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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 ANGEL DE JESUS ZEPEDA RIVAS,
14 BRENDA RUIZ TOVAR, LAWRENCE
MWAURA, LUCIANO GONZALO
15 MENDOZA JERONIMO, CORAIMA
YARITZA SANCHEZ NUÑEZ, JAVIER
16 ALFARO, DUNG TUAN DANG,

17 Petitioners-Plaintiffs,

18 v.

19 DAVID JENNINGS, Acting Director of the
San Francisco Field Office of U.S. Immigration
20 and Customs Enforcement; MATTHEW T.
ALBENCE, Deputy Director and Senior
21 Official Performing the Duties of the Director
of the U.S. Immigration and Customs
22 Enforcement; U.S. IMMIGRATION AND
23 CUSTOMS ENFORCEMENT; GEO GROUP,
INC.; NATHAN ALLEN, Warden of Mesa
24 Verde Detention Facility,

25 Respondents-Defendants.
26
27
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CASE NO.

**PETITIONERS-PLAINTIFFS’
NOTICE OF MOTION AND
MOTION FOR TEMPORARY
RESTRAINING ORDER**

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*Motion for Admission *Pro Hac Vice*
Forthcoming

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that, as soon as they may be heard, Plaintiffs will and hereby do move, pursuant to Civil L. R. 7-1 and 65-1, for a temporary restraining order directing ICE¹ to release a sufficient number of putative class members in order to allow for social distancing at Mesa Verde ICE Processing Facility (Mesa Verde) and Yuba County Jail (YCJ). This motion is supported by the following Memorandum of Points and Authorities, the Class Petition for Writ of Habeas Corpus and Complaint for Injunctive and Declaratory Relief, the Motion for Provisional Class Certification, and declarations of each of the Class Representative Plaintiffs, or their attorneys on their behalf, and various experts, all of which are filed contemporaneously.

Pursuant to Civil L.R. 65-1(b), on April 20, 2020 at 4 p.m., counsel for Plaintiffs called Assistant U.S. Attorney Sara Winslow at the U.S. Attorney's Office for the Northern District of California and sent an e-mail to Ms. Winslow to advise of the emergency reasons requiring them to seek a temporary restraining order. In addition, Plaintiffs' counsel e-mailed to Ms. Winslow copies of (1) the Class Petition for Writ of Habeas Corpus and Class Complaint for Injunctive and Declaratory Relief, (2) Motion for Temporary Restraining Order, (3) Motion for Provisional Class Certification, and (4) associated proposed orders.

I. INTRODUCTION

As COVID-19 ravages the country and the world, Plaintiffs are trapped in close quarters in two immigration detention centers, Mesa Verde and YCJ. Plaintiffs spend their days within arm's reach of one another, share communal bathrooms and showers, and are forced into tightly spaced single-file lines throughout the day. To prevent contracting and spreading COVID-19, the Centers for Disease Control and Prevention ("CDC") has recommended that individuals avoid contact with others and practice social distancing.² Yet, Plaintiffs' continued detention in Mesa Verde and YCJ prevents them from doing exactly what the CDC recommends.

¹ References to "Defendants" in this motion are not intended to suggest that Plaintiffs here seek injunctive relief against any non-governmental entities.

² See Coronavirus Disease 2019 (COVID-19), Prevent Getting Sick, How to Protect Yourself & Others, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>.

1 Social distancing is critical with COVID-19 because the disease has no known vaccine or
2 cure and is highly contagious. It can survive on hard surfaces and be transmitted by touch. It can
3 be carried and transmitted by people who exhibit no symptoms. To implement the CDC's
4 guidance, 95% of Americans—about 316 million people—have been ordered to stay at home.³
5 Until there is a vaccine or cure for COVID-19, which will likely take over a year,⁴ the disease
6 will continue to spread and could threaten the life of any adult who contracts it.

7 Defendants' response to has been dangerously inadequate. Experts have been warning
8 Defendants that COVID-19 will spread "like wildfire" in congregate settings, like Mesa Verde
9 and YCJ, where people cannot consistently maintain a distance of at least six feet from one
10 another. In other jails and detention center, it has, with deadly results. Defendants have the
11 power to reduce the detained populations at both Mesa Verde and YCJ to sufficiently
12 accommodate consistent, meaningful social distancing. They refuse to do so. Indeed, in recent
13 weeks, Defendants *increased* the detained immigrant population at YCJ.⁵

14 Recognizing the profound risk that continued detention in Mesa Verde and YCJ poses to
15 those detained there, multiple judges in this District have ordered ICE to release detained
16 immigrants on the grounds that their continued detention would violate the Constitution.⁶
17 Plaintiffs here are currently suffering the *same* constitutional violation that has justified
18 individual release in these cases.

19 Hundreds of lives are at stake. The systemic crisis at Mesa Verde and YCJ must be
20 resolved at a systemic level. And it must be resolved quickly. As of April 17, there have been

21
22 ³ See Sarah Mervosh, et al., N.Y. Times (Apr. 7, 2020), *See Which States and Cities Have Told Residents to Stay at Home*, <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html>.

23 ⁴ Carolyn Kormann, New Yorker (Mar. 8, 2020), *How Long Will It Take to Develop a Coronavirus Vaccine?*, <https://www.newyorker.com/news/news-desk/how-long-will-it-take-to-develop-a-coronavirus-vaccine> (quoting Anthony Fauci, director of the National Institute of Allergy and Infectious Diseases).

24 ⁵ As of April 18, 2020, there were 157 ICE detainees at YCJ. This marks a net increase of seven ICE detainees at
25 YCJ compared to April 2. During the same period, the net YCJ population of criminal detainees decreased by
several dozen. Thus, during the same period that YCJ responded to COVID-19 by decreasing its population of
criminal detainees, ICE made the facility more crowded than it otherwise would have been. Riordan ¶ 9.

26 ⁶ See *Doe v. Barr*, No. 20-cv-02141-LBR, 2020 WL 1820667, at *9-10 (N.D. Cal. Apr. 12, 2020) (granting TRO
27 and ordering release of ICE detainee in YCJ on grounds that risk of continued confinement was excessive in
relation to government interest); *Bent v. Barr*, No. 19-cv-06123-DMR, 2020 WL 1812850 at *4-6 (N.D. Cal. Apr.
28 9, 2020) (same Mesa Verde); *Bahena Ortuño v. Jennings*, No. 20-cv-02064-MMC, 2020 WL 1701724, at *3-5
(N.D. Cal. Apr. 8, 2020) (same for Mesa Verde and YCJ detainees).

1 124 confirmed COVID-19 cases among ICE detainees nationwide—a jump of over 50 cases
 2 from the previous week.⁷ This Court should grant a temporary restraining order to implement a
 3 system for class members’ expedited release until conditions in Mesa Verde and YCJ can
 4 accommodate the required social distancing.

5 **II. FACTS**

6 **A. COVID-19 Poses Grave Risk of Harm to Plaintiffs**

7 COVID-19 is a deadly, highly contagious viral disease that has no cure. It has caused a
 8 global pandemic, infecting millions of people and killing over a hundred thousand in a matter of
 9 months.⁸ In the United States, there are at least 720,630 cases and 37,202 confirmed deaths.⁹ In
 10 California, there are at least 31,530 cases and 1,178 confirmed deaths.¹⁰

11 COVID-19 poses a serious health risk to all adults. Although certain characteristics such
 12 as advanced age or underlying health conditions exacerbate the risk of death or serious illness
 13 from COVID-19, any adult who contracts the disease can experience severe illness, require
 14 hospitalization, or die. While people under the age of 20 have largely been protected from
 15 severe effects of the coronavirus, 55% of COVID-19 hospitalizations and 20% of deaths were
 16 from people between the ages of 20 and 64. Greifinger ¶ 8. Early CDC data shows nearly 40%
 17 of COVID-19 patients hospitalized in the U.S. have been between the ages of 18 and 54.¹¹ In
 18 New York, approximately one-third of the patients between the ages of 30 and 39 who died

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 20 ⁷ U.S. Immigr. & Customs Enforcement, Confirmed Cases, ICE Guidance on COVID-19 (last updated Apr. 17,
 2020, 8:00 p.m.), <https://www.ice.gov/coronavirus>.

21 ⁸ See World Health Org., Coronavirus Disease 2019 (COVID-19) Situation Report – 89 (Apr. 18, 2020),
 22 [https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200418-sitrep-89-covid-
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23 ⁹ See Ctrs. for Disease Control & Prevention, Coronavirus Disease 2019 (COVID-19), Cases, Data, & Surveillance,
 24 Cases of Coronavirus Disease (COVID-19) in the U.S. (last updated Apr. 19, 2020),
 25 <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>. Kern County, where Mesa Verde is
 26 located, has seen 574 cases and three deaths. See Kern Cty. Pub. Health Servs. Dep’t, COVID-19 Dashboard (last
 27 updated Apr. 19, 2020), https://kernpublichealth.com/covid-19_dashboard/. Yuba and Sutter Counties have seen 40
 28 cases and three deaths, while neighboring Sacramento and Yolo Counties have seen more than 1,000 cases and 400
 deaths. See Yuba Cty., Coronavirus Update for Yuba-Sutter (last updated Apr. 19, 2020, 6:18 p.m.),
<https://www.yuba.org/coronavirus/>. Dr. Greifinger has cautioned that according to at least one model, as few as ten
 confirmed cases in a county indicate a near-certainty of an existing, undetected epidemic. Greifinger ¶ 45.

¹⁰ See L.A. Times, *Tracking Coronavirus in California* (last updated Apr. 19, 2020, 11:50 p.m.),
<https://www.latimes.com/projects/california-coronavirus-cases-tracking-outbreak/>.

¹¹ See Dr. Sanjay Gupta, *The Mystery of Why the Coronavirus Kills Some Young People*, CNN (Apr. 6, 2020),
<http://www.cnn.com/2020/04/05/health/young-people-dying-coronavirus-sanjay-gupta/index.html>.

1 from COVID-19 did not appear to have any risk factors,¹² and physicians treating COVID-19
 2 have noted the “randomness” with regard to which young people are unable to survive
 3 contraction of the illness.¹³ Short of death, COVID-19 can cause prolonged illness and suffering
 4 in people of any age who contract it. In addition to requiring ventilation to stabilize oxygen
 5 intake, increasing numbers of patients also risk kidney failure and require dialysis, possibly
 6 permanently.¹⁴ People of all ages and medical backgrounds who have contracted COVID-19
 7 describe painful symptoms including vomiting, diarrhea, fever, relentless shivering, and severe
 8 difficulty breathing.¹⁵

9 In addition, many people have undiagnosed risk factors. For example, hypertension
 10 makes someone at higher risk of severe illness from COVID-19,¹⁶ but the CDC has stated that
 11 about 11 million adults in the U.S. have high blood pressure but do not know it.¹⁷ Under-
 12 diagnosis of risk factors is particularly likely among the proposed class, who are part of a
 13 population that often lacks adequate access to healthcare. Among the nonelderly population,
 14 23% of noncitizens with lawful status and more than four in ten (45%) undocumented

16 ¹² See Chris Mooney et al., *Hundreds of Young Americans Have Now Been Killed by the Coronavirus, Data Shows*,
 17 *Wash. Post* (Apr. 8, 2020), <https://www.washingtonpost.com/health/2020/04/08/young-people-coronavirus-deaths/>.

17 ¹³ *Id.*

18 ¹⁴ Reed Abelson et al., *An Overlooked, Possibly Fatal Coronavirus Crisis: A Dire Need for Kidney Dialysis*, *N.Y.*
Times (Apr. 18, 2020), <https://www.nytimes.com/2020/04/18/health/kidney-dialysis-coronavirus.html>.

19 ¹⁵ See Marissa J. Lang, *Nightmares, Flashbacks, Uncertainty: A 29-year-old Recovers After Coronavirus Brought*
 20 *Him Near Death*, *Wash. Post* (Apr. 17, 2020), [https://www.washingtonpost.com/local/coronavirus-covid-19-](https://www.washingtonpost.com/local/coronavirus-covid-19-recovery-francis-wilson-virginia-dc/2020/04/16/0bb55974-7858-11ea-a130-df573469f094_story.html)
 21 [recovery-francis-wilson-virginia-dc/2020/04/16/0bb55974-7858-11ea-a130-df573469f094_story.html](https://www.washingtonpost.com/local/coronavirus-covid-19-recovery-francis-wilson-virginia-dc/2020/04/16/0bb55974-7858-11ea-a130-df573469f094_story.html) (describing
 22 experience of otherwise healthy 29-year-old who survived COVID-19 after requiring an 11-day medically induced
 23 coma); Lizzie Presser, *A Medical Worker Describes Terrifying Lung Failure from COVID-19—Even in His Young*
 24 *Patients*, *ProPublica* (Mar. 21, 2020), [https://www.propublica.org/article/a-medical-worker-describes--terrifying-](https://www.propublica.org/article/a-medical-worker-describes--terrifying-lung-failure-from-covid19-even-in-his-young-patients)
 25 [lung-failure-from-covid19-even-in-his-young-patients](https://www.propublica.org/article/a-medical-worker-describes--terrifying-lung-failure-from-covid19-even-in-his-young-patients) (respiratory therapist describing COVID-19 as “knocking
 26 out what should be perfectly fit, healthy people. Patients will be on minimal support, on a little bit of oxygen, and
 27 then all of a sudden, they go into complete respiratory arrest, shut down and can’t breathe at all.”); Fiona
 28 Lowenstein, *I’m 26. Coronavirus Sent Me to the Hospital.*, *N.Y. Times* (Mar. 23, 2020),
<https://www.nytimes.com/2020/03/23/opinion/coronavirus-young-people.html> (describing feeling “desperate for
 oxygen” before being hospitalized); Sui Lee Wee & Vivian Wang, *Two Women Fell Sick from Coronavirus. One*
survived., *N.Y. Times* (Mar. 13, 2020), [https://www.nytimes.com/interactive/2020/03/13/world/asia/coronavirus-](https://www.nytimes.com/interactive/2020/03/13/world/asia/coronavirus-death-life.html)
[death-life.html](https://www.nytimes.com/interactive/2020/03/13/world/asia/coronavirus-death-life.html) (describing experiences of two otherwise healthy nurses in China who contracted COVID-19 and
 were hospitalized, one of whom died).

26 ¹⁶ Ctrs. for Disease Control & Prevention, *Coronavirus Disease 2019 (COVID-19), People Who Need Extra*
 27 *Precautions, People Who are at Higher Risk for Severe Illness*, [https://www.cdc.gov/coronavirus/2019-ncov/need-](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html)
[extra-precautions/people-at-higher-risk.html](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html).

28 ¹⁷ Ctrs. for Disease Control & Prevention, *CDC Features, Diseases & Conditions, 5 Surprising Facts About High*
Blood Pressure, <https://www.cdc.gov/features/highbloodpressure/index.html>.

1 immigrants were uninsured as of March 2020, compared to less than one in ten (9%) citizens.¹⁸
 2 Lack of health insurance often results in a failure to identify chronic diseases or other health
 3 conditions.¹⁹

4 There is no vaccine, antiviral treatment, or cure for COVID-19. Greifinger ¶ 6. The
 5 disease is believed to spread through “respiratory droplets” through “close exposure” of up to
 6 six feet. Mishori ¶ 6; Greifinger ¶ 11. “Transmission also is possible through contact with
 7 contaminated surfaces.” Greifinger ¶ 10. Individuals infected with COVID-19 can transmit it to
 8 others even if they have no symptoms. Mishori ¶ 6.

9 Because of its highly contagious nature, the only available strategy to reduce the risk of
 10 injury or death from COVID-19 is to prevent people from being infected in the first place.
 11 Greifinger ¶ 6; Mishori ¶ 22. “Social distancing,” or maintaining a minimum of six feet of
 12 separation at all times from other people, paired with “hand hygiene,” is the only effective
 13 means of stopping the spread of the disease. Greifinger ¶ 11; Hernandez ¶ 12 (“The most
 14 effective mitigation measures are community-wide social distancing.”). Social distancing is the
 15 “cornerstone” of the CDC’s prevention plan.²⁰ In the last month, state governments and the
 16 federal government have fundamentally restructured American life to limit all interaction except
 17 within one’s own household, and, when such interaction is unavoidable, to require social
 18 distancing.²¹

19 **B. Adequate Social Distancing is Impossible at Current Population Levels at**
 20 **Mesa Verde and YCJ**

21 In early April, Mesa Verde had detainee population of 286 people. *See Bahena Ortuño v.*
 22 *Jennings*, No. 20-cv-02064-MMC (N.D. Cal.), Supp. Dec. of Erik Bonnar ¶ 2 (ECF No. 29-2).

24 ¹⁸ Health Coverage of Immigrants, Kaiser Family Foundation (Mar. 18, 2020), <https://www.kff.org/disparities-policy/fact-sheet/health-coverage-of-immigrants/>.

25 ¹⁹ Jennifer Tolbert et al., Key Facts about the Uninsured Population, Kaiser Family Foundation (Dec. 13, 2019), <https://www.kff.org/uninsured/issue-brief/key-facts-about-the-uninsured-population/>.

26 ²⁰ Ctrs. for Disease Control & Prevention, Coronavirus Disease 2019 (COVID-19), Prevent Getting Sick, Cloth
 27 Face Covers, Recommendation Regarding the Use of Cloth Face Coverings, Especially in Areas of Significant
 Community-Based Transmission, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html>.

28 ²¹ Mervosh et al., *supra* note 2 (listing orders by state).

1 YCJ has a current detainee population of approximately 286 people—approximately 157 of
2 those are ICE detainees, while the remainder are detained pursuant to the Yuba County criminal
3 justice system. Riordan ¶ 9. Social distancing is incompatible with every aspect of life in
4 detention at Mesa Verde and YCJ.

5 *First*, Plaintiffs and the proposed class cannot maintain physical distance from other
6 detainees in the units where they sleep. YCJ contains several different types of housing units,
7 each with its own alphabetical designation. There are four dorms (B, C, P, R) in which detainees
8 sleep in bunk beds in close proximity to one another. Riordan Exh. A (Berg Report at p. 9); *id.*
9 Exh. C (photograph marked as DSC “198” is unit C); *id.* Exh. D (photographs marked as DSC
10 112 and DSC 114 are of housing unit R); Kavanagh ¶¶ 5-6, 10-11. The C and D dorms have 50
11 beds. Kavanagh ¶ 6. Six other housing units (G, H, I, J, K, L) have bunk beds bolted to the wall
12 and are separated from corridors by a set of bars with open space between the bars, so air flows
13 freely between the cells and the corridors. Riordan Exh. A at 9; *id.* Exh. D (photograph marked
14 as DSC 105 is of housing unit I); Kavanagh ¶ 9. The distance from top to bottom bunk
15 throughout the facility is less than six feet. Mwaura ¶ 10; Zepeda ¶ 15. Several other housing
16 units (D, E, F) involve two-person cells surrounding a common area where half of each unit’s
17 detainees are released at a time during the day. Riordan Exh. A at 9.

18 Throughout the sleeping quarters in YCJ, social distancing is impossible. Mwaura ¶¶ 9-
19 10; Tovar ¶ 14; Zepeda ¶¶ 14-15. From their own beds, Plaintiffs can reach out and touch the
20 beds beside them. Tovar ¶ 14; Mwaura ¶ 10 (describing two bunks within two feet of him and
21 four more within four feet). The dorms in which plaintiffs live are crowded. Tovar ¶ 14 (dorm is
22 “completely full”); *see also* Mwaura ¶ 10 (only 8 detainees out of 36 do not have a bunk mate);
23 Zepeda ¶ 15 (describing that all bottom bunks are less than a meter apart and occupied).

24 In Mesa Verde, all detainees sleep in bunk beds only a few feet apart in 100-bed
25 dormitory spaces. Knox Dec. ¶ 9; Riordan Exh. E (2018 PREA Audit) at 2. Mesa Verde has
26 three isolation cells in a restricted housing unit that hold one person each. Riordan Exh. E at 2.
27 Plaintiffs also describe being arm’s width from others while in their beds. Dang ¶ 13; Nuñez ¶
28

1 14; Alfaro ¶ 18 (“[The bunk beds] are so close to one another I can reach out my arms and touch
2 another bunk bed.”). Social distancing is impossible at current levels. *See* Dang ¶ 11
3 (surrounded by full bunks in at-capacity dorm); Nuñez ¶¶ 12, 14 (sleeping in half-capacity dorm
4 less than six feet from two other women); Alfaro ¶ 16 (describing one or two beds free out of
5 100).

6 “[B]y definition [the sleeping arrangements in both facilities] prohibit[] social distancing,
7 as the distance between the upper and lower bunks is less than six feet.” Greifinger ¶ 34.
8 Further, “[b]ecause detainees get in and out of bed, bunk beds that are closer than ten feet from
9 one another will not allow adequate social distancing.” *Id.* ¶ 35. At Mesa Verde specifically, Dr.
10 Greifinger has concluded that it “is fundamentally a congregate living space where there is a
11 high risk of infectious spread.” Greifinger Dec. ¶ 34(a). Similarly, at YCJ, although there are
12 number of different unit layouts, “none of the sleeping arrangements appear safe in the context
13 of the coronavirus.” Greifinger ¶ 34(b).

14 *Second*, Plaintiffs and the proposed class cannot maintain safe physical distance from one
15 another when sharing common areas in their housing units, including when eating and using the
16 bathroom and shower. In the dining areas in both facilities, most tables and chairs in common
17 spaces are bolted to the ground and cannot be moved. Kavanagh ¶ 3 (YCJ); Riordan Exhs. C &
18 D (Takei ECF No. 197-17 & 197-15) (YCJ); Riordan Exh. F (Takei at 5, 24, 25) (Mesa Verde);
19 Tovar ¶ 14 (YCJ); Alfaro ¶ 22 (Mesa Verde). At the tables, class members sit “right next to each
20 other,” Zepeda ¶ 16 (YCJ), “elbow to elbow,” Mwaura ¶ 13 (YCJ); Alfaro ¶ 22 (“When we
21 watch television, we sit right next to one another”) (Mesa Verde). There is not enough space
22 between chairs to maintain social distances at the tables and not enough tables for detainees to
23 space themselves among them. Kavanagh ¶ 9 (YCJ); Dang ¶¶ 17-18 (Mesa Verde); Nuñez ¶ 14
24 (Mesa Verde). At Mesa Verde, “[t]he people serving food are an arm’s length distance or less”
25 from Plaintiffs when they serve them. Dang ¶ 17.

26 Plaintiffs regularly have to line up without sufficient space to maintain social distancing
27 in the line. At Mesa Verde, guards force Plaintiffs to line up and take them to the dining area;

1 they are “inches apart in line.” Dang ¶ 17; *see also* Nuñez ¶ 14. At YCJ, Plaintiffs must also
 2 regularly line up in close quarters. *See* Zepeda ¶ 21 (to use the bathroom), ¶ 23 (to see medical
 3 staff); ¶ 24 (to receive afternoon medication); Mwaura ¶ 12 (to go to dining hall).

4 It is likewise impossible to maintain social distance when using the bathrooms and
 5 showers at both facilities. At Mesa Verde, there are five toilets, five showers, and seven sinks
 6 per 100-person dormitory. Riordan Exh. E at 2. Plaintiffs are “shoulder to shoulder” when
 7 washing their hands. Nuñez ¶ 12. At YJC, toilets and showers are shared and are separated by
 8 curtains or thin dividers that generally rise to shoulder height. Tovar ¶ 15 (“you do not have any
 9 privacy or space”); Kavanagh ¶ 6; *see also* Mwaura ¶ 16. Plaintiffs’ experiences illustrate that
 10 “the structure and facilities of the Mesa Verde Detention Center and the Yuba County Jail
 11 [make] social distancing [] impossible . . . and there is a serious risk of infection for all of those
 12 who are detained.” Greifinger ¶ 43.

13 **C. Plaintiffs Face an Imminent and Substantial Risk of Exposure to COVID-19**
 14 **in Mesa Verde and YCJ**

15 Jail and detention settings like Mesa Verde and YCJ “pose a heightened public health risk
 16 to the spread of COVID-19, even greater than other non-carceral institutions.” Greifinger ¶ 16.
 17 According to Dr. Mishori, “The risk posed by infectious diseases in immigration detention
 18 facilities is significantly higher than in the community, both in terms of risk of exposure and
 19 transmission and harm to individuals who become infected.” ¶ 7. In addition, at Mesa Verde and
 20 YCJ, the risks inherent in detainees’ inability to maintain six feet of physical distance from
 21 others are compounded by other conditions of confinement, including poor sanitation,
 22 inadequate access to personal hygiene, substandard medical care, and the entry of newly-
 23 detained people into the population without proper screening or quarantine. Greifinger ¶¶ 39,
 24 41, 42, 49-56 (identifying factors within Mesa Verde and YCJ that compound the risk inherent
 25 in Plaintiffs’ inability to maintain social distancing).

26 Plaintiffs describe sanitary and hygienic conditions that are wanting. At Mesa Verde,
 27 detainees must wash their hands, shower, and clean their personal items using hotel-size
 28

1 shampoo and soap. Nuñez ¶ 11. On April 17, 2020, they received a liquid soap dispenser and
 2 napkin dispenser, ostensibly in response to COVID-19. Nuñez ¶¶ 11, 16. There is no access to
 3 hand sanitizer. Dang ¶ 20. Plaintiffs are paid \$1 per day to clean their dorms and the bathrooms
 4 they share with up to 99 other detainees for themselves, using only a mop, gloves, and cleaning
 5 solution. Dang ¶ 16. One individual describes that everyone in his dorm must “use and re-use
 6 the same little towel over and over again to dry [their] hands or wipe surfaces, and it smells and
 7 is unsanitary.” Alfaro ¶ 23. At YCJ, the solitary bathroom in the yard is “disgusting,” (Tovar ¶
 8 17) and clothes often come back from laundry with a foul smell (Zepeda ¶ 26). Detainees
 9 without protective gear were forced to clean up after a visibly ill woman was removed from a
 10 dorm in which she languished for days. Tovar ¶ 21.²² Moreover, Defendants’ responses to
 11 people with symptoms have been delayed and inconsistent with CDC recommendations and
 12 their own internal policies. *See* Tovar ¶¶ 7-9, 21 (describing delayed, inadequate response to
 13 sick woman in dorm); Mwaura ¶ 30 (sick detainees in dorm room not receiving attention);
 14 Alfaro ¶ 39 (“I have also never heard of anyone here who has been isolated or quarantined.”).

15 Perhaps even more shockingly, Defendants have continued to introduce *new* detainees
 16 into the ghastly existing conditions at Mesa Verde and YCJ, including people transferred from
 17 facilities with known COVID-19 cases and who entered without a two-week quarantine. Alfaro
 18 ¶ 17 (“within hours of someone leaving, a new person comes in to take their place”); Dang ¶ 12
 19 (describing newly-detained people who are coughing and sick); Nuñez ¶ 16 (detailing transfer
 20 from YCJ to MV who was not quarantined before joining dorm); Zepeda ¶¶ 29-30 (noting two
 21 transfers from Santa Rita Jail, one of whom entered YCJ dorm after five days in cell alone and
 22 another who was isolated for only six hours)²³; Mwaura ¶ 31 (describing new detainee who
 23 entered Apr. 17, 2020).

24
 25
 26 ²² Even outside the context of the pandemic, Plaintiffs have experienced substandard medical care in both YCJ and
 27 Mesa Verde. *See* Tovar ¶ 18 (YCJ); Mwaura ¶ 6 (not receiving care for Valley Fever at YCJ); Zepeda ¶ 9 (10
 28 outstanding requests to see medical staff at YCJ); Dang ¶ 24 (MV failed to respond to request for medical records).

²³ Santa Rita Jail has 27 confirmed cases of COVID-19. *See* Rick Hurd, *Coronavirus: Alameda County Now Has Second-Most Cases in Bay Area*, East Bay Times (Apr. 17, 2020),
<https://www.eastbaytimes.com/2020/04/17/coronavirus-alameda-county-now-has-second-most-cases-in-bay-area/>.

1 Defendants' own medical subject matter experts have recognized that conditions like
2 those present currently at Mesa Verde and YCJ amount to a "tinderbox scenario" for the rapid
3 spread of COVID-19. *See* Letter from Drs. Scott A. Allen & Josiah Rich to Rep. Bennie
4 Thompson, *et al.* (Mar. 19, 2020), [https://www.documentcloud.org/documents/6816336-](https://www.documentcloud.org/documents/6816336-032020-Letter-From-Drs-Allen-Rich-to-Congress-Re.html#document/p4/a557238)
5 [032020-Letter-From-Drs-Allen-Rich-to-Congress-Re.html#document/p4/a557238](https://www.documentcloud.org/documents/6816336-032020-Letter-From-Drs-Allen-Rich-to-Congress-Re.html#document/p4/a557238) (hereafter
6 "Drs. Allen & Rich Letter"). So, too, have Plaintiffs' experts. As Dr. Mishori described, "A
7 coronavirus brought into a detention facility can quickly spread among the dense detainee
8 cohort. Soon many are sick—including high-risk groups such as those with chronic
9 conditions—quickly overwhelming the already strained health infrastructure within the facility."
10 ¶ 16. Dr. Greifinger has specifically reviewed ICE's response to the threat of COVID-19 and
11 concludes that it "is deficient, putting detainees . . . in imminent danger of serious illness and
12 death." ¶ 43.

13 In addition, it is clear that the only way to mitigate against this doomsday scenario is to
14 significantly reduce the population of both Mesa Verde and YCJ. As Dr. Greifinger explains,
15 ICE has failed "to appreciate the importance of releasing detainees to limit the risk for the
16 individuals released, for those who remain detained, and for the general public." Greifinger
17 ¶ 47.²⁴ All experts agree that social distancing, paired with vigilant hygiene, is the most
18 effective measure to prevent transmission of COVID-19, *see* Hernandez Dec. ¶¶ 11-12; Mishori
19 Dec. ¶¶ 10-11; Greifinger Dec. ¶ 11, 30, 31, and it is clear that both Mesa Verde and YCJ have
20 "fail[ed] to meet minimally acceptable standards of social distancing, putting the residents at
21 grave and unacceptable risk of pervasive infections, [which will] lead[] to serious illness and
22 death." Greifinger ¶ 59. In turn, release is "the most important means of mitigating the spread of
23 COVID-19 in ICE detention centers . . . even if the conditions inside the facility were
24 impeccable." Greifinger ¶ 48.

25 At this point, ICE does not need to hypothesize as to what might happen in Mesa Verde
26 or YJC once COVID-19 takes hold as, sadly, in other congregate facilities where conditions are
27

28 ²⁴ Greifinger identifies numerous other deficiencies in ICE's national response. *See* Greifinger ¶¶ 39, 41, 42, 48-55.

1 similar to those in Mesa Verde and YCJ, tragedy has struck. In three weeks across March and
 2 April, the jail at Rikers Island in New York jumped from no cases among inmates to 273 cases,
 3 a higher rate of infection than in the most infected places in the world; four corrections staff
 4 members and one inmate have died. Greifinger ¶¶ 21-22. The Cook County Jail has likewise
 5 seen an alarming rise in cases: the Jail went from two confirmed inmate cases on March 23,
 6 2020, to 342 confirmed inmate cases on April 17, 2020.²⁵ Three inmates have died.²⁶ As of
 7 April 17, 2020, there were at least 124 confirmed cases among detainees in ICE custody,
 8 including at least eighteen at the Otay Mesa Detention Center in San Diego.²⁷ These tragedies
 9 are foreseeable and preventable.

10 The catastrophe of a concentrated outbreak, which endangers the lives of not only those
 11 trapped in custody, but also those on the outside because it can overwhelm an already-stressed
 12 public health infrastructure, are precisely why multiple jurisdictions, including Los Angeles,
 13 Detroit, Travis County, New York City, and more than half of states have released thousands of
 14 people from criminal custody.²⁸

15 **III. LEGAL STANDARD**

16 Plaintiffs are entitled to a temporary restraining order if they establish that they are
 17 “likely to succeed on the merits, . . . likely to suffer irreparable harm in the absence of
 18 preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is in the
 19 public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Stuhlberg Int’l*
 20 *Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001) (noting that
 21 preliminary injunction and temporary restraining order standards are “substantially identical”).

22
 23 ²⁵ Andy Grimm, ‘I feel like I lost the battle for my husband,’ widow of dead Cook County Jail detainee says, Chicago Sun Times, <https://chicago.suntimes.com/2020/4/16/21224183/lost-battle-husband-widow-dead-cook-county-jail-detainee-coronavirus> (Apr. 16, 2020).

24 ²⁶ *Id.*

25 ²⁷ U.S. Immigration and Customs Enforcement, Confirmed Cases, ICE Guidance on COVID-19 (last updated Apr. 13, 2020, 11:43 a.m.), <https://www.ice.gov/coronavirus> (click on “Confirmed Cases”); see also Max Rivlin Nadler, KPBS, *Otay Mesa COVID-19 Outbreak Now The Largest At A US Immigration Detention Center*, <https://www.kpbs.org/news/2020/apr/14/otay-mesa-detention-center-now-largest-immigration/> (Apr. 14, 2020).

27 ²⁸ See Responses to COVID-19 pandemic, Prison Policy Initiative (Apr. 10, 2020) (collecting instances where jails and prisons have released detainees due to COVID-19), <https://www.prisonpolicy.org/virus/virusresponse.html#releases>.

1 A temporary restraining order may likewise issue where “serious questions going to the merits
2 [are] raised and the balance of hardships tips sharply in [plaintiff’s] favor.” *All. for the Wild
3 Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (citation omitted). To succeed under the
4 “serious question” test, Plaintiffs must show that they are likely to suffer irreparable injury and
5 that an injunction is in the public’s interest. *Id.* at 1132.

6 **IV. ARGUMENT**

7 As the institutions of American life, including jails and prisons across the country,
8 fundamentally transform to accommodate social distancing, ICE stands virtually alone in
9 defying the medical and societal consensus. Despite overwhelming expert evidence to the
10 contrary, ICE asserts that immigrants detained in facilities where no one has tested positive for
11 COVID-19 are not at risk of infection at all, even as the disease ravages the communities
12 outside and regardless of whether ICE has administered any tests. ICE maintains that it can keep
13 immigrants in custody safe by ordering increased access to soap and sanitizer, conducting
14 screenings that fail to account for asymptomatic transmission, and issuing bare
15 recommendations that encourage social distancing while simultaneously admitting that “strict
16 social distancing may not be possible in congregate settings such as detention facilities.”²⁹

17 ICE has made clear that it will not act of its own volition to make social distancing
18 possible. Although on April 10, ICE issued a non-binding recommendation that detention
19 centers consider reducing their populations to 75% of capacity (regardless of whether such a
20 reduction was actually sufficient to accommodate social distancing in any particular facility), a
21 week later, ICE’s Acting Director Matthew T. Albence told a Congressional oversight
22 committee that the agency contemplated no further releases.³⁰ Before Congress, Acting Director
23 Albence went further, testifying that ICE cannot release any more detainees because it would
24 suggest that the Administration is “not enforcing our immigration laws,” which would be a
25

26 ²⁹ ICE ERO, *COVID-19 Pandemic Response Requirements*,
27 <https://www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities.pdf> (Apr. 10, 2020).

28 ³⁰ House Committee on Oversight and Reform, *DHS Officials Refuse to Release Asylum Seekers and Other Non-Violent Detainees Despite Spread of Coronavirus*, <https://oversight.house.gov/news/press-releases/dhs-officials-refuse-to-release-asylum-seekers-and-other-non-violent-detainees> (Apr. 17, 2020).

1 “huge pull factor” and create a “rush at the borders.”³¹ ICE’s actions in California bear out this
 2 strategy of relative inaction. Just in the past few weeks, the population of ICE detainees at YCJ
 3 has *increased*. Riordan ¶ 9. In court, ICE has taken the position that the threat of COVID-19 is
 4 speculative because there are no confirmed cases at Mesa Verde or YJC.³²

5 Courts in this circuit have seen ICE’s responses to the COVID-19 crisis for what they
 6 are: half-measures that do not effectively protect the civil detainees in ICE’s custody from a
 7 serious risk of infection. *See e.g., Castillo v. Barr*, No. cv-20-00605, 2020 WL 1502864, at *5
 8 (C.D. Cal. Mar. 27, 2020) (“Civil detainees must be protected by the Government. Petitioners
 9 have not been protected. They are not kept at least 6 feet apart from others at all times.”) As a
 10 result, judges have required ICE to release individual detainees from Mesa Verde and YCJ on
 11 the grounds that their continued detention would violate due process. *See Bahena Ortuño v.*
 12 *Jennings*, No. 20-cv-02064-MMC, 2020 WL 1701724 at *4 (N.D. Cal. Apr. 8, 2020); *Bent v.*
 13 *Barr*, No. 19-cv-06123-DMR, 2020 WL 1812850 at *6 (N.D. Cal. Apr. 9, 2020); *See Castillo v.*
 14 *Barr*, No. cv-20-00605 TJH (AFMX), 2020 WL 1502864, at *5 (C.D. Cal. Mar. 27, 2020).

15 The population levels in Mesa Verde and YCJ are a structural barrier that prohibit
 16 necessary social distancing and, as a result, the risk of contracting COVID-19 looms over every
 17 single Plaintiff every single day. This Court’s intervention is urgently needed to prevent the
 18 catastrophic harm to Plaintiffs that will result if ICE is permitted to proceed in its intransigent
 19 refusal to reduce the population of its facilities.

20 **A. Plaintiffs are Likely to Succeed on the Merits**

21 **1. Plaintiffs’ Detention in an Environment Where Social** 22 **Distancing is Impossible is Unreasonably Dangerous in** 23 **Violation of Substantive Due Process**

24 The Constitution prohibits the government from exposing people in its custody to
 25 unjustifiable or unreasonable risks of harm. These constitutional protections are strongest for

26 ³¹ House Committee on Oversight and Reform, *DHS Officials Refuse to Release Asylum Seekers and Other Non-*
Violent Detainees Despite Spread of Coronavirus, [https://oversight.house.gov/news/press-releases/dhs-officials-](https://oversight.house.gov/news/press-releases/dhs-officials-refuse-to-release-asylum-seekers-and-other-non-violent-detainees)
 27 [refuse-to-release-asylum-seekers-and-other-non-violent-detainees](https://oversight.house.gov/news/press-releases/dhs-officials-refuse-to-release-asylum-seekers-and-other-non-violent-detainees) (Apr. 17, 2020).

28 ³² Opp. Brief at 16, *Bahena Ortuño v. Jennings*, No. 3:20-cv-02064 (N.D. Cal. Mar. 30, 2020) (“In any event,
 Petitioners’ assertion that detention per se poses an increased risk of health complications or death from COVID-19
 is purely speculative. COVID-19 has not spread to the facilities where Petitioners are being detained.”)

1 civil detainees like Plaintiffs, who are in detention pursuant to civil immigration laws. *See*
 2 *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Their constitutional rights while in custody are
 3 derived from the Due Process Clause of the Fifth Amendment, which provides significantly
 4 greater protection than the Eighth Amendment’s ban on cruel and unusual punishment.
 5 *Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982). Plaintiffs are likely to prevail on either of
 6 two due process theories. First, the risks presented by COVID-19 in the congregate detention
 7 environments of Mesa Verde and YCJ are excessive in relation to the government’s interests
 8 and could be achieved by alternative and less harsh methods. Second, the government’s decision
 9 to maintain robust population levels at Mesa Verde and YCJ constitutes deliberate indifference.

10 **a. The Impossibility of Social Distancing Exposes**
 11 **Plaintiffs to an Unjustifiable Risk of Contracting A**
 12 **Deadly Virus in Light of Alternatives to Detention that**
 13 **Would Equally Serve the Government’s Interests in**
 14 **Appearance for Removal Proceedings and Community**
 15 **Safety**

16 Conditions of confinement violate due process when they expose civil detainees to a risk
 17 of harm that is either excessive in relation to a legitimate government objective, or is imposed to
 18 achieve an objective that could be accomplished using “alternative and less harsh methods.”
 19 *Jones v. Blanas*, 393 F.3d 918, 932 (9th Cir. 2004); *see also Jackson v. Indiana*, 406 U.S. 715,
 20 738 (1972) (“[D]ue process requires that the nature and duration of commitment bear some
 21 reasonable relation to the purpose for which the individual is committed.”).

22 Conditions of confinement for civil detainees are presumptively unconstitutional when
 23 they are “identical to, similar to, or more restrictive than” those afforded their criminal
 24 counterparts. *Unknown Parties v. Nielsen*, No. CV-15-00250-TUC-DCB, 2020 WL 813774, at
 25 *4 (D. Ariz. Feb. 19, 2020) (quoting *Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982)). There
 26 is currently a nationwide trend of mass releases of people serving sentences for criminal
 27 convictions to protect their health and facilitate social distancing within jails and prisons.³³ Los
 28 Angeles County alone has released at least 1,700 people from county jails, Washington State

³³ *See supra* n. 27.

1 has released at over 1,100 people serving sentences for convictions, and Michigan is releasing at
2 least 1,000 people per month.³⁴ Plaintiffs, as civil detainees, are entitled to “more considerate
3 treatment” than their criminal counterparts, *Jones*, 393 F.3d at 931-32, but Defendants have
4 notably not extended them similar treatment. Out of well over 30,000 civil ICE detainees
5 nationwide, the agency has released 693,³⁵ and does not intend to release more.³⁶ In YCJ, also
6 home to individuals incarcerated for criminal offenses, the county has released some prisoners
7 in response to COVID-19, but ICE has *increased* its population of civil detainees.³⁷ Instead of
8 depopulating detention centers in line with criminal justice authorities nationwide, Defendants
9 have sought to make changes at the margins that do not effectively address the risk that their
10 current custody imposes on Plaintiffs. *See* Greifinger ¶ 47. Because Plaintiffs have been
11 afforded considerably inferior treatment than their criminal counterparts, their continued
12 detention is presumptively unconstitutional.

13 It is well-settled that a detained individual’s constitutional protections extend to “future
14 harm,” including a “condition of confinement that is sure or very likely to cause serious illness
15 and needless suffering the next week or month or years.” *Helling v. McKinney*, 509 U.S. 25, 33
16 (1993); *see also id.* at 34 (“It would be odd to deny an injunction to inmates who plainly proved
17 an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened
18 to them”); *Parsons v. Ryan*, 754 F.3d 657, 679 (9th Cir. 2014) (affirming the certification of a
19 class of prison inmates and explaining that “every single [] inmate faces a substantial risk of
20 serious harm if [the prison’s] policies and practices provide constitutionally deficient care for
21 treatment of medical, dental, and mental health needs”).

22 As detailed *supra*, under the current conditions in Mesa Verde and YCJ, Plaintiffs are
23 exposed to a risk of infection with a deadly, incurable virus because consistent social distancing

24
25 ³⁴ *Id.*

³⁵ Hott Decl. ¶¶ 10, 13, ECF No. 125-1, *Frailhat v. ICE*, No. 5:19-cv-01456 (C.D. Cal. Apr. 15, 2020).

³⁶ Press Release, House Comm. on Oversight and Reform, *DHS Officials Refuse to Release Asylum Seekers and Other Non-Violent Detainees Despite Spread of Coronavirus* (Apr. 17, 2020), <https://oversight.house.gov/news/press-releases/dhs-officials-refuse-to-release-asylum-seekers-and-other-non-violent-detainees>.

³⁷ Riordan ¶ 9 (noting increase in ICE population at YCJ); *id.* Exh. G, David Wilson, *Yuba County Jail Population Reduced*, Appeal Democrat (Apr. 15, 2020).

1 is impossible. *Supra* § II.B. Defendants cannot seriously dispute this. Three judges in this
2 district have ordered detainees released from Mesa Verde and YCJ, pointing to their risk of
3 infection without the ability to maintain social distance. *Bahena Ortuño*, 2020 WL 1701724 at
4 *4 (finding that four “petitioners cannot practice meaningful social distancing in [Mesa Verde
5 and YCJ]”); *Bent*, 2020 WL 1812850 at *6 (“[E]ven assuming that Respondents accurately
6 describe [Mesa Verde]’s current practices, these practices are inadequate to ensure the ‘safety
7 and general wellbeing’ of [Mesa Verde] detainees during the COVID-19 pandemic.”); *Doe v.*
8 *Barr*, No. 3:20-cv-02141 LB, 2020 WL 1920667 at *10-11 (citing *Bahena Ortuño* and *Bent* in
9 holding same for YCJ detainee).

10 Because *all* adults risk serious harm if they contract COVID-19, *see* Greifinger ¶ 8, and
11 all individuals are at the same risk of contracting COVID-19, all putative class members are at
12 serious risk of harm from COVID-19. *Cf. Savino v. Souza*, No. 1:20-cv-10617-WGY, 2020 WL
13 1703844 at *7 (D. Mass. Apr. 8, 2020) (certifying class of all ICE detainees in Bristol County
14 House of Corrections and recognizing that “[c]rucial to the Court’s determination is the
15 troubling fact that even perfectly healthy detainees are seriously threatened by COVID-19. . . . it
16 cannot be denied that the virus is gravely dangerous to all of us”); *Malam v. Adducci*, No. 2:20-
17 cv-10829, 2020 WL 1809675 at *3) (E.D. Mich. Apr. 9, 2020) (“declin[ing] to set a floor for
18 the level of risk a party must show to warrant immediate release from immigration detention due
19 to the COVID-19 pandemic” and ordering release of ICE detainee who did not fall into CDC
20 risk category.)

21 The Government’s judicially-recognized interest in the continued detention of
22 Plaintiffs—ensuring public safety and that Plaintiffs appear at their removal proceedings—
23 cannot justify exposing them to a substantial risk of contracting a deadly, incurable virus and
24 suffering severe bodily harm or death as a result. Judges in this District have already ordered
25 individual detainees released, finding that the government’s interests can be accomplished
26 through “alternative, less harsh methods,” like release on supervision and conditions. *Bahena*
27 *Ortuño* 2020 WL 1701724 at *4 (finding that despite the government’s “non-punitive purpose”
28

1 in detaining petitioners their current detention is “excessive in relation to that purpose”); *Doe*,
2 2020 WL 1820667 at *10 (same for YCJ detainee); *Bent*, 2020 WL 1812850 at *7-8 (same for
3 Mesa Verde detainee). Courts throughout the country have reached similar conclusions. *See*,
4 *e.g.*, *Rafael L.O. v. Tsoukaris*, No. 20-3481, 2020 WL 1808843 at *7 (D.N.J. Apr. 9, 2020)
5 (recognizing that “COVID-19, and its associated risks, is the difference maker—it changes the
6 equation in evaluating the government’s legitimate objectives”); *Thakker v. Doll*, No. 1:20-cv-
7 480, 2020 WL 1671563 at *8 (M.D. Pa. Mar. 31, 2020) (same for ICE detainees in York County
8 Jail in Pennsylvania). ICE itself has recognized as much when it issued a statement recognizing
9 the need for alternatives to detention for *new arrestees* to protect public health.³⁸ Inexplicably,
10 however, ICE has refused to apply that same logic to its current detainees.

11 This is particularly troubling because it is well established that ICE has a range of highly
12 effective tools at its disposal to ensure that individuals report for court hearings and other
13 appointments, including conditions of supervision. *See Thakker*, 2020 WL 1671563 at *8
14 (noting “that ICE has a plethora of means *other than* physical detention at their disposal by
15 which they may monitor civil detainees and ensure that they are present at removal proceedings,
16 including remote monitoring and remote check-ins”) (emphasis in original). These alternatives
17 to detention are highly effective: for example, a federally contracted evaluation of a program
18 that featured monitoring instead of immigration detention reported a 99% attendance rate at all
19 immigration court hearings and a 95% attendance rate at final hearings. *See* U.S. Gov’t
20 Accountability Office, GAO-15-26, Alternatives to Detention: Improved Data Collection and
21 Analyses Needed to Better Assess Program Effectiveness 10-11 (Nov. 2014),
22 <https://www.gao.gov/assets/670/666911.pdf>; *see also Brief of 43 Social Science Researchers*
23 *and Professors as Amici Curiae in Support of Respondents*, at 36-37, *Jennings v. Rodriguez*,
24 2016 WL 6276890, (No. 15-1204) (discussing an alternatives to detention program studied in
25
26

27 ³⁸ *See* ICE Guidance on COVID-19, <https://www.ice.gov/covid19> (Apr. 17, 2020) (during pandemic, in many
28 circumstances ICE “will exercise discretion to delay enforcement actions until after the crisis or use alternatives to
detention, as appropriate.”), available at <https://www.ice.gov/covid19>.

1 2011 that saw fewer than 1% of participants removed from the program due to arrest by another
2 law enforcement agency).

3 Plaintiffs and the proposed class are therefore likely to demonstrate that the government’s
4 interests could be satisfied by alternatives to detention and that their current detention in
5 dangerous conditions is unconstitutionally excessive.

6 **b. Plaintiffs are also Likely to Prevail by Showing**
7 **Defendants’ Refusal to Ensure Adequate Social**
8 **Distancing Constitutes Deliberate Indifference**

9 People in government custody have a right to reasonable health and safety. *See*
10 *Youngberg v. Romeo*, 457 U.S. 307, 315–16 (1982). “The rationale for this principle is simple
11 enough: when the State by the affirmative exercise of its power so restrains an individual’s
12 liberty that it renders him unable to care for himself, and at the same time fails to provide for his
13 basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it
14 transgresses the substantive limits on state action set by the Eighth Amendment and the Due
15 Process Clause.” *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 200 (1989).

16 As individuals who are detained for civil offenses, Plaintiffs need not prove “deliberate
17 indifference” to prevail on a substantive due process claim. *Jones*, 393 F.3d at 933. Nonetheless,
18 here, Defendants clearly are being deliberately indifferent to the substantial risks posed by
19 COVID-19 within the congregate detention environments of Mesa Verde and YCJ. In contrast
20 to the subjective Eighth Amendment standard, the Fifth Amendment deliberate indifference
21 standard is purely objective. The government violates due process when “there is a substantial
22 risk of serious harm” to Plaintiffs and the proposed class “that could [be] eliminated through
23 reasonable and available measures that [Defendants] did not take” and that are likely to “caus[e]
24 the injury the plaintiff [will] suffer[.]” *Castro v. Cnty. of Los Angeles*, 833 F.3d 1060, 1070 (9th
25 Cir. 2016). Where Defendants are fully aware of the serious risks facing Plaintiffs and fail to
26 take the only measures known to effectively mitigate those risks, they are deliberately
27 indifferent under the Fifth Amendment. *See, e.g., J.P. v. Sessions*, 2019 WL 6723686 at *36
28 (C.D. Cal. Nov. 5, 2019) (finding the plaintiffs likely to succeed in proving the government was

1 deliberately indifferent where they presented evidence that immigration enforcement agencies
2 were aware of risks associated with a policy and implemented it anyways).

3 Here, Defendants have acted, and continue to act, with deliberate indifference to known
4 and obvious risks of COVID-19 transmission. On February 25, 2020, March 13, 2020, and
5 March 19, 2020, Defendants' own medical experts warned them that COVID-19 endangered
6 everyone in their custody and that "social distancing is essential to slow the spread of the
7 coronavirus to minimize the risk of infection." *See supra* Drs. Allen & Rich Letter (Mar. 19,
8 2020). On March 17, 2020, these same medical experts published an opinion piece in the
9 *Washington Post* explaining the need to act immediately to stem the spread of COVID-19 in
10 jails and prisons.³⁹ They warned Defendants that only release from custody on a large scale
11 could prevent calamity. Scores of medical experts, including the expert testimony in this case,
12 have subsequently agreed. Greifinger ¶¶ 47, 58; Hernandez ¶ 30; Mishori ¶¶ 22-23.
13 Respondents have disregarded their advice and instead adopted a series of half-measures that are
14 "patently insufficient to protect Petitioners." *Basank v. Decker*, No. 20 Civ. 2518, 2020 WL
15 1481503, at *6-7 (S.D.N.Y. Mar. 26, 2020) (ordering release from immigration detention
16 because Defendants were deliberately indifferent to risk of COVID-19 infection); *see also*
17 *Castillo*, 2020 WL 1502864, at *5 (ordering release from Adelanto ICE Processing Center
18 because "Petitioners have not been protected. They are not kept at least 6 feet apart from others
19 at all times. They have been put into a situation where they are forced to touch surfaces touched
20 by other detainees, such as with common sinks, toilets, and showers.").

21 It is not possible to mitigate the risk of contracting COVID-19 in Mesa Verde and YCJ
22 without consistent social distancing. Greifinger ¶ 31 ("If there is inadequate social distancing,
23 hygiene and sanitation, there will almost certainly be infection and an outbreak."), ¶ 59 ("The
24 only way to avoid these unacceptable risk is to materially reduce the population, implement
25 social distancing as described herein, and ensure appropriate hygiene."). According to the CDC
26

27 ³⁹ Josiah Rich *et. al*, *We must release prisoners to lessen the spread of coronavirus*, *Washington Post* (Mar. 17,
28 2020), <https://www.washingtonpost.com/opinions/2020/03/17/we-must-release-prisoners-lessen-spread-coronavirus/>.

1 a “cloth face cover is not a substitute for social distancing.”⁴⁰ The uniform medical consensus,
 2 embraced by the CDC, maintains that even when vigilant hygiene and sanitation are
 3 maintained,⁴¹ it simply is not possible to prevent contagion unless people can maintain a
 4 physical distance of at least six feet from one another at all times. Greifinger ¶47.

5 While Defendants have issued guidance to “promote” social distancing,⁴² it is patently
 6 insufficient at Mesa Verde and YCJ, where social distancing is currently impossible. Greifinger
 7 Dec. ¶ 47 (“The measures outlined in ICE’s April 10 Guidance are impossible to carry out given
 8 the limits of the infrastructure” at Mesa Verde and YCJ). Even if, as the guidance suggests,
 9 detention centers actually reduce their populations to 75% of capacity, Dr. Greifinger points out
 10 that “ICE provides no evidence that 70% of 75% capacity would facilitate effective social
 11 distancing within dormitories or cells, which requires that individuals maintain six feet of
 12 separation.” Greifinger Dec. ¶ 48(a). As Judge Phillips just found in a case involving prisoners,
 13 “The County’s assurances that it has provided unlimited free soap to prisoners and advised
 14 prisoners to remain physically distant—without establishing that it is physically possible to do
 15 so—is unlikely to be sufficient to defeat a claim of deliberate indifference . . . In sum,
 16 Defendant has failed to demonstrate that it is currently taking adequate precautions to protect
 17 the health of the prisoners in the country jails.” *Gray v. Cty. of Riverside*, 5:13-cv-0444-VAP-
 18 OPx (C.D. Cal. Apr. 14, 2020), Order at *5 (ECF 191).

19 Similarly, courts have already found that ICE’s current actions to date—which include
 20 providing free soap, increasing sanitation supplies, screening staff for body temperature, and
 21 encouraging good hygiene—do not satisfy Defendants’ constitutional duty to mitigate the risk
 22 of harm to detainees in Mesa Verde and YCJ because they do not accommodate social
 23 distancing. *Doe*, 2020 WL 1820667 at *11 (“The petitioner cannot meaningfully protect himself
 24 at the Yuba County jail from the risks of his custody”); *Bahena Ortuño*, 2020 WL 1701724 at
 25

26 ⁴⁰ CDC, Coronavirus Disease 2019 (COVID-19) Protect Yourself: Know How It Spreads,
 27 <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>.

⁴¹ Vigilant hygiene and sanitation are not possible at Mesa Verde and YCJ. *Supra* § II.C.

⁴² ICE ERO COVID-19 Pandemic Response Requirements at 4, 13 (Apr. 10, 2020), available at
 28 <https://www.ice.gov/covid1>.

1 *4 (ordering release of petitioners with medical vulnerabilities because they “cannot practice
2 meaningful social distancing in [Mesa Verde and YCJ]”).

3 The facts are clear: social distancing is the only meaningful measure to prevent the spread
4 of COVID-19 among the Plaintiff class. Social distancing is currently impossible in Mesa Verde
5 and YCJ. It will continue to be impossible in Mesa Verde and YCJ unless Defendants
6 significantly reduce the detained populations in each detention center. Mishori ¶¶ 22-23. The
7 law is also clear: because Defendants have failed to take known, available measures to mitigate
8 an obvious, substantial risk to Plaintiffs, the law is also clear: the conditions of Plaintiffs’
9 confinement violate due process. *See Castro*, 833 F.3d at 1071.

10 **B. Plaintiffs Satisfy the Remaining Factors for Preliminary Relief**

11 **1. Exposure to a Lethal Virus Which Lacks Any Vaccine,
12 Treatment, or Cure Constitutes Irreparable Harm**

13 “[T]he deprivation of constitutional rights ‘unquestionably constitutes irreparable
14 injury.’” *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427
15 U.S. 347, 373 (1976)). Irreparable harm exists where government actions threaten an
16 individual’s health. *See M.R. v. Dreyfus*, 663 F.3d 1100, 1111 (9th Cir. 2011), *as amended by*
17 *697 F.3d 706* (9th Cir. 2012); *Indep. Living Ctr. of S. Cal., Inc. v. Shewry*, 543 F.3d 1047, 1050
18 (9th Cir. 2008). Likewise, continued immigration detention under “substandard physical
19 conditions, [and] low standards of medical care” is a form of irreparable harm supporting
20 injunctive relief. *See Padilla v. ICE*, 953 F.3d 1134, 1148 (9th Cir. 2020). Defendants cannot
21 dispute that all adults face a risk of serious illness upon contracting COVID-19. Greifinger Dec.
22 ¶ 8, that social distancing is the only effective measure to prevent the spread of COVID-19,
23 Hernandez Dec. ¶ 12, and that social distancing will not be possible inside Mesa Verde and YCJ
24 without reducing the detained population. Greifinger Dec. ¶¶ 33-35. “Inadequate health and
25 safety measures at a detention center cause cognizable harm to every detainee at that center.”
26 *Hernandez v. Wolf*, No. 20-cv-00617, slip op. at 8-9 (C.D. Cal. Apr. 1, 2020), *citing Parsons*,

1 754 F.3d at 679. The entire Plaintiff class is at risk or irreparable harm that can be remedied
2 only be depopulating Mesa Verde and YCJ.

3 **2. Public Interest and Balance of Equities Weigh Heavily in**
4 **Plaintiffs' Favor**

5 Plaintiffs' continued detention at current population levels "threatens the health of
6 detainees, staff and the broader population." Greifinger Dec. ¶ 24. For these reasons, as in the
7 cases where this Court has already granted relief, the balance of equities falls squarely in the
8 Plaintiffs' favor. *See Doe*, 2020 WL 1920667 at *11; *Bent*, 2020 WL 1812850 at *7; *Bahena*
9 *Ortuño*, 2020 WL 1701724 at *4.

10 As an initial matter, "[f]aced with . . . preventable human suffering, [the Ninth Circuit]
11 ha[s] little difficulty concluding that the balance of hardships tips decidedly in plaintiffs' favor."
12 *Hernandez v. Sessions*, 872 F.3d 976, 996 (9th Cir. 2017) (quotation omitted). Moreover, it is in
13 both ICE's and the broader public interest to reduce the threat of an imminent COVID-19
14 outbreak at Mesa Verde and YCJ. ICE has an interest in preventing any potential spread of
15 COVID-19 in its detention facility, which may then affect guards, visitors, attorneys, and others
16 who may potentially interact with detainees. An outbreak of COVID-19 at Mesa Verde and YCJ
17 would doubtless put significant pressure on or exceed the capacity of local health infrastructure.
18 *Hernandez* Dec. ¶¶ 23 (stating that an outbreak at Mesa Verde or YCJ would likely "strain[] and
19 overload[]" nearby emergency medical facilities) As a judge of this Court explained:

20 [U]nder the highly unusual circumstances presented, i.e., a global pandemic of a
21 type not seen within recent memory, the public interest is served by the requested
22 injunction. Specifically, the public interest in promoting public health is served by
23 efforts to contain the further spread of COVID-19, particularly in detention
centers, which typically are staffed by numerous individuals who reside in nearby
communities.

24 *Bahena Ortuño*, 2020 WL 1701724 at *4. Accordingly, the balance of equities favors Plaintiffs.
25 To the extent ICE has public safety or flight concerns about any particular detainee, those can be
26 accounted for through the alternatives to detention discusses above. *See supra* at 17-18.

C. Justice Requires Comprehensive Relief for the Class

1
2 “[T]he appropriate capacity of a jail during a pandemic obviously differs enormously
3 from its appropriate capacity under ordinary circumstances.” *Bent*, 2020 WL 1812850 at *4,
4 quoting *Basank*, 2020 WL 1481503 at *6. There are hundreds of ICE detainees at Mesa Verde
5 and YCJ. Should the Court deny Plaintiffs’ motion for provisional class certification and a
6 temporary restraining order, dozens of individual Mesa Verde and YCJ detainees will likely file
7 claims for relief depending on their access to lawyers. Those individual petitions would
8 vindicate individual Petitioners through release, but, given the time-consuming nature of
9 individual habeas litigation, would leave hundreds of identically situated people detained under
10 conditions that violate their due process rights. They also would constitute an enormous tax on
11 this Court’s resources, will likely take too long and would, at best, result in constitutional rights
12 turning on the happenstance of whether a detainee has access to a lawyer, or on their language
13 skills and education level. That is fundamentally unfair. *All* of the Proposed Class Members are
14 at grave risk of COVID-19 infection under their current conditions of confinement, regardless of
15 whether their circumstances permit them to file individual claims. The appropriate remedy for
16 the system-wide crisis at Mesa Verde and YCJ is system-wide relief for all those whose rights
17 are being violated.

18 Litigation on behalf of the detainees in both facilities, which share in the jurisdiction of
19 the San Francisco ICE Field Office, also prevents absurd efforts that depopulate one facility but
20 result in increased populations in the other, like transfers *between* the facilities. During the
21 course of the COVID-19 pandemic, ICE has transferred detainees from YCJ to Mesa Verde,
22 thus reducing the population in one while increasing the other, and unjustifiably placing the
23 transferred detainee and detainees in the new facility at risk. Sanchez-Nunez ¶ 16 (detainee
24 transferred from YCJ to Mesa Verde immediately introduced into general population).

25 Another district court recently certified a class of ICE detainees held at two detention
26 centers in Bristol County, Massachusetts, recognizing that a systemic remedy was necessary “*in*
27 *order to protect everyone* [in the facility] from the impending threat of mass contagion.” See
28 *Savino*, 2020 WL 1703844 at *7 (emphasis added). That court issued an order requiring a

1 reduction of the population of those detention centers on an expedited, individualized basis. *Id.*
2 at 28.

3 Plaintiffs propose that this Court adopt a similar procedure, as set forth in the Proposed
4 Order, by which claims for relief are processed fast enough that there is a chance social
5 distancing could be established at Mesa Verde and YCJ before a serious outbreak occurs, but
6 also allows this Court to assess the individual circumstances of detainees at Mesa Verde and
7 YCJ and craft appropriate conditions of release. Of course, nothing in Plaintiffs' Proposed Order
8 bars Defendants from implementing an alternative plan to rapidly reduce the populations to a
9 level where they could implement social distancing at both facilities.

10 ICE, however, has steadfastly refused to implement such a system to date— leaving no
11 doubt that this Court's intervention is desperately needed. This Court should grant the
12 temporary restraining order, adopt Plaintiffs' proposal for considering release requests on an
13 expedited basis, and keep that system in place until the Government takes the necessary steps to
14 cease the ongoing system wide Fifth Amendment violation at Mesa Verde and YCJ.

15 **V. SECURITY**

16 "Rule 65(c) invests the district court with discretion as to the amount of security required,
17 if any." *Jorgensen v. Cassidy*, 320 F.3d 906, 919 (9th Cir. 2003) (internal quotation marks and
18 citation omitted). District courts routinely exercise this discretion to require no security in cases
19 brought by indigent and/or incarcerated people. *See, e.g., Toussaint v. Rushen*, 553 F. Supp.
20 1365, 1383 (N.D. Cal. 1983) (state prisoners); *Orantes-Hernandez v. Smith*, 541 F. Supp. 351,
21 385 n. 42 (C.D. Cal. 1982) (detained immigrants). This Court should do the same.

1 **VI. CONCLUSION**

2 This Court should grant Plaintiffs’ motion and order ICE to release people from Mesa
3 Verde and YCJ in order to facilitate social distancing.

4
5 Dated: April 20, 2020

Respectfully submitted,

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