

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

MARIO SALAZAR and MIKHAIL
VASSERMAN,

Petitioners-Plaintiffs,

vs.

Case No. _____

JOHN TSOUKARIS, in his official capacity as
Field Office Director, Enforcement and Removal
Operations, Newark Field Office, U.S.
Immigration and Customs Enforcement;
MATTHEW ALBENCE, in his official capacity
as Deputy Director and Senior Official
Performing the Duties of the Director, U.S.
Immigration and Customs Enforcement; CHAD
WOLF, in his official capacity as Acting
Secretary, U.S. Department of Homeland
Security; U.S. IMMIGRATION AND
CUSTOMS ENFORCEMENT; WILLIAM P.
BARR, in his official capacity as Attorney
General of the United States, WILLIAM
ANDERSON, in his official capacity as Warden
of Essex County Correctional Facility, and GUY
CIRILLO, in his official capacity as Warden of
Essex County Correctional Facility,

Respondents-Defendants.

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

INTRODUCTION

1. The global COVID-19 pandemic has already reached inside the walls of the Essex County Correctional Facility (“ECCF”) in Newark, New Jersey. This urgent petition for a writ of habeas corpus and complaint for injunctive relief is filed on behalf of two men held in detention

at the ECCF who have serious pre-existing medical conditions. Mario Salazar and Mikhail Vasserman face a “high risk of serious illness or death if exposed to and infected with COVID-19.” (Declaration of Dr. Jaimie Meyer, Part V). “Because exposure to and infection with COVID-19 is likely in ECCF and because the facility is ill-equipped to manage individuals during an inevitable outbreak,” the only way to protect the Petitioners-Plaintiffs (“Plaintiffs”) is to ensure they are immediately released. (*Id.*).

2. Four staff members and one immigration detainee from the ECCF, where Plaintiffs are detained, have already tested positive for COVID-19. Moreover, immigration detainees at the ECCF live in extremely close quarters, sharing numerous spaces such as recreation areas, bathrooms, and law libraries. This makes it impossible for them to engage in effective social distancing. They also have limited ability to maintain the heightened hygiene that is recommended to prevent the spread of COVID-19, due to limited access to soap and other hygiene items.

3. Clustering vulnerable individuals under these circumstances and waiting for COVID-19 to explode at the ECCF creates not only a humanitarian crisis, but also a constitutional one. Courts have long recognized that the Constitution forbids the government from allowing the people in its custody to suffer and die from infectious disease. The nature of the pandemic and the conditions of confinement at the ECCF make it impossible for Respondents-Defendants (“Defendants”) to protect vulnerable Plaintiffs from risk of infection. That risk of harm is “so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk.” *Helling v. McKinney*, 509 U.S. 25, 36 (1993).

4. In New Jersey, the state Attorney General and County Prosecutors 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). Over 50 people have now been released from ECCF pursuant to this order.

5. New Jersey is not the only jurisdiction that has taken action in the face of this enormous public health threat. Around the country, courts, government officials, and prison systems are increasingly recognizing that release from detention is the only way to protect vulnerable detainees from COVID-19. Last week, a panel of the Ninth Circuit *sua sponte* ordered the immediate release from civil detention of an immigrant who is in removal proceedings, holding that release was necessary “[i]n light of the rapidly escalating public health crisis, which public health authorities predict will especially impact immigration detention centers.”

Xochihua-Jaimes v. Barr, Order, No. 18-71460 (9th Cir. Mar. 23, 2020). A growing consensus of courts have reached the same conclusion. *See Coronel v. Decker*, Opinion & Order, 20-cv-2472 (AJN) (S.D.N.Y. Mar. 27, 2020) (ordering immediate release of four petitioners with chronic medical conditions on due process grounds); *Castillo v. Barr*, TRO and Order to Show Cause, CV 20-00605 TJH (AFMx) (C.D. Cal. Mar. 27, 2020) (same for two petitioners); *Basank v. Decker*, Order, No. 1:20-cv-02518 (S.D.N.Y. Mar. 26, 2020) (same for ten petitioners); *Jovel v. Decker*, No. 1:20-cv-00308-GBD-SN (S.D.N.Y. Mar. 26, 2020) (ordering release of petitioner with unspecified medical problems within 8 days unless bond hearing provided); *see also 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 74-year old 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 release of 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 release of diabetic criminal defendant awaiting sentencing, even though there had been no confirmed COVID-19 cases in the facility and despite government’s precautions to prevent the spread of coronavirus); *United States v. Stephens*, 19cr95, 2020 WL 1295155, (AJN) (S.D.N.Y. Mar. 19, 2020) (releasing 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) (immediate release of 106 petitioners held at Rikers on a non-criminal technical parole violation who are older or have underlying medical conditions); *State v. Ferguson*, Order, No. 2019-270536-FH (Mich. Ct. App. Mar. 23, 2020) (immediate release on bond due to “the public health factors arising out of the present public health emergency”).

6. This Court has the authority and the obligation to order Defendants to comply with the Fifth Amendment and release Plaintiffs from civil detention. For the reasons discussed below, this Court should require Defendants to temporarily release Plaintiffs from custody to afford them the chance to avoid infection with COVID-19, and thereby to avoid the heightened risk of serious illness or death that this infection would cause them. COVID-19 has already entered the Essex County Correctional Facility. Plaintiffs implore this Court to issue an order to protect their lives.

JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction over this matter under 28 U.S.C. § 1331 (federal question), 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).

8. Venue lies in the United States District Court for District of New Jersey because Plaintiffs are detained by Defendants at a jail located in Essex County which is within the District

of New Jersey. 28 U.S.C. § 2242. Venue is proper in the District of New Jersey because a substantial portion of the relevant events occurred in the District and because several Defendants reside in the District. 28 U.S.C. § 1391(b), (e)(1).

PARTIES

Petitioners-Plaintiffs

9. Petitioner-Plaintiff Mikhail Vasserman is a 57-year-old refugee from Russia who has been detained by ICE at ECCF for nearly 16 months. He suffers from several health problems, including poorly controlled diabetes that has likely caused him to lose feeling in his legs; high blood pressure; and high cholesterol. He was temporarily paralyzed when he was young, and has had open-heart surgery to replace an aortic valve. He is detained while waiting for a decision on his immigration appeal, which was unopposed by the government. Mr. Vasserman lives in a large room of 48 people with only a couple of feet between each detainee's bed. He has encountered several sick detainees in his dorm, including one man sleeping in the neighboring bed who had a fever for days before he was moved, several men who had flu-like symptoms for two weeks, and one man whom others in his dorm believe has coronavirus and has been covering his face with a shirt. (Declaration of Mikhail Vasserman.)

10. Petitioner-Plaintiff Mario Salazar is a man in his forties who has lived in the United States for over a decade and is currently detained at ECCF. Mr. Salazar has Type II Diabetes, and his blood sugar levels are not well-controlled inside the facility. He also regularly coughs up blood, and has high cholesterol. He lives in a dormitory with more than 50 other detainees, and frequently shares spaces with other detainees, including by sleeping in the same room as all the other detainees in his dormitory. (Declaration of Mario Salazar.)

Respondents-Defendants

11. Respondent-Defendant John Tsoukaris is the Field Office Director for Enforcement and Removal Operations (“ERO”) in the Newark Field Office of Immigration and Customs Enforcement (“ICE”), an agency within the U.S. Department of Homeland Security. ERO is a division of ICE that manages and oversees the immigration detention system. In his capacity as Field Director for ERO, Defendant Tsoukaris exercises control over and is a custodian of immigration detainees held at all of the correctional facilities in New Jersey that house ICE detainees, including the Essex County Correctional Facility. At all times relevant to this Complaint, Defendant Tsoukaris was acting within the scope and course of his employment with ICE. He is sued in his official capacity.

12. Respondent-Defendant Matthew T. Albence is the Deputy Director and Senior Official Performing the Duties of the Director of ICE. Defendant Albence 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. At all times relevant to this complaint, Defendant Albence was acting within the scope and course of his position as an ICE official. He is sued in his official capacity.

13. Respondent-Defendant Chad Wolf is sued in his official capacity as the Acting Secretary for DHS. In this capacity, he has responsibility for the administration of immigration laws pursuant to 8 U.S.C. § 1103(a), has authority over ICE and its field offices, and has authority to order the release of Plaintiffs. At all times relevant to this complaint, Mr. Wolf was acting within the scope and course of his position as the Acting Secretary for DHS. He also is a legal custodian of Plaintiffs. He is sued in his official capacity.

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

15. Respondent-Defendant William P. Barr is the Attorney General of the United States and the most senior official in the U.S. Department of Justice. He has authority to interpret immigration laws and adjudicate removal cases and custody redeterminations. The Attorney General delegates this responsibility to the Executive Office of Immigration Review (“EOIR”), which administers the immigration courts and the Board of Immigration Appeals. He is sued in his official capacity.

16. Respondent-Defendant William Anderson is a Warden at Essex County Correctional Facility in Newark, New Jersey, where Plaintiffs are detained. Defendant Anderson is an immediate, physical custodian of these Plaintiffs. He is sued in his official capacity.

17. Respondent-Defendant Guy Cirillo is a Warden at Essex County Correctional Facility in Newark, New Jersey, where Plaintiffs are detained. Defendant Cirillo is an immediate, physical custodian of these Plaintiffs. He is sued in his official capacity.

STATEMENT OF FACTS

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

18. In the United States, more than 81,300 people have already tested positive for the virus, and more than 1,000 have died. Donald G. McNeil Jr., *The U.S. Now Leads the World in Coronavirus Cases*, New York Times (Mar. 26, 2020), <https://nyti.ms/3bw3tPQ> (Ex. M to Haas Decl.). The United States now has more positive cases than any other country in the world. *Id.* In

New Jersey, there are more than 11,124 confirmed cases and 140 known deaths. Brent Johnson, *N.J. coronavirus cases rise to 11,124 with 140 deaths. Another big surge as 2,289 new positive tests and 32 new deaths are announced*, NJ.com (March 28, 2020) (Ex. N to Haas Decl.).

19. The virus that causes COVID-19 is highly contagious and can survive for long periods on inanimate surfaces, making it inevitable that the disease will spread among communities where it appears. Meyer Decl. ¶ 42.

20. Outcomes from COVID-19 vary from a mild upper respiratory infection to death. Individuals who are at low risk may experience mild symptoms, while high risk individuals may suffer pneumonia, sepsis, and death from the disease. Meyer Decl. ¶ 23.

21. Individuals with serious underlying medical conditions are at the highest risk of severe disease and death if they are infected with COVID-19. *See* Meyer Decl. ¶ 23, Section V.

22. There is no vaccine to prevent COVID-19. There is no known cure or FDA-approved treatment for COVID-19 at this time. The only way to protect vulnerable people from serious health outcomes, including death, is to prevent them from being infected with the coronavirus. Meyer Decl. ¶¶ 22, 25.

23. COVID-19 infects people who come into contact with respiratory droplets that contain the coronavirus, such as those produced when an infected person coughs or sneezes. *Id.* ¶ 22; *see also* Centers for Disease Control, *How to Protect Yourself* (Mar. 18, 2020) (Ex. O to Haas Decl.).¹

24. Such droplets can spread between people even at a distance of up to six feet. Meyer Decl. ¶ 22. Because the virus can survive for long periods on inanimate surfaces, it is also possible

¹ https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fprepare%2Fprevention.html.

to contract the virus after touching a surface that has had contact with the virus. *Id.* ¶ 42. Thus, the only known means of minimizing the risk of infection are social distancing and increased sanitization. *Id.* ¶ 25

25. As a result, governments across the country and around the world have sought to make social distancing into public policy. New Jersey’s governor issued an executive order closing businesses and requiring residents to stay at home until further notice. He has also imposed aggressive social distancing measures to mitigate the further spread of COVID-19 in the state, changed election procedures, halted evictions and foreclosures, suspended all elective surgeries, and required childcare centers to close on April 1. *See generally* New Jersey Exec. Orders 103-110 (Mar. 2020) (Ex. P to Haas Decl.). The idea behind these actions is that, by “flattening the curve,” those most vulnerable will be least likely to become infected and, if they do, the numbers of infected individuals will be low enough that medical facilities will have enough beds, masks, and ventilators for those who need them. *See* Declaration of Dr. Dora Schriro, ¶ 27.

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

26. Immigration detention facilities are enclosed environments where contagious diseases can easily spread. Schriro Decl. ¶¶ 14-16, 22; Meyer Decl. ¶ 11. People live in close quarters and are subject to security measures that make the “social distancing” that is needed to effectively prevent the spread of COVID-19 impossible. Schriro Decl., ¶¶ 14, 22. Food preparation and food service is communal, with little opportunity for disinfection. Schriro Decl., ¶¶ 14-16, 19. Moreover, because detention facilities also limit access to items and services that are necessary to maintaining hygiene, such as soap and clean clothes, the risk of disease spread is even higher. Schriro Decl., ¶¶ 15-16, 18; Meyer Decl. ¶¶ 9-21, 45-6. Typically, little to no instruction regarding

sanitation is provided to detainees; when it is given, it is generally communicated in English and sometimes Spanish, languages Plaintiff Vasserman does not speak. Schriro Decl. ¶ 17.

27. At the ECCF, many immigration detainees live in dormitories that hold up to 70 detainees at a time. Santana Decl. ¶ 7. In these dormitories, detainees must share one large room for sleeping, eating, and socializing. Their beds are placed only a few feet apart. Vasserman Decl. ¶¶ 14-15. The dozens of detainees in each dormitory must share only a small number of sinks, toilets, and showers, and detainees from multiple dormitories share one small law library. Santana Decl. ¶ 7.

28. Even detainees who do not live in these dormitories are in extraordinarily close quarters. Such detainees typically sleep in a small room with one other detainee, but still share their eating and socializing space with over 100 others. *Id.* ¶ 8. Like those in the dormitories, these numerous detainees must share limited bathroom facilities and one law library. *Id.*

29. The federal government itself has reported that facilities at the ECCF are unhygienic. A report of the Department of Homeland Security Office of the Inspector General documented mold and other unsanitary conditions at the ECCF, and expressed concern that these conditions could impact the health of immigration 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.); *see also* Dep't of Homeland Security, Office of the Inspector General, *Concerns about ICE Detainee Treatment and Care at Four Detention Facilities* 10 (2019), <https://www.oig.dhs.gov/sites/default/files/assets/2019-06/OIG-19-47-Jun19.pdf> (noting that at the time of report, detainees were not provided soap again after intake and could only obtain soap via commissary purchases) (Ex. Q to Haas Decl.). 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.*

30. Dr. Jaimie Meyer, an Assistant Professor at Yale School of Medicine who specializes in infectious diseases, attests that the crowded conditions at the ECCF make one of the most vital preventative measures, social distancing, impossible, and describes the conditions at the ECCF as “primed for the rapid and extensive spread of a highly contagious disease” like COVID-19. Meyer Decl. ¶ 38. Crowding and lack of adequate hygiene make the ECCF a “tinderbox” for the rapid spread of COVID-19. Meyer Decl. ¶ 38.

31. This kind of rapid spread has already occurred in other facilities. In New York City, for example, jails have become an epicenter of infectious spread. Across New York City’s jails, at least 132 incarcerated people and 104 staff had tested positive for COVID-19. *See* Ned Parker et al., *Spread of Coronavirus Accelerates in U.S. Jails and Prisons*, Reuters (Mar. 28, 2020) (Ex. R to Haas Decl.).²

32. Even before the epidemic, immigration detainees at the ECCF reported having problems receiving adequate medical care. Santana Decl. ¶¶ 9, 12. Although the ECCF has announced protocols it has adopted in response to the threat of COVID-19, *see* Exhibits B, E, and H to Haas Decl., these efforts are nowhere near enough to protect vulnerable immigration detainees like Plaintiffs.

33. After reviewing the protocols that Essex has announced, Dr. Meyer concluded that the County’s plans for the provision of personal protection equipment to medical staff are “woefully inadequate.” Meyer Decl. ¶ 41. She also expressed concern about the way the ECCF

² <https://www.reuters.com/article/us-health-coronavirus-usa-inmates-insigh/spread-of-coronavirus-accelerates-in-u-s-jails-and-prisons-idUSKBN21F0TM>.

has conducted intakes as insufficient to prevent the virus from entering the facility, and noted that plans for how the ECCF plans to isolate individuals who are ill from the rest of the population are likely insufficient to prevent the spread of COVID-19. *Id.* ¶¶ 39, 40.

34. The lack of adequate preparation is especially disturbing because the virus has already reached the ECCF. According to county officials, at least four staff members and one immigration detainee at the Essex County Correctional Facility have already tested positive for coronavirus. Ex. I to Haas Decl. Notably, the immigration detainee was diagnosed only after being sent to the hospital for an unrelated trauma, at which point hospital staff observed his symptoms and tested him for coronavirus. Ex. A to Haas Decl. Meanwhile, Essex officials have reported that multiple immigration detainees at the ECCF have a fever and have now been housed together, but have not been tested for the virus. Santana Decl. ¶ 19. Moreover, Essex officials confirmed that detainees who had been in close contact with the detainee who tested positive also had not been tested for the virus. *Id.* Since there is no evidence that ECCF medical staff have tested any of these people for coronavirus infection, and testing is generally unavailable, the infection rate at the ECCF is likely to be significantly higher than reported.

35. Now that COVID-19 has been introduced into the ECCF, where social distancing and other precautionary measures cannot be effectively taken, “there is high likelihood of an imminent and widespread COVID19 outbreak” at the facility. Meyer Decl. ¶ 42.

C. Continued ICE Detention is Unsafe for Those Most Vulnerable to COVID-19.

36. Without a vaccine or cure for COVID-19, mitigating the risk of contracting the virus is the only known way to protect those who are most vulnerable to serious harm from infection. Meyer Dec. ¶¶ 22, 25.

37. The risk of infection is particularly high in detention centers like the ECCF where social distancing measures are impossible to implement. Meyer Dec. ¶¶ 44-47.

38. Dr. Dora Schriro, a former correctional official with decades of experience managing both civil detainee populations and prisoner populations, indicates that “best 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.

D. Plaintiffs Must Be Released from ICE Custody Because They Are Particularly Vulnerable to Serious Illness or Death If Infected by COVID-19.

39. Plaintiffs in this case are all individuals who are especially vulnerable to serious illness and death if they are infected with COVID-19, but ICE nonetheless continues to detain them at the ECCF while they await the adjudication of their immigration cases.

40. **Mikhail Vasserman.** Mr. Vasserman is a 57-year-old man originally from Russia. He has been detained by ICE at the ECCF for nearly 16 months. Vasserman Decl. ¶¶ 1, 3.

41. Mr. Vasserman has lived in the United States since 1999 and has raised three children with his wife, Irina. One of his children passed away in a car accident. His youngest son, 20-year-old Phillip, is a U.S. citizen. Phillip currently lives at home and helps care for Irina, who has stage 4 liver disease and requires a kidney transplant. ICE detained Mr. Vasserman on November 30, 2018. *Id.* ¶¶ 4-5, 12.

42. Mr. Vasserman has significant health problems. He suffers from poorly-controlled diabetes, which he reports has caused him to lose feeling in his legs; high blood pressure; and high cholesterol. He will soon need open-heart surgery to replace his aortic valve after his first replacement in 2007. He takes 11 medications daily to address his many health problems. *Id.* ¶¶ 7-9.

43. Since being detained, Mr. Vasserman has gone to the doctor about the numbness in his legs, which has made it hard for him to stand or walk. The doctor merely prescribed some painkillers and mentioned that his diabetes may be causing these problems. *Id.* ¶ 7.

44. Mr. Vasserman is at high risk of severe illness or death from COVID-19 because of his significant health problems. Meyer Decl., Section V.

45. **Mario Salazar.** Mr. Salazar is in his forties and has lived in the United States for over a decade. Salazar Decl. ¶¶ 1-2. He has two minor children who are U.S. citizens. *Id.* ¶ 2. He has been detained at the ECCF since March 2020. *Id.* at ¶ 1.

46. Mr. Salazar has significant health problems. He suffers from poorly-controlled Type II Diabetes and has been coughing up blood regularly. *Id.* ¶¶ 4-6.

47. Since being detained, Mr. Salazar has only had access to soap when he showers, and cannot wash his hands regularly. *Id.* ¶ 9.

48. Mr. Salazar is at high risk of severe illness or death from COVID-19 because of his significant health problems. Meyer Decl., Section V.

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

49. Public health measures across the country, including in New Jersey, demonstrate the widespread recognition that the only clinically recommended course of action to protect individuals who have medical conditions that make them vulnerable to serious illness or death from COVID-19 is to practice social distancing and increased hygiene. Yet, it is impossible to engage in these behaviors inside the ECCF. Meyer Decl. ¶ 38.

49. Medical experts for the Department of Homeland Security have publicly recommended that ICE release vulnerable individuals who have underlying health conditions, and indicated that releasing vulnerable people will save both the lives of detainees and the lives of

detention staff and people in the community at large. Schriro Decl. ¶¶ 23, 25 (citing Scott A. Allen, MD, FACP & Josiah Rich, MD, MPH, *Letter to House and Senate Committees on Homeland Security* (Mar. 19, 2020) (Ex. S to Haas Decl.)).³

50. On March 20, 2020, the American Civil Liberties Foundation (ACLU) of New Jersey joined more than 40 other advocacy organizations in sending a letter to Defendant Tsoukaris, alerting him to the high risk of COVID-19 infection in detention facilities and the dangerous health outcomes of an infection for vulnerable individuals, and urging him to release all ICE detainees and suspend ICE enforcement operations. Ex. J to Haas Decl.

51. 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. J to Haas Decl. Thus, Defendant Tsoukaris acknowledged that factors such as underlying medical conditions – the very things that make Plaintiffs so vulnerable to COVID-19 – can justify release in light of the current pandemic. Nonetheless, Plaintiffs remain detained at the ECCF.

LEGAL FRAMEWORK

A. Immigrants Detainees are Entitled to Constitutional Due Process Protections Against Exposure to Infectious Disease.

52. Immigrant detainees, regardless of 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) (“government detention violates th[e] Due Process] Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections . . . or, in certain special and ‘narrow’ nonpunitive ‘circumstances’” not present here);

³<https://whistleblower.org/wp-content/uploads/2020/03/Drs.-Allen-and-Rich-3.20.2020-Letter-to-Congress.pdf>.

E. D. v. Sharkey, 928 F.3d 299, 306–07 (3d Cir. 2019) (“This Circuit has long viewed the legal rights of an immigration detainee to be analogous to those of a pretrial detainee. We now join a number of our sister Circuits in expressly holding that immigration detainees are entitled to the same due process protections.”).⁴

53. Due process rights for civil detainees mean that they 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.”).

54. “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)). Put differently, to assess whether a condition constitutes impermissible punishment, “[w]e must ask, first, whether any legitimate purposes are served by these conditions, and second, whether these conditions are rationally related to these purposes.” *Hubbard*, 538 F.3d at 232. Conditions must be assessed in their totality. *Id.* at 233.

55. The government has an affirmative duty to provide conditions of reasonable health and safety to the people it holds in its custody, and violates the Constitution when it “fails to provide for [the] basic human needs—e.g., food, clothing, shelter, medical care, and reasonable

⁴ The Fifth Amendment requires the federal Defendants-Respondents to provide due process protections to Plaintiffs. The Fourteenth Amendment requires the state Defendants-Respondents to provide the same due process.

safety” of those in custody. *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189, 199-200 (1989); *see also Union County Jail Inmates v. Di Buono*, 713 F.2d 984, 999, 1008 (3d Cir. 1983) (explaining that conditions are cruel and unusual when they “deprive inmates of the minimal civilized measure of life’s necessities,” such as the “necessity” of “habitable shelter,” as measured under “contemporary standards of decency”).

56. Courts in this Circuit have repeatedly found “unsanitary, unsafe, or otherwise inadequate conditions” sufficient to state a Due Process claim. *Petty v. Nutter*, No. 15-3430, 2016 WL 7018538, at *2 (E.D. Pa. Nov. 30, 2016) (holding that allegations of overcrowded cell, restricted movement, and exposure to others’ bodily fluids sufficed to state a Due Process claim); *see Grohs v. Lanigan*, No. 16-7083, 2019 WL 150061, at *11 (D.N.J. Apr. 5, 2019) (holding that allegations of exposure to “extreme heat combined with lack of potable water, as well as generally unsanitary conditions” sufficed to state a conditions-of-confinement claim under the Fourteenth Amendment).

57. Because civil detainees are not serving a sentence imposed as “punishment,” courts analyze civil detention conditions under the Due Process Clause rather than the Eighth Amendment. The Supreme Court has held that in the context of use of force, pretrial detainees need not meet the heightened, subjective level of intent that prisoners must meet in order to state a claim. *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015). Rather, they need only show that force knowingly used against them is objectively unreasonable. Although the Third Circuit has not yet applied *Kingsley* in the context of civil detention conditions, other Courts of Appeals have ruled that when it comes to conditions of confinement, pretrial detainees need only demonstrate that there is an unreasonable risk of harm to their health or safety in order to state a claim. *See Castro v. County of Los Angeles*, 833 F.3d 1060, 1069-71 (9th Cir. 2016); *Darnell v. Pineiro*, 849 F.3d

17, 34-36 (2d Cir. 2017); *Mulvania v. Sheriff of Rock County Island*, 850 F.3d 849, 856-58 (7th Cir. 2017); *see also See L.R. v. School District of Philadelphia*, 836 F.3d 235, 246 (3d Cir. 2016) (recognizing that “deliberate indifference might exist without actual knowledge of a risk of harm when the risk is so obvious that it should be known”); *Kedra v. Schroeter*, 876 F.3d 424, 439-40 (3d Cir. 2017) (recognizing validity of the *Kingsley* objective standard in contexts outside of use of force against pretrial detainees).

58. The Third Circuit also has recognized that conditions that would violate the Eighth Amendment are more than enough to violate a pretrial 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. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983)).

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

60. Where the circumstantial evidence establishes that the risk individuals face is obvious, that evidence, alone, is enough to allow a factfinder to conclude that Defendants know of the risk and are deliberately indifferent to those individuals’ health or safety. *Phillips v. Superintendent Chester SCI*, 739 F. App’x 125, 129 n.7 (3d Cir. 2018) (citing *Farmer v. Brennan*, 511 U.S. 825, 842 (1994)). *See also Farmer*, 511 U.S. at 842 (explaining that “[w]hether a prison

official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence”).

61. The Supreme Court has recognized that it violates the Eighth Amendment to crowd 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)); see also *Monmouth Cty. Corr. Inst. Inmates v. Lanzaro*, 595 F. Supp. 1417, 1438 (D.N.J. 1984), as amended, 717 F. Supp. 268 (D.N.J. 1989) (holding that living in overcrowded cells, with inoperable showers, an over-utilized medical department, and dirty and unsanitary conditions that “create health and safety hazards” violates prisoners’ Eighth Amendment rights).

62. Due process rights may be violated even before a detainee is exposed to disease. Because the Eighth Amendment requires that “inmates be furnished with the basic human needs, one of which is ‘reasonable safety[,]’” *Helling v. McKinney*, 509 U.S. at 33 . (quoting *DeShaney*, 489 U.S. at 200), “[i]t would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them[.]” *Id.*

B. Defendants Are Violating Plaintiff’s Constitutional Due Process Rights.

63. The conditions at the ECCF described above, *supra* ¶¶ 26-29, 31-33, are sufficient to demonstrate that Plaintiffs’ constitutional due process rights are being violated. Keeping highly vulnerable persons detained in close proximity to one another and without the sanitation necessary to combat the spread of the virus serves no legitimate purpose. Nor is detention under these circumstances rationally related to the enforcement of immigration laws.

64. Plaintiffs' due process rights are also being violated because their conditions of confinement place them at serious risk of being infected with COVID-19 and Defendants are being deliberately indifferent to this critical safety concern.

65. There is no question that COVID-19 poses a serious risk to Plaintiffs. COVID-19 is highly contagious, and can cause severe illness and death. *See supra* ¶¶ 17-24. Plaintiffs are at a heightened risk because of their underlying health conditions, as described above.

66. Defendants have actual knowledge of the serious risk that COVID-19 poses to people like Plaintiffs who have underlying health conditions. Nonetheless, Plaintiffs – both of whom are at high risk of serious illness or death from COVID-19 – remain detained.

67. Defendants have long been on notice of the risk that COVID-19 poses to Plaintiffs and others with serious medical conditions. Indeed, medical experts who contracted with the DHS Office of Civil Rights and Civil Liberties raised concerns to the Department in February and March 2020.⁵ On March 19, 2020, they brought their concerns to the House and Senate Committees on Homeland Security. Allen & Rich Letter at 2. They explained that in order to save both the lives of detainees and in the community at large, “minimally, DHS should consider releasing all detainees in high risk medical groups[.]” *Id.* at 5-6.

68. John Sandweg, a former acting director of ICE, has written publicly about the need to release nonviolent detainees because ICE detention centers “are extremely susceptible to

⁵ *See* March 19, 2020 letter from Scott A. Allen, MD, FACP and Josiah Rich, MD, MPH to House and Senate Committees on Homeland Security, *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.). [Hereinafter “Allen & Rich Letter”].

outbreaks of infectious diseases” and “preventing the virus from being introduced into these facilities is impossible.”⁶

69. Moreover, advocates put Defendants on notice of the risks posed to individuals in New Jersey on March 20, 2020. *See* Ex. J to Haas Decl.

70. As detailed above, Prisons and jails around the country—including in New Jersey—are already releasing non-violent detainees because the risk of contagion is overwhelming. *See supra* ¶¶ 4-5.

71. The circumstances of this case make clear that release is the only means to protect Plaintiffs’ due process rights. Public health experts have made clear that slowing the spread of COVID-19 requires social distancing and increased hygiene, and that individuals with the Plaintiffs’ underlying medical conditions are vulnerable to serious disease and death if they contract this virus. *See supra* ¶¶ 21-23. However, Plaintiffs cannot take these measures while detained at the ECCF. The only course of action that can remedy these unlawful conditions is release from the detention centers where risk mitigation is impossible.

C. ICE Regularly Uses Its Authority To Release People Detained In Custody Because They Suffer Serious Medical Conditions.

72. ICE has a longstanding practice of ordering humanitarian releases from custody. The agency has routinely exercised its authority to release particularly vulnerable detainees—including on medical grounds. As former Deputy Assistant Director for Custody Programs in ICE Enforcement and Removal Operations Andrew Lorenzen-Strait explains, “ICE has exercised and

⁶ *See* John Sandweg, “I Used to Run ICE. We Need to Release the Nonviolent Detainees.” *The Atlantic* (March 22, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/release-ice-detainees/608536/> (Ex. T to Haas Decl.).

still exercises discretion for purposes of releasing both individuals with serious medical conditions and individuals who are vulnerable to medical harm.” Strait Decl. at ¶¶ 2, 3.

73. ICE’s policy and practice has been to limit the detention of any individuals with special vulnerabilities, including those known to be suffering from serious physical or mental illness, those who have disabilities, those who are elderly, and those whose detention is not in the public interest. *Id.* at ¶¶ 2, 4. Under ICE policy, individuals who did not yet have a serious illness, but were vulnerable to medical harm, were also considered for release, including those with any physical or mental condition that would make them more susceptible to medical harm. *Id.* at ¶ 7.

74. Exercising prosecutorial discretion over detention continues to be an integral part of ICE’s enforcement practices. *Id.* at ¶¶ 3, 14. ICE exercises this discretion frequently for detainees with serious medical conditions. *Id.* at ¶ 5.

75. ICE’s policy and practice of exercising prosecutorial discretion in this way is authorized under a range of statutory and regulatory provisions, including INA §§ 212(d)(5), 235(b), 236, 241, and 8 C.F.R. §§ 1.1(q), 212.5, 235.3, 236.2(b). *See* Strait Decl. at ¶¶ 10, 13. ICE has released individuals regardless of the statutory basis for a noncitizen’s detention. *Id.* at ¶ 11.

76. In response to the pandemic, Defendants have recently reconsidered individuals detained in New Jersey for release on the basis of age and medical conditions. *See* Ex. K to Haas Decl. (recognizing that “[i]t is the responsibility of ICE to periodically review detainee cases and re-evaluate custody determinations.”). As of March 28, 2020, ICE had released 26 detainees from the ECCF due to age and health conditions. *See* Haas Decl. Ex. H.

77. Moreover, ICE has a range of highly effective tools at its disposal to ensure that individuals report for court hearings and other appointments. For example, ICE’s conditional supervision program, called ISAP (Intensive Supervision Appearance Program), relies on the use

of electronic ankle monitors, biometric voice recognition software, unannounced home visits, employer verification, and in-person reporting to supervise participants. A government-contracted evaluation of this program reported a 99% attendance rate at all immigration court hearings and a 95% attendance rate at final hearings. Strait Decl. ¶ 15; *see also* Schriro Decl. ¶ 27.

78. Consistent with the Due Process clause of the Fifth Amendment to the U.S. Constitution, ICE must release detainees where civil detention has become punitive and where release is the only remedy to prevent this impermissible punishment. The fact that ICE has the authority to release immigrants from custody and has exercised this authority in the past indicates that the remedy Plaintiffs request is neither unprecedented nor unmanageable for the agency.

D. This Court Has Authority to Order Plaintiffs' Release to Vindicate Their Fifth Amendment Rights, and Such Relief Is Necessary Here.

79. 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); *Id. see also 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 pretrial detainees as necessary to reach a population cap).

80. Because the Plaintiffs’ serious medical conditions place them at high risk of serious illness or death if they contract COVID-19, and because COVID-19 is exceptionally likely to spread quickly through ECCF now that it has been introduced there, release is the only means to ensure compliance with the Fifth Amendment’s prohibition against punitive detention. By continuing to detain Plaintiffs – not only placing them in the path of the virus, but also depriving them of the tools they need to protect themselves, such as social distancing – Defendants are subjecting Plaintiffs to

unreasonable harm, and to unconstitutional punishment. The only course of action that can remedy these unlawful conditions is release from the detention centers where risk mitigation is impossible.

CLAIMS FOR RELIEF

COUNT I

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

81. 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 fails to satisfy its affirmative duty to provide conditions of reasonable health and safety to the people it holds in its custody, and violates the Constitution when it fails to provide for basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety for those in custody. The federal government also violates substantive due process when, acting with deliberate indifference, it subjects civil detainees to objectively unreasonable risks to their health and safety, to cruel treatment, or to conditions of confinement that amount to punishment.

82. By detaining Plaintiffs at the ECCF, Defendants are subjecting Plaintiffs to an unreasonable risk of contracting COVID-19, for which there is no vaccine and no cure, and which can be lethal. Plaintiffs are particularly vulnerable to serious medical complications from COVID-19 infection and are at unreasonable risk of illness and death as long as they are held in detention. By subjecting Plaintiffs to this risk Defendants are maintaining detention conditions that amount to punishment and failing to ensure safety and health in violation of Plaintiffs' due process rights. Likewise, the continued detention of Plaintiffs at the ECCF is deliberately indifferent to Plaintiffs' health and safety because only releasing Plaintiffs from custody can adequately protect them from

COVID-19. Defendants are aware of the serious risk posed by COVID-19 and are failing to take the only action that can respond to Plaintiffs' medical needs, which is to release Plaintiffs.

COUNT II

Violation of Fifth Amendment Right to Due Process Unreasonably Prolonged Detention Without a Bond Hearing

83. Plaintiff Mikhail Vasserman has been detained by ICE for about 16 months, and he has not had a bond hearing before an immigration judge. He is detained pursuant to 8 U.S.C. § 1226(c). He has an appeal pending before the Board of Immigration Appeals, which the government has not opposed.

84. The Third Circuit has held that unreasonably prolonged detention without a bond hearing violates the Fifth Amendment Due Process Clause. *E.g., Chavez-Alvarez v. Warden York Cnty. Prisons*, 783 F.3d 469, 478 (3d Cir. 2015) (“[W]e are convinced that, beginning sometime after the six-month timeframe considered by *Demore*, and certainly by the time Chavez-Alvarez had been detained for one year, the burdens to Chavez-Alvarez's liberties outweighed any justification for using presumptions to detain him without bond to further the goals of the statute.”); *Diop v. ICE/Homeland Security*, 656 F.3d 221 (3d Cir. 2011) (holding that the “constitutionality of [mandatory detention] is a function of the length of the detention” and that “when 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.”).

85. Mr. Vasserman's prolonged detention without a bond hearing under § 1226(c) violates the Fifth Amendment by depriving him of liberty without due process of law.

PRAYER FOR RELIEF

WHEREFORE Plaintiffs request that the Court grant the following relief:

- a. Issue a Writ of Habeas Corpus on the ground that Plaintiffs' continued detention violates the Due Process Clause, and order Plaintiffs' immediate release, with appropriate precautionary public health measures;
- b. In the alternative, issue injunctive relief ordering Defendants to immediately release Plaintiffs, with appropriate precautionary public health measures, on the grounds that their continued detention violates Plaintiffs' due process rights;
- c. In the alternative, order Defendants to provide Plaintiffs an immediate bond hearing where the government bears to burden of justifying his continued detention;
- d. Award Plaintiffs their costs and reasonable attorneys' fees in this action under the Equal Access to Justice Act ("EAJA"), 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: March 29, 2020

Respectfully Submitted,

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**Motions to appear pro hac vice forthcoming.*

***Motions to appear pro hac vice forthcoming; not admitted in DC; practice limited to federal courts.*

****Due to the COVID-19 pandemic and the urgency of this Petition and Complaint, counsel for the Plaintiffs have not been able to obtain verifications with the Plaintiffs' signatures prior to this filing. Speaking by telephone, each Plaintiff has verified the facts above that pertain to them personally.*

