:

An outbreak among the MPC detainee population will inevitably spread through the surrounding community, as MPC staff members, who live outside the detention facility, will be exposed to sick detainees. Additionally, an outbreak in MPC will put additional strain on hospitals and health care resources in the community, which are already straining to care for the community at large during the pandemic.

Vazquez Barrera, 2020 WL 1904497, at *7; *see also Thakker*, 2020 WL 1671563 at *9 (“Efforts to stop the spread of COVID-19 and promote public health are clearly in the public’s best interest, and the release of these fragile Plaintiffs from confinement is one step further in a positive direction.”). Further, both the current and former Natchez mayor have expressed concern over the risk that an ACDC outbreak would exacerbate community spread in the surrounding areas and overwhelm an already overwhelmed local hospital system.⁶¹ In May, even before the surge in infections in Mississippi, two ACDC staff had tested positive for COVID-19.⁶² The public cannot afford a further taxing of its medical infrastructure.⁶³

⁶¹ See Scott Hawkins, *Mayoral candidate expresses virus concerns about prison*, Mar. 30, 2020, <https://www.natchezdemocrat.com/2020/03/30/mayoral-candidate-expresses-virus-concerns-about-prison/>; Gaby del Valle and Jack Herrera, *‘Like Petri Dishes for the Virus’: ICE Detention Centers Threaten the Rural South*, Politico, May 5, 2020, <https://www.politico.com/news/magazine/2020/05/05/coronavirus-ice-detention-rural-communities-186688>; Scott Hawkins, *COVID-19 Task Force: Hospitals reaching capacity, considering contingency plans*, Natchez Democrat, Jul. 28, 2020, <https://www.natchezdemocrat.com/2020/07/28/covid-19-task-force-hospitals-reaching-capacity-considering-contingency-plans/>.

Despite the costs of bringing ACDC into compliance with CDC guidelines, the risk of catastrophic medical consequences to Plaintiffs still tilts equities in Plaintiffs' favor. *See Hernandez v. Sessions*, 872 F.3d 976, 996 (9th Cir. 2017) (“Faced with such a conflict between financial concerns and preventable human suffering, we have little difficulty concluding that the balance of hardships tips decidedly in Plaintiffs’ favor.”).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant the motion for a temporary restraining order and order Defendants to immediately conduct widespread testing, to abide by all CDC guidelines, and to stop all transfers into and out of ACDC. Additionally, the Court should order a health inspection of the facility at the earliest possible date in order to identify with specificity the conditions reforms that need to be undertaken in order to adequately prevent the spread of COVID-19 within ACDC.

Dated: September 17, 2020

Respectfully submitted,

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⁶² Gaby del Valle and Jack Herrera, ‘Like Petri Dishes for the Virus’: ICE Detention Centers Threaten the Rural South, *Politico*, May 5, 2020, <https://www.politico.com/news/magazine/2020/05/05/coronavirus-ice-detention-rural-communities-186688>.

⁶³ Niyogi Decl. ¶ 26.

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CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2020, I electronically filed the foregoing document and accompanying motion, exhibits, and proposed order with the Clerk of the Court using the CM/ECF system. I further certify that I spoke with AUSA Williams on the telephone and advised her of this filing on September 16, 2020, prior to its filing. In addition, I have emailed copies of these documents to AUSA Williams at the following email address at the U.S. Attorney's Office for the Southern District of Mississippi:

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