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13 UNITED STATES DISTRICT COURT
14 CENTRAL DISTRICT OF CALIFORNIA

15
16 NWANA ELVIRA EYERE, MARIA
DE LOS ANGELES SANTIBANEZ
17 BRAVO LEPE, WENDY LIZETTE
ORDONEZ, and AGUSTINA PINEDA
18 ORTUNO,

19 Petitioners-Plaintiffs,

20 vs.

21 CHAD F. WOLF, Acting Secretary,
U.S. Department of Homeland Security;
22 MATTHEW T. ALBENCE, Deputy
Director and Senior Official Performing
the Duties of the Director, U.S.
23 Immigration and Customs Enforcement;
24 DAVID MARIN, Director of the Los
Angeles Field Office, Enforcement and
25 Removal Operations, U.S. Immigration
and Customs Enforcement; and JAMES
26 JANECKA, Warden, Adelanto ICE
Processing Center,

27 Respondents-
28 Defendants.

Case No.

ADELANTO COVID

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

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10 **Pro hac vice* application forthcoming
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1 **I. INTRODUCTION**

2 “This is an unprecedented time in our nation’s history, filled with
3 uncertainty, fear and anxiety. But in the time of a crisis, our response to those at
4 particularly high risk must be with compassion and not apathy. The Government
5 cannot act with a callous disregard for the safety of our fellow human beings.”
6 *Castillo v. Barr*, Case No. 5:20-cv-00605-TJH-AFM, Dkt. No. 32 at 9 (C.D. Cal.
7 Mar. 27, 2020); *Hernandez v. Wolf*, Case No. 5:20-cv-00617-TJH-KS, Dkt. No. 17
8 at 13-14 (C.D. Cal. Apr. 1, 2020). And yet this is precisely what it is doing.

9 As COVID-19 spreads, public health officials are telling people to stay home
10 if they feel sick and practice social distancing at all times. But in jails, prisons, and
11 detention facilities like the Adelanto ICE Processing Center (Adelanto), those
12 options do not exist. Indeed, Adelanto’s immigrant detainees are forcibly held in
13 close proximity to one another and detainees and staff alike are denied adequate
14 sanitation and protective equipment. In the context of the COVID-19 pandemic,
15 these conditions violate the constitutional rights of immigrant detainees,
16 particularly those with health conditions that place them at heightened risk of
17 serious illness or death from COVID-19. This is precisely the conclusion reached
18 by this Court repeatedly over the last few days. “Under the Due Process Clause, a
19 civil detainee cannot be subject to the current conditions of confinement at
20 Adelanto,” where there is “potential exposure . . . to a serious, communicable
21 disease . . . [that is] very likely to cause a serious illness.” *Castillo*, Case No. 5:20-
22 cv-00605-TJH-AFM, at 9 (C.D. Cal. Mar. 27, 2020) (quoting *Helling v. McKinney*,
23 509 U.S. 25, 32 (1993)); *Hernandez*, Case No. 5:20-cv-00617-TJH-KS, Dkt. at 11-
24 12 (C.D. Cal. Apr. 1, 2020) (same); *see also Robles Rodriguez v. Wolf*, Case No.
25 5:20-cv-00627-TJH-GJS, Dkt. Nos. 32, 35-39 (C.D. Cal. Apr. 2, 2020).

26 Plaintiffs in this case have vulnerabilities similar to those of the petitioners in
27 *Castillo*, *Hernandez*, and *Rodriguez*, and their health conditions place them at
28 serious risk of life-threatening illness or death if they remain in Adelanto. Plaintiffs

1 are older adults and/or have medical conditions that lead to high risk of serious
2 illness from COVID-19 infection, including asthma, hypertension, lung disease,
3 autoimmune disorders, and physical limitations that require personal assistance
4 with intimate tasks like bathing. As detailed below, Plaintiffs’ continued detention
5 during the current COVID-19 outbreak “violates contemporary standards of
6 decency to expose anyone unwillingly to such a risk” and violates their
7 constitutional right to safety in government custody. *Helling v. McKinney*, 509
8 U.S. 25, 36 (1993).

9 This Court has the authority to order Defendants to comply with the Fifth
10 Amendment and release Plaintiffs from civil detention at Adelanto. It should do
11 so. Release from custody is the only means by which this Court can ensure that the
12 Government *not* act in callous disregard for the safety of our fellow human
13 beings. Anything short of release, leaves too much to chance—for these detainees
14 and the public.

15 **II. PARTIES**

16 1. Petitioner-Plaintiff Agustina Pineda Ortuno is a 56-year-old Mexican
17 woman detained by ICE at Adelanto for almost eight months. Ms. Ortuno suffers
18 from asthma, abnormal liver function, high blood pressure, arthritis, hypertension,
19 and enlarged lymph nodes. Ms. Ortuno currently suffers from a bad cough. Ms.
20 Ortuno has a history of traumatic brain and head injuries, which required multiple
21 brain surgeries, and she suffers from post-traumatic stress disorder, persistent
22 depressive disorder, and cognitive impairment with memory loss and
23 comprehension issues. As a consequence of her health conditions, she is at a high
24 risk for severe illness or death if she contracts COVID-19.

25 2. Petitioner-Plaintiff Wendy Lizette Ordonez is a 49-year-old Honduran
26 woman detained by ICE at Adelanto since January 2019. Ms. Ordonez has been a
27 Lawful Permanent Resident in the United States for 30 years. On March 2, 2020,
28 Ms. Ordonez underwent extensive shoulder surgery, received inadequate post-

1 operative care at Adelanto, and as a result her wounds have not healed and she has
2 not regained mobility. Additionally, she has a painful undiagnosed knee growth that
3 confines her to a wheelchair and a partially-developed left hand with limited
4 dexterity due to a congenital birth defect. As a consequence of her health
5 conditions, which require her to rely on other women in the detention center to
6 perform functions necessary to maintain proper hygiene, such as showering,
7 accessing restroom facilities, changing undergarments, laundry, and making her
8 bed, she is at a high risk for severe illness or death if she contracts COVID-19.

9 3. Petitioner-Plaintiff Nwana Elvira Eyere is a 26-year-old Cameroonian
10 woman who has been detained by ICE at Adelanto since approximately July of
11 2018. She suffers from asthma requiring the use of an inhaler, Hepatitis A, chronic
12 gastritis, and back pain. In the past month alone, Ms. Eyere's difficulties breathing
13 significantly increased but Adelanto officials have not acted on her repeated
14 requests for medical attention. As a consequence, her pre-existing respiratory issues
15 place her at significant risk for severe illness or death if she contracts COVID-19.

16 4. Petitioner-Plaintiff Angeles Santibanez Bravo Lepe ("Angeles Lepe")
17 is a 42-year-old Mexican woman detained by ICE at Adelanto since March 2019.
18 She suffers from schizophrenia and post-traumatic stress disorder, and she has a
19 history of seizure disorder and fibromyalgia. As a consequence of her health
20 conditions, she is at a high risk for severe illness or death if she contracts COVID-
21 19.

22 5. Respondent-Defendant Chad F. Wolf is the Acting Secretary for the
23 Department of Homeland Security ("DHS"). In this capacity, he has responsibility
24 for the administration of immigration laws pursuant to 8 U.S.C. § 1103(a), has
25 authority over U.S. Immigration and Customs Enforcement ("ICE") and its field
26 offices, and has authority to order the release of Plaintiffs. At all times relevant to
27 this Complaint, Defendant Wolf was acting within the scope and course of his
28 position as the Acting Secretary for DHS. Defendant Wolf is sued in his official

1 capacity.

2 6. Respondent-Defendant Matthew T. Albence is the Deputy Director
3 and Senior Official Performing the Duties of the Director of ICE. Defendant
4 Albence is responsible for ICE’s policies, practices, and procedures, including those
5 relating to immigrant detention. At all times relevant to this Complaint, Defendant
6 Albence was acting within the scope and course of his position as an ICE official.
7 He is sued in his official capacity.

8 7. Respondent-Defendant David Marin is Director for the Los Angeles
9 Field Office of Enforcement and Removal Operations (“ERO”) within ICE, a
10 federal law enforcement agency within DHS. ERO is a division of ICE that
11 manages and oversees the immigration detention system. In his capacity as Field
12 Office Director for ERO, Defendant Marin exercises control over and is a custodian
13 of immigration detainees held at Adelanto, including all Plaintiffs in this case. At
14 all times relevant to this Complaint, Defendant Marin was acting within the scope
15 and course of his employment with ICE. He is sued in his official capacity.

16 8. Respondent-Defendant James Janecka is Warden of Adelanto in San
17 Bernardino County, where all Plaintiffs are detained. Defendant Janecka is the
18 immediate, physical custodian of Plaintiffs. He is sued in his official capacity.

19 **III. JURISDICTION AND VENUE**

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

24 10. Venue lies in the United States District Court for the Central District
25 of California, the judicial district in which Plaintiffs are currently in custody. Venue
26 is proper in the Central District of California under 28 U.S.C. § 1391, as venue is
27 proper in any district in which a defendant resides, and a substantial part of the
28 events giving rise to the claims in this action took place in this District. Venue is

1 also proper under 28 U.S.C. § 2243 because the immediate custodians of all the
2 Plaintiffs reside in this District.

3 **IV. FACTS**

4 **A. COVID-19 Poses Grave Risk of Harm, Including Serious Illness or**
5 **Death, to Persons with Certain Medical Conditions.**

6 11. COVID-19, a disease caused by coronavirus, has rapidly reached
7 pandemic status. As of April 3, 2020, at least 972,303 people around the world
8 have received confirmed diagnoses of COVID-19, including 258,611 people in the
9 United States. At least 50,322 people have died globally as a result of COVID-19,
10 including 6,660 people in the United States.

11 12. In San Bernardino County, where the Adelanto ICE Processing Center
12 (Adelanto) is located, as of April 3, 2020 there were 304 confirmed cases of
13 COVID-19, a 20% increase from a day prior, including three confirmed cases in
14 Adelanto city, and eight deaths in the county as a result of the disease. Health
15 officials predict these numbers to continue to increase, perhaps exponentially.

16 13. The coronavirus that causes COVID-19 is a novel virus—it is a new
17 strain that has not been previously identified in humans. At present there is no
18 vaccine and no cure for COVID-19. No one has immunity. Currently, the only
19 known effective way to control the virus is to use preventive strategies, including
20 frequent hand cleaning using soap or hand sanitizer, regularly disinfecting
21 frequently touched surfaces, and avoiding close contact by maintaining social
22 distancing of six feet between individuals.

23 14. People over the age of fifty and those of any age with certain medical
24 conditions face greater chances of serious illness or death from COVID-19.
25 Currently-known medical conditions that increase the risk of serious complications
26 from COVID-19 include lung disease, heart disease, chronic liver disease
27 (including hepatitis patients), diabetes, asthma, hypertension, chronic neurological
28 conditions, illnesses leading to a compromised immune system (such as from

1 cancer, HIV, smoking, long-term use of certain medications, or autoimmune
2 disease), and other health or physical conditions that make individuals more
3 susceptible to infection (including physical disabilities). This list is non-exhaustive,
4 and medical experts continue expanding the list of known risk-factors. Each of the
5 Plaintiffs has one or more of the known risk-factors for developing serious
6 complications or dying from COVID-19.

7 15. In many people, COVID-19 causes fever, cough, and shortness of
8 breath. But for individuals with underlying medical conditions, shortness of breath
9 can be severe and sometimes fatal. COVID-19 can severely damage lung tissue,
10 and in some cases, can cause a permanent loss of respiratory capacity. COVID-19
11 may also cause inflammation of the heart muscle. COVID-19 may also trigger an
12 over-response of the immune system, further damaging tissues in a cytokine release
13 syndrome that can result in widespread damage to other organs, including
14 permanent injury to the kidneys and neurological injury.

15 16. Some patients exhibit the first symptoms of infection in as little as two
16 days after exposure, and their condition can seriously deteriorate in as little as five
17 days or sooner. Even younger and healthier people who contract COVID-19 may
18 require supportive care, which includes supplemental oxygen, positive pressure
19 ventilation, and in extreme cases, extracorporeal mechanical oxygenation.

20 17. Most people in higher risk categories who develop serious symptoms,
21 however, will need advanced support. Advanced support requires highly
22 specialized equipment that is in limited supply, and an entire team of care
23 providers, respiratory therapists, and intensive care physicians. Patients in high-
24 risk categories who do not die from COVID-19 should expect a prolonged
25 recovery, including the need for extensive rehabilitation for profound
26 reconditioning, neurological damage, and the loss of respiratory capacity.

27 18. The Centers for Disease Control and Prevention (“CDC”) projects that
28 COVID-19 could infect over 200 million people and kill over 1.5 million in the

1 United States over the course of the epidemic without effective public health
2 intervention. On March 19, 2020, Governor Gavin Newsom ordered all California
3 residents to stay at home unless they are getting food, caring for a relative or friend,
4 obtaining healthcare, or working in an occupation deemed “essential.” While
5 outside, residents must keep at least six feet of distance from each other.

6 **B. Adelanto ICE Detainees Face An Elevated, Substantial Risk of**
7 **COVID-19 Transmission.**

8 19. People who live in institutional settings such as immigration detention
9 centers are at high risk of infection with COVID-19, and detainees over the age of
10 50 or of any age with underlying medical conditions face grave risk of severe
11 illness and death if infected.

12 20. In immigration detention centers, including Adelanto, detainees
13 necessarily live in inescapably close quarters and have unavoidable contact with
14 other detainees and detention center. Detention facilities are not built to allow
15 detainees to maintain the recommended distance of 6 feet from others. The
16 detainees, including Plaintiffs, share toilets, sinks, showers, telephones, and other
17 items without disinfection between each use. Communal food preparation and
18 service provide little opportunity for surface disinfection. Staff arrive and leave on
19 a shift basis, and there is limited ability to adequately screen staff for new,
20 asymptomatic infection. These conditions present increased danger for the spread
21 of COVID-19 if and when it is introduced into a facility, with DHS’s own medical
22 experts describing immigration detention centers as “tinderbox[es]” for the spread
23 of the disease.

24 21. Indeed, this Court just days ago found that conditions in Adelanto
25 make it ripe for the spread of COVID-19:

26 At Adelanto, a holding area can contain 60 to 70 detainees, with a
27 large common area and dormitory-type sleeping rooms housing four or
28 six detainees with shared sinks, toilets and showers. Guards regularly
rotate through the various holding areas several times a day. At meal

1 times – three times a day – the 60 to 70 detainees in each holding area
2 line up together, sometimes only inches apart, in the cafeteria. The
3 guards, detainees and cafeteria workers do not regularly wear gloves or
4 masks to prevent the spread of the coronavirus. While detainees have
5 access to gloves, there is no requirement that they wear them.

6 Detainees do not have access to masks or hand sanitizer

7 *Castillo v. Barr*, Case No. 5:20-cv-00605-TJH-AFM, Dkt. No. 32 at 3–4 (C.D. Cal.
8 Mar. 27, 2020); *Hernandez v. Wolf*, Case No. 5:20-cv-00617-TJH-KS, Dkt. No. 17
9 at 5 (C.D. Cal. Apr. 1, 2020).

10 22. Detention centers have limited options to implement the social
11 distancing that is now required in response to COVID-19. Detention centers are
12 densely populated, with shared spaces for hygiene, meals, medical evaluations,
13 etc.—and limited access to adequate soap, water, or alcohol gel. The combination
14 of a high density of individuals, even a handful of asymptomatic carriers, and
15 inadequate access to the tools needed to limit spread will lead to a very high
16 proportion of cases in ICE detention facilities.

17 23. ICE has not adequately prepared to prevent the spread of COVID-19
18 in its detention centers. The Honorable Dolly M. Gee has recognized that ICE’s
19 own COVID-19 Guidance, on its face, is deficient:

20 The ICE Guidance asserts that it was updated on March 26, 2020 and
21 that ICE implements CDC recommendations, but the section on its
22 website about how it is specifically addressing conditions in detention
23 has not been updated since March 15, 2020, and does not mention
24 social distancing, increased personal hygiene, or increased testing and
25 medical care.

26 *See Flores v. Barr*, Case No. 2:85-cv-04544-DMG-AGR, Dkt. No. 740 at 7 (C.D.
27 Cal. Mar. 28, 2020). While ICE updated its guidance again on April 1, 2020, the
28 relevant portion—regarding protective measures for detainees—still has not been
updated from the March 15, 2020 version Judge Gee cites.

29 24. COVID-19 infections have already been confirmed in other ICE
30 facilities. A third party leaked an internal DHS report, which shows that as of

1 March 18, 2020, nine detainees had been isolated and twenty-four were being
2 monitored across ten different ICE facilities. Moreover, one hundred and twenty
3 ICE employees were, at that time, self-quarantined. ICE reported its first COVID-
4 19 case at a detention center on March 24, 2020. Since then, as of April 1, 2020,
5 the number has grown to at least twelve confirmed cases in New Jersey, Arizona,
6 Colorado, Texas, and Georgia.

7 25. Given the widespread shortage of COVID-19 testing in the United
8 States, detention facilities simply cannot conduct aggressive, widespread testing to
9 identify all positive cases of COVID-19. For this reason, any assertion as to the
10 number of COVID-19 transmissions at an institution where testing remains
11 unavailable is functionally meaningless. Without a rigorous testing regime, it is
12 impossible to conclude that COVID-19 has not already entered Adelanto.

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

15 26. The only option to protect Plaintiffs and others from COVID-19, given
16 the current conditions at Adelanto, is to release Plaintiffs from detention. Public
17 health experts and immigration detention experts alike have recommended the
18 release of vulnerable detainees from custody because risk mitigation is the only
19 known strategy that can protect vulnerable groups from COVID-19.

20 27. Dr. Craig Haney, a correctional health expert, warns that “[if DHS]
21 does not act immediately to reduce its immigration detention population, COVID-
22 19 is likely going to spread rapidly throughout its immigration detention centers,
23 overburdening the detention center medical care program and surrounding
24 community hospitals, resulting in likely deaths.” Further, Dr. Haney’s professional
25 opinion is “that adult immigration prisons must reduce their populations urgently in
26 order to allow the necessary social distancing in response to the COVID-19
27 Pandemic.”

28 28. Dr. Parveen Parmar, an emergency medicine practitioner and public

1 health researcher who regularly cares for incarcerated patients reviewed Plaintiffs’
2 declarations and medical records, and has studied the available Detainee Death
3 Reviews in ICE Detention. Based on her expert opinion, she concluded that “the
4 combination of crowding, inadequate access to hygiene, as well as substandard
5 medical care in ICE detention facilities, and specifically in Adelanto, put
6 [Plaintiffs] at risk of significant morbidity and mortality resulting from infection
7 with COVID-19. I recommend their release.”

8 29. In a whistleblower letter to Congress in February, DHS’ medical
9 experts Dr. Scott Allen and Dr. Josiah Rich urged that “*it is essential to consider*
10 *releasing all detainees who do not pose an immediate risk to public safety*” and
11 recommended that at the *minimum*, “DHS should consider releasing all detainees in
12 high risk medical groups such as older people and those with chronic diseases.”
13 They concluded that “acting immediately will save lives not of only those detained,
14 but also detention staff and their families, and the community-at-large.”

15 30. On March 26, 2020, Attorney General William Barr issued a directive
16 to the Bureau of Prisons to “utilize home confinement, where appropriate, to protect
17 the health and safety of BOP personnel and the people in [their] custody,”
18 specifying that “home confinement might be more effective in protecting” inmates’
19 health.

20 31. The former Acting Director of ICE, John Sandweg, has stated that
21 “ICE can, and must, reduce the risk [COVID-19] poses to so many people, and the
22 most effective way to do so is to drastically reduce the number of people it is
23 currently holding.”

24 32. In the last several weeks, heeding the guidance of public health and
25 correctional health experts, multiple courts, including this Court, have also ordered
26 the release of similarly-situated detained persons in light of the severe threats posed
27 by COVID-19.

28 33. On March 23, 2020, in a published order, the Ninth Circuit *sua sponte*

1 ordered the release of an immigrant detainee because of the danger posed by
2 COVID-19. “[I]n light of the rapidly escalating public health crisis, which public
3 health authorities predict will especially impact immigration detention centers, the
4 court *sua sponte* orders that Petitioner be immediately released from detention and
5 that removal of Petitioner be stayed pending final disposition by this court.”

6 *Xochihua-Jaimes v. Barr*, No. 18-71460 (9th Cir. Mar. 23, 2020) (Order).

7 34. Several other courts have ordered the release of individuals in both
8 federal and state criminal systems across the country. *See, e.g., Coronel v. Decker*,
9 20-cv-2472, 2020 WL 1487274 (S.D.N.Y. Mar. 27, 2020) (ordering immediate
10 release of four petitioners with chronic medical conditions on due process grounds);
11 *Basank v. Decker*, No. 1:20-cv-02518, 2020 WL 1481503 (S.D.N.Y. Mar. 26,
12 2020) (same, for ten petitioners); *Jovel v. Decker*, 20 Civ. 308 (GBD) (SN), 2020
13 WL 1467397 (S.D.N.Y. Mar. 26, 2020) (ordering release of petitioner with
14 unspecified medical problems within eight days unless bond hearing provided);
15 *United States v. Stephens*, 1:15-cr-00095 (AJN), Doc. No. 2798 (S.D.N.Y. March
16 19, 2020) (explaining that “the unprecedented and extraordinarily dangerous nature
17 of the COVID-19 pandemic has become apparent” and that “inmates may be at a
18 heightened risk of contracting COVID-19 should an outbreak develop”); *United*
19 *States v. Barkman*, 3:19-cr-0052-RCJ-WGC, 2020 U.S. Dist. LEXIS 45628 (D.
20 Nev. March 17, 2020) (modifying intermittent confinement as a condition of
21 probation due to the COVID-19 pandemic); *In re. Extradition of Alejandro Toledo*
22 *Manrique*, 2020 WL 1307109 (N.D. Cal. March 19, 2020) (ordering release on
23 bond despite government assertions that facility has preparedness plan in place and
24 no cases have been confirmed); *United States v. Raihan*, No. 20-cr-68 (BMC) (JO),
25 Dkt. No. 20 at 10:12-19 (E.D.N.Y. Mar. 12, 2020) (deciding to continue a criminal
26 defendant on pretrial release rather than remand to the Metropolitan Detention
27 Center in part due to risk of COVID-19); *United States v. Perez*, 19 Cr. 297 (PAE),
28 2020 WL 1329225, at *1 (S.D.N.Y. Mar. 19, 2020) (ordering release of detainee

1 with serious lung disease and other significant health problems); *United States v.*
 2 *Fellela*, No. 3:19-cr-79, 2020 U.S. Dist. LEXIS 49198, at *1 (D. Conn. Mar. 20,
 3 2020) (ordering release of diabetic criminal defendant awaiting sentencing, even
 4 though there had been no confirmed COVID-19 cases in the facility and despite
 5 government’s steps to prevent the spread of coronavirus); *United States v. Stephens*,
 6 15-cr-95 (AJN), 2020 WL 1295155, at *2 (S.D.N.Y. Mar. 19, 2020) (releasing
 7 pretrial detainee in light of “the unprecedented and extraordinarily dangerous nature
 8 of the COVID-19 pandemic”); *People ex rel. Stoughton on behalf of Little et al. v.*
 9 *Brann*, Index No. 260154/2020 (Bronx Sup. Ct. Mar. 25, 2020) (ordering
 10 immediate release of 106 petitioners held at Rikers on a non-criminal technical
 11 parole violation who are older or have underlying medical conditions); *State v.*
 12 *Ferguson*, Order, No. 2019-270536-FH (Mich. Ct. App. Mar. 23, 2020) (ordering
 13 defendant’s immediate release on bond due to “the public health factors arising out
 14 of the present public health emergency”); *In re Request to Commute or Suspend*
 15 *County Jail Sentences*, Dkt. No. 084230 (N.J. Mar. 22, 2020) (court consent order,
 16 creating immediate presumption of release for every person serving a county jail
 17 sentence based on COVID-19); *Thakker v. Doll*, Case No. 1:20-cv-00480-JEJ, Dkt.
 18 No. 47 (M.D. Pa. Mar. 31, 2020).

19 35. This Court has ordered release of multiple detainees at Adelanto,
 20 finding that “[u]nder the Due Process clause, a civil detainee cannot be subject to
 21 the current conditions of confinement at Adelanto,” where there is “potential
 22 exposure ... to a serious, communicable disease ... [that is] very likely to cause a
 23 serious illness.” *Castillo v. Barr*, Case No. 5:20-cv-00605-TJH-AFM, Dkt. No. 32
 24 (C.D. Cal. Mar. 27, 2020) (quoting *Helling*, 509 U.S. at 32); *Hernandez v. Wolf*,
 25 Case No. 5:20-cv-00617-TJH-KS, Dkt. No. 17 at 11-12 (C.D. Cal. Apr. 1, 2020);
 26 *Robles Rodriguez v. Wolf*, Case No. 5:20-cv-00627-TJH-GJS, Dkt. Nos. 32, 35-39
 27 (C.D. Cal. Apr. 2, 2020).

28 **D. Plaintiffs Should Be Released from Custody Because They Are**

1 **Particularly Vulnerable to Serious Illness or Death If Infected by**
2 **COVID-19.**

3 36. Plaintiffs in this case are women who are particularly vulnerable to
4 serious illness or death if infected by COVID-19 and who are currently detained at
5 Adelanto as they await the adjudication of their civil immigration cases.

6 37. **Agustina Pineda Ortuno.** Ms. Ortuno is a 56-year-old citizen of
7 Mexico. Ms. Ortuno has been detained by ICE at Adelanto since approximately
8 August 2019. Ms. Ortuno is a *Franco* class member with appointed pro bono
9 counsel representing her in her immigration proceedings. Ms. Ortuno has filed a U
10 visa application based on the abuse she suffered by her husband. Her application
11 remains pending before U.S. Citizenship and Immigration Services (USCIS).

12 38. Ms. Ortuno suffers from asthma, abnormal liver function, high blood
13 pressure, arthritis, hypertension, and enlarged lymph nodes. Ms. Ortuno also has a
14 history of traumatic brain and head injuries resulting from spousal abuse, which
15 required multiple brain surgeries and caused persistent depressive disorder, post-
16 traumatic stress disorder, and cognitive impairment with memory loss and
17 comprehension issues.

18 39. Ms. Ortuno currently suffers from a bad cough. Ms. Ortuno submitted
19 two written requests seeking medical treatment for her cough, and the only
20 treatment she has received was someone providing her with salt water to gargle.

21 40. Ms. Ortuno has stated that many women are coughing at Adelanto. “I
22 had to use half a roll of toilet paper to cover my mouth to try and stop from
23 coughing into the air. However, in the past few days we have run out of toilet
24 paper. When I asked the detention guards for something to cough into, they told
25 me to cough into a woman’s sanitary pad. My lungs hurt from all of the coughing.
26 We have not had toilet paper to use when we use the toilet.”

27 41. Ms. Ortuno is critically vulnerable to COVID-19 as a result of her
28 chronic and acute health conditions, including asthma and a persistent cough. She

1 describes conditions at Adelanto which are unsanitary and likely a breeding ground
2 spread of the COVID-19 disease. Ms. Ortuno has U.S. citizen children in Orange
3 County, California with whom she can live upon release.

4 42. **Wendy Lizette Ordonez.** Ms. Ordonez is a 49-year-old Honduran
5 citizen who is detained by ICE at Adelanto. Ms. Ordonez has been a Lawful
6 Permanent Resident in the United States for 30 years. She has been detained at
7 Adelanto since approximately January 2019. Ms. Ordonez's immigration case is
8 currently pending review by the Ninth Circuit Court of Appeals. She was
9 unrepresented throughout her immigration case until she recently retained pro
10 representation who are assisting her with pursuing several forms of immigration
11 relief.

12 43. Ms. Ordonez has multiple conditions which limit her ability to care for
13 herself during her detention at Adelanto. Her right hand is missing most of its
14 fingers as a result of a congenital birth defect. Ms. Ordonez underwent extensive
15 surgery on her right shoulder on March 2, 2020, from which she is still healing.
16 Ms. Ordonez's bandages were not changed for the first eleven days following
17 surgery, despite her request for someone to do so each day. She has not yet
18 regained mobility in her shoulder. On March 29, 2020, Ms. Ordonez slipped in the
19 shower and hurt the same right arm.

20 44. Ms. Ordonez also has a painful undiagnosed knee growth that has
21 confined her to a wheelchair. Despite seeking medical treatment repeatedly for
22 knee pain, she did not receive treatment until March 16, 2020, after she fell and a
23 detention officer finally took her to the medical unit.

24 45. On March 16, 2020, when she was in the medical unit for treatment of
25 her knee pain, Ms. Ordonez witnessed a doctor become visibly upset because the
26 doctor was treating another detainee who had been quarantined, but the detainee
27 was not wearing proper protective gear.

28 46. As a consequence of Ms. Ordonez's health conditions, which require

1 her to rely on other women detained at Adelanto to perform actions necessary to
2 maintain her personal hygiene, such as showering, doing her laundry, accessing
3 restroom facilities, and making her bed, she is at a high risk for severe illness or
4 death if she contracts COVID-19. Ms. Ordonez has a daughter and friend in
5 Phoenix, Arizona with whom she can live upon release.

6 47. **Nwana Elvira Eyere.** Ms. Eyere is a 26-year-old Cameroonian
7 woman. Ms. Eyere has been detained by DHS since she came to the United States
8 in 2017 as an asylum seeker and has been detained at Adelanto since approximately
9 July 2018. Ms. Eyere's asylum case is currently pending review by the Ninth
10 Circuit Court of Appeals.

11 48. Ms. Eyere suffers from asthma, for which she requires use of an
12 inhaler. In the past month Ms. Eyere has repeatedly experienced trouble breathing,
13 and despite numerous written requests, she has not seen a doctor at Adelanto.
14 During Ms. Eyere's detention, she developed Hepatitis A. Ms. Eyere also has
15 hypertension, chronic gastritis, and ulcers that have been aggravated during her
16 detention.

17 49. Ms. Eyere is critically vulnerable to COVID-19 as a result of her
18 chronic health conditions, including asthma and hypertension. Ms. Eyere's U.S.
19 citizen sister resides in Ohio, and Ms. Eyere can live with her upon release.

20 50. **Angeles Lepe.** Ms. Lepe is a 42-year-old Mexican woman who has
21 been detained by ICE at Adelanto since March 2019. Ms. Lepe is a *Franco* class
22 member with appointed pro bono counsel representing her in her immigration
23 proceedings.

24 51. Ms. Lepe suffers from schizophrenia and post-traumatic stress
25 disorder, and she has a history of seizure disorder and fibromyalgia. As a
26 consequence of her health conditions, Ms. Lepe is vulnerable to COVID-19. Ms.
27 Lepe's U.S. Citizen sister resides in Riverside County, and Ms. Lepe can live with
28 her upon release.

1 **V. LEGAL FRAMEWORK**

2 **A. Plaintiffs Have a Constitutional Right to Reasonable Safety from**
3 **Infectious Disease in Custody.**

4 52. The federal government has an affirmative duty to provide conditions
5 of reasonable health and safety for those in its custody. As the Supreme Court has
6 explained, “when the State takes a person into its custody and holds him there
7 against his will, the Constitution imposes upon it a corresponding duty to assume
8 some responsibility for his safety and general well-being.” *DeShaney v. Winnebago*
9 *County Dept. of Soc. Servs.*, 489 U.S. 189, 199-200 (1989); *see also Helling v.*
10 *McKinney*, 509 U.S. 25, 32 (1993). This responsibility includes providing those in
11 its custody with “food, clothing, shelter, medical care, and reasonable safety.” 489
12 U.S. at 200.

13 53. The Eighth Amendment’s prohibition against cruel and unusual
14 punishment is violated where conditions pose an unreasonable risk of future harm,
15 even if that harm has not yet come to pass. *Helling*, 509 U.S. at 33 (“It would be
16 odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening
17 condition in their prison on the ground that nothing yet had happened to them.”)
18 Specifically, the government may not “ignore a condition of confinement that is
19 sure or very likely to cause serious illness,” including communicable diseases. *See*
20 *id.* at 32.

21 54. These principles equally apply in the context of immigration detention.
22 Immigrant detainees, even those with prior criminal convictions, are civil detainees
23 held pursuant to civil immigration laws. *Zadvydas v. Davis*, 533 U.S. 678, 690
24 (2001). Under the Fifth Amendment’s Due Process Clause, a civil detainee cannot
25 be subjected to conditions that amount to punishment. *See King v. Cty. Of L.A.*,
26 885 F.3d 548, 556-557 (9th Cir. 2018). Civil detainees, like Plaintiffs here, are
27 entitled to conditions of confinement that are at least equal to those of convicted
28 prisoners and to those of criminal pretrial detainees. *Jones v. Blanas*, 393 F.3d 918,

1 933-34 (9th Cir. 2004), *cert. denied*, 546 U.S. 820 (2005); see also *King*, 885 F.3d
2 at 557 (finding presumption of unconstitutional punitive treatment where
3 confinement conditions for civil detainees are similar to those faced by pre-trial
4 criminal detainees). A condition of confinement for a civil immigration detainee
5 violates the Constitution “if it imposes some harm to the detainee that significantly
6 exceeds or is independent of the inherent discomforts of confinement and is not
7 reasonably related to a legitimate governmental objective or is excessive in relation
8 to the legitimate governmental objective.” *Unknown Parties v. Johnson*, No. CV-
9 15-00250-TUC-DCB, 2016 WL 8188563, at *5 (D. Ariz. Nov. 18, 2016), *aff’d sub*
10 *nom. Doe v. Kelly*, 878 F.3d 710 (9th Cir. 2017).

11 55. As this Court has explained, “[t]he law is clear – the Government
12 cannot put a civil detainee into a dangerous situation, especially where that
13 dangerous situation was created by the government.” *Castillo*, Case No. 5:20-cv-
14 00605-TJH-AFM, at 6 *citing Hernandez v. City of San Jose*, 897 F.3d 1125, 1133
15 (9th Cir. 2018). Indeed, the government has a duty to civil immigration detainees
16 like Plaintiffs to reasonably abate known risks such as those posed here by COVID-
17 19. *See Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016).
18 Government officials violate due process where, as here, they “knew, or should
19 have known” of a condition that “posed an excessive risk to health” and fail to take
20 appropriate action. *Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017); *Charles v.*
21 *Orange Cty.*, 925 F.3d 73, 87 (2d Cir. 2019) (“Deliberate indifference . . . can be
22 established by either a subjective or objective standard: A plaintiff can prove
23 deliberate indifference by showing that the defendant official recklessly failed to act
24 with reasonable care to mitigate the risk that the condition posed to the pretrial
25 detainee even though the defendant-official knew, *or should have known*, that the
26 condition posed an excessive risk to the plaintiff’s health or safety.” (internal
27 quotation marks, citation, and alterations omitted)). The risk of contracting
28 COVID-19 in tightly-confined spaces, especially jails, is now exceedingly obvious

1 and should be remedied.

2 **B. ICE Has the Authority to Release Detainees in Its Custody.**

3 56. ICE is authorized to release people who are vulnerable to severe illness
4 or death if they contract COVID-19 in order to comply with constitutional
5 requirements. For example, the regulations governing ICE's release authorities
6 state that serious medical conditions are a reason to parole an individual, as
7 "continued detention would not be appropriate" in such cases, or when their
8 detention is not "in the public interest." 8 C.F.R. § 212.5(b)(1), (5). Indeed, ICE
9 has routinely exercised discretion to release vulnerable detainees, like Plaintiffs,
10 from custody. At Adelanto, however, ICE has routinely declined to exercise that
11 discretion, resulting in the prolonged detention of individuals who are eligible for
12 release.

13 57. The Due Process Clause of the Fifth Amendment requires ICE to
14 release detainees, like Plaintiffs, where civil detention has become punitive and
15 where release is the only remedy to prevent this impermissible punishment.

16 **C. This Court Should Exercise Its Authority to Order Plaintiffs'
17 Release to Vindicate Their Fifth Amendment Rights.**

18 58. This Court should exercise its authority to order Plaintiffs' release to
19 ensure their constitutional rights, as it has done recently for other Adelanto
20 detainees.

21 59. As the constitutional principles and public health experts make clear,
22 releasing Plaintiffs is the only viable remedy to ensure their safety from the threat
23 to their health that COVID-19 poses. Plaintiffs are people with medical conditions
24 who are at particularly grave risk of severe illness or death if they contract COVID-
25 19.

26 60. Practicing social distancing and hygiene measures, which are
27 Plaintiffs' only defense against COVID-19, is practically impossible in the
28 environment of an immigration detention center where Plaintiffs share toilets, sinks,

1 and showers, and are in close contact with the many other detainees and officers
2 around them. Plaintiffs face unreasonable harm from continued detention because
3 these conditions increase the likelihood of viral spread.

4 61. In its March 27 and April 1 orders releasing Adelanto detainees in the
5 *Castillo* and *Hernandez* matters, this Court explained;

6 “Civil detainees must be protected by the Government. [Detainee
7 Petitioners] have not been protected. They are not kept at least 6 feet
8 apart from others at all times. They have been put into a situation
9 where they are forced to touch surfaces touched by other detainees,
10 such as with common sinks, toilets and showers. Moreover, the
11 Government cannot deny the fact that the risk of infection in
immigration detention facilities – and jails – is particularly high if an
asymptomatic guard, or other employee, enters a facility. ...

12 This is an unprecedented time in our nation’s history, filled with
13 uncertainty, fear and anxiety. But in the time of a crisis, our response
14 to those at particularly high risk must be with compassion and not
15 apathy. The Government cannot act with a callous disregard for the
safety of our fellow human beings.”

16 *Castillo*, Case No. 5:20-cv-00605-TJH-AFM, at 9; *Hernandez*, Case No. 5:20-cv-
17 00617-TJH-KS, at 13-14.

18 **VI. CLAIM FOR RELIEF**

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

22 62. The Fifth Amendment of the Constitution guarantees that civil
23 detainees, including all immigrant detainees, may not be subjected to punishment.
24 The federal government violates this substantive due process right when it subjects
25 civil detainees to conditions of confinement that do not ensure those detainees’
26 safety and health.

27 63. Defendants’ conditions of confinement subject Plaintiffs to heightened
28 risk of contracting COVID-19, and if infected, Plaintiffs particular vulnerabilities

1 place them at risk serious illness and death. Defendants violate Plaintiffs’ rights
2 under the Due Process Clause by subjecting Plaintiffs to a substantial risk of serious
3 harm.

4 64. Experts specializing in correctional medical care and infectious disease
5 uniformly affirm that people vulnerable to COVID-19 who are held in immigration
6 detention are at significant risk of serious illness or death. Accordingly, Defendants
7 are subjecting Plaintiffs to detention conditions that amount to punishment and that
8 fail to ensure their safety and health.

9 65. For these reasons, Defendants’ ongoing detention of Plaintiffs violates
10 the Due Process Clause.

11 **VII. PRAYER FOR RELIEF**

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

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

Dated: April 3, 2020

MORGAN, LEWIS & BOCKIUS LLP

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