

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

JANET MALAM,

Plaintiff,

- against -

REBECCA ADDUCCI, in her official capacity as Detroit District Director of U.S. Immigration & Customs Enforcement; MATTHEW T. ALBENCE, in his official capacity as Deputy Director and Senior Official Performing the Duties of the Director of the U.S. Immigration & Customs Enforcement; CHAD WOLF, in his official capacity as Acting Secretary, U.S. Department of Homeland Security; WILLIAM P. BARR, in his official capacity as Attorney General, U.S. Department of Justice; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; HEIDI E. WASHINGTON, in her capacity of Director of Michigan Department of Corrections Calhoun Correctional Center,

Defendants,

And

RUBY BRISELDA ESCOBAR; AMER TOMA,
Plaintiff-Intervenors.

No. 2:20-cv-10829-JEL-APP

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

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INTRODUCTION

1. Petitioner-Plaintiffs (“Plaintiffs”) are immigration detainees being held at Calhoun County Correctional Center (“Calhoun”) who are particularly vulnerable to serious illness or death if infected by COVID-19, and who face a heightened risk of contracting the virus unless they are released immediately.

2. The novel coronavirus that causes COVID-19 has quickly led to a global pandemic. As of April 4, 2020, over 1,056,159 people worldwide have received confirmed diagnoses of COVID-19, and over 57,206 of those people have died. There is no vaccine against COVID-19, and there is no known cure. No one is immune from contracting the illness. COVID-19 is most likely to cause serious illness and elevated risk of death for older adults and those with certain underlying medical conditions or disease.

3. The COVID-19 virus can cause severe damage to lung tissue, sometimes leading to a permanent loss of respiratory capacity, and can damage tissues in other vital organs including the heart and liver. Patients with serious cases of COVID-19 require advanced medical support, including positive pressure ventilation and extracorporeal mechanical oxygenation in intensive care. That treatment can require the use of specialized equipment, like ventilators. The pandemic has put ventilators in high demand and short

supply around the world, and has even led to shortages of less specialized equipment such as face masks, gloves, and other personal protective equipment (“PPE”). Patients who do not die from serious cases of COVID-19 may face prolonged recovery periods, including extensive rehabilitation from neurologic damage and loss of respiratory capacity. The only known effective measures to reduce the risk of serious illness or death caused by COVID-19 for vulnerable people are social distancing and improved hygiene. As a result, unprecedented public health measures are being undertaken in all fifty states and around the world.

4. People in enclosed group environments, where they live, eat, and sleep in close proximity, face increased danger of contracting COVID-19, as already evidenced by the rapid spread of the virus in cruise ships and nursing homes. This problem is particularly acute with respect to people who are confined in jails and other correctional facilities, for whom it is virtually impossible to engage in the necessary social distancing and hygiene required to mitigate the risk of transmission, even with the best-laid plans. The enormity of the dangers faced by people in such facilities has become self-evident as more of them are testing positive for COVID-19 with each passing day. For instance, at the Rikers Island jail in New York City, the number of confirmed cases jumped from one to over 200 in roughly 12 days.

5. For this reason, leading public health experts have recommended the prompt release from custody of people such as Plaintiffs who are most vulnerable to COVID-19, protecting those with the greatest vulnerability to COVID-19 from transmission of the virus, and also allowing for greater risk mitigation for all people held or working in the jail. Release of the most vulnerable people such as Plaintiffs also reduces the burden on the region's limited health-care infrastructure, as it lessens the likelihood that an overwhelming number of people will become seriously ill from COVID-19 at the same time.

6. Plaintiffs are older adults and/or have underlying medical conditions that create a high risk of serious COVID-19 infection.¹ If they continue to be detained at Calhoun during the current outbreak of COVID-19,

¹ The underlying medical conditions that create a high risk of serious COVID-19 infection include, but are not limited to: blood disorders, such as sickle cell disease or taking blood thinners; chronic kidney disease; chronic liver disease, including cirrhosis and chronic hepatitis; cancer or cancer treatments; organ or bone marrow transplant; individuals taking immunosuppressant medications; HIV or AIDS; current or recent pregnancy in the last two weeks; diabetes; inherited metabolic disorders and mitochondrial disorders; heart disease, including coronary artery disease, congenital heart disease, and heart failure; lung disease, including asthma and COPD (chronic bronchitis or emphysema); neurological and neurologic development conditions such as cerebral palsy, epilepsy (seizure disorders), stroke, intellectual disability, moderate to severe developmental delay, muscular dystrophy, or spinal cord injury; severe obesity (body mass index [BMI] of 40 or higher); and any other condition or treatment that weakens the immune response.

they face a danger that is “so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk” and violates their constitutional right to safety in government custody. *Helling v. McKinney*, 509 U.S. 25, 36 (1993).

7. Accordingly, this Court should issue a Writ of Habeas Corpus and order Plaintiffs’ immediate release, with appropriate precautionary public health measures, on the ground that their continued detention violates the Due Process Clause or, in the alternative, issue injunctive relief ordering Defendants to release Plaintiffs immediately, with appropriate precautionary public health measures, on the grounds that their continued detention violates the Due Process Clause.

PARTIES

8. Plaintiff Ruby Briselda Escobar is a citizen of El Salvador who has been detained by Immigration & Customs Enforcement (“ICE”) at Calhoun since November 2018. She suffers from a brain aneurysm and a congenital heart murmur, which may have developed into heart disease. As a consequence, she is at high risk for severe illness or death if she contracts COVID-19.

9. Plaintiff Amer Toma is a citizen of Iraq who was detained by ICE in Monroe County Jail from September 21, 2019 to February, 2020, at

which point he was moved to Calhoun where he remains today. Mr. Toma is 55 years old. Mr. Toma suffers from hypotension, and has three bullets in his body that require him to use a wheel-chair and have caused infection and swelling. Two years ago, Mr. Toma was hospitalized for prostate issues, and a doctor has recently recommended that he undergo cancer testing after Mr. Toma reported blood in his stool. As a consequence, he is at high risk for severe illness or death if he contracts COVID-19.

10. Respondent-Defendant Rebecca Adducci is the Detroit District Director of ICE. In that position, she is responsible for carrying out ICE's immigration detention operations at Calhoun. Defendant Adducci is a legal custodian of Plaintiffs, and the proper respondent for a habeas petition. *See Roman v. Ashcroft*, 340 F.3d 314, 321 (6th Cir. 2003). She is sued in her official capacity.

11. Defendant Matthew T. Albence is the Deputy Director and Senior Official Performing the Duties of the Director of ICE. In that position, he is responsible for ICE's policies, practices, and procedures, including those relating to the detention of immigrants. Defendant Albence is a legal custodian of Plaintiffs. He is sued in his official capacity.

12. Defendant Chad Wolf is Acting Secretary of the U.S. Department of Homeland Security. In that position, he is responsible for the

enforcement of the immigration laws and supervises Ms. Adducci at ICE Detroit Field Operations. Defendant Wolf is a legal custodian of Plaintiffs. He is sued in his official capacity.

13. Defendant William P. Barr is Attorney General of the United States and chief officer of the U.S. Department of Justice. He is responsible for the administration of the immigration laws pursuant to 8 U.S.C. § 1103, routinely does and transacts business in the Eastern District of Michigan, and is a legal custodian of Plaintiff. He is sued in his official capacity.

14. Defendant ICE is a federal law enforcement agency within the U.S. Department of Homeland Security. ICE is responsible for criminal and civil enforcement of immigration laws, including the detention and removal of immigrants. Enforcement and Removal Operations, a division of ICE, manages and oversees the immigration detention system. Defendant ICE is a legal custodian of Plaintiffs.²

² The petition/complaint filed by Janet Malam, in which petitioners/plaintiffs here are intervening, named Matthew T. Albence, Chad Wolf, William P. Barr, and ICE as Respondent-Defendants. Intervenors seek injunctive and declaratory, but not habeas relief, from those defendants. *See Roman v. Ashcroft*, 340 F.3d 314, 321 (6th Cir. 2003). The petition/complaint filed by Ms. Malam also named Michigan Department of Corrections Director Heidi E. Washington as a Respondent/Defendants. Intervenors do not bring claims against Ms. Washington.

JURISDICTION AND VENUE

15. This Court has subject matter jurisdiction over this matter under 28 U.S.C. § 1331 (federal question jurisdiction), 28 U.S.C. § 1346 (original jurisdiction), 28 U.S.C. § 2241 (habeas jurisdiction) and Article I, Section 9, clause 2 of the United States Constitution (the Suspension Clause).

16. Venue lies in the U.S. District Court for the Eastern District of Michigan, the judicial district in which Plaintiffs are currently in custody. Venue is proper in the Eastern District of Michigan under 28 U.S.C. § 1391, as venue is proper in any district in which a defendant resides.

FACTS

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

17. COVID-19 is a coronavirus that has reached pandemic status. As of April 4, 2020, at least 1,056,159 people worldwide have confirmed diagnoses, including over 241,703 people in the United States. Over 57,206 people have died as a result of COVID-19 worldwide, including at least 5,854 in the United States. The transmission of COVID-19 is expected to grow exponentially.

18. Older people and those with certain medical conditions face greater chances of serious illness or death from COVID-19. Certain

underlying medical conditions increase the risk of serious COVID-19 disease for people of any age.

19. In many people, COVID-19 causes fever, cough, and shortness of breath. But for older people, as well as those with medical conditions that increase the risk of serious COVID-19 infection, shortness of breath can be severe. Moreover, the COVID-19 virus can severely damage lung tissue, which requires an extensive period of rehabilitation, and in some cases can cause a permanent loss of respiratory capacity. COVID-19 may also target the heart muscle, causing a medical condition called myocarditis, or inflammation of the heart muscle, which can also affect the heart's electrical system, reducing the heart's ability to pump. Reduced pumping can lead to rapid or abnormal heart rhythms in the short term, and to long-term heart failure that limits exercise tolerance and the ability to work. In addition, COVID-19 can trigger an over-response of the immune system, further damaging tissues in a cytokine-release syndrome that can result in widespread damage to other organs, including permanent injury to the kidneys and neurologic injury.

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

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

22. The need for care, including intensive care, and the likelihood of death, are much higher from COVID-19 infection than from influenza. Sources differ, but all are grave: sources report fatality rates ranging from nearly 2% to over 15% for populations at high risk for complications from COVID-19, like the elderly or those with preexisting conditions. Moreover, recent studies estimate that the COVID-19 fatality rate for the general population ranges from six to thirteen times as high as a severe seasonal influenza fatality rate, even in advanced countries with highly effective healthcare systems.

23. Patients in high-risk categories who do not die from COVID-19 often experience a prolonged recovery, including the need for extensive

rehabilitation for profound reconditioning, loss of digits, neurologic damage, and the loss of respiratory capacity.

24. There is no vaccine against COVID-19, nor is there any known medication to prevent or treat infection from COVID-19. On March 26, 2020, Dr. Anthony Fauci, head of the National Institute of Allergy and Infectious Diseases (NIAID), estimated that a vaccine could be developed in 18 months. This estimation is optimistic. Vaccines typically take between eight and 10 years to develop. Vaccines usually must be tested in four phases before they attain regulatory approval: (1) animal testing, (2) small-group human testing to assess safety and monitor immune response, (3) medium-sized group testing to assess members of at-risk groups, and (4) large-scale testing on thousands of people. Moreover, more time is needed after approval to distribute the vaccine across the country. With these long trials and distribution schedules in mind, other experts have expressed reservations about the 18-month estimate given by Dr. Fauci.

25. The only known effective measures to reduce the risk of illness, or death from COVID-19 to vulnerable people are to prevent them from being infected in the first place. Social distancing, or remaining physically separated from known or potentially infected individuals, and vigilant

hygiene, including washing hands with soap and water, are the only known effective measures for protecting vulnerable people from COVID-19.

26. Projections by the Centers for Disease Control and Prevention (“CDC”) indicate that over 200 million people in the United States could be infected with COVID-19 over the course of the pandemic without effective public health intervention, with as many as 1.7 million deaths in the United States alone.

B. Plaintiffs Face an Elevated Risk of COVID-19 Transmission

27. As of April 4, 2020, there were 12,744 confirmed cases of COVID-19 and 479 deaths from COVID-19 in Michigan.

28. The COVID-19 outbreak in Michigan has resulted in unprecedented health measures to facilitate and enforce social distancing. On March 24, Governor Gretchen Whitmer issued Executive Order 2020-21, suspending through April 13 all activities unnecessary to sustain or protect life. The order requires employees to work from home unless they are considered “essential” or they work in jobs related to public safety, health care, or other critical industries. The order also requires individuals who leave their home to adhere to social distancing measures recommended by the CDC, including “remaining at least six feet away from people outside the individual’s household to the extent feasible under the circumstances.”

29. The Michigan Department of Corrections has already placed four prisons on partial lockdown because of the rising number of inmates testing positive for the virus. It is highly likely, if not inevitable, that COVID-19 will reach Calhoun if it is not already present.

30. Indeed, over the past two weeks, hundreds of COVID-19 diagnoses have been confirmed at local, state, and federal correctional facilities across the United States. In Michigan, press reports say that at least 184 prisoners and 38 corrections staffers have contracted COVID-19 across the Department of Corrections' 29 facilities. The problem is almost certainly worse than reported given the dearth of available testing in such facilities.

31. The conditions at correctional facilities such as Calhoun, which are enclosed group environments where inmates live and sleep in close proximity, pose a heightened public health risk for the spread of COVID-19. Other enclosed group environments, such as cruise ships and nursing homes, have seen extremely high COVID-19 transmission rates. The danger is even greater at Calhoun, where inmates are rarely more than six feet apart, scant medical resources are available, and many detainees are at high risk of serious infection.

32. At Calhoun, Plaintiffs and other detainees are kept together in "pods" containing groups of seventy people, who sleep, eat, and live in closely

confined quarters. Detainees sleep close together in bunkbeds near communal tables and chairs with shared air circulating in the pod. Similarly, detainees share a limited number of telephones and bathrooms, among other items in the facility. They are transported throughout the facility in close proximity. They interact with individuals from other pods in court, in the legal visiting areas, in the hallways, in the recreation area, and even while waiting to get their required medications. Detainees face the further risk of disease transmission through their work, as many work cleaning the kitchen, the laundry area, the bathrooms, and their own pods. Many detainees have also reported concerns about inadequate hygienic practices.

33. Jails like Calhoun also lack the medical infrastructure necessary to address the spread of infectious disease and treatment of people most vulnerable to illness in detention. During the H1N1 influenza epidemic in 2009, for example, jails and prisons were sites of severe outbreaks. Monroe County Jail and Calhoun each experienced mumps outbreaks just last year. News reports suggested an ICE detainee from Guatemala connected the outbreak between both facilities when the detainee was transferred between the Monroe County Jail and Calhoun. Calhoun confirmed at least two cases, and news outlets suggested that “several inmates” at both jails were infected.

34. The current methods implemented by the Michigan Department of Corrections and Calhoun are not enough to protect Plaintiffs or other vulnerable inmates from COVID-19. Even though the Michigan Department of Corrections will require inmates and prison employees to wear masks, the Michigan Department of Corrections does not currently have enough inventory for all prisoners and staffers and might not have enough masks until the end of next week. Given the rapid spread of COVID-19, many inmates—including vulnerable inmates like Plaintiffs—could contract COVID-19 in that timeframe. Calhoun also says it is requiring staff to have their temperatures taken when they arrive at work, but that is insufficient for a virus like COVID-19 because infected persons may be asymptomatic but still contagious.

35. Given the even greater risk of infection posed by COVID-19, and the fact that inmates cannot engage in proper hygiene and isolate themselves from infected residents or staff, it is only a matter of time until the virus reaches Calhoun and rapidly infects the inmates and detainees, including Plaintiffs. The early evidence bears this out: for example, the rate of infection in New York City jails is more than seven times as high as the rate of infection in New York City overall. Indeed, it may be that the virus is already present at Calhoun and that it has already begun to spread.

36. The staff at jails like Calhoun also have a higher risk of contracting coronavirus due to the lack of protective gear and the impossibility of social distancing. As of Wednesday morning, at least twenty five prison staff in Michigan had already tested positive for coronavirus. On Tuesday, a corrections transportation officer in Detroit died after contracting COVID-19. Accordingly, Michigan detainees and other Michigan facility staff are at very high risk for contracting the virus. Indeed, at a single jail in New York City, 167 inmates and 114 staff members already have tested positive for coronavirus. It is only a matter of time until Calhoun faces a similar crisis.

37. On March 29, Governor Whitmer issued Executive Order 2020-29, the purported aim of which is to protect vulnerable populations in jails from the spread of COVID-19. But the executive order falls far short of achieving that objective. For example, the order requires staff to implement safety measures when someone displays symptoms of the virus, but that cannot be effective against a virus where many of those who are infected may suffer from only mild symptoms or even be entirely asymptomatic while still carrying and spreading the disease.

38. Other jails around the country have tried similar mitigation efforts to no avail. The virus continues to infiltrate and spread through correctional facilities. The top doctor at Rikers Island in New York City has

lamented how extensive mitigation efforts failed to slow the spread of the disease at the jail. He joins a chorus of public health experts in concluding that for such efforts to be effective, they must be paired with a reduction in the number of people incarcerated.

39. Recognizing the limits of any social distancing or hygiene-based mitigation strategy in a correctional facility, Governor Whitmer included in Executive Order 2020-29 a recommendation that individuals who are older or have underlying health conditions, among others, be considered for early release. Some county jails in Michigan have already begun to reduce their inmate populations. Macomb County Jail, for example, has reduced its inmate population from 875 to 648.

40. And, when correctional facilities have been unwilling to take appropriate action to address the heightened danger of COVID-19 infection, courts have not hesitated to intervene and protect the civil liberties of those most vulnerable to infection. Last week, for example, two New York judges ordered the release of ICE detainees who were at high risk of serious COVID-19 infection because of an outbreak in their respective jails. *Basank v. Decker*, No. 20-cv-2518, 2020 WL 1481503 (S.D.N.Y. Mar. 26, 2020); *Coronel v. Decker*, No. 20-cv-2472, 2020 U.S. Dist. LEXIS 53954 (S.D.N.Y. Mar. 27, 2020). Similarly, on March 31, the District Court for the Middle District of

Pennsylvania granted a Temporary Restraining Order releasing a group of individuals at high risk for serious infection from ICE detention. *Thakker v. Doll*, No. 20-cv-480 (M.D. Pa. Mar. 31, 2020).

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

41. Leading public health experts have recommended that Plaintiffs, and other high-risk detainees, be released from Calhoun and similar correctional facilities.

42. Dr. Jonathan Louis Golob, an expert in infectious diseases and immunocompromised patients, has declared that social distancing and hygiene “are the only known effective measures for protecting vulnerable communities from COVID-19.” He has further advised that it is reasonable to expect that COVID-19 will “readily spread in detention centers such as prisons and jails[.]” Therefore, he has concluded, vulnerable people in such facilities “are at grave risk of severe illness and death from COVID-19.”

43. Plaintiffs in this case are people who are particularly vulnerable to serious illness or death if infected by COVID-19 and are currently detained at Calhoun as they await the resolution of their civil immigration cases.

44. **Ruby Briselda Escobar** is a citizen of El Salvador who has been in ICE custody since November 2018, approximately a year and a half. Ms. Escobar came to the United States when she was 24 years old in 2013. She

fled El Salvador after being kidnapped and held hostage by sex traffickers. While held hostage, Ms. Escobar was repeatedly sexually assaulted. When she was first detained by ICE in 2018, Ms. Escobar had a “reasonable fear” interview by an ICE officer, who found her to be credible but found no legal ground for relief. Ms. Escobar was referred to an immigration judge who also agreed she was credible but that no relief was available to her. Ms. Escobar was ordered removed, but her ICE officer has not acted on the removal order. Ms. Escobar is now pursuing a T visa application, which is pending with U.S. Citizenship and Immigration Services (USCIS).

45. Ms. Escobar suffers from a brain aneurysm and congenital heart murmur. Her heart condition is triggered by stress, which occurs often in detention. Her heart condition symptoms include fits of heavy sweating, weakness and chest pain that make it difficult to breathe, and loss of feeling in her fingers and face. Ms. Escobar experienced a stroke or heart attack while being sexually assaulted and held hostage during her journey seeking safety in the United States. After fleeing to the United States, Ms. Escobar saw a doctor about her heart condition who told her she needed follow-up care to get proper treatment. Ms. Escobar believes she was born with her brain condition, but symptoms only emerged after the trauma she experienced in 2013. Ms. Escobar’s brain condition produces symptoms of nausea,

forgetfulness, dizziness, double vision, and headaches. The symptoms continue while she is in detention. Ms. Escobar has requested to see a doctor who can help her with her brain condition, but a suitable doctor has not been provided.

46. Ms. Escobar is critically vulnerable to COVID-19 because of her heart condition and brain condition.

47. **Amer Toma** is an Iraqi national who first entered the United States about 10 years ago under Refugee status. Mr. Toma has been in ICE custody since September 21, 2019. Mr. Toma was arrested for driving with 5-45 kilograms of marijuana in his car, for which he received two years' probation and no jail time. Since being brought into ICE custody, Mr. Toma has been detained at both Monroe County Jail and Calhoun.

48. Mr. Toma is 55 years old, wheelchair bound, and suffers from hypotension, for which he takes medication. He also has prostate issues that required a two-month hospitalization about two years ago. His doctor recommended that he get a cancer screening after blood appeared in Mr. Toma's stool. Mr. Toma was injured in the Iran-Iraq war, and now has three bullets in his body that have been a source of infection and swelling. Mr. Toma also has a hernia that has not received treatment. He has been on SSI disability for seven years.

49. Mr. Toma is critically vulnerable to COVID-19 because of his heart condition and susceptibility to infection.

LEGAL BACKGROUND

A. Plaintiffs Have a Constitutional Right to Reasonable Safety in Custody

50. “[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.” *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189, 199-200 (1989). As civil detainees, Plaintiffs’ detention is governed by the Fifth Amendment. *Bell v. Wolfish*, 441 U.S. 520, 539 (1979).³ Under the Fifth Amendment, civil detention may not “amount to punishment of the detainee.” *Bell*, 441 U.S. at 535.

³ Plaintiffs’ continued detention also violates the Eighth Amendment’s prohibition of cruel and unusual punishment—a much stricter standard than the Fifth Amendment’s ban on any punishment, which applies here. This is because Defendants have ignored “a condition of confinement that is sure or very likely to cause serious illness” by crowding Plaintiffs into living quarters with others who have “infectious maladies . . . even though the possible infection might not affect all of those exposed.” *Helling*, 509 U.S. at 32-33. *See Bell*, 441 U.S. at 539; *Thakker*, No. 1:20-cv-480, at *22 n.15 (ordering immediate release of immigration detainees due to COVID-19 under the Fifth Amendment and, citing *Helling*, finding that plaintiffs had also met the “more exacting Eighth Amendment standard”).

51. Because of Plaintiffs' underlying health conditions, which make them especially vulnerable to infection from COVID-19, the condition of their confinement is not "reasonably related to a legitimate governmental objective"; instead it is "arbitrary or purposeless[.]" *See Bell*, 441 U.S. at 539. *See also J.H. v. Williamson Cty., Tennessee*, 951 F.3d 709 (6th Cir. 2020) (applying *Bell* test to pre-trial detainee's conditions of confinement claim); *Turner v. Stumbo*, 701 F.2d 567, 572 (6th Cir. 1983) (same).

52. Plaintiffs' detention is not "reasonably related" to its objective because it creates a serious risk of imminent illness and death. *See Bell*, 441 U.S. at 539. This risk is urgent, imminent, and unrelated to any legitimate governmental goal, as several federal courts have already held. *See, e.g., Xochihua-Jaimes*, No. 18-71460 at *1 (*sua sponte* ordering immediate release of immigrant petitioner "[i]n light of the rapidly escalating public health crisis, which public health authorities predict will especially impact immigration detention centers"); *Thakker v. Doll*, No. 1:20-cv-480 (M.D. Pa. Mar. 31, 2020) (ordering immediate release of immigrant petitioners because "we can see no rational relationship between a legitimate government objective and keeping Petitioners detained in unsanitary, tightly-packed environments").

53. When the government fails to meet its obligation to provide adequate medical care, courts have a responsibility to remedy the resulting

constitutional violation. *See Brown v. Plata*, 563 U.S. 493, 511 (2011) (“When necessary to ensure compliance with a constitutional mandate, courts may enter orders placing limits on a prison’s population.”). The power to remedy constitutional violations arising from government confinement falls within the Court’s broad power to fashion equitable relief. *See Hutto v. Finney*, 437 U.S. 678, 687 n.9 (1978).

54. To vindicate detainees’ due process rights in the face of the COVID-19 pandemic, federal and state courts across the country have ordered the release of detained individuals. *See, e.g., Hernandez v. Wolf*, No. 20-60017-TJH (C.D. Cal. Apr. 1, 2020) (ordering release of detainee in California due to threat of COVID-19); *Thakker v. Doll*, No. 1:20-cv-480 (M.D. Pa. Mar. 31, 2020) (same for 13 detainees in Pennsylvania); *Coronel v. Decker*, No. 20-cv-2472, 2020 WL 1487274 (S.D.N.Y. Mar. 27, 2020) (ordering release of four medically vulnerable immigrant plaintiffs held in New York and New Jersey detention centers due to threat of COVID-19); *Basank v. Decker*, No. 20-cv-2518, 2020 WL 1481503, at *1 (S.D.N.Y. Mar. 26, 2020) (same, for ten immigrant plaintiffs who “suffer[] from chronic medical conditions, and face[] an imminent risk of death or serious injury in immigration detention if exposed to COVID-19”); *Calderon Jimenez v. Wolf*, No. 18-10225-MLW, Dkt. 507 (D. Mass. Mar. 26, 2020) (ordering grant of

bail for an immigrant detainee held in Plymouth County, Massachusetts because “being in jail enhances risk”). On March 23, 2020, the Ninth Circuit ordered, *sua sponte*, the release of an immigrant petitioner “[i]n light of the rapidly escalating public health crisis, which public health authorities predict will especially impact immigration detention centers.” *Xochihua-Jaimes*, No. 18-71460, 2020 WL 1429877, at *1.

B. Petitioners Held in Post-Order Custody Must Be Released Because, as a Result of the COVID-19 Crisis Impact on International Travel and Removals, Their Removal Is Not Significantly Likely in the Reasonably Foreseeable Future

55. Ms. Escobar, who was ordered removed to El Salvador, has been detained since November 2018, approximately a year and a half. Mr. Toma, who was ordered removed to Iraq, has been detained since September 2019, more than six months. As a result of the COVID-19 crisis, Ms. Escobar and Mr. Toma are not significantly likely to be removed in the reasonably foreseeable future, and therefore must be released pursuant to *Zadvydas v. Davis*, 533 U.S. 678 (2001).

56. Both Ms. Escobar and Mr. Toma have final orders of removal, and are therefore detained under 8 U.S.C. § 1231, the statute governing post-order detention. 8 U.S.C. § 1231(a)(2) authorizes a 90-day period of mandatory post-final-order detention during which time ICE is supposed to effectuate removal, also known as “the removal period,” § 1231(a)(1)(A).

57. Individuals whom the government is unable to remove during the 90-day removal period should be released under conditions of supervision. 8 U.S.C. § 1231(a)(3) (“If the alien . . . is not removed within the removal period, the alien, pending removal, shall be subject to supervision.”). These conditions include periodic reporting and other “reasonable written restrictions on the alien’s conduct.” *Id.*

58. Both Ms. Escobar and Mr. Toma have been detained far longer than the 90-day removal period.

59. In certain circumstances, the government “*may*” continue to detain certain individuals “beyond the removal period,” including when individuals have been ordered removed on criminal grounds or where the government deems them to be a risk to the community or unlikely to comply with a removal order. 8 U.S.C. § 1231(a)(6) (emphasis added).

60. ICE continued the detention of both Ms. Escobar and Mr. Toma beyond 90 days. Ms. Escobar has no criminal history. Mr. Toma has a conviction for delivery/manufacture of marijuana, for which he was sentenced to two years’ probation. There is no hearing process by which either Ms. Escobar or Mr. Toma could appeal the government’s unilateral determination that they should be detained past the 90-day removal period.

61. In *Zadvydas v. Davis*, the Supreme Court held that 8 U.S.C. § 1231(a)(6) authorizes continued detention beyond the removal period only insofar as removal is “reasonably foreseeable.” 533 U.S. at 699. That is because, to satisfy due process, detention must “bear a reasonable relation to the purpose for which the individual [was] committed.” *Id.* at 690 (citations omitted). Because the principal purpose of the post-final-order detention statute is to effectuate removal, if removal cannot be effectuated, detention bears no reasonable relation to its purpose. *Id.* at 697. Thus, in order to avoid the serious constitutional problem that would be created if the statute authorized detention in such circumstances, the Court construed Section 1231(a)(6) as authorizing post-final-order detention only for a “period reasonably necessary to secure removal,” a period that the Court determined to be presumptively six months. *Id.* at 699-701. After this six-month period, if a detainee provides “good reason” to believe that his or her removal is not significantly likely in the reasonably foreseeable future, “the Government must respond with evidence sufficient to rebut that showing.” *Id.* at 701. If the government cannot do so, the individual must be released.

62. Petitioners Escobar and Toma have both been detained longer than six months. The COVID-19 crisis provides good reason to believe their removal is not significantly likely in the reasonably foreseeable future.

Therefore, they must be released unless Defendants provide evidence that rebuts Petitioners' showing that removal is unlikely in the reasonably foreseeable future.

63. Even under normal circumstances before the COVID-19 pandemic, securing the necessary documents for deportees and coordinating their travel could be a time-consuming, complicated, and costly process.

64. That process has now ground to a halt. The COVID-19 crisis has resulted in an unprecedented shutdown of international travel, a closure of international borders, the shuttering of embassy and consular services that are an integral part of removal processing, and a drastic curtailment of immigration case processing.

65. International travel has come to a virtual standstill. Sixty-four global airlines have completely suspended operations, and U.S. airlines have greatly reduced operations.⁴ Delta will cut its international flights by 80%.⁵ American Airlines plans to cut its international flights by 90% through April

⁴ Thomas Pallini, *64 Global Airlines Have Completely Stopped Flying Scheduled Flights Due to Travel Bans, Airspace Closures, and Low Demand for Travel – See the Full List*, BUS. INSIDER (Apr. 1, 2020), <https://www.businessinsider.com/coronavirus-global-airlines-stopping-flights-suspending-operations-2020-3>.

⁵ Kelly Yamanouchi, *Delta Says it Still Flies to All Points in its Domestic Network*, ATLANTA JOURNAL-CONSTITUTION (Apr. 3, 2020), <https://www.ajc.com/blog/airport/delta-says-still-flies-all-airports-its-domestic-network/Rym2MyGFFHdanXuKP7VPpK/>.

and May.⁶ It is unclear when regular commercial air travel will resume, and, even when it does, it will likely take a great deal of time before regular routes are reestablished to many countries, meaning that it is likely to remain extremely difficult to effectuate removals.

66. While ICE uses charter flights to effectuate removals to some countries, for many countries ICE relies on commercial airlines. Removals are not significantly likely in the reasonably foreseeable future to countries where ICE cannot currently operate charter flights and where there is no regular commercial air travel.

67. In addition, many countries have closed their borders as a result of COVID-19. Both commercial and charter flights are affected. It is unclear how long it will be until countries reopen their borders, or, when they do, whether countries will agree to accept people deported from the United States, particularly those coming from Michigan, one of the areas in the United States hardest hit by COVID-19. It is also unclear what requirements countries will impose in order to accept individuals coming from abroad. For example, even if a country opens up its borders and allows entry conditioned on a period of

⁶ Keith Griffin, *American Airlines Cuts International Flights by 90% Through May – but Vows NOT to Halt Domestic Service During the Coronavirus Crisis*, DAILY MAIL (Apr. 3, 2020), <https://www.dailymail.co.uk/news/article-8186105/American-Airlines-cuts-international-flights-90-May.html>.

quarantine, it is unclear that deportees, who are unlikely to have the resources to isolate in a hotel for several weeks, will be admitted.

68. The shuttering of consular and embassy services makes removals more difficult still. Even absent the COVID-19 crisis, individuals set to be deported must obtain travel documents, usually a passport. It was already quite difficult for ICE to obtain passports or other travel documents for nationals of certain countries. Given the global scale of the COVID-19 crisis, foreign governments are fully occupied with protecting their countries from the pandemic. As in the United States, government employees in other countries responsible for processing passport and document requests are likely to be working from home, assuming that they have internet and computers, which will often not be the case. Similarly, foreign consular and embassy staff in the United States face challenging working conditions, if they are working at all. As a result, it is unlikely that ICE will be able any time soon to obtain passports or travel documents for petitioners who do not already have them.

69. The slowing and shutdown of consular and embassy services will also affect removals to countries where transit visas through third countries are necessary in order to remove a person because there are no direct flights to the country of deportation. Because many deportees are escorted by ICE

officers on such flights, in order to travel through the transit country or countries, ICE needs to procure transit visas not just for the deportee, but also for the ICE escorts.

70. Likewise, immigration case processing in the United States has been severely curtailed as a result of the pandemic. As of 2020, there were over 1.1 million cases pending in the immigration court system, and the average wait for a disposition in Michigan is almost two years.⁷ While the Detroit Immigration Court remains open for detainee hearings, detainees are being encouraged to waive their right to in-person appearances in favor of telephonic appearances, and to work with the Department of Justice to take certain facts out of controversy.⁸ Thus, those detainees who wish to press their right to fair procedures will see their cases delayed in a system that is heavily backlogged under the best of circumstances.

⁷ See *Immigration Court Backlog Tool*, TRAC REPORTS, INC., https://trac.syr.edu/phptools/immigration/court_backlog/.

⁸ MARK JEBSON, U.S. IMMIGRATION JUDGE, STANDING ORDER: TELEPHONIC APPEARANCE DUE TO COVID-19 IN DETAINED CASES BEFORE JUDGE MARK JEBSON IN THE DETROIT IMMIGRATION COURT (MAR. 26, 2020). Regarding the right to an in-person hearing generally, IMMIGRATION COURT PRACTICE MANUAL, DEPARTMENT OF JUSTICE, CHAPTER 4 (2008) (“[E]videntiary hearings on the merits may only be conducted by telephone conference if the respondent consents after being notified of the right to proceed in person or through video conference.”).

71. As the pandemic continues to spread, it is unclear how long it will take for immigration courts or the Board of Immigration Appeals to hear cases from individuals who are seeking further immigration relief or who are detained due to a government appeal.

72. Defendants seek to deport Petitioner Ruby Escobar to El Salvador. El Salvador has banned entry to all foreigners, excluding accredited diplomats and legal residents, and those allowed to enter are subject to a 30-day quarantine.⁹ El Salvador also shut down its airport on March 16, 2020 to all commercial flights, and it is unclear when the airport will reopen.

73. Ms. Escobar's immigration attorney is not certain whether Ms. Escobar has a passport or other immigration documents that would permit her entry into El Salvador, or whether those still must be obtained, which would be very difficult under present circumstances.

74. Given these facts, Ms. Escobar has provided good reason to believe that her removal is not significantly likely in the reasonably foreseeable future. She must therefore be released unless Defendants can rebut that showing.

⁹ See *Coronavirus: Travel Restrictions, border shutdowns by country*, AL JAZEERA (Apr. 4, 2020), <https://www.aljazeera.com/news/2020/03/coronavirus-travel-restrictions-border-shutdowns-country-200318091505922.html>; U.S. Embassy in El Salvador, Current Information for U.S. Citizens in El Salvador.

75. Defendants seek to deport Petitioner Amer Toma to Iraq. On February 25, 2020, Mr. Toma won his immigration case, and was granted Withholding of Removal under the Convention Against Torture from the Detroit Immigration Court. However, the government appealed, and is keeping Mr. Toma in immigration detention while it appeals. It is unclear how long it will take for the government's appeal to be decided given the impact of the COVID-19 crisis on the operations of the Board of Immigration Appeals.

76. Even before the COVID-19 crisis, this Court found, based on extensive evidence obtained in class action litigation about the difficulty of repatriating nationals of Iraq, that there is no significant likelihood that Iraqi nationals will be removed to Iraq in the reasonably foreseeable future. *See Hamama v. Adducci*, 349 F. Supp. 3d 665 (E.D. Mich. 2019), *rev'd on other grounds*, 946 F.3d 875 (6th Cir. 2020). Although Mr. Toma is not a class member in *Hamama* due to the date of his removal order, the *Hamama* court's factual findings about the obstacles to removals to Iraq are directly relevant here.

77. Because of the COVID-19 crisis, the obstacles to Mr. Toma's removal are even greater than at the time of the *Hamama* decision. Iraq will not accept repatriations or issue travel documents without first conducting an

in-person consular interview. Mr. Toma has not had a consular interview. Given the COVID-19 crisis, it is unclear whether or when Iraqi consular officials will conduct any further consular interviews.

78. Iraq has suspended all flights to and from Iraq, and has also banned travel between Iraqi provinces.¹⁰ The World Health Organization reports that, as of April 1, 2020 there were 697 total cases of COVID-19 in Iraq, and that it expects the reported numbers to “spike in the coming two weeks.”¹¹

79. Given these facts, Mr. Toma has provided good reason to believe that his removal is not significantly likely in the reasonably foreseeable future. He must therefore be released unless Respondents can rebut the showing.

C. ICE Has the Authority to Release Detained People in Its Custody

80. It is well within ICE’s authority to comply with constitutional requirements by releasing people who are vulnerable to severe illness or death if they contract COVID-19. For example, the regulations governing ICE’s release authority state that serious medical conditions are a reason to parole

¹⁰ *COVID-19 Information*, U.S. EMBASSY & CONSULATES IN IRAQ (Apr. 1, 2020), <https://iq.usembassy.gov/covid-19-information/>.

¹¹ *The Fight to Contain COVID-19 in Iraq*, WORLD HEALTH ORGANIZATION, <http://www.emro.who.int/irq/iraq-news/the-fight-to-contain-covid-19-in-iraq.html>.

an individual, as “continued detention would not be appropriate” in such cases. 8 C.F.R. § 212.5(b)(1).

81. ICE not only has the authority to exercise its discretion to release individuals from custody, but has routinely done so for especially vulnerable detainees like Plaintiffs.

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

83. ICE’s discretion applies regardless of the statutory basis for a noncitizen’s detention.

D. This Court Has the Authority to Order Plaintiffs’ Release

84. While the circumstances of this case are certainly unusual, the Court’s authority to order Plaintiffs’ release to ensure their constitutional rights are protected is well established. District courts have “ample authority” to address “each element” contributing to a constitutional violation. *Hutto v. Finney*, 437 U.S. 678, 687 (1978).

85. Courts regularly have exercised this authority to remedy constitutional violations caused by overcrowding. *See Duran v. Elrod*, 713 F.2d 292, 297-98 (7th Cir. 1983), *cert. denied*, 465 U.S. 1108 (1984)

(concluding that court did not exceed its authority in directing release of low-bond pre-trial detainees as necessary to reach a population cap).

86. Where the government fails to meet its obligations to provide for adequate medical care, courts have a responsibility to remedy the resulting constitutional violation. *See Brown v. Plata*, 563 U.S. 493, 511 (2011). As a result, “[w]hen necessary to ensure compliance with a constitutional mandate, courts may enter orders placing limits on a prison’s population.” *Id.*

87. These constitutional principles make clear, consistent with the opinions of leading public health experts, that releasing Plaintiffs is the only viable remedy to ensure their safety from the threat to their health that COVID-19 poses. Plaintiffs are older adults and people with underlying medical conditions who are at particularly grave risk of severe illness or death if they contract COVID-19.

88. In the face of this great threat, social distancing and hygiene measures are Plaintiffs’ only defense against COVID-19. Those protective measures are impossible at Calhoun, where Plaintiffs share sleeping quarters, toilets, sinks and showers, eat and recreate in communal spaces, and are necessarily in close contact with the many other detainees and officers around them. Because these conditions pose a heightened risk of infectious spread, Plaintiffs face unreasonable harm from continued detention.

CLAIMS FOR RELIEF

COUNT ONE

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

89. Plaintiffs repeat and reallege each and every allegation above, as if set forth in full herein.

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

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

92. Leading public health experts agree that Plaintiffs "are at grave risk of severe illness and death" if they remain at jails like Calhoun.

Accordingly, Defendants are subjecting Plaintiffs to detention conditions that amount to punishment and that fail to ensure their safety and health.

93. For these reasons, Defendants' ongoing detention of Plaintiffs violates the Due Process Clause.

COUNT TWO
**Defendants' Detention of Plaintiffs Where Removal Is Not
Significantly Likely in the Foreseeable Future Violates
8 U.S.C. § 1231(a)(6)**

94. Petitioners reallege the foregoing paragraphs as if set forth fully herein.

95. Due process requires that immigration detention bear a reasonable relation to its purpose. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *Rosales-Garcia v. Holland*, 322 F.3d 386, 411 (6th Cir. 2003). The principal purpose of the statute that authorizes post-final-order detention, 8 U.S.C. § 1231, is to effectuate removal. Where removal cannot be effectuated, detention is not reasonably related to its purpose, would violate due process, and is not statutorily authorized.

96. Petitioners Escobar and Toma have met their burden of establishing good reason to believe that their removal is not reasonably likely in the foreseeable future. Defendants have not rebutted this showing, as they have provided no evidence that either Ms. Escobar's or Mr. Toma's removal is reasonably foreseeable. Absent such evidence, Petitioners' detention is not

authorized by statute and they are entitled to immediate release under orders of supervision.

PRAYER FOR RELIEF

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

- a. Issue a Writ of Habeas Corpus and order Plaintiffs' immediate release, with appropriate precautionary public health measures, on the ground that their continued detention violates the Due Process Clause;
- b. In the alternative, issue injunctive relief ordering Defendants to immediately release Plaintiffs, with appropriate precautionary public health measures, on the ground that their continued detention violates the Due Process Clause;
- c. Issue a declaration that Defendants' continued detention in civil immigration custody of individuals at increased risk for severe illness, including older individuals and persons of any age with underlying medical conditions that may increase the risk of serious COVID-19, violates the Due Process Clause;
- d. Declare that for persons held in post-order detention under 8 U.S.C. § 1231, including Plaintiffs Escobar and Toma, there is

good reason to believe that, due to the COVID-19 crisis, there is no significant likelihood of their removal in the reasonably foreseeable future, and that such persons, including Plaintiffs Escobar and Toma, must be released unless the government can rebut that showing;

- e. Find that Defendants have failed to rebut the showing of Plaintiffs Escobar and Toma that their removal is not significantly likely in the reasonably foreseeable future; order the government immediately to release Plaintiffs Escobar and Toma from detention under orders of supervision; and enjoin Defendants from redetaining Plaintiffs unless or until Defendants can establish that their removal is significantly likely in the reasonably foreseeable future;
- f. Award Plaintiffs their costs and reasonable attorneys' fees in this action under the Equal Access to Justice Act, as amended, 5 U.S.C. § 504 and 28 U.S.C. § 2412, and on any other basis justified under law; and
- e. Grant any other and further relief that this Court may deem fit and proper.

Dated: April 5, 2020

Respectfully submitted,

/s/ Miriam J. Aukerman

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* Application for admission forthcoming

CERTIFICATE OF SERVICE

I, Jeannie S. Rhee, certify that on April 5, 2020, I caused a true and correct copy of the foregoing document to be filed and served electronically via the ECF system. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system.

Respectfully submitted,

/s/ Jeannie S. Rhee