

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

JANET MALAM,

Petitioner-Plaintiff,

- against -

REBECCA ADDUCCI, *et al.*,

Respondent-Defendants.

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

**PETITIONER-PLAINTIFFS' MOTION FOR
TEMPORARY RESTRAINING ORDER**

Petitioner-Plaintiffs (“Plaintiffs”) Waad Barash, Leonard Baroi, Lenche Krcoska, Sergio Perez Pavon, Yohandry Ley Santana, Johanna Whernman, and William Whernman hereby move this Court, pursuant to Fed. R. Civ. P. 65, for a temporary restraining order requiring their immediate release from the Calhoun County Correctional Center. The grounds for this motion are set forth in the Brief in Support of Plaintiffs’ Motion for Temporary Restraining Order, filed herewith, and the accompanying Declarations in support.

In accordance with Local Rule 7.1(a), the Plaintiffs’ counsel contacted Jennifer Newby, counsel for Respondent-Defendants, and Andrew Stacer, counsel for separately-represented Petitioner-Plaintiff Janet Malam, to seek their consent of

this motion. Petitioner-Plaintiff Malam has no objection while Respondent-Defendants oppose Plaintiffs' request.

Dated: June 5, 2020

Respectfully submitted,

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**BRIEF IN SUPPORT OF PETITIONER-PLAINTIFFS’
MOTION FOR TEMPORARY RESTRAINING ORDER**

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INTRODUCTION

Waad Barash, Leonard Baroi, Lenche Krcoska, Sergio Perez Pavon, Yohandry Ley Santana, Johanna Whernman, and William Whernman (collectively, “Plaintiffs”) are non-citizen immigration detainees whose medical conditions and/or age make them highly vulnerable to serious illness and death from the COVID-19 disease, and who are being held in civil detention at Calhoun County Correctional Center (“Calhoun”) in Battle Creek, Michigan in violation of their Due Process rights. The COVID-19 disease continues to infect and, in some cases, kill scores of immigrant detainees across the country because of the confined, congregate nature of the detention facilities in which they are held. As this Court recently observed: “the number of COVID-19 cases in detention facilities nationwide . . . highlights the stark reality that communal confinement, even with the precautions [Respondent-Defendants (“Defendants”)] have employed, creates a significant risk of COVID-19 infection.” May 12 Op. & Order, Dkt. 68, PageID.1915. This reality is particularly stark for individuals like Plaintiffs, who suffer from medical conditions like asthma, chronic bronchitis, tuberculosis, diabetes, and hypertension, that make them especially vulnerable to COVID-19-related injuries.

Indeed, no precaution would adequately mitigate Plaintiffs’ high risk of substantial harm from COVID-19 because, as the Court aptly stated: “COVID-19 does not respect prison walls.” *Id.* at PageID.1937. Nor is there any vaccine,

treatment, or cure for COVID-19, which continues to be spread by people who are completely asymptomatic. May 12 Op. & Order, Dkt. 68, PageID.1941 (citing Apr. 6 Order & Op., Dkt. 23, PageID.559). The only option for medically vulnerable people to avoid serious illness or death from COVID-19 is to practice, among other things, rigorous social distancing. As recognized by the Court, however, Defendants have effectively “conceded that they have not implemented any policies specific to the protection of medically vulnerable detainees [at Calhoun]” and that “adequate social distancing remains impossible.” *Id.* at PageID.1917–18 (crediting testimony of Dr. Homer Venters, physician and epidemiologist), 1948.

Due to the nature of this pandemic and inescapably confined conditions at Calhoun, there remains no way—short of immediate release—to ensure that individuals at highest risk, such as Plaintiffs, do not face a substantial risk of serious harm if they remain detained. The grave risk they face is not reasonably related to, and is excessive in relation to, the government’s interest in securing their availability for removal. Accordingly, the Court should grant Plaintiffs’ motion and order their immediate release.¹

¹ Although Plaintiffs are moving for a temporary restraining order, they have no objections to the Court treating this motion as a motion for a preliminary injunction. *See* May 12 Op. & Order, Dkt. 68, PageID.1911 (treating motion for temporary restraining order as a motion for a preliminary injunction because Defendants were on notice of the relief sought and the Court allowed time for extensive briefing and oral argument).

FACTS

As of June 1, 2020, 1,734,040 people in the United States have contracted COVID-19, and 102,640 people in the United States have died from the disease.² Plaintiffs, like other individuals who are older and/or have certain medical conditions, are acutely vulnerable and face greater chances of serious illness or death if exposed to the disease.³ McKenzie Decl. ¶ 40. People who fall into the highest-risk category and who contract COVID-19 typically require advanced support, including highly specialized equipment and a team of medical providers. Golob Decl. ¶ 8, Dkt. 44–2. So long as Plaintiffs are detained at Calhoun, they cannot take the most basic steps to protect themselves; most importantly, they cannot attain any social distance, which puts them at imminent risk of severe illness or death. Venters 3d Supp. Decl. ¶¶ 3, 7.

I. PLAINTIFFS ARE ESPECIALLY SUSCEPTIBLE TO AND ARE AT GRAVE RISK OF HARM FROM COVID-19.

Plaintiffs’ underlying medical conditions and/or age increase the risk of serious illness or fatality if they are exposed to COVID-19.

Plaintiff Waad Barash is 56 years old and reportedly tested positive for tuberculosis upon arrival at Calhoun. Barash Decl. ¶¶ 2, 5. He has yet to receive

² Coronavirus disease 2019 (COVID-19) Situation Report – 133, World Health Organization (June 1, 2020), Ngo Decl. Ex. A.

³ Amended Petition for the Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 and Complaint for Injunctive and Declaratory Relief (“Pet.”) ¶¶ 94–124.

any treatment for this condition. *Id.* ¶ 6. Prior to his detention, Mr. Barash smoked one pack of cigarettes per day for the past ten years. *Id.* ¶ 5. Mr. Barash also suffers from hypertension, a hernia, and depression. *Id.* He has not been given any medication to treat his hypertension while at Calhoun, either. *Id.* ¶ 6. As a result of his advanced age and medical conditions, Mr. Barash, a former smoker, is at high risk for severe illness or death if he contracts COVID-19. May 23 Op. & Order, Dkt. 90, at PageID.2717 (crediting testimony from medical experts and CDC guidance stating that despite some uncertainty surrounding causation, hypertension is nonetheless “a CDC-recognized risk factor” for severe illness and/or death from COVID-19); McKenzie Decl. ¶ 20 (“[R]esearch has [] shown that current and former smokers are at increased risk of severe COVID-19 illness and death.”); Center for Disease Control & Prevention, People Who Are at Higher Risk for Severe Illness, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html> (last accessed June 2, 2020) (listing “smoking” as a condition that may cause an individual to become immunocompromised).

Plaintiff Leonard Victor Baroi is 23 years old and suffers from hypertension. Baroi Decl. ¶¶ 2, 5. Mr. Baroi treats his hypertension with a medication called Beazepril. *Id.* at 5. Mr. Baroi also suffered from a bout of pneumonia in November 2019. *Id.* ¶ 5. Although undiagnosed, Mr. Baroi has had a prolonged coughing problem for the past two years. *Id.* Mr. Baroi is a former

smoker and, prior to his arrest, smoked one or two cigarettes per day for the past two years. *Id.* Mr. Baroi also suffers from anxiety and has suffered a number of anxiety attacks. *Id.* As a result of his hypertension and history of smoking, Mr. Baroi is at high risk for severe illness or death if he contracts COVID-19. May 23 Op. & Order, Dkt. 90, at PageID.2717; McKenzie Decl. ¶¶ 20, 22–23.

Plaintiff Lenche Krcoska is 52 years old and suffers from rheumatoid arthritis and a heart arrhythmia. Krcoska Decl. ¶ 3. Rheumatoid arthritis is an autoimmune disease that causes destruction of joints, particularly in the hands and feet. McKenzie Decl. ¶ 24. Ms. Krcoska’s rheumatoid arthritis, from which she has suffered since 2008, causes pain, swelling, and deformation of her joints. Krcoska Decl. ¶ 3. She currently manages her symptoms with medication. McKenzie Decl. ¶ 24. Although her doctor has prescribed a specific diet in light of her rheumatoid arthritis diagnoses, she cannot follow that diet while at Calhoun. Krcoska Decl. ¶ 3. Ms. Krcoska has also been diagnosed with a severe depressive episode and insomnia, for which she was prescribed three separate medications. *Id.* As a result of these conditions, including her advanced age, she is at high risk for severe illness or death if she contracts COVID-19. McKenzie Decl. ¶ 26.

Plaintiff Sergio Perez Pavon is 36 years old and has suffered from type 2 diabetes for the past 15 years. Golden Decl. ¶¶ 2, 5. Since 2011, Mr. Perez Pavon has treated his diabetes with certain medications (Metformin and Glyburide), but at

Calhoun, his medications were changed, and, as a result, Mr. Perez Pavon has become insulin dependent. *Id.* ¶ 5. Because of his diabetes, Mr. Perez Pavon is at high risk for severe illness or death if he contracts COVID-19. McKenzie Decl. ¶ 29; May 12 Op. & Order, Dkt. 68, at PageID.1920 (concluding that diabetic plaintiffs “are at sufficiently heightened risk of severe complication from COVID-19 such that a high risk of exposure translates into high risk of irreparable injury.”).

Yohandry Ley Santana is 33 years old and suffers from asthma. Ley Santana Decl. ¶¶ 2–3. Mr. Ley Santana’s asthma causes daily shortness of breath, which leads him to regularly lose his breath in his sleep. *Id.* ¶ 4. Mr. Ley Santana was diagnosed with asthma when he was only eight months old and has experienced severe breathing problems that have caused him to be hospitalized numerous times, including twice as an adult. *Id.* On two occasions, as an adult, Mr. Ley Santana was intubated due to breathing problems. *Id.* In January 2019, Mr. Ley Santana was hospitalized and diagnosed with severe bronchitis and severe allergies to pollen and dust. *Id.* ¶ 4. Prior to being detained, Mr. Ley Santana was prescribed a medication to control his allergies and an Albuterol inhaler for his asthma, but he has not received either in detention, even after specifically requesting them. *Id.* ¶ 5. Because of the frequency and severity of his symptoms, Mr. Ley Santana has a diagnosis of moderate persistent asthma and is thus at high risk for severe illness or death if he contracts COVID-19. McKenzie Decl. ¶¶ 34 (adding that his “lack of access to a

short-acting albuterol inhaler while in detention likely also increases his risk as it is an important emergency rescue medication for all asthmatics.”); May 23 Op. & Order, Dkt. 90, at PageID.2718–20 (noting that the CDC recognizes moderate asthma as a COVID-19 risk factor and that the symptoms of moderate asthma include, among other things, daily symptoms, weekly nighttime awakenings, and some limitation with respect to normal activity).

Plaintiffs Johanna and William Whernman, mother and son of 57 and 22 years of age, respectively, both suffer from asthma. Johanna Whernman Decl. ¶ 2(a); William Whernman Decl. ¶ 2(a). Both use inhalers to treat their conditions, and neither has consistently received their inhalers while at Calhoun. Johanna Whernman Decl. ¶ 2(c); William Whernman Decl. ¶ 2(c). William is also clinically obese with a body mass index of 30.85. McKenzie Decl. ¶ 35. Johanna further suffers from chronic bronchitis and hypertension. Johanna Whernman Decl. ¶¶ 2(a), (c). Johanna has also been hospitalized multiple times—most recently in February 2020—due to side effects from her asthma medication. *Id.* ¶ 2(a). Johanna’s age is an even further contributing risk factor. McKenzie Decl. ¶ 39. As a result of all of the above-listed conditions, both William and Johanna are at high risk for severe illness or death if they contract COVID-19. *Id.* ¶¶ 36, 38.

II. DETENTION AT CALHOUN PUTS PLAINTIFFS AT IMMINENT RISK OF SUBSTANTIAL BODILY HARM.

The danger of COVID-19 to Plaintiffs remains acute at Calhoun. Infectious diseases like COVID-19 are exponentially more likely to spread in “congregate environments,” such as immigration detention centers.⁴ Greifinger Decl. ¶¶ 8, 10, Dkt. 44–3; Venters Decl. ¶¶ 17–18, Dkt. 47; Letter from Drs. Scott A. Allen & Josiah Rich to Rep. Bennie Thompson et al. (Mar. 19, 2020), Ngo Decl. Ex. B. The first positive case of COVID-19 at Calhoun was reported to the Court on May 11, 2020. *See* Dkt. 68, at 13. As of June 1, 2020, the most recent day for which data is available, the facility had two publicly confirmed cases.⁵ On June 1, 2020, however, Defendants informed the Court by email of two further asymptomatic cases that were just discovered as a result of partial testing of some detainees, inmates and staff

⁴ According to ICE, as of June 1, 2020, 1,461 ICE detainees (across more than 60 facilities in Arizona, California, Colorado, D.C., Florida, Georgia, Illinois, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New Jersey, New York, Pennsylvania, Texas, Virginia, and Washington) and 167 ICE employees have tested positive for COVID-19. U.S. Immigration & Customs Enforcement, ICE Guidance on COVID-19: Confirmed Cases (last updated June 1, 2020); Ngo Decl. Ex. C. Two of these detainees have died in ICE custody. U.S. Immigration & Customs Enforcement, ICE Guidance on COVID-19: Confirmed Cases (last updated June 1, 2020); Ngo Decl. Ex. C. The number of confirmed cases among ICE detainees and staff is more than four times what it was just over one month ago, and it will continue to grow. *See* Dkt. 44, at PageID.1024–25 n.5 (noting that ICE had confirmed 35 cases of COVID-19 among its detainees and staff as of April 24, 2020).

⁵ *See* U.S. Immigration & Customs Enforcement, ICE Guidance on COVID-19: Confirmed Cases (last updated June 1, 2020); Ngo Decl. Ex. C.

conducted by the National Guard. No information was provided about what housing units the positive detainees were in, or what other detainees were in contact with them. *See also* Venters Decl. ¶ 15, Dkt. 47 (noting rapid spread of COVID-19 among Michigan Department of Corrections detainees).

ICE guidance acknowledges the risks of COVID-19 to detainees, and calls on all ICE detention facilities to take certain protective steps where possible.⁶ In addition, Defendants have claimed in their discovery responses that Calhoun is taking certain steps, such as quarantining new detainees. In fact, Plaintiffs' experience demonstrate that the guidance is not being followed,⁷ and analysis of Defendants' housing data shows that detainees are repeatedly being moved, rather than being quarantined in the manner Defendants describe.⁸ However, even if the

⁶ U.S. Immigration & Customs Enforcement, *COVID-19 Pandemic Response Requirements 11* (Apr. 10, 2020) ("ICE Guidance"), ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities.pdf; Ngo Decl. Ex. D.

⁷ Even Defendants' purported attempt to improve facility hygiene appear inadequate: several Plaintiffs have observed a lack of access to soap and a lack of appropriate use of personal protective equipment ("PPE") by Calhoun jail staff. Baroi Decl. ¶¶ 6, 18; Krcoska Decl. ¶¶ 6–7; Ley Santana ¶ 5 ("The staff at Calhoun does not typically wear masks, and they only wear gloves when they come into contact with the detainees."); Venters 3d Supp. Decl. ¶¶ 12 (noting that lack of adequate access to soap "represents a lack of adherence to basic CDC guidelines regarding infection control in detention settings" and that failure to appropriately wear face masks and other PPE violates Calhoun's own policies).

⁸ The housing records show, for example, that Calhoun detainees were transferred between housing units at least 250 times between April 15 and May 15, 2020; that there were at least 18 individuals who did not properly remain in a single quarantine area for a full 14 days before being transferred to other areas of the

ICE guidance were being followed at Calhoun and even if Defendants were implementing all the steps they claim, that would be woefully inadequate protection for the reasons enumerated below. Schriro Decl. ¶ 24, Dkt. 44–5; Venters 3d Supp. Decl. ¶ 7 (noting that even after taking into account additional purported steps taken by Calhoun to quarantine new detainees and improve various hygiene practices at the facility, “Calhoun [still] has an insufficient COVID-19 plan, thereby endangering the safety and health of individuals detained there . . .”).

First, as this Court has observed, ICE effectively concedes that “strict social distancing may not be possible in congregate settings such as detention facilities,”⁹ and in fact, the physical structure of the Calhoun facilities makes social distancing impossible. *See* May 12 Op. & Order, Dkt. 68, at PageID.1918; Venters Decl. ¶ 27, Dkt. 47 (the ICE Guidance “fail[s] to address the most common scenarios in which high-risk detainees find themselves in close quarters that make social distancing impossible”); Venters 3d Supp. Decl. ¶ 11 (“There continues to be no guarantee for detainees to engage in social distancing at all times at Calhoun.”). While ICE

facility; that there were at least 39 individuals who were transferred out of a quarantine area after 14 days, despite new arrivals to the facility being placed in that same quarantine area during that time; and that there are many instances of detainees inmates being transferred to and from Pod R—which appears to be an intake unit—originating from and moving to both designated quarantine areas and non-quarantine areas of the facility. Haier Decl. ¶¶ 8–13.

⁹ ICE Guidance at 13.

recommends that “[d]etainees who meet CDC criteria for epidemiologic risk of exposure to COVID-19 [be] housed separately from the general population,” at Calhoun, medically vulnerable individuals like Plaintiffs remain housed in the general population. Greifinger Decl. ¶ 12(f), 12(h), Dkt. 44–3; Krcoska Decl. ¶ 7; Baroi Decl. ¶¶ 6, 8–12; Ley Santana Decl. ¶ 5; Venters 3d Supp. Decl. ¶ 11.

Nor is Calhoun following its own quarantine procedures: detained individuals are still kept together in groups of approximately 30-60 people who eat, live, sleep, and recreate in closely confined quarters. *See* Haier Decl. ¶¶ 15–21 (noting that each Plaintiff has been housed in pods containing anywhere up to 56 people)¹⁰; Krcoska Decl. ¶ 7 (noting that the beds in her cell are kept three feet apart and that detainees eat meals at communal tables situated less than six feet apart); Baroi Decl. ¶¶ 9–10 (noting that Mr. Baroi shares a room with 30 detainees that sleep on beds approximately three feet apart and sit so close to one another during communal meals that their arms touch); Ley Santana Decl. ¶ 7 (“At Calhoun, I am currently in Pod D with 46 other detainees. It is impossible to practice social distancing in this confined area.”); Golden Decl. ¶ 6 (“During the day, Mr. Perez Pavon spends part of the day in a larger room with approximately 30 to 40 other individuals.”); ICE-000820

¹⁰ Mr. Barash has been housed in a pod with between 49 and 56 people; Mr. Baroi in two pods, one a high-risk quarantine area, with between 22-55 people; Ms. Krcoska in a pod with between 16 and 23 people; Mr. Ley-Santana in a pod with between 44 and 53 people; and Mr. Perez Pavon in a pod with between 21 and 32 people. Haier Decl. ¶¶ 15-21.

(noting that Pods A and B, used as high-risk quarantine areas, each have a capacity of 56 individuals with 29 cells); ICE-000388 (stating that unless there is a reason to the contrary, “all meals [served to detainees] will be consumed in the [communal] day room.”); Venters 3d Supp. Decl. ¶¶ 11 (noting the “physical impossibility . . . for detainees to maintain a six foot distance from others at all times.”).¹¹

Second, because detainees are unable to maintain social distancing practices, and COVID-19 is now known to be present at Calhoun, it is likely that COVID-19 has or will spread quickly among Calhoun’s detainees and staff. Golob Decl. ¶ 13, Dkt. 44–2 (“[I]t is reasonable to expect COVID-19 will [] readily spread in detention centers such as prisons and jails, particularly when residents cannot engage in social distancing measures, cannot practice proper hygiene, and cannot isolate themselves from infected residents or staff.”); Schiro Decl. ¶¶ 24(e), 32, 34, Dkt. 44–5. Detainees and staff regularly come and go. *See, e.g.*, Baroi Decl. ¶ 18 (“I have . . . noticed new deputies being frequently rotated into the facility.”); Haier Decl. ¶ 13 (noting that at least 250 detainees were transferred between pods between April 15 and May 15, 2020). Moreover, it is impossible for Plaintiffs to shelter in place;

¹¹ Although Defendants suggest that certain detainees receive meals in their cells and not within any communal areas, this practice appears limited only to detainees being quarantined. *See* Defs.’ Sup. Resp. to Pls.’ Rog. No. 2 (stating that for the individuals currently in the quarantine process, meals are provided in cells, but that cohorts are nonetheless released from their cells for a limited time each day to, among other things, make calls and shower); Ngo Decl. Ex. E.

instead they must interact with strangers who may be carriers for the disease. Venters Decl. ¶¶ 19, 27, Dkt. 47; Haier Decl. ¶¶ 8 (identifying ten individuals who did not properly remain in quarantine for a full 14 days before being transferred to other areas of the facility); 9 (identifying 20 detainees placed in a detainee pod prior to being quarantined); 10 (identifying 39 detainees transferred out of quarantine after 14 days despite new arrivals being placed in that same quarantine area during that time). As a result, detainees have no way to socially distance themselves from newly arrived detainees and staff members who may be carrying the virus asymptotically. Golob Decl. ¶ 13 (“With new individuals and staff coming into the detention centers who may be asymptomatic or not yet presenting symptoms, the risk of infection rises even with symptom screening measures.”).

Third, to Plaintiffs’ knowledge, Defendants have yet to implement any comprehensive plan for ongoing testing of either staff or detainees for COVID-19. From March 1, 2020 through May 18, 2020, Defendants tested only eight detainees at Calhoun, an astonishingly low amount, considering that ICE knowingly housed over 50 detainees with chronic medical conditions at Calhoun during that time period. Defs’ First Supp. Resp. to Pls.’ Rog. Nos. 11, 15; Ngo Decl. Ex. E.

In an email to the Court on June 1, 2020, Defendants reported that the National Guard had conducted voluntary testing at Calhoun on May 23, 2020, and that 97 detainees and inmates and 16 staff members were tested. Of those, two detainees

were confirmed with asymptomatic cases. Plaintiffs have asked Defendants for additional information regarding testing but Defendants have yet to provide any further information.¹² Basic questions remain unanswered, like how many detainees were tested, how many people were exposed to the asymptomatic positive detainees (and whether those people will be tested), and whether Defendants have any plans for regular testing. Moreover, as stressed by Dr. Venters, Calhoun appears to be falling short of Michigan Department of Health guidance recommending testing of individuals in “congregate living settings” that exhibit any symptoms of COVID-19, not just a fever. Venters 3d Supp. Decl. ¶ 10.

While some Calhoun detainees were apparently tested, others report having experienced symptoms of COVID-19, but not receiving medical attention or testing. *See, e.g.*, Krcoska Decl. ¶ 8 (“Since arriving at Calhoun, I have not been offered COVID-19 testing.”); Venters Supp. Decl. ¶ 16, Dkt. 57–2 (indicating concern that detainee [Min Dan Zhang] exhibiting “clear and concerning” COVID-19 symptoms was “not properly assessed for potentially having COVID-19” and recommending “immediate assessment and treatment”).¹³ Further, Calhoun has still yet to produce any data showing how many individuals report COVID-19 symptoms, which “calls

¹² Nationally, ICE reportedly has tested just 2,781 of its total 25,911 detainees for COVID-19 as of Sunday, May 31, 2020—approximately 10.7% across all its facilities. *See* Ngo Decl. Ex. C.

¹³ Plaintiffs have requested information from Defendants about whether Ms. Zhang had been tested for COVID-19, but received no response.

into question [Calhoun's] ability to make adequate decisions about who needs testing, whatever the criteria are." Venters 3d Supp. Decl. ¶ 10(a) (adding that screening form for testing "contains no questions or fields about whether a person has any high-risk condition or age," which "runs counter to the clear guidance promulgated by the Michigan Department of Health."). Because Calhoun cannot guarantee widespread, comprehensive, and regular testing for COVID-19, the government effectively concedes that staff and detainees will be unaware about who has actually contracted the disease, who is at risk of exposure, and how far it has spread. *See* May 12 Op. & Order, Dkt. 68, at PageID.1918 (noting that Calhoun's "widespread lack of testing is of particular concern given that COVID-19 can spread through asymptomatic transmission.").¹⁴

Indeed, the newly-confirmed presence of two asymptomatic cases at Calhoun shows that simply screening for symptoms at the time of admission is not an adequate protection against the spread of the virus.¹⁵ Without "a comprehensive and rigorous testing regime, a lack of proven cases of COVID-19 is functionally meaningless for determining if there is a risk for COVID-19 transmission in a

¹⁴ Although Defendants may have recently conducted at least some testing, *see* Baroi Decl. ¶ 12, Plaintiffs are entirely unaware of any details surrounding these purported tests, including the exact recipients of the tests, and the quality, quantity, and frequency of the testing.

¹⁵ But for the National Guard's purported recent testing, moreover, Calhoun would likely have never discovered the two asymptomatic detainees who tested positive for COVID-19.

community or institution.” Golob Decl. ¶ 7, Dkt. 44–2. CDC guidance further suggests that any adequately comprehensive testing scheme should involve repeated COVID-19 testing until no new cases are detected for a period of time and should include all residents and staff. Venters 3d Supp. Dec. ¶ 10(e)(i). Further, detainees and staff must be screened for symptoms of COVID-19—not merely for a high temperature—on an ongoing basis. *Id.* ¶ 10(e)(iv).

For these reasons and others enumerated in the supporting declarations, Plaintiffs are at risk of imminent and substantial bodily harm.

III. RELEASE FROM DETENTION IS THE ONLY WAY TO PROTECT PLAINTIFFS’ SAFETY AND THEIR DUE PROCESS RIGHTS.

Because Plaintiffs cannot be safe at Calhoun, only their immediate release will vindicate their Due Process rights. Public health experts and prison administrators across the country have made it abundantly clear that medically vulnerable people kept in detention facilities must be released for their own safety and for the safety of others.¹⁶

DHS’s own subject matter experts have stressed that Defendants should release “all detainees in high risk medical groups, such as older people and those

¹⁶ As described in prior filings in this case, multiple other jurisdictions have collectively released thousands of people from custody, acknowledging the grave threat posed by a viral outbreak in jails and detention centers. *See, e.g.*, Dkt. 44, PageID.1032 n.11 (listing examples); Schriro Decl. ¶¶ 49–52, Dkt. 44–5.

with chronic disease.” Ngo Decl. Ex. B.¹⁷ The same analysis applies with equal force to Calhoun. *See* Greifinger Decl. ¶ 17, Dkt. 44–3 (correctional medical expert recommending release of high-risk individuals as a “key part of a risk mitigation strategy”); Golob Decl. ¶ 14, Dkt. 44–2 (infectious disease specialist concluding there are “many reasons” that vulnerable people are at grave risk); Venters Decl. ¶ 43, Dkt. 47 (agreeing that “ICE and Calhoun must immediately release Plaintiffs who possess risk factors to prevent their serious illness and/or death.”).

In light of the public health evidence, this Court has already found that “even the most stringent precautionary measures—short of limiting the detained population itself—simply cannot protect detainees from the extremely high risk of contracting this unique and deadly disease.” Apr. 6 Am. Op. & Order, Dkt. 23, PageID.554. Medically vulnerable individuals remain “at an unreasonable and substantial risk of infection, and consequently of dire health consequences, including death” despite precautionary measures due to the “asymptomatic nature of transmission, the impossibility of adequate social distancing in communal detention spaces, and the inability or unwillingness to test all inmates and staff.” Dkt. 33,

¹⁷ Likewise, former Acting Director of ICE John Sandweg has also publicly called on the agency to release “thousands” of people in order to prevent an outbreak amongst detainees, ICE agents and officers, medical personnel, contract workers, and others who work in ICE’s facilities. *See* 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/>, Ngo Decl. Ex. F.

PageID.715. The “stark reality [is] that communal confinement, even with the precautions Defendants have employed, creates a significant risk of COVID-19 infection.” May 12 Op. & Order, Dkt. 68, PageID.1915. These findings apply equally to the Plaintiffs here.

ARGUMENT

Plaintiffs meet the legal requirements for the Court to grant them a temporary restraining order: (1) they are likely to succeed on the merits of their claims; (2) they are likely to suffer irreparable harm in the absence of relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *McKinney v. Villalva*, No. 10-11581, 2010 WL 2730759, at *1 (E.D. Mich. July 9, 2010) (citing *Ohio Republican Party v. Brunner*, 543 F.3d 357, 361 (6th Cir. 2008) (“The same factors are considered in determining whether to grant a request for either a temporary restraining order or a preliminary injunction.”). The court must balance each of the four factors and “no single factor is dispositive.” *City of Dearborn v. Comcast of Mich.*, 558 F. Supp. 2d 750, 754 (E.D. Mich. 2008). Where plaintiffs demonstrate “irreparable harm which decidedly outweighs any potential harm to the defendant,” the “degree of likelihood of success required” is less, and a plaintiff need only show “serious questions going to the merits.” *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985).

IV. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.

Plaintiffs are likely to establish that Defendants violated—and continue to violate—Plaintiffs’ constitutional rights by condemning them, notwithstanding their age and/or particular medical vulnerabilities, to confined, close quarters, where it is impossible to practice social distancing. Defendants *cannot* adequately remedy any potential harm suffered by Plaintiffs as a result of exposure to COVID-19. Accordingly, Plaintiffs’ continued detention at Calhoun violates their Fifth Amendment rights.

A. Plaintiffs’ Continued Detention at Calhoun Violates the Fifth Amendment.

This Court has yet to decide what standard applies to Plaintiffs’ claims, finding in each instance to date that Plaintiffs have satisfied the most stringent objective and subjective deliberate indifference test. Dkt. 29, PageID.641, n.1; Dkt. 35, PageID.725; May 12 Op. & Order, Dkt. 68, PageID.1930-32; May 23 Op. & Order, Dkt. 90, PageID.2725 n.1. While Plaintiffs believe, for the reasons set out in Plaintiffs’ Supplemental Brief, Dkt. 82, the punishment test is applicable here, Plaintiffs will nonetheless discuss both tests.

1. Plaintiffs’ Detention is Not Reasonably Related To, and is Excessive in Relation to, the Government’s Interest in Ensuring Their Availability for Removal.

Defendants have violated, and continue to violate, Plaintiffs’ constitutional Due Process rights by detaining them in conditions that in no way “reasonably

relate[] to a legitimate governmental purpose.” *Bell v. Wolfish*, 441 U.S. 520, 539 (1979). As civil detainees, Plaintiffs’ detention is governed by the Fifth Amendment. *Id.* Under the Fifth Amendment, civil detention may not “amount to punishment of the detainee.” *Id.* at 535. Because of their underlying health conditions and/or age, which make them especially vulnerable to infection from COVID-19, the condition of Plaintiffs’ confinement is not “reasonably related to a legitimate governmental objective”; instead it is “arbitrary or purposeless” or “excessive in relation to” its asserted purpose. *Id.* at 539, 561; *see also J.H. v. Williamson Cty., Tenn.*, 951 F.3d 709, 717 (6th Cir. 2020) (applying *Bell* test to pre-trial detainee’s conditions of confinement claim); *Turner v. Stumbo*, 701 F.2d 567, 572–73 (6th Cir. 1983) (same).

Defendants’ purpose in detaining Plaintiffs is “assuring [their] presence at the moment of removal.” *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001). The question is not whether Plaintiffs’ detention would be reasonably related, and not excessive, in relation to that purpose under normal circumstances, but whether it is reasonable during a pandemic. Because Plaintiffs’ continued detention creates a grave risk of serious illness or death from contracting COVID-19, detention is not reasonably

related to its objective at this time, particularly given that Plaintiffs can be safely supervised in the community.¹⁸

2. Defendants Cannot Ensure Plaintiffs Reasonable Safety and Are Deliberately Indifferent to the Substantial Risk That Plaintiffs Will Suffer Serious Harm

Plaintiffs also satisfy the more stringent “deliberate indifference” standard traditionally applied in the Eighth Amendment context for prisoners. For the reasons outlined in Plaintiffs’ Supplemental Brief, Dkt. 82, and the amicus brief, Dkt. 81, if the Court resorts to the deliberate indifference test, it should apply only the objective component of that test. Plaintiffs nonetheless satisfy both prongs of the deliberate indifference standard for the same reason that the Court has found the test satisfied for other plaintiffs.

As explained in detail above, the overwhelming evidence shows that COVID-19 poses a serious risk to Plaintiffs, and that continued detention constitutes both

¹⁸ See e.g., *Refunjol v. Adducci*, No. 2:20-cv-2099, 2020 WL 2487119, at *15-16 (S.D. Oh. May 14, 2020); *Galan-Reyes v. Acoff*, No. 20-cv-345-SMY, 2020 WL 2497133, at *4 (S.D. Ill. May 14, 2020); *Rodriguez Alcantara v. Archambeault*, No. 3:20-cv-00756-DMS-AHG, 2020 WL 2315777, at *8-9 (S.D. Cal. May 1, 2020); *Kevin M. A. v. Decker*, No. CV 20-4593 (KM), 2020 WL 2092791, at *6-8 (D.N.J. May 1, 2020); *Pimentel-Estrada v. Barr*, No. 2:20-cv-495-RSM-BAT, 2020 WL 2092430, at *17 (W.D. Wash. Apr. 28, 2020); *Doe v. Barr*, No. 20-cv-02263-RMI, 2020 WL 1984266, at *6 (N.D. Cal. Apr. 27, 2020); *Refunjol v. Adducci*, No. 2:20-cv-2099, 2020 WL 1983077, at *3-4 (S.D. Oh. Apr. 27, 2020); *Perez v. Wolf*, No. No. 5:19-cv-05191-EJD, 2020 WL 1865303 (N.D. Cal. Apr. 14, 2020); *Bent v. Barr*, No. 19-cv-06123-DMR, 2020 WL 1812850 (Apr. 9, 2020).

objective and subjective deliberate indifference under the circumstances. Indeed, as the Court has said, “any response short of authorizing release” for those “whose underlying health conditions expose [them] to a high risk of an adverse outcome if infected by COVID-19, demonstrates deliberate indifference to a substantial risk.” Dkt. 33, PageID.722–23. Plaintiffs meet the objective prong of the deliberate indifference test because so long as plaintiffs remain detained, they are exposed to a substantial risk of serious harm. *See* Apr. 6 Am. Op. & Order, Dkt. 23, PageID.566; May 12 Op. & Order, Dkt. 68, Pg.ID# 1934–41 (rejecting Defendants’ argument re imminence of harm, compliance with policies, and societal toleration of risk).

Plaintiffs also meet the subjective prong of the deliberate indifference test (if it is required). In light of Plaintiffs’ underlying health conditions and age, including Defendants’ own designations of Plaintiffs as “high-risk” detainees, Defendants cannot deny awareness of the risk posed to Plaintiffs by COVID-19 or ensure their reasonable safety even with precautionary measures. *See* Apr. 6 Am. Op. & Order, Dkt. 23, PageID.567–69; Defs.’ First Supp. Resp. to Pls.’ Rog. No. 11; ICE-000415. Moreover, “[b]ecause Defendants have not taken specific precautions to protect medically vulnerable detainees, the Court finds that Defendants have acted unreasonably and have disregarded the risk of COVID-19.” May 12 Op. & Order, Dkt. 68, PageID.1942, 1947–48 (concluding that “Defendants are aware that medically vulnerable detainees require additional protection, but nonetheless have

declined to act.”); Venters 3d Supp. Decl. ¶¶ 8, 15, 17 (stating that Calhoun wholly lacks an adequate COVID-19 response plan, including the absence of any protocols for social distancing or contact tracing, employment of zero on-site physicians, and incomplete identification of high-risk patients); *Zaya v. Adducci*, 2020 WL 1903172, at * 5 (E.D. Mich., April 18, 2020) (“[T]o the extent that Respondents’ precautions do not ensure Petitioner’s ‘reasonable safety,’ see *Helling v. McKinney*, 509 U.S. 25, 33 (1993), they cannot be said to be reasonable.”).

B. Plaintiffs’ Release Is the Sole Effective Remedy for the Constitutional Violation at Issue.

Plaintiffs’ immediate release is the sole effective remedy for the constitutional violation here. When the government fails to meet its obligations to provide adequate medical care, courts have a responsibility to remedy the constitutional violation. See *Brown v. Plata*, 563 U.S. 493, 511 (2011) (“When necessary to ensure compliance with a constitutional mandate, courts may enter orders placing limits on a prison’s population.”). The power to remedy constitutional violations arising from government confinement falls within the Court’s broad power to fashion equitable relief. See *Hutto v. Finney*, 437 U.S. 678, 687 n.9 (1978).

To vindicate detainees’ Due Process rights in the face of the COVID-19 pandemic, federal and state courts across the country—including this Court—have ordered the release of detained individuals. See, e.g., May 23 Op. & Order, Dkt. 90; *Zaya*, 2020 WL 1903172, at * 5; *Cameron v. Bouchard*, No. 20-cv-10949, Dkt. 111,

(E.D. Mich. May 31, 2020) (establishing process to consider release of medically vulnerable subclass of inmates at Oakland County Jail); *Herrera-Herrera v. Kolitwenzew*, No. 2:20-cv-02120-SEM-TSH, ECF No. 36 (C.D. Ill. May 19, 2020); *Prieto Refunjol v. Adducci*, No. 2:20-cv-2099, ECF No. 44 (S.D. Ohio May 14, 2020); *Galan-Reyes v. Acoff*, No. 20-cv-345-SMY, ECF No. 22 (S.D. Ill. May 14, 2020); *Gomes v. Wolf*, No. 20-cv-453-LM, ECF No. 123 (D.N.H. May 14, 2020); *Savino v. Souza*, No. 20-10617-WGY, ECF No. 175 (D. Mass. May 12, 2020); *Perez-Perez v. Adducci*, No. 20-10833, 2020 WL 2305276 (E.D. Mich. May 9, 2020); *Alcantara v. Archambeault*, No. 20cv0756 DMS (AHG), ECF No. 38 (S.D. Cal. Apr. 30, 2020); *Zepeda Rivas v. Jennings*, No. 20-cv-02731-VC, ECF No. 53 (N.D. Cal. Apr. 29, 2020); *Fofana v. Albence*, No. 2:20-cv-10869-GAD-DRG, Dkt. 15 (E.D. Mich. Apr. 15, 2020).¹⁹

In this case, as in the many similar cases listed above, the Plaintiffs' immediate release from detention is the only effective remedy for the constitutional violation they are suffering. There is no known cure or treatment for COVID-19, no known vaccine, and no known natural immunity. Social distancing is essential to mitigate the spread of contagion. *See supra* Facts II. At Calhoun, Plaintiffs cannot maintain the necessary distance from either their fellow detainees or the staff at the facility sufficient to protect their health.

¹⁹ *See also* Schriro Decl. ¶¶ 49–52, Dkt. 44–5.

Because Plaintiffs have shown that their continued detention would cause an unacceptably high risk of grave injury, Plaintiffs are likely to succeed on the merits of their claim that their continued detention violates their rights under the Fifth Amendment, and that release from custody is the only permissible way to ensure their safety and the safety of others with whom they are currently in close and daily contact.

V. PLAINTIFFS HAVE SATISFIED ALL OTHER FACTORS REQUIRED FOR THIS COURT TO GRANT A TEMPORARY RESTRAINING ORDER.

A. Plaintiffs' Exposure to COVID-19 Constitutes Irreparable Harm.

For the reasons stated in the Court's April 6, May 12 and May 23 Orders and Opinions, as well as earlier motions for temporary restraining orders in this case, this Plaintiffs' exposure to COVID-19 undoubtedly continues to constitute irreparable harm. *See, e.g.*, Apr. 6 Am. Op. & Order, Dkt. 23, at PageID.551 (finding irreparable harm); May 12 Op. & Order, Dkt 68, at PageID.1928–29 (same); May 23 Op. & Order, Dkt 90, at PageID.2712 (same); Pl.'s Mots. for TRO, Dkt. 20, at PageID.351; Dkt. 44, at PageID.1042.

B. The Public Interest and the Balance of Equities Weigh Heavily in Plaintiffs' Favor.

So long as they continue to be confined at Calhoun, Plaintiffs' health and lives are in danger in violation of their Due Process rights. Releasing them from detention with appropriate precautions will protect their safety and remedy the continued

violation of their constitutional rights, which is in the public interest. *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 222 (6th Cir. 2016) (holding that protection of constitutional rights is “a purpose that is always in the public interest”). This Court has repeatedly found that the public interest and the balance of equities weigh heavily in Plaintiffs favor. *See, e.g.*, Apr. 6 Am. Op. & Order, Dkt. 23, at PageID.571–74 (finding that the balance of equities favors Plaintiffs because (1) denying an immediate injunction would risk deprivation of Plaintiffs’ constitutional rights, (2) Plaintiffs’ releases protect public health, and (3) the enforcement of the U.S. immigration laws against Plaintiffs can continue largely unabated when Plaintiffs are released); May 12 Op. & Order, Dkt 68, at PageID.1951–52 (similar analysis); May 23 Op. & Order, Dkt 68, at PageID.2726–27 (similar analysis). For the reasons stated in this Court’s prior opinions and orders, as well as earlier motions for temporary restraining orders in this case, the public interest and balance of equities continue to weigh heavily in Plaintiffs’ favor. *See* Dkt. 20, at PageID.351–52; Dkt. 44, at PageID.1042–43.²⁰

CONCLUSION

²⁰As detained, indigent individuals, Plaintiff request this Court to exercise its discretion to require no security in issuing this relief. *Urbain v. Knapp Bros. Mfg. Co.*, 217 F.2d 810, 815–16 (6th Cir. 1954) (“[T]he matter of requiring security in each case rests in the discretion of the District Judge.”).

For the foregoing reasons, this Court should grant Plaintiffs' motion for a temporary restraining order and direct Plaintiffs' immediate release from Calhoun.

Dated: June 5, 2020

Respectfully submitted,

/s/ Miriam Aukerman

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* Application for admission
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CERTIFICATE OF SERVICE

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

Respectfully submitted,

/s/ Jeannie S. Rhee