IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MARIO SALAZAR and MIKHAIL VASSERMAN,

Petitioners-Plaintiffs,

vs.

Case No. 2:20-cv-03382-ES

JOHN TSOUKARIS, in his official capacity as Field Office Director, Enforcement and Removal Operations, Newark Field Office, U.S. Immigration and Customs Enforcement, et al.,

Respondents-Defendants.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS-PETITIONERS' MOTION FOR TEMPORARY RESTRAINING ORDER

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INTRODUCTION

Plaintiffs file this motion as the COVID-19 pandemic rages across the United States. Public health experts, including doctors who work with the Department of Homeland Security, have repeatedly sounded the alarm about the extreme speed with which the virus will attack people confined in our jails, prisons, and detention centers. They have urged officials to immediately release people from custody, both to protect their lives and slow the virus's spread in the community. On Sunday, March 29, 2020, our country passed a grim milestone: Patrick Jones, a 49-year-old man who, like the Plaintiffs, suffered from medical conditions placing him at high risk of harm from COVID-19, became the first person in U.S. federal custody known to have died from this disease.

Here in New Jersey, Respondent-Defendants ("Defendants") are detaining Petitioners-Plaintiffs Mario Pablo Salazar and Mikhail Vasserman ("Plaintiffs") at Essex County Correctional Facility (ECCF) in Newark, in civil custody of Defendant U.S. Immigration and Customs Enforcement ("ICE"). Four staff members and one person detained at the ECCF have already tested positive for COVID-19, and other people detained are reported to be exhibiting symptoms consistent with COVID-19 without access to testing. In short, the pandemic is already inside this facility. Both Mr. Vasserman and Mr. Salazar, like Patrick Jones, have underlying medical conditions that place them "at high risk of serious illness or death if exposed to and infected with COVID-19." Meyer Decl.[1] Section V (discussing Plaintiffs). While confined at the ECCF, Mr. Vasserman and Mr. Salazar have no way to distance themselves from other people,

[1] With the exception of the Declaration of Farrin Anello, the declarations cited in this memorandum of law were filed as attachments to the Petition and Complaint.

nor to take other basic steps to protect themselves. Thus, the only way to protect Plaintiffs from the irreparable harm of severe illness or death is to order their immediate release.

Plaintiffs are likely to succeed on the merits of their core due process claim because the Due Process Clause of the Fifth Amendment forbids the government from knowingly allowing those in its custody to suffer and die from infectious disease.[2] Plaintiffs' continued detention at the ECCF during the COVID-19 outbreak tramples this constitutional protection. Moreover, public health favors their release: should Plaintiffs become seriously ill at the ECCF, they will require intensive treatment, likely at outside facilities. Meyer Decl. ¶ 18. To the extent treatment will still be possible for them, that will burden an already over-taxed healthcare system. *Id.* ¶ 29.

In New Jersey, the Attorney General and County Prosecutors have agreed, pursuant to a court consent order, to create an immediate presumption of release for every person serving a county jail sentence because of COVID-19. *In the Matter of the Request to Commute or Suspend County Jail Sentences*, Consent Order, No. 084230 (N.J. Mar. 22, 2020), Ex. U to Haas Decl. Around the country, a growing number of courts have similarly concluded that individuals must be released from detention in light of COVID-19. *See* Argument I.A.1, *infra*. This Court should join this growing chorus. For the reasons discussed below, the Court should immediately issue a temporary restraining order requiring ICE to temporarily release Plaintiffs from custody so they have a chance to avoid infection and the risk of complications and death from COVID-19.

[2] Mr. Vasserman also has pled a claim for a bond hearing, because his detention of 16 months has become unreasonably prolonged, and due process requires a constitutionally adequate bond hearing. *See Diop v. ICE/Homeland Security*, 656 F.3d 221, 233 (3d Cir. 2011) ("[W]hen detention becomes unreasonable, the Due Process Clause demands a hearing, at which the Government bears the burden of proving that continued detention is necessary to fulfill the purposes of the detention statute."). In light of the urgent need to seek relief from the threat posed by COVID-19, The present motion focuses on Count I of the Petition. However, counsel for the Plaintiffs are prepared to provide additional briefing on Count II, should the Court need to reach this issue.

FACTUAL BACKGROUND

I. Plaintiffs are at Grave Risk of Harm, Including Serious Illness or Death.

Plaintiffs suffer from serious health conditions. Mr. Vasserman has poorly-controlled diabetes, which has likely caused him to lose feeling in his legs. He also has high blood pressure and high cholesterol, and he will soon need open-heart surgery to replace his aortic valve—an invasive surgery he first underwent in 2007. He takes 11 medications daily to address his many health problems. Vasserman Decl. ¶¶ 7–9. Mr. Salazar suffers from poorly-controlled Type II Diabetes and has been coughing up blood regularly. Salazar Decl. ¶¶ 4–6. As a result of these serious underlying medical conditions, Plaintiffs are at the highest risk of grave illness or even death if they contract COVID-19. Meyer Decl. Section V. And, as discussed below, the probability that they will contract COVID-19 if they remain in the ECCF is high.

II. Conditions at the ECCF Increase the Risk of COVID-19 Infection.

Four staff members and one ICE detainee from the ECCF have already tested positive for COVID-19. Ex. I to Haas Decl. Given that testing is generally unavailable, the infection rate at the ECCF is likely significantly higher. *See* Meyer Decl. ¶ 17, 42. Because the virus is highly contagious, particularly in close quarters, and can survive for long periods on inanimate surfaces, once the disease appears – as it has in the ECCF – it will inevitably spread. *See id.* ¶ 42. Therefore, the risk "of an imminent and widespread COVID-19 outbreak at the facility" is "high." *Id.*

Without a vaccine to prevent contracting COVID-19 or an FDA-approved treatment, the only way vulnerable people like Plaintiffs can avoid serious health outcomes from COVID-19, including death, is to prevent infection. *Id.* ¶¶ 22, 25. The only known means of reducing the risk of infection are social distancing and heightened sanitization. *Id.* ¶ 25.

In responding to the COVID-19 pandemic, social distancing measures are necessary not only to minimize the risk of individual disease, but also to "flatten the curve" of infection for

everyone, so that the medical facilities can provide adequate care to infected individuals. Schriro Decl. ¶ 27; *See also* Scott A. Allen, MD, FACP and Josiah Rich, MD, MPH, Letter to House and Senate Committees on Homeland Security (Mar. 19, 2020), *available at* https://whistleblower.org/wp-content/uploads/2020/03/Drs.-Allen-and-Rich-3.20.2020-Letter-to-Congress.pdf (stating that releasing detainees "will save lives of not only those detained, but also detention staff and their families, and the community-at-large") (Ex. S to Haas Decl.).

Inside the ECCF, meanwhile, neither detained people nor staff members can practice "social distancing." *See* Meyer Decl. ¶¶ 11, 38, 44; Schriro Decl. ¶¶ 14-16, 22. Rather, COVID-19 has found an ideal environment in which to spread. *Barkman*, 2020 U.S. Dist. LEXIS 45628, at *5 (recognizing that "[c]onditions of pretrial confinement create the ideal environment for the transmission of contagious disease"). Many detainees live in dormitories that hold up to 70 detainees at a time. Santana Decl. ¶ 7. Mr. Vasserman lives in a single room with 48 detainees. Vasserman Decl. ¶ 14. Mr. Salazar lives in a single room with more than 50 detainees. Salazar Decl. ¶ 8. Detainees must share this one large room for sleeping, eating, and socializing. Their beds are placed only a few feet apart. Vasserman Decl. ¶ 14. All of the detainees in each dormitory must also share only a small number of sinks, toilets, and showers, and detainees from multiple dormitories share one small law library. Santana Decl. ¶ 7. Food is prepared and served communally, providing little opportunity for disinfection. Schriro Decl., ¶¶ 14–16, 19.

The conditions at the ECCF also prevent detainees from practicing heightened sanitization. Because detention facilities limit access to items and services necessary to maintaining hygiene, such as soap and clean clothes, the risk of disease spread is even higher. *Id*. ¶¶ 15–16, 18; Meyer Decl. ¶¶ 13–14, 16–19. Mr. Salazar, for example, cannot regularly wash his hands because he only has access to soap when he showers. Salazar Decl. ¶ 9. Detainees have reported skipping showers

because a broken boiler caused water to be so hot it was unusable. Santana Decl. ¶ 10. They have even reported the presence of maggots in sinks. *Id*. Detention facilities offer little to no instruction about sanitation to detainees, but when it is provided, it is generally communicated in English and sometimes Spanish, not the native languages of many detainees, like Plaintiff Vasserman, who speaks Russian. *See* Schriro Decl. ¶ 17.

The government itself has found ECCF facilities to be unhygienic. A 2019 report of the Department of Homeland Security Office of the Inspector General documented unsanitary conditions at the ECCF and expressed concern that these conditions could harm the health of detainees. Dep't of Homeland Security, Office of the Inspector General, *Issues Requiring Action at the Essex County Correctional Facility in Newark, New Jersey* 7-8 (2019), https://www.oig.dhs.gov/sites/default/files/assets/2019-02/OIG-19-20-Feb19.pdf (Ex. Q to Haas Decl.). These conditions make ECCF a "tinderbox" "primed for the rapid and extensive spread" of COVID-19. Meyer Decl. ¶ 38.

Dr. Jamie Meyer, an Assistant Professor at Yale School of Medicine who specializes in infectious diseases, attests that Defendants' protocols to address the pandemic are "woefully inadequate." *Id.* ¶ 41. The plans for intake, isolating sick detainees, and providing personal protection equipment to medical staff are all insufficient to prevent COVID-19 from spreading in the ECCF. *Id.* ¶¶ 39–41.

III. ICE Continues to Expose Plaintiffs to Dangerous Conditions of Confinement Despite Being Advised of These Dangers.

As noted above, Plaintiffs are at heightened risk of serious illness or death if they contract COVID-19. Release from detention is the ***only*** way to protect them. "[B]est correctional and correctional health care practice would require, at a minimum, the preemptive release of individuals who are at-risk of serious illness or death if they become infected with COVID-19."

Schriro Decl. ¶ 23. The Department of Homeland Security's own medical experts have publicly recommended that ICE release vulnerable individuals, including those with underlying health conditions. Schriro Decl. ¶¶ 23, 25. *See also* Scott A. Allen, MD, FACP and Josiah Rich, MD, MPH, Letter to House and Senate Committees on Homeland Security (Mar. 19, 2020), *available at* https://whistleblower.org/wp-content/uploads/2020/03/Drs.-Allen-and-Rich-3.20.2020-Letter-to-Congress.pdf (Ex. S to Haas Decl.). The former Acting Director of ICE, John Sandweg, has similarly stated that "ICE can, and must, reduce the risk [COVID-19] poses to so many people, and the most effective way to do so is to drastically reduce the number of people it is currently holding." John Sandweg, *I Used to Run ICE. We Need to Release the Nonviolent Detainees*, The Atlantic (Mar. 22, 2020), https://www.theatlantic.com/ideas/archive/2020/03/release-ice-detainees/608536/ (Ex. T to Haas Decl.).

Defendants have failed to take this necessary step, despite being aware of the risks to medically vulnerable individuals like Plaintiffs. On March 20, 2020, the American Civil Liberties Union of New Jersey (ACLU-NJ) joined more than 40 other advocacy organizations in sending a letter to Defendant Tsoukaris, urging him to release all ICE detainees and suspend ICE enforcement operations because of the high risk of spreading COVID-19 in detention facilities and the severe health consequences of infection for vulnerable individuals. Ex. J to Haas Decl. On March 25, 2020, Defendant Tsoukaris responded, stating that ICE had prudentially chosen to release several detainees on the basis of criteria such as age and medical conditions. Ex. K to Haas Decl. Defendant's letter thereby acknowledged that underlying medical conditions – the very things that make Plaintiffs so vulnerable to COVID-19 – can justify release in light of the current

pandemic. The ECCF has now released dozens of detainees for the same reason. Ex. H to Haas Decl. Yet Plaintiffs remain detained at the ECCF despite their serious medical conditions.

LEGAL STANDARD

On a motion for a temporary restraining order, the plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Kongtcheu v. Secaucus Healthcare Ctr., LLC*, No. 2:13-CV-1856, 2014 WL 2436048, at *2 (D.N.J. May 30, 2014) ("The standard for granting a temporary restraining order is the same as the standard for granting a preliminary injunction."). Courts have broad power to fashion equitable remedies to address constitutional violations in prisons, *Hutto v. Finney*, 437 U.S. 678, 687 n.9 (1978), and "[w]hen necessary to ensure compliance with a constitutional mandate, courts may enter orders placing limits on a prison's population." *Brown v. Plata*, 563 U.S. 493, 511 (2011) (ordering California state prison system to reduce crowding).

ARGUMENT

I. Plaintiffs Meet their Burden to Show the Need for a Temporary Restraining Order.

The only way to protect the Plaintiffs' constitutional due process rights is to immediately release them from detention. Detention conditions that expose people to life-threatening infectious disease are constitutionally intolerable, and the danger that Plaintiffs face – severe illness and potential death – is quintessential irreparable harm.

There is also an overwhelming public interest in limiting the spread of COVID-19, both to minimize further infections and to reduce strain on overwhelmed health systems. The balance of equities weighs heavily in favor of Plaintiffs, whose health and lives are at stake.

A. Plaintiffs Are Likely to Succeed on the Merits.

1. Plaintiffs' Continued Detention Violates Their Due Process Rights.

Immigrant detainees, including those with prior criminal convictions, are civil detainees entitled to the same Fifth and Fourteenth Amendment due process protections as pretrial detainees. *See Zadvydas v. Davis,* 533 U.S. 678, 690 (2001); *E. D. v. Sharkey*, 928 F.3d 299, 306-07 (3d Cir. 2019). Civil detainees are "entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." *Aruanno v. Johnson*, 683 F. App'x 172, 175 (3d Cir. 2017) (quoting *Youngberg v. Romeo*, 457 U.S. 307, 321–22 (1982)); *see also Bell v. Wolfish,* 441 U.S. 520, 535 n.16 (1979) ("Due process requires that a pretrial detainee not be punished."). As a result, conditions that would violate the Eighth Amendment are more than enough to also violate a civil detainee's due process rights. *See Natale v. Camden Cty. Corr. Facility*, 318 F.3d 575, 581 (3d Cir. 2003) (explaining that "the Fourteenth Amendment affords pretrial detainees protections 'at least as great as the Eighth Amendment protections available to a convicted prisoner'") (quoting *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983)); *see also Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2475 (2015) (explaining that "pretrial detainees (unlike convicted prisoners) cannot be punished at all. . . .").

Plaintiffs are likely to establish a violation of their Due Process rights through conditions of confinement that expose them to the serious risks associated with COVID-19. "To determine whether challenged conditions of confinement amount to punishment, this Court determines whether a condition of confinement is reasonably related to a legitimate governmental objective; if it is not, we may infer 'that the purpose of the governmental action is punishment that may not be constitutionally inflicted upon detainees *qua* detainees.'" *Sharkey*, 928 F.3d at 307 (quoting *Hubbard v. Taylor*, 538 F.3d 229, 232 (3d Cir. 2008)).

Here, Plaintiffs are detained in a facility that has already had four staff members and one detainee test positive for COVID-19. *See* Ex. I to Haas Decl. They live in conditions that make social distancing impossible, and where their access to basic hygiene products like soap is limited. Plaintiffs are subject to overcrowded conditions, including dormitories that currently house more than 50 detainees who sleep, eat, and socialize in one room. Beds are placed only a few feet apart, and detainees must share only a small number of sinks, toilets, and showers. *See supra* at 4.

Moreover, the ECCF's plans for minimizing COVID-19 transmission are "woefully inadequate." Meyer Decl. ¶ 41. The facility does not appear to be even testing detainees for COVID-19, even though some are exhibiting symptoms consistent with this disease or have been in contact with others who have tested positive. Santana Decl. ¶ 19. Given that the virus already has reached the ECCF, the failure to test puts lives at risk. Defendants have not taken sufficient action to address the "the rapid community spread of this virus . . . and the likelihood of it being spread before a patient is symptomatic[.]" *United States v. Barkman*, Case No. 3:19-cr-0052 2020 U.S. Dist. LEXIS 45628, at *9 (D. Nev. Mar. 17, 2020) (suspending confinement order after considering overcrowding and lack of personal hygiene materials, insufficient access to medical care, and lack of COVID-19 tests in detention facility); *see Basank v. Decker*, No. 1:20-cv-02518, 2020 WL 1481503, at *12 (S.D.N.Y. Mar. 26, 2020) ("The spread of COVID-19 is measured in a matter of a single day – not weeks, months, or years – and Respondents appear to ignore this condition of confinement that will likely cause imminent, life-threatening illness.").

In light of these conditions, one court has already ordered ICE to release other individuals detained at the ECCF who are at high risk of harm from COVID-19 on Due Process grounds. *See Basank*, No. 1:20-cv-02518 (ordering the immediate release of ten petitioners with chronic medical conditions under the Due Process Clause, including individuals detained at the ECCF). Courts

have also ordered releases on Due Process grounds from other ICE detention facilities. *See, e.g.*, *Coronel v. Decker*, Opinion & Order, 20-cv-2472 (AJN), 2020 WL 1487274 (S.D.N.Y. Mar. 27, 2020) (ordering the immediate release of four petitioners with chronic medical conditions under the Due Process Clause); *Castillo v. Barr*, Temporary Restraining Order and Order to Show Cause, CV 20-00605 TJH (AFMx) (C.D. Cal. Mar. 27, 2020) (same, for two petitioners). And other courts around the country have ordered releases due to the unique dangers posed by COVID-19. *See Jovel v. Decker*, No. 1:20-cv-00308-GBD-SN, 2020 WL 1467397 (S.D.N.Y. Mar. 26, 2020) (ordering release of petitioner with unspecified medical problems within 8 days unless petitioner is provided with a bond hearing); *Calderon Jimenez v. Wolf*, Memorandum and Order, C.A. No. 18-10225-MLW (D. Mass. Mar. 26, 2020), ECF No. 507 (ordering release of detainee because "we're living in the midst of a coronavirus epidemic," "some infected people die," and "being in a jail enhances risk" as "[s]ocial distancing" and "[w]ashing hands" is "difficult or impossible"); *In re Extradition of Alejandro Toledo Manrique*, No. 19-71055, 2020 WL 1307109, at *1 (N.D. Cal. Mar. 19, 2020) (ordering the release of a detainee after rejecting "the government's suggestion that [the plaintiff] should wait until there is a confirmed outbreak of COVID-19 in [the facility] before seeking release" as "impractical" because "[b]y then it may be too late"); *United States v. Perez*, No. 19 CR. 297 (PAE), 2020 WL 1329225, at *1 (S.D.N.Y. Mar. 19, 2020) (ordering the release of a detainee with serious lung disease and other significant health problems); *United States v. Fellela*, No. 3:19-cr-79, 2020 U.S. Dist. LEXIS 49198, at *1 (D. Conn. Mar. 20, 2020) (ordering the release of a diabetic criminal defendant who was awaiting sentencing); *United States v. Stephens*, 15-cr-95, 2020 WL 1295155, (AJN), at *2 (S.D.N.Y. Mar. 19, 2020) (reconsidering a prior bail determination and releasing a pretrial detainee in light of "the unprecedented and extraordinarily dangerous nature of the COVID-19 pandemic"); *Little v. Brann*, Writ of Habeas Corpus (N.Y.

Sup. Ct. Mar. 25, 2020) (granting the immediate release of 110 petitioners held at Rikers on a non-criminal technical parole violation who are older or have underlying medical conditions); *People v. Ferguson*, Order, No. 2019-270536-FH, 2020 Mich. App. LEXIS 2202, at *1 (Mich. Ct. App. Mar. 23, 2020) (ordering defendant's immediate release on bond due to "the public health factors arising out of the present public health emergency").[3]

In the face of ample medical evidence that social distancing and hygiene are the only way to avoid COVID-19, detaining medically vulnerable Plaintiffs in close proximity to one another and without the sanitation necessary to combat the spread of the virus serves ***no*** legitimate purpose. *See, e.g.*, *Duran v. Merline*, 923 F. Supp. 2d 702, 714-16 (D.N.J. 2013) (denying defendants summary judgment on detainees' due process claim in part based on evidence of severe overcrowding and unhygienic conditions that "led to the spread of disease"--conditions that are not "rationally related to [any legitimate purposes]"); *cf. Barkman*, 2020 U.S. Dist. LEXIS 45628, at *6-9 (noting the dangers posed by cramped conditions, lack of access to personal hygiene items,

[3] Courts have likewise delayed or prohibited entry into criminal custody in light of the pandemic. *E.g.*, *United States v. Garlock*, No. 18-CR-00418-VC-1, 2020 WL 1439980 (N.D. Cal. Mar. 25, 2020) (sua sponte extending criminal defendant's surrender date" because "[b]y now it almost goes without saying that we should not be adding to the prison population during the COVID-19 pandemic if it can be avoided" given "the health risks—to inmates, guards, and the community at large—created by large prison populations"); *Waterkeeper All. Inc. v. Spirit of Utah Wilderness, Inc.*, No. 10-CV-1136 (NSR), 2020 WL 1332001, at *1 (S.D.N.Y. Mar. 23, 2020) (extending criminal defendant's surrender date "[i]n light of recent COVID-19 pandemic affecting New York" and related directives from court's chief judge); *United States v. Barkman*, Case No. 3:19-cr-0052, 2020 U.S. Dist. LEXIS 45628, at *1, *3 (D. Nev. Mar. 17, 2020) (suspending confinement order because "[c]onditions of pretrial confinement create the ideal environment for the transmission of contagious disease"); *United States v. Raihan*, No. 20-cr-68 (BMC) (JO), Dkt. No. 20 at 10:12–19 (E.D.N.Y. Mar. 12, 2020) (ordering that criminal defendant continue on pretrial release rather than be remanded to detention center due, in part, to court's recognition of the fact that "[t]he more people we crowd into that facility, the more we're increasing the risk to the community").

and limited medical care and equipment in detention facility). Nor is detention under these circumstances reasonably related to the enforcement of immigration laws. *See Unknown Parties v. Johnson*, No. CV-15-00250-TUC-DCB, 2016 WL 8188563, at *5 (D. Ariz. Nov. 18, 2016), *aff'd sub nom. Doe v. Kelly*, 878 F.3d 710 (9th Cir. 2017). In *Zadvydas v. Davis*, the Supreme Court held that "[t]here is no sufficiently strong special justification . . . for indefinite civil detention." 533 U.S. 678, 690 (2001). If the government's interest in effectuating removal and protecting the community cannot justify indefinite detention, it also cannot justify the similarly "potentially permanent" medical harm and death that Plaintiffs could well face. *See id.* at 690–91.

2. Defendants' Deliberate Indifference to Plaintiffs' Health and Safety Violates Even the Stricter Eighth Amendment Standards.

The violation of Plaintiffs' due process rights described above is enough for Plaintiffs to establish that they are likely to succeed on the merits. But even if that were not the case, the conditions that Plaintiffs face are so severe that they violate not only the Fifth Amendment, but also the stricter prohibition of cruel and unusual punishment that applies to convicted prisoners who sue under the Eighth Amendment. As noted above, if a condition of confinement violates prisoners' rights under the Eighth Amendment, it necessarily violates the rights of civil detainees as well. *See Natale v. Camden Cty. Corr. Facility*, 318 F.3d 575, 581 (3d Cir. 2003).

To prevail on a claim that conditions of confinement violate the Eighth Amendment, a plaintiff "must meet two requirements: (1) the deprivation alleged must objectively be 'sufficiently serious,' and (2) the 'prison official must have a sufficiently culpable state of mind,'" such as deliberate indifference to the prisoner's health or safety. *Thomas v. Tice*, 948 F.3d 133, 138 (3d Cir. 2020) (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)).

Placing Plaintiffs in the path of COVID-19 despite the significant likelihood that they will experience serious illness or death if infected clearly constitutes a "sufficiently serious"

deprivation. The Supreme Court has recognized that the government violates the Eighth Amendment when it crowds prisoners into cells with others who have "infectious maladies," "even though the possible infection might not affect all of those exposed." *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (citing *Hutto v. Finney,* 437 U.S. 678, 682 (1978)). This Court has likewise recognized that a plaintiff states an Eighth Amendment claim when forced into living conditions where infectious disease is rampant. *See Monmouth Cty. Corr. Inst. Inmates v. Lanzaro*, 595 F. Supp. 1417, 1430–31, 1438 (D.N.J. 1984), *as amended*, 717 F. Supp. 268 (D.N.J. 1989) (holding that the Eighth Amendment rights of prisoners living in overcrowded cells, with inoperable showers, an over-utilized medical department, and dirty and unsanitary conditions that "create health and safety hazards" were violated because those individuals "are deprived of basic human needs such as habitable shelter and are generally forced to endure conditions which amount to an unnecessary infliction of pain") (marks omitted); *see also Stewart v. Kelchner*, No. 06-2463, 2007 WL 9718681, at *13 (M.D. Pa. May 11, 2007), *report and recommendation adopted*, 2007 WL 9718672 (M.D. Pa. June 1, 2007) (allowing conditions of confinement claim to proceed after the plaintiff was placed in a cell where he was exposed to and developed Methicillin-resistant Staphylococcus aureus (MRSA)).

Moreover, the test for the "seriousness" of a medical need is flexible, and is satisfied either by expert medical testimony or when it is "so obvious that a lay person would easily recognize the necessity for a doctor's attention." *Atkinson v. Taylor*, 316 F.3d 257, 272–73 (3d Cir. 2003) (internal quotation marks and citation omitted). Plaintiffs satisfy either version of the test. A layperson would surely recognize the risks COVID-19 poses to Plaintiffs under their current circumstances. *Cf. Garlock*, 2020 WL 1439980 (noting that "[b]y now it almost goes without saying that we should not be adding to the prison population during the COVID-19 pandemic if it

can be avoided"). In addition, Plaintiffs have submitted expert evidence demonstrating the serious risk COVID-19 poses to them if they remain in the ECCF. *See generally* Meyer Decl.; Schriro Decl.; Ex. S to Haas Decl. (Letter of Dr. Allen & Dr. Rich). As discussed above, Plaintiffs are at specific and heightened risk of serious illness or death.

Furthermore, the record contains overwhelming evidence that Defendants are aware of the risk posed by COVID-19. Individuals within the ECCF have tested positive for the disease, and medical experts for the Department of Homeland Security have specifically identified the risk of its spread. Beginning in February 2020, medical experts for DHS repeatedly alerted ICE to this threat and have now urged official to consider releasing, at a minimum, detainees who are particularly vulnerable to COVID-19 See Ex. S to Haas Decl. (Letter of Dr. Allen & Dr. Rich), 2-3, 5-6. Advocacy groups here in New Jersey, including the ACLU-NJ, also notified Defendants about the threat posed by COVID-19 in ICE detention centers. Ex. J to Haas Decl.

Indeed, ICE has acknowledged that underlying medical conditions that render individuals vulnerable to COVID-19 can justify release. Ex. K to Haas Decl. (Letter from John Tsoukaris). To date, ICE has released about 26 people from Essex based on their age and medical vulnerabilities. Ex. H to Haas Decl. The Plaintiffs both have medical conditions that put them at high risk from COVID-19, and yet they remain detained at the ECCF, with their lives in peril.

Finally, in addition to Defendants' actual knowledge of the risk, the evidence establishes Defendants' deliberate indifference to the risks posed by COVID-19 because those risks are obvious. *See Farmer v. Brennan*, 511 U.S. 825, 842 (1994); *Phillips v. Superintendent Chester SCI*, 739 F. App'x 125, 129 n.7 (3d Cir. 2018) (applying *Farmer* standard). As other courts have now recognized, "[t]he risk of contracting COVID-19 in tightly-confined spaces, especially jails,

is now exceedingly obvious." *Basank*, No. 1:20-cv-02518, at *12 (ordering releases of people detained by ICE at ECCF); *see also supra* at 10-11.

In short, the evidence shows that COVID-19 poses a serious risk and that Defendants are aware of that risk, both from explicit notice they have received, and because it is obvious. Defendants' failure to release Plaintiffs from these intolerable conditions is deliberate indifference to that risk, in violation of the Plaintiffs' constitutional rights. *See Farmer*, 511 U.S. at 842.

B. Infection with a Lethal Virus that Lacks Any Vaccine or Cure Constitutes Irreparable Harm.

Plaintiffs have moved for a temporary restraining order because the difference of even just a few days may be the difference between life and death. The number of COVID-19 cases is increasing exponentially, and several COVID-19 cases have already been detected inside the ECCF There is a strong likelihood that absent immediate relief from the Court, Plaintiffs will be infected with COVID-19, and due to their medical conditions they face a heightened risk of dying or suffering long-term health consequences from this virus. This threat of imminent harm warrants immediate relief. *See Helling*, 509 U.S. at 33 (explaining that "a prison inmate . . . could successfully complain about demonstrably unsafe drinking water without waiting for an attack of dysentery."). For this reason, Judge Torres held recently, in a case involving ECCF, that "[t]he risk that Petitioners will face a severe, and quite possibly fatal, infection if they remain in immigration detention constitutes irreparable harm warranting a TRO." *Basank*, No. 1:20-cv-02518, at *5-10 (collecting cases and reviewing evidence supporting this conclusion).

Moreover, even the failure to ***test*** for a disease has been sufficient to support a finding of irreparable harm. *See Boone v. Brown*, No. 05-0750, 2005 WL 2006997, at *14–15 (D.N.J. Aug. 22, 2005) (granting preliminary injunction requiring prison to provide detainee with testing for highly contagious and infectious disease after holding that "it seems patently clear that a continued

denial of [such] testing . . . is sufficient to demonstrate irreparable harm"); *Austin v. Pa. Dep't of Corr.*, No. 90-7497, 1992 WL 277511, at *8 (E.D. Pa. Sept. 29, 1992) (granting preliminary injunction requiring prison to develop testing and protocol for tuberculosis); *see also Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) ("correctional officers have an affirmative obligation to protect prisoners from infectious disease"). The risks here are even more extreme. The ECCF's ongoing failure to provide conditions that protect the basic health and safety of Plaintiffs risks causing them irreparable harm. *See Padilla v. U.S. Immigration & Customs Enforcement,* No. 19-35565, 2020 WL 1482393, at *9 (9th Cir. Mar. 27, 2020) (affirming district court's finding that "the deprivation of a fundamental constitutional right and its attendant harms, which range from physical, emotional, and psychological damages" in immigration detention constitutes irreparable harm justifying injunctive relief).

C. There is a Strong Public Interest in Plaintiffs' Release.

The public interest strongly favors Plaintiffs' release. "It is always in the public interest to ensure that any prisoner litigation affecting fundamental liberty interests comport with the requirements of due process." *Boone*, 2005 WL 2006997, at *15. Here, the public has a further, and indeed overwhelming interest, in minimizing the spread of COVID-19 and avoiding the additional burdens Plaintiffs would place on the healthcare system if they were to become seriously ill. Release is necessary not only to save Plaintiffs from imminent risk, but also to protect the community at large.

First, the disease is highly contagious and has no vaccine or cure, meaning that each new infection may result in still more individuals becoming infected. The release of people most vulnerable to COVID-19 thus reduces the overall health risk for everyone, detainees and facility staff alike. *See* Schriro Decl. ¶ 23; Meyer Decl. ¶ 44. As detailed above, immigration detention

facilities face greater risk of infectious spread because of crowding, the high percentage of detained people vulnerable to serious illness in the event of COVID-19 transmission, and limited availability of medical care. Meyer Decl. ¶¶ 13–16. Reducing the size of the population of individuals in detention is "the single most important infection prevention strategy for COVID 19," which will "reduce the infection to individuals in these facilities and staff." Meyer Decl. ¶ 45; *see also* Schriro Decl. ¶ 23. Plaintiffs' release thus *furthers* ICE's interests in maintaining a healthy and orderly environment at ICE Facilities.

Second, there is a strong public interest in minimizing the spread of COVID-19 to help address the overwhelmed state of the U.S. medical system and communities outside of detention. Because detention facilities often rely on outside hospitals and emergency departments to provide intensive medical care, releasing vulnerable individuals like Plaintiffs will help to avoid taxing an already overburdened medical system. Meyer Decl. ¶ 18; *see also Raihan*, No. 20-cr-68 (BMC) (JO), Dkt. No. 20 at 10:12–19 ("The more people we crowd into that facility, the more we're increasing the risk to the community."). If released, Mr. Salazar and Mr. Vasserman would return to live with their families, where they can self-quarantine for the recommended 14-day period. Salazar Decl. ¶ 11; Vasserman Decl. ¶ 18.

D. The Balance of Equities Favors Releasing the Plaintiffs.

Finally, the balance of equities heavily favors Plaintiffs' release, in light of the serious illness or death they risk from COVID-19. Defendants' countervailing interest in indefinitely detaining the Plaintiffs in dangerous conditions is weak at best. To the contrary, ICE has in the past exercised its discretion to release vulnerable detainees like Plaintiffs, especially for medical

reasons.[4] *See* Lorenzen-Strait Decl. ¶ 7 (describing ICE's longstanding policy of releasing medically vulnerable people from custody, based upon a determination of whether a person had "any physical or mental condition would make them more susceptible to medical harm while in ICE custody"); *see also id.* ¶ 8 ("Under this rubric, ICE would have considered individuals at high risk of suffering complications and/or death if they were to contract a highly infectious and incurable disease such as COVID-19 to be detainees with special vulnerabilities, eligible for release from detention."). ICE has a number of tools available – beyond physical detention – to meet its enforcement goals, as demonstrated by the enforcement measures already used when individuals with serious medical conditions are released from detention. Schriro Decl. ¶ 24; Lorenzen-Strait Decl. ¶¶ 14-15. The situation presented by COVID-19 is no different.[5]

II. The Court Should Not Require Plaintiffs to Provide Security Prior to Issuing a Temporary Restraining Order.

Rule 65(c) invests the district court with discretion to waive the requirement that a court issuing a temporary restraining order require the movant to provide security to pay the potential costs and damages of the enjoined party. *Temple Univ. v. White*, 941 F.2d 201, 219 (3d Cir. 1991). District courts routinely exercise this discretion to require no security in cases brought by indigent and/or incarcerated people. *See, e.g., S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot.*,

[4] Plaintiffs do not argue that they can force ICE to exercise discretionary authority to release them. Rather, the point is that historically, ICE practice has been to release at-risk detainees.

[5] If anything, under the unusual circumstances of this pandemic, there are fewer concerns than normal about flight risk from releasing detainees. *See In re Extradition of Alejandro Toledo Manrique*, 2020 WL 1307109, at *1 ("The Court's concern was that Toledo would flee the country, but international travel is hard now. Travel bans are in place, and even if Toledo got into another country, he would most likely be quarantined in God-knows-what conditions, which can't be all that tempting."); *see also* Schriro Decl. ¶ 24 (referencing a recent report by the Government Accountability Report stating that 99 percent of immigrant participants in ICE's alternative to detention project appear for subsequent court hearings).

145 F. Supp. 446, 504 (D.N.J. 2001) (holding that, under Third Circuit law, indigent and non-profit plaintiffs enforcing civil rights need not post a security bond); *Simcox v. Delaware County*, No. 91-6874, 1992 WL 97896, at *6 (E.D. Pa. May 5, 1992) (same for incarcerated plaintiff proceeding *in forma pauperis*). This Court should do the same here.

CONCLUSION

The country faces a public health crisis of epic proportions. COVID-19 presents risks to all of us, and has forced us to come together as a country, put partisanship aside, and do what is right for the community and the public health. We must allow and encourage everyone to engage in practices that flatten the curve—social distancing and vigorous hygiene. This protects the most vulnerable among us and gives our overtaxed healthcare system the chance to treat those most gravely affected by COVID-19.

Plaintiffs are among the most vulnerable to this disease. So long as they remain detained at ECCF, they are sitting ducks who have no choice but to wait for this deadly virus to attack them. The only humane and constitutional solution, consistent with the advice of public health experts, is to order Plaintiffs' immediate release so they can take reasonable measures to protect themselves. Plaintiffs urge this Court to join the growing chorus of courts who have already taken critical action to save lives. Plaintiffs respectfully request that Court to grant their motion for a temporary restraining order and order their immediate release.

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Respectfully Submitted,

/s/ Jeanne LoCicero

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**Petition for permission to file pro hac vice forthcoming*

**Petition for permission to file pro hac vice forthcoming; not admitted in D.C.; practice limited to federal court.*