

APPENDIX E
Sample Habeas Petition (Ninth Circuit)

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

KARLENA DAWSON; ALFREDO
ESPINOZA-ESPARZA; NORMA LOPEZ
NUNEZ; MARJORIS RAMIREZ-OCHOA;
MARIA GONZALEZ-MENDOZA; JOE
HLUPHEKA BAYANA; LEONIDAS
PLUTIN HERNANDEZ; KELVIN
MELGAR-ALAS; JESUS GONZALEZ
HERRERA,

Petitioners-Plaintiffs,

v.

NATHALIE ASHER, Director of the Seattle
Field Office of U.S. Immigration and Customs
Enforcement; MATTHEW T. ALBENCE,
Deputy Director and Senior Official Performing
the Duties of the Director of the U.S.
Immigration and Customs Enforcement; U.S.
IMMIGRATION AND CUSTOMS
ENFORCEMENT; STEVEN LANGFORD,
Warden, Tacoma Northwest Detention Center,

Respondents-Defendants.

Case No. 2:20-cv-409

**PETITION FOR WRIT OF
HABEAS CORPUS PURSUANT
TO 28 U.S.C. § 2241 AND
COMPLAINT FOR INJUNCTIVE
RELIEF**

I. INTRODUCTION

1
2 The novel coronavirus that causes COVID-19 has led to a global pandemic. In only a few
3 months, 153,517 people worldwide have received confirmed diagnoses of COVID-19, and over
4 5,735 of those people have died. There is no vaccine against COVID-19, and there is no known
5 cure. No one is immune. COVID-19 is most likely to cause serious illness and elevated risk of
6 death for older adults and those with certain medical conditions or underlying disease. The
7 COVID-19 virus can cause severe damage to lung tissue, sometimes leading to a permanent loss
8 of respiratory capacity, and can damage tissues in other vital organs including the heart and liver.
9 Patients with serious cases of COVID-19 require advanced medical support, including positive
10 pressure ventilation and extracorporeal mechanical oxygenation in intensive care. Patients who
11 do not die from serious cases of COVID-19 may face prolonged recovery periods, including
12 extensive rehabilitation from neurologic damage and loss of respiratory capacity. The only
13 known effective measures to reduce the risk for vulnerable people of serious illness or
14 death caused by COVID-19 are social distancing and improved hygiene, which have led to
15 unprecedented public health measures around the world. According to preliminary data from
16 China, 20 percent of people in high risk categories who contracted COVID-19 there died.

17 People in congregate environments, which are places where people live, eat, and sleep in
18 close proximity, face increased danger of contracting COVID-19, as already evidenced by
19 the rapid spread of the virus in cruise ships and nursing homes. People who are confined
20 in prisons, jails, and detention centers will find it virtually impossible to engage in the
21 necessary social distancing and hygiene required to mitigate the risk of transmission, even with
22 the best-laid plans. For this reason, correctional public health experts have recommended the
23 release from custody of people most vulnerable to COVID-19. Release protects the people with
24

1 the greatest vulnerability to COVID-19 from transmission of the virus, and also allows for
2 greater risk mitigation for all people held or working in a prison, jail, or detention center. Release
3 of the most vulnerable people from custody also reduces the burden on the region's
4 limited health care infrastructure, as it lessens the likelihood that an overwhelming number of
5 people will become seriously ill from COVID-19 at the same time.

6 Petitioners-Plaintiffs (hereinafter Plaintiffs) are people who are particularly vulnerable to
7 serious illness or death if infected by COVID-19 and who are held in civil detention
8 by Immigration and Customs Enforcement (ICE) at the Tacoma Northwest Detention
9 Center (NWDC) in Tacoma, Washington as they await the adjudication of their immigration
10 cases. Plaintiffs are older adults or have medical conditions that lead to high risk of serious
11 COVID-19 infection, including lung disease, heart disease, diabetes, epilepsy, kidney disease,
12 autoimmune disorders, asthma, and hypertension. The NWDC is located in the Seattle,
13 Washington metropolitan area, the epicenter of the largest COVID-19 outbreak in the United
14 States, and one of the largest known outbreaks in the world. As detailed below, the danger posed
15 by Plaintiffs' detention during the current outbreak of COVID-19 is "so grave that it violates
16 contemporary standards of decency to expose anyone unwillingly to such a risk" and violates
17 their constitutional right to safety in government custody. *Helling v. McKinney*, 509 U.S. 25, 36
18 (1993).

19 II. PARTIES

20 1. Petitioner-Plaintiff Karlena Dawson is a citizen of Jamaica who has been detained
21 by ICE at the NWDC since February of 2019. She suffers from cholangitis, an autoimmune liver
22 disease. As a consequence, she is at high risk for severe illness or death if she contracts COVID-
23 19.

1 2. Petitioner-Plaintiff Alfredo Espinoza Garza is citizen of Mexico who is detained
2 by ICE at NWDC. While detained at the facility, he has suffered acute chest pain that required
3 hospitalization to receive treatment for a heart attack. As a consequence of his health condition,
4 he is at a high risk for severe illness or death if he contracts COVID-19.

5 3. Petitioner-Plaintiff Norma Lopez Nunez is a citizen of Mexico who is detained by
6 ICE at the NWDC. She is 65 years old and suffers from hypertension and heart disease, in
7 addition to other ailments. As a consequence, she is at high risk for severe illness or death if she
8 contracts COVID-19.

9 4. Petitioner-Plaintiff Marjoris Ramirez Ochoa is a citizen of Cuba who is detained
10 by ICE at the NWDC. She suffers from chronic high blood pressure, kidney disease, and
11 epilepsy, among other conditions. As a consequence, she is at high risk for severe illness or death
12 if she contracts COVID-19.

13 5. Petitioner-Plaintiff Maria Gonzalez Mendoza is a citizen of Mexico who is
14 detained by ICE at the NWDC. She suffers from diabetes, high blood pressure, and asthma. As a
15 consequence, she is at high risk for severe illness or death if she contracts COVID-19.

16 6. Petitioner-Plaintiff Joe Hlupheka Bayana is a citizen of Zimbabwe who has been
17 detained by ICE at the NWDC since October of 2018. He is 57 years old and suffers from
18 diabetes and seizures. As a consequence, he is at high risk for severe illness or death if he
19 contracts COVID-19.

20 7. Petitioner-Plaintiff Leonidas Plutin Hernandez is a citizen of Cuba who is
21 detained by ICE at the NWDC. He is 59 years old and suffers from high blood pressure. As a
22 consequence of his health condition, he is at a high risk for severe illness or death if he contracts
23 COVID-19.

1 8. Petitioner-Plaintiff Kelvin Melgar Alas is a citizen of El Salvador who has been
2 detained by ICE at the NWDC since July of 2018. He has been confined to a wheelchair since
3 1995, requires a colonoscopy bag and catheter, and has been transferred to the hospital multiple
4 times for pneumonia while detained at the NWDC. As a consequence of his fragile health
5 condition, he is at high risk for severe illness or death if he contracts COVID-19.

6 9. Petitioner-Plaintiff Jesus Gonzalez Herrera is a citizen of Mexico who has been
7 detained by ICE since July of 2019 and is currently detained at the NWDC. He suffers from
8 diabetes and high blood pressure. As a consequence of his health condition, he is at a high risk
9 for severe illness or death if he contracts COVID-19.

10 10. Respondent-Defendant Nathalie Asher (Asher) is the Field Officer Director for
11 the Seattle Field Office of ICE. The Seattle Field Office is responsible for carrying out ICE's
12 immigration detention operations at the NWDC. Defendant Asher is a legal custodian of
13 Plaintiffs. She is sued in her official capacity.

14 11. Respondent-Defendant Matthew T. Albence (Albence) is the Deputy Director and
15 Senior Official Performing the Duties of the Director of ICE. Defendant Albence is responsible
16 for ICE's policies, practices, and procedures, including those relating to the detention of
17 immigrants. Defendant Albence is a legal custodian of Plaintiffs. He is sued in his official
18 capacity.

19 12. Respondent-Defendant ICE is a federal law enforcement agency within the
20 Department of Homeland Security. ICE is responsible for the criminal and civil enforcement of
21 immigration laws, including the detention and removal of immigrants. Enforcement and
22 Removal Operations (ERO), a division of ICE, manages and oversees the immigration detention
23 system. Defendant ICE is a legal custodian of Plaintiffs.

1 heart disease, chronic liver or kidney disease (including hepatitis and dialysis patients), diabetes,
2 epilepsy, hypertension, compromised immune systems (such as from cancer, HIV, or
3 autoimmune disease), blood disorders (including sickle cell disease), inherited metabolic
4 disorders, stroke, developmental delay, and pregnancy.

5 18. In many people, COVID-19 causes fever, cough, and shortness of breath. But for
6 people over the age of fifty or with medical conditions that increase the risk of serious COVID-
7 19 infection, shortness of breath can be severe.

8 19. The COVID-19 virus can severely damage lung tissue, which requires an
9 extensive period of rehabilitation, and in some cases, can cause a permanent loss of respiratory
10 capacity. COVID-19 may also target the heart muscle, causing a medical condition called
11 myocarditis, or inflammation of the heart muscle. Myocarditis can affect the heart muscle and
12 electrical system, reducing the heart's ability to pump. This reduction can lead to rapid or
13 abnormal heart rhythms in the short term, and long-term heart failure that limits exercise
14 tolerance and the ability to work.

15 20. Emerging evidence suggests that COVID-19 can also trigger an over-response of
16 the immune system, further damaging tissues in a cytokine release syndrome that can result in
17 widespread damage to other organs, including permanent injury to the kidneys and neurologic
18 injury.

19 21. These complications can manifest at an alarming pace. Patients can show the first
20 symptoms of infection in as little as two days after exposure, and their condition can seriously
21 deteriorate in as little as five days or sooner.

22 22. Even some younger and healthier people who contract COVID-19 may
23 require supportive care, which includes supplemental oxygen, positive pressure ventilation, and
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1 in extreme cases, extracorporeal mechanical oxygenation. Most people in higher risk categories
2 who develop serious disease, however, will need advanced support. This level of supportive care
3 requires highly specialized equipment that is in limited supply, and an entire team of care
4 providers, including 1:1 or 1:2 nurse to patient ratios, respiratory therapists, and intensive care
5 physicians. This level of support can quickly exceed local health care resources.

6 23. The need for care, including intensive care, and the likelihood of death, is much
7 higher from COVID-19 infection than from influenza. According to recent estimates, the fatality
8 rate of people infected with COVID-19 is about ten times higher than a severe seasonal
9 influenza, even in advanced countries with highly effective health care systems. For people in the
10 highest risk populations, the fatality rate of COVID-19 infection is about 15 percent. Preliminary
11 data from China showed that 20 percent of people in high-risk categories who have contracted
12 COVID-19 there have died.

13 24. Patients in high-risk categories who do not die from COVID-19 should expect a
14 prolonged recovery, including the need for extensive rehabilitation for profound reconditioning,
15 loss of digits, neurologic damage, and the loss of respiratory capacity.

16 25. There is no vaccine against COVID-19, nor is there any no known medication to
17 prevent or treat infection from COVID-19. The only known effective measures to reduce the risk
18 for vulnerable people from injury or death from COVID-19 are to prevent them from being
19 infected in the first place. Social distancing, or remaining physically separated from known or
20 potentially infected individuals, and vigilant hygiene, including washing hands with soap and
21 water, are the only known effective measures for protecting vulnerable people from COVID-19.

22 26. Nationally, projections by the Centers for Disease Control and Prevention
23 (CDC) indicate that over 200 million people in the United States could be infected with COVID-
24

1 19 over the course of the epidemic without effective public health intervention, with as many as
2 1.5 million deaths in the most severe projections.

3 **B. People Detained at the Northwest Detention Center Face an Elevated Risk of**
4 **COVID-19 Transmission.**

5 27. The NWDC is located in the Seattle, Washington metropolitan area, the epicenter
6 of the largest COVID-19 outbreak in the United States at this time, and one of the largest known
7 outbreaks in the world.

8 28. As of March 15, 2020, there were 769 confirmed cases of COVID-19 and 42
9 deaths from COVID-19 in Washington State.

10 29. The COVID-19 outbreak in Washington State has resulted in unprecedented
11 health measures to facilitate and enforce social distancing. Immigration courts and the ICE field
12 office in Seattle have already closed in the past month due to staff exposure to COVID-19. It is
13 highly likely, and perhaps inevitable, that COVID-19 will reach the NWDC.

14 30. People who live in institutional settings such as immigration detention centers and
15 who are over the age of 50 or are any age with medical conditions that put them at high risk of
16 illness if infected by COVID-19 are at grave risk of severe illness and death.

17 31. Immigration detention facilities are “congregate environments,” or places where
18 people live and sleep in close proximity. Infectious diseases that are communicated by air or
19 touch are more likely to spread in these environments. This presents an increased danger for the
20 spread of COVID-19 if and when it is introduced into a facility.

21 32. Enclosed group environments, like cruise ships or nursing homes, have become
22 the sites for the most severe outbreaks of COVID-19. The highest known person-to-person
23 transmission rate for COVID-19 took place in a skilled nursing home facility in Kirkland,
24 Washington, and on afflicted cruise ships in Japan and off the coast of California.

1 33. The conditions of immigration detention facilities pose a heightened public health
2 risk for the spread of COVID-19 that is even greater than in non-carceral
3 institutions. Immigration detention facilities have even greater risk of infectious spread because
4 of crowding, the proportion of vulnerable people detained, and often scant medical care
5 resources. People live in close quarters and as a result, cannot achieve the “social distancing”
6 needed to effectively prevent the spread of COVID-19. They may be unable to maintain the
7 recommended distance of 6 feet from others and may share or touch objects used by others.
8 Toilets, sinks, and showers are shared, without disinfection between each use. Food preparation
9 and service is communal with little opportunity for surface disinfection. Staff arrive and leave on
10 a shift basis, and there is limited ability to adequately screen staff for new, asymptomatic
11 infection.

12 34. Many immigration detention facilities lack adequate medical infrastructure to
13 address the spread of infectious disease and treatment of people most vulnerable to illness in
14 detention. During the H1N1 influenza epidemic in 2009, jails and prisons were sites of severe
15 outbreaks. It is reasonable to expect COVID-19 will also readily spread in detention centers,
16 especially when people cannot engage in proper hygiene and isolate themselves from infected
17 residents or staff.

18 **C. People Most Vulnerable to COVID-19 Should Be Released from ICE Detention.**

19 35. Because risk mitigation is the only known strategy that can protect vulnerable
20 groups from COVID-19, public health experts with experience in immigration detention and
21 correctional settings have recommended the release of vulnerable detainees from custody.

22 36. Dr. Marc Stern, a correctional health expert, has as concluded that “[f]or detainees
23 who are at high risk of serious illness or death should they contract the COVID-19 virus, release
24

1 from detention is a critically important way to meaningfully mitigate that risk.” For that reason,
2 Dr. Stern has recommended the “release of eligible individuals from detention, with priority
3 given to the elderly and those with underlying medical conditions most vulnerable to serious
4 illness or death if infected with COVID-19.”

5 37. Dr. Robert Greifinger, a correctional health expert, has concluded that “even with
6 the best-laid plans to address the spread of COVID-19 in detention facilities, the release of high-
7 risk individuals is a key part of a risk mitigation strategy. Accordingly, “[i]n [his] opinion, the
8 public health recommendation is to release high-risk people from detention, given the heightened
9 risks to their health and safety, especially given the lack of a viable vaccine for prevention or
10 effective treatment at this stage.”

11 38. In the event that a scenario where vulnerable detainees have already been exposed
12 to COVID-19, these experts recommend testing where possible, and the release of detainees to a
13 quarantine setting outside of detention in coordination with local health authorities.

14 **D. Plaintiffs Are Particularly Vulnerable to Serious Illness or Death If Infected by**
15 **COVID-19 and Should Be Released from Custody.**

16 39. Plaintiffs in this case are people who are particularly vulnerable to serious illness
17 or death if infected by COVID-19 who are currently detained at the NWDC as they await the
18 adjudication of their civil immigration cases.

19 40. **Karlana Dawson.** Ms. Dawson is a 48-year-old citizen of Jamaica. Ms. Dawson
20 has been detained by ICE at the NWDC since February of 2019. Ms. Dawson was previously
21 deported from the United States but returned after learning that her children, who remained in the
22 United States, had suffered physical and sexual abuse at the hands of their foster father. She was
23 ordered removed, but has since filed a petition for review challenging the removal order. She has
24 also filed a U visa application based on the abuse suffered by her children, which remains

1 pending before U.S. Citizenship and Immigration Services (USCIS). If that application is
2 approved, she will be granted permission to remain in the United States with lawful status.

3 41. Ms. Dawson has been diagnosed with cholangitis, a progressive liver disease. She
4 has been informed that she has a life expectancy of 10-12 years. She must take ursodiol twice a
5 day to suppress enzymes because of her auto-immune disease. She also has diabetes, which
6 requires her to take insulin and metformin.

7 42. Ms. Dawson is critically vulnerable to COVID-19 because of her autoimmune
8 disease and diabetes.

9 43. **Alfredo Espinoza Esparza.** Mr. Espinoza is a 41-year-old citizen of Mexico who
10 was living in Spokane, Washington, with his family, when he was arrested in October of 2019,
11 by Border Patrol at the restaurant where he works. He has been detained by ICE at the NWDC
12 since that time. He is applying for cancellation of removal and adjustment of status to lawful
13 permanent residence before the immigration court.

14 44. On or about January 16, 2020, while detained at the NWDC, Mr. Espinoza
15 suffered acute chest pain that required hospitalization to receive treatment for a heart attack. He
16 was subsequently returned to the NWDC, where he is currently detained. He also suffers from a
17 rectal hemorrhage which requires medication. Mr. Espinoza also suffers from joint and nerve
18 damage in his elbow, from when he was handcuffed by Border Patrol agents. This medical
19 workers at the NWDC have diagnosed the elbow pain as a result of a lesion to his ulnar nerve
20 and multiple small osteochondral joint bodies. This has caused persistent numbness in his
21 forearm and finger, and consistent aches and pain in his arm, wrist, and hand.

22 45. Mr. Espinoza is critically vulnerable to COVID-19 because of his significant
23 health problems.

1 46. **Norma Lopez Nunez.** Ms. Lopez is a 65-year-old citizen of Mexico. She is
2 detained by ICE at the NWDC. She was issued a removal order that she is now challenging on a
3 petition for review before the Ninth Circuit Court of Appeals.

4 47. Ms. Lopez suffers from hypertension and heart disease, in addition to major
5 depression and other mental impairments.

6 48. Ms. Lopez is critically vulnerable to COVID-19 because of her age and her
7 significant health problems.

8 49. **Marjoris Ramirez Ochoa.** Ms. Ramirez is a 43-year-old citizen of Cuba. She is
9 detained by ICE at the NWDC. She last entered the United States in 2002 and is appealing a
10 decision by the Immigration Judge denying her applications for withholding of removal and
11 protection under the Convention Against Torture.

12 50. Ms. Ramirez suffers from chronic high blood pressure, kidney disease and
13 epilepsy. While detained she has suffered five seizures, but has not been referred to medical care
14 outside of the detention center. She also suffers from respiratory problems and has contracted
15 pneumonia in the past. Finally, she suffers from depression, gastritis, and an ovarian cyst, among
16 other conditions.

17 51. Ms. Ramirez is critically vulnerable to COVID-19 because of her significant
18 health problems.

19 52. **Maria Gonzalez Mendoza.** Ms. Gonzalez is a 49-year-old citizen of Mexico. She
20 is detained by ICE at the NWDC. She has lived in the United States since 1986 and has three
21 children, all of whom are U.S. citizens. She is applying for cancellation of removal and
22 adjustment of status to lawful permanent residence before the immigration court.
23
24

1 53. Ms. Gonzalez suffers from high blood pressure, diabetes, and asthma. She
2 receives medication for her asthma, in addition to depression and mental illness.

3 54. Ms. Gonzalez is critically vulnerable to COVID-19 because of her significant
4 health problems.

5 55. **Joe Hlupheka Bayana.** Mr. Bayana is a 57-year-old citizen of Zimbabwe. He has
6 been detained by ICE at the NWDC since October of 2018. He has filed a petition for review to
7 the Ninth Circuit Court of Appeals challenging the Board of Immigration Appeals' denial of his
8 motion to reopen immigration proceedings.

9 56. Mr. Bayana suffers from type II diabetes. He takes insulin three times a day to
10 treat his condition. He receives medication to treat seizures, as well as depression.

11 57. Mr. Bayana is critically vulnerable to COVID-19 because of his age and
12 significant health problems.

13 58. **Leonidas Plutin Hernandez.** Mr. Plutin is a 59-year-old citizen of Cuba. He has
14 been detained by ICE since August of 2019. He is currently detained at the NWDC.

15 59. Mr. Plutin suffers from chronic high blood pressure, for which he receives daily
16 medication.

17 60. Mr. Plutin is critically vulnerable to COVID-19 because of his age and chronic
18 high blood pressure.

19 61. **Kelvin Melgar Alas.** Mr. Melgar is 41-year-old citizen of El Salvador. He has
20 been detained by ICE since July of 2018. He was issued an order of removal that he is now
21 challenging on a petition for review before the Ninth Circuit Court of Appeals, which issued a
22 stay of removal.

1 68. Conditions that pose an unreasonable risk of future harm violate the Eighth
2 Amendment’s prohibition against cruel and unusual punishment, even if that harm has not yet
3 come to pass. The Eighth Amendment requires that “inmates be furnished with the basic human
4 needs, one of which is ‘reasonable safety.’” *Helling v. McKinney*, 509 U.S. at 33 (quoting
5 *DeShaney*, 489 U.S. at 200). Accordingly, “[i]t would be odd to deny an injunction to inmates
6 who plainly proved an unsafe, life-threatening condition in their prison on the ground that
7 nothing yet had happened to them.” *Id.*

8 69. The Supreme Court has explicitly recognized that the risk of contracting a
9 communicable disease may constitute such an “unsafe, life-threatening condition” that threatens
10 “reasonably safety.” *Id.*

11 70. These principles also apply in the context of immigration detention. Immigrant
12 detainees, even those with prior criminal convictions, are *civil detainees* held pursuant to civil
13 immigration laws. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

14 71. Because detained immigrants are civil detainees, their constitutional protections
15 while in custody are derived from the Fifth Amendment, which provides protections even greater
16 than the Eighth Amendment. The Eighth Amendment, which applies to persons convicted of
17 criminal offenses, allows punishment as long as it is not cruel and unusual. But the Fifth
18 Amendment’s due process protections do not allow punishment at all. *Bell v. Wolfish*, 441 U.S.
19 520, 535 n.16 (1979) (“Due process requires that a pretrial detainee not be punished.”).

20 72. The Ninth Circuit has applied this principle to make clear that that civil detainees,
21 like Plaintiffs here, are entitled to conditions of confinement that are superior to those of
22 convicted prisoners and to those of criminal pretrial detainees. *Jones v. Blanas*, 393 F.3d 918,
23 933-34 (9th Cir. 2004), *cert. denied*, 546 U.S. 820 (2005); *see also King v. Cnty. of Los Angeles*,

1 885 F.3d 548, 557 (9th Cir. 2018) (finding presumption of punitive, and thus unconstitutional,
2 treatment where conditions of confinement for civil detainees are similar to those faced by pre-
3 trial criminal detainees).

4 73. Moreover, because civil detention is governed by the Fifth Amendment rather
5 than the Eighth Amendment, the “deliberate indifference” standard required to establish a
6 constitutional violation in the latter context does not apply to civil detainees like Plaintiffs.
7 *Jones*, 393 F.3d at 934. Instead, a condition of confinement for a civil immigration detainee
8 violates the Constitution “if it imposes some harm to the detainee that significantly exceeds or is
9 independent of the inherent discomforts of confinement and is not reasonably related to a
10 legitimate governmental objective or is excessive in relation to the legitimate governmental
11 objective.” *Unknown Parties v. Johnson*, No. CV-15-00250-TUC-DCB, 2016 WL 8188563, at
12 *5 (D. Ariz. Nov. 18, 2016), *aff’d sub nom. Doe v. Kelly*, 878 F.3d 710 (9th Cir. 2017).

13 **B. ICE Has the Authority to Release Detained People in Its Custody.**

14 74. It is well within ICE’s authority to comply with these constitutional requirements
15 by releasing people who are vulnerable to severe illness or death if they contract COVID-19. For
16 example, the regulations governing ICE’s release authority state that serious medical conditions
17 are a reason to parole an individual, as “continued detention would not be appropriate” in such
18 cases. 8 C.F.R. § 212.5(b)(1).

19 75. ICE not only has the authority to exercise discretion to release individuals from
20 custody, but has routinely exercised this discretion to release particularly vulnerable detainees
21 like Plaintiffs.

22 76. High level ICE officials corroborate this fact. As former Deputy Assistant
23 Director for Custody Programs in ICE Enforcement and Removal Operations Andrew Lorenzen-

1 Strait explains, “ICE has exercised and still exercises discretion for purposes of releasing
2 individuals with serious medical conditions from detention.” In fact, “ICE exercises
3 humanitarian parole authority *all the time* for serious medical reasons.”

4 77. This exercise of discretion comes from a long line of agency directives explicitly
5 instructing officers to exercise favorable discretion in cases involving severe medical concerns
6 and other humanitarian equities militating against detention.

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

9 **C. This Court Has Authority to Order Plaintiffs’ Release to Vindicate Their Fifth
10 Amendment Rights, and Such Relief Is Appropriate Here.**

11 79. While the circumstances of this case are novel and emerging, the Court’s
12 authority to order Plaintiffs’ release to ensure their constitutional rights are protected is not.
13 “Federal courts possess whatever powers are necessary to remedy constitutional violations
14 because they are charged with protecting these rights.” *Stone v. City & Cnty. of San Francisco*,
15 968 F.2d 850, 861 (9th Cir. 1992). As a result, “[w]hen necessary to ensure compliance with a
16 constitutional mandate, courts may enter orders placing limits on a prison’s population.” *Brown*
17 *v. Plata*, 563 U.S. 493, 511 (2011).

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

22 81. The same principle applies here. As the constitutional principles and public health
23 experts make clear, releasing Plaintiffs is the only viable remedy to ensure their safety from the
24 threat to their health that COVID-19 poses. Plaintiffs are older adults and people with medical

1 conditions who are at particularly grave risk of severe illness or death if they contract COVID-
2 19.

3 82. In the face of this great threat, social distancing and hygiene measures are
4 Plaintiffs' only defense against COVID-19. Those protective measures are exceedingly difficult,
5 if not impossible, in the environment of an immigration detention center, where Plaintiffs share
6 toilets, sinks, and showers, eat in communal spaces, and are in close contact with the many other
7 detainees and officers around them. These conditions pose even greater risk of infectious spread,
8 and as a result, Plaintiffs face unreasonable harm from continued detention.

9 **VI. CLAIM FOR RELIEF**

10 **Violation of Fifth Amendment Right to Substantive Due Process (Unlawful Punishment;
11 Freedom from Cruel Treatment and Conditions of Confinement)**

12 83. The Fifth Amendment of the Constitution guarantees that civil detainees,
13 including all immigrant detainees, may not be subjected to punishment. The federal government
14 violates this substantive due process right when it subjects civil detainees to cruel treatment and
15 conditions of confinement that amount to punishment or does not ensure those detainees' safety
16 and health.

17 84. Defendants' conditions of confinement subject Plaintiffs to heightened risk of
18 contracting COVID-19, for which there is no vaccine, known treatment, or cure. Because of
19 Plaintiffs' particular vulnerabilities, they risk serious illness and death if infected with COVID-
20 19. Defendants are subjecting Plaintiffs to a substantial risk of serious harm, in violation of
21 Plaintiffs' rights under the Due Process Clause.

22 85. As public health experts in correctional medical care and infectious disease agree,
23 people vulnerable to COVID-19 who are held in immigration detention "are at grave risk of
24

1 severe illness and death.” Accordingly, Defendants are subjecting Plaintiffs to detention
2 conditions that amount to punishment and that fail to ensure their safety and health.

3 86. For these reasons, Defendants’ ongoing detention of Plaintiffs violates the Due
4 Process Clause.

5 **VII. PRAYER FOR RELIEF**

6 WHEREFORE Plaintiffs request that the Court grant the following relief:

- 7 a. Issue a Writ of Habeas Corpus and order Plaintiffs’ immediate release, with
8 appropriate precautionary public health measures, on the ground that their
9 continued detention violates the Due Process Clause;
- 10 b. In the alternative, issue injunctive relief ordering Defendants to immediately
11 release Plaintiffs, with appropriate precautionary public health measures, on the
12 grounds that their continued detention violates the Due Process Clause;
- 13 c. Issue a declaration that Defendants’ continued detention in civil immigration
14 custody of individuals at increased risk for severe illness, including all people
15 over fifty years old and persons of any age with underlying medical conditions
16 that may increase the risk of serious COVID-19, violates the Due Process Clause;
- 17 d. Award Plaintiffs their costs and reasonable attorneys’ fees in this action under the
18 Equal Access to Justice Act (“EAJA”), as amended, 5 U.S.C. § 504 and 28 U.S.C.
19 § 2412, and on any other basis justified under law; and
- 20 e. Grant any other and further relief that this Court may deem fit and proper.

1
2 RESPECTFULLY SUBMITTED 16th of March, 2020.

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