

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

RANDO BETANCOURT BARCO, MICHEL
FUENTES LUIS, LUIS ALFONSO MEJIA
VELASQUEZ,

Plaintiffs-Petitioners,

v.

COREY PRICE, in his official capacity as Director
of the El Paso ICE Field Office; DORA OROZCO, in
her official capacity as Warden of Otero County
Processing Center; MATTHEW T. ALBENCE, in his
official capacity as Deputy Director and Senior Official
Performing the Duties of the Director of the U.S.
Immigration & Customs Enforcement; CHAD WOLF,
in his official capacity as Acting Secretary, U.S.
Department of Homeland Security; WILLIAM P.
BARR, in his official capacity as Attorney General, U.S.
Department of Justice; and U.S. IMMIGRATION AND
CUSTOMS ENFORCEMENT,

Defendants-Respondents.

Case No.

**COMPLAINT AND
PETITION FOR WRIT OF
HABEAS CORPUS**

INTRODUCTION

1. This action challenges the continued detention of Plaintiffs-Petitioners (“Plaintiffs”) at Otero County Processing Center (“Otero”) by U.S. Immigration and Customs Enforcement (“ICE”) during the novel coronavirus (“COVID-19”) global pandemic. Plaintiffs are immigration detainees who have underlying medical conditions which place them at a significantly higher risk of infection, severe illness, and death from COVID-19 while confined at Otero.

2. On March 11, 2020, the World Health Organization declared COVID-19 a pandemic. Since then, the number of COVID-19 cases in the United States surged from roughly one thousand to 753,317 as of April 20, 2020. Of those 753,317 cases, 36,109 people have died.

3. There is no specific treatment, vaccine, or cure for COVID-19 and no one is immune. The COVID-19 virus is highly contagious and spreads easily and efficiently through person-to-person contact through respiratory droplets produced when an infected person coughs, sneezes, or talks.

4. The only way to prevent infection and the risk of severe illness and death from COVID-19, particularly for medically vulnerable people, is to practice rigorous hygiene and social distancing. This has necessitated the undertaking of unprecedented public health measures to limit social interactions in the form of stay-at-home orders. In New Mexico, for example, Governor Michelle Lujan Grisham instructed residents to remain in their homes except for outings absolutely necessary for health, safety, and welfare.

5. People living in group environments, or places where people live, eat, and sleep in close proximity to one another, face a heightened risk of contracting COVID-19, as evidenced by

the rapid spread of COVID-19 in cruise ships, nursing homes, and large social gatherings. This risk is elevated even further in correctional settings, where it is often impossible to secure regular provisions of necessary personal hygienic supplies such as soap. Likewise, it is impossible for people confined in correctional settings to follow recommended social distancing guidelines.

6. Because of the acute risk of infection from the COVID-19 virus present in correctional settings, particularly for people whose underlying medical conditions make them vulnerable to severe illness or death if infected, leading public health experts have recommended releasing people from prisons and jails. Judges, prosecutors, and correctional authorities across the county have responded by ordering releases. Doing so contributes to greater risk mitigation for all incarcerated people, facility employees, and the surrounding community at large by loosening the strain on scarce medical resources.

7. Plaintiffs-Petitioners (“Plaintiffs”) are at heightened risk of severe illness or death if they contract COVID-19 due to their underlying medical conditions. If they continue to be detained at Otero during the COVID-19 pandemic, they face a danger that is “so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk” and that violates their constitutional right to safety in government custody. *Helling v. McKinney*, 509 U.S. 25, 36 (1993).

8. Given this serious risk, Plaintiffs ask this Court to issue a Writ of Habeas Corpus and order their immediate release, subject to appropriate precautionary public health measures, such as home quarantine and confinement upon release, on the ground that their continued detention violates the Due Process Clause of the U.S. Constitution. In the alternative, Plaintiffs ask this Court to issue injunctive relief ordering Defendants-Respondents (“Defendants”) to

release them immediately, with appropriate precautionary public health measures, on the grounds that their continued detention violates the Due Process Clause.

PARTIES

9. Plaintiff Rando Betancourt Barco is a citizen of Cuba who has been detained at Otero since March 20, 2020. Mr. Barco has been diagnosed with asthma, a respiratory condition in which certain illnesses, including the flu, can lead to the inflammation of the airways and lungs as well as pneumonia and other acute respiratory diseases. Mr. Barco also has been diagnosed with diabetes, a metabolic disorder that can compromise immune system functions and increase the body's vulnerability to infection. As a consequence, he is at high risk of severe illness or death if he contracts COVID-19.

10. Plaintiff Michel Fuentes Luis is a citizen of Cuba who has been detained at Otero for nearly 6 months. Mr. Luis has been diagnosed with asthma, a respiratory condition in which certain illnesses, including the flu, can lead to the inflammation of the airways and lungs as well as pneumonia and other acute respiratory diseases. Mr. Luis also suffers from an untreated hand injury sustained following a fall in a dormitory at Otero. As a consequence, he is at high risk of severe illness or death if he contracts COVID-19.

11. Plaintiff Luis Alfonso Mejia Velasquez is a citizen of Honduras who has been detained since February 1, 2020. He has been held at Otero for just over one week. Mr. Velasquez has been diagnosed with high blood pressure, which has led to persistent chest pains, difficulty breathing, headaches, and dizziness. As a consequence, he is at high risk of severe illness or death if he contracts COVID-19.

12. Defendant Corey Price is the Field Office Director for the El Paso ICE Field

Office, which has administrative jurisdiction over Plaintiffs' detention. He is a legal custodian of Plaintiffs. He is sued in his official capacity.

13. Defendant Dora Orozco is the warden of the Otero County Processing Center, where Plaintiffs are detained. She is a legal custodian of Plaintiffs. She is sued in her official capacity.

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

15. Defendant Chad Wolf is Acting Secretary of the U.S. Department of Homeland Security. In that position, he is responsible for the enforcement of the immigration laws. Defendant Wolf is a legal custodian of Plaintiffs. He is sued in his official capacity.

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

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

JURISDICTION AND VENUE

18. This Court has subject matter jurisdiction over this matter under 28 U.S.C. § 1331 (federal question jurisdiction), 28 U.S.C. § 1346 (original jurisdiction), 5 U.S.C. § 702 (waiver of sovereign immunity); 28 U.S.C. § 2241 (habeas jurisdiction) and Article I, Section 9, clause 2 of the United States Constitution (the Suspension Clause).

19. Venue lies in the U.S. District Court for the District of New Mexico, the judicial district in which Plaintiffs are currently in custody. 28 U.S.C. § 2242. Venue is proper in the District of New Mexico under 28 U.S.C. § 1391, as venue is proper in any district in which a substantial part of the events or omissions giving rise to the claim occurs.

FACTS

A. COVID-19 Poses a Serious Risk of Harm to Medically Vulnerable Populations

20. COVID-19 was classified as a global pandemic on March 11, 2020 by the World Health Organization. Declaration of Dr. Joseph J. Amon (“Amon Decl.”) ¶ 5. As of April 20, 2020, at least 753,317 people in the United States have tested positive for COVID-19, and 36,109 people have died from the disease. These figures jump significantly each day and represent the highest number of confirmed cases and deaths in the world. In New Mexico, public health authorities are bracing for a surge in confirmed cases and expect hospitals to reach capacity in a number of weeks.¹

21. While COVID-19 can have no or mild symptoms for people at low risk, it can lead to respiratory failure and death in others. Amon Decl. ¶ 6. It may lead to virus-induced acute

¹ See Declaration of Noor Zafar, Exhibit A, *State surge model indicates New Mexico COVID-19 peak, late May: charts, graphs*, KRQE Media (April 9, 2020), <https://www.krqe.com/health/coronavirus-new-mexico/governor-lujan-grisham-to-hold-news-conference/>.

lung injury, inflammatory response, multiple organ damage and secondary nosocomial infections. Amon Decl. ¶ 6. There is no known cure or anti-viral treatment for COVID-19 at this time. Amon Decl. ¶ 6.

22. The COVID-19 virus is highly contagious, and spreads easily and efficiently within group environments. Amon Decl. ¶¶ 14-15, 23. The virus spreads primarily through person-to-person contact through respiratory droplets produced when an infected person coughs, sneezes, or talks. Amon Decl. ¶14. These droplets can possibly be inhaled or land in the mouths or noses of people nearby, particularly people within 6 feet. Amon Decl. ¶14. As well, these droplets land on objects and surfaces around the infected person which can lead to other people contracting the COVID-19 virus by touching these objects or surfaces, then touching their eyes, nose or mouth. Amon Decl. ¶14. The risk of spread is much higher in group environments due to the close proximity in which people live, eat, and/or sleep within such spaces. This heightened risk is evidenced by the extremely high COVID-19 transmission rates in cruise ships, large social gatherings, and long-term care facilities. Amon Decl. ¶ 23.

23. The COVID-19 virus's contagious nature is further exacerbated by its variance with respect to the pace at which the symptoms of infection manifest. There is significant evidence that one can contract and spread the virus without ever having the symptoms manifest. By some estimates, up to half of people infected may show mild or no symptoms at all. Crucially, such asymptomatic or presymptomatic carriers are nevertheless highly infectious to others. Amon Decl. ¶ 15.

24. The only known effective measures to reduce the risk of contracting COVID-19 are social distancing or remaining physically separated from known or potentially infected

individuals, and vigilant sanitation and hygiene, including repeatedly and thoroughly washing hands with soap and water. Declaration of Norton Kalishman (“Kalishman Decl.”) ¶ 19.

B. Plaintiffs Face an Elevated Risk of Harm from COVID-19 While Confined at Otero

25. People within group environments, including cruise ships, long-term care facilities, and large social gatherings, face a heightened risk of contracting COVID-19 due to the ease with which the virus spreads within such settings. Amon Decl. ¶ 23. However, the risk of spread is even higher within detention centers, including Otero, given that detained individuals are in close quarters on a near constant basis, making it virtually impossible to adhere to social distancing guidelines. Amon Decl. ¶ 23. As well, with the amount of crowding that is typical to carceral settings, keeping surfaces adequately sanitized to prevent the spread of COVID-19 is unrealistic. Amon Decl. ¶ 23.

26. As of April 16, 2020, ICE has acknowledged that at least one detainee has contracted COVID-19 at Otero. *See ICE Guidance on COVID-19, Confirmed Cases*, <https://www.ice.gov/coronavirus>. Due to the heightened risk of transmission within carceral settings, it is inevitable that COVID-19 will spread rapidly throughout Otero without effective intervention.

27. Social distancing is often not feasible within the typical immigration detention framework given the crowding in facilities and physical infrastructure limitations. Declaration of Dora Schriro (“Schriro Decl.”) ¶¶ 26–27. Housing and food service leave little opportunity for detainees to maintain 6 feet of space between one another. Schriro Decl. ¶¶ 26–27.

28. The failure to adhere to social distancing practices occurs regularly throughout Otero, even amidst the COVID-19 pandemic. At Otero, detainees are housed dormitory style in

rooms that have dimensions of approximately 20 meters by 15 meters. Declaration of Michel Fuentes Luis (“Luis Decl.”) ¶ 11. There are 50 bunk beds in each dormitory with one meter of distance between each bed. Luis Decl. ¶ 11. As well, detainees at Otero have to eat meals in a cafeteria that is approximately 25 meters by 12 meters with 48 tables that seat four people and are less than one meter wide. Luis Decl. ¶ 12. At times, there will be as many as 100 detainees eating in the cafeteria at one time. Luis Decl. ¶ 12. Detainees report that it is almost impossible to practice social distancing while navigating those conditions. Luis Decl. ¶ 10; Declaration of Rando Betancourt Barco (“Barco Decl.”) ¶ 9; Declaration of Luis Alfonzo Mejia Velasquez (“Velasquez Decl.”) ¶ 11.

29. People confined at immigration detention facilities likewise face significant obstacles to practicing the rigorous hygiene required to prevent COVID-19 infection. Detainees are often without sufficient access to soap and other cleaning supplies. Amon Decl. ¶ 23. Toilets, sinks, showers, and other common areas are shared, and without adequate surface disinfection between each use. Amon Decl. ¶ 23. These conditions make immigration detention centers uniquely vulnerable to the rapid spread of COVID-19. Amon Decl. ¶ 22.

30. People detained at Otero have reported that such inadequate hygienic and sanitation practices have continued amidst the COVID-19 pandemic. Vealsquez Decl. ¶ 12–13; Luis Decl. 13–14; Amon Decl. ¶ 36. At Otero, detainees share the toilets, sinks, and showers. In one dormitory, 49 detainees share four toilets with sinks attached on top and four showers, none of which are disinfected between each use. Luis Decl. ¶ 10. Detainees at Otero report that they are not provided with sufficient cleaning supplies or hand soap and that guards do not wear masks or gloves. Barco Dec. 11; Vealsquez Decl. ¶ 12–13; Luis Decl. 13–14; Amon Decl. ¶ 36.

Some detainees at Otero who have exhibited COVID-19 symptoms indicating a fever have not been tested for the virus, and each day, new people who may be infected with COVID-19 are brought into the facility to be detained. Luis Decl. ¶ 15, 17; Amon Decl. ¶ 36. Defendants' failure to institute adequate hygienic practices amidst the COVID-19 pandemic comports with conditions observed by Plaintiffs' counsel during pre-COVID-19 visits to the Otero facility. During one such visit on January 21, 2020, Nia Rucker of the American Civil Liberties Union of New Mexico observed that the dormitory toilets had no lids or covers, and "no barriers to give privacy or keep urine, feces or other fluids from scattering towards other sinks/toilet." Rucker Decl. ¶ 7. As well, Ms. Rucker observed that the dormitories each had a few pay phones and electronic tablets made available to detainees for limited communication with family, detention officers, etc. *Id.* However, there were no observable means for sanitizing the tablets or phones between each use. *Id.* Ms. Rucker did not observe any available cleaning supplies for the toilets and showers, and no available sanitizing wipes for commonly used surfaces such as door handles, bunk bed frames, tables, or chairs. *Id.* ¶ 13. Given these conditions, Otero, like many other immigration detention centers, is a veritable ticking time bomb for a COVID-19 outbreak. Amon Decl. ¶¶ 36-45, 50.

31. The issues that the conditions present at Otero are compounded by the fact that that administrators at the facility have made the decision that they will not set up legal calls between the people detained and their attorneys. *See* Exhibit A (email re: Concerns with detainee access to legal calls). Accordingly, the people who are detained at Otero have difficulty reporting their health conditions and the conditions in the facility to their attorneys. Attorneys are the only people who are likely to be able to advocate on behalf of their clients once they learn that clients

have presented symptoms or are medically vulnerable.

32. In the event of a COVID-19 outbreak at Otero, it is likely that local health resources will be further strained, especially given that New Mexico is projected to reach hospital capacity due to COVID-19 in a matter of weeks.² If many contract COVID-19 in a detention facility, they will require hospitalization in the community, threatening to overwhelm the community's resources. Amon Decl. ¶¶ 41-42. Crucially, overwhelming local public health systems will likely prevent facilities from providing treatment to all who require it, increasing the likelihood that individuals with serious cases of COVID-19 will die.

33. Recognizing this heightened risk, courts across the country have intervened to protect the civil liberties, health, and lives of those most vulnerable to infection. *See, e.g., Hope v. Doll*, No. 1:20-cv-00562, Dkt. 22 (M.D. Pa. Apr. 10, 2020) (denying motion for reconsideration of TRO grant and ordering immediate release of 22 medically vulnerable immigrant detainees); *Malam v. Adducci*, No. 2:20-cv-10829 (E.D. Mich., Apr. 6, 2020) (“[T]he only reasonable response by Respondents is the release of Petitioner; any other response demonstrates a disregard of the specific, severe, and life-threatening risk to Petitioner from COVID-19.”); *Toma v. Adducci*, No. 2:20-cv-10829-JEL-APP, Dkt. No. 29 (E.D. Mich. Apr. 9, 2020) (granting TRO releasing medically vulnerable immigrant detainee because of the risk of COVID-19); *Rafael L.O. v. Tsoukaris*, No. 2:20-cv-3481-JMV, Dkt. No. 24, 2020 WL 1808843 (D.N.J. Apr. 9, 2020) (same for three detainees);

² See Declaration of Noor Zafar, Exhibit A, *State surge model indicates New Mexico COVID-19 peak, late May: charts, graphs*, KRQE Media (April 9, 2020), <https://www.krqe.com/health/coronavirus-new-mexico/governor-lujan-grisham-to-hold-news-conference/>.

Ali v. DHS, No. 4:20-cv-140, 2020 WL 1666074 at *5 (S.D. Tex. Apr. 2, 2020) (ordering release of prisoner and noting that “individuals housed within detention centers nonetheless remain particularly vulnerable to infections”); *Bent v. Barr*, No. 4:19-cv-06123, Dkt. 26 (N.D. Cal. Apr. 9, 2020) (granting TRO releasing medically vulnerable immigrant detainee because of the risk of COVID-19); *Bahena Ortuno v. Jennings*, No. 3:20-cv-02064-MMC, Dkt. No. 38 (N.D. Cal. Apr. 8, 2020) (same for four detainees); *Basank v. Decker*, -- F. Supp. 3d ----, 2020 WL 1481503, at *3 (S.D.N.Y. Mar. 26, 2020) (ordering release because “[t]he nature of detention facilities makes exposure and spread of the [coronavirus] particularly harmful”); *Coronel v. Decker*, -- F. Supp. 3d ----, 2020 WL 1487274, at *9-10 (S.D.N.Y. Mar. 27, 2020) (same for four detainees); *Hernandez v. Decker*, No. 20-cv-1589 (JPO), 2020 WL 1547459 (S.D.N.Y. Mar. 31, 2020); *Hernandez v. Wolf*, 20-cv-617, Dkt. No. 17 (C.D. Cal., Apr. 1, 2020) (“Because of the highly contagious nature of the coronavirus and the, relatively high, mortality rate of COVID-19, the disease can spread uncontrollably with devastating results in a crowded, closed facility, such as an immigration detention center.”); *Robles Rodriguez v. Wolf*, No. 5:20-cv-00627-TJH-GJS, Dkt. Nos. 32, 35-39 (C.D. Cal. Apr. 2, 2020) (same for six detainees); *Bravo Castillo v. Barr*, No. 20-605-TJH (AFMx), --- F. Supp. 3d ----, 2020 WL 1502864 (C.D. Cal. Mar. 27, 2020) (same for two detainees); *Savino v. Souza*, No. 20-10617-WGY, --- F. Supp. 3d ----, 2020 WL 1703844 (D. Mass. Apr. 8, 2020) (granting motion for class cert resulting in release of at least 49 detainees as of this

filing); *Nguyen v. Marin*, No. 20-00646, Dkt. No. 10, (C.D. Cal. Apr. 3, 2020); *Avendaño Hernandez v. Decker*, No. 20-CV-1589, 2020 WL 1547459, at *4 (S.D.N.Y. Mar. 31, 2020); *Barbecho v. Decker*, 20-cv-02821, Dkt. No. 20 (S.D.N.Y. Apr. 15, 2020); *J.G. v. Decker*, No. 20-cv-03644-KM, Dkt. No. 36 (D.N.J. Apr. 15, 2020); *Fofana v. Albence*, No. 20-cv-10869, Dkt. No. 15 (E.D. Mich. Apr. 15, 2020); *A.R. v. Decker*, No. 20-3600 (D.N.J. Apr. 12, 2020); *Thakker v. Doll*, No. 20-00480 (M.D. Pa. Mar. 31, 2020); *Fraihat v. Wolf*, No. 20-00590 (C.D. Cal. Mar. 30, 2020); *see also Coreas v. Bounds*, No. TDC-20-0780, 2020 WL 1663133, at *11 (D. Md. Apr. 3, 2020) (holding that failure to act to address risk to high-risk individuals in light of any confirmed case of COVID-19 among staff members or detainees at the facility “would establish knowing disregard of a serious medical need constituting deliberate indifference”). On March 23, 2020, the Ninth Circuit ordered, *sua sponte*, the release of an immigrant petitioner “[i]n light of the rapidly escalating public health crisis, which . . . authorities predict will especially impact immigration detention centers.” *Xochihua-Jaimes*, 2020 WL 1429877, at *1 (9th Cir. Mar.23, 2020).

C. Leading Public Health Experts Agree that Medically Vulnerable People Should Be Released from ICE Detention

34. The rapid spread of COVID-19 globally has led to increased calls to release medically vulnerable people from correctional facilities. In New Mexico, for example, a group of sixty medical professionals wrote a letter urging state officials to release people from custody, agreeing with experts across the country that “[t]he safest way to ensure that a

jail or prison does not become a site for COVID-19 to spread is to reduce the number of people who are incarcerated.”³ Likewise, leading public and correctional health experts have also called for the release of vulnerable detainees, including Plaintiffs, from Otero. Schriro Decl. ¶ 41.

35. Dr. Joseph J. Amon, an infectious disease epidemiologist who has decades of experience as a public health researcher and practitioner, has declared that “while hand washing and disinfecting surfaces is advisable, the main strategy for limiting disease transmission is social distancing and that for such distancing to be effective it must occur before individuals display symptoms.” Amon Decl. ¶ 16. He has cautioned that ICE’s most recent COVID-19 protocols “are entirely inadequate to prevent or mitigate the rapid transmission of COVID-19 in Otero County Processing Center,” which puts high-risk patients such as Plaintiffs in danger. Amon Decl. ¶ 27. These facts have led Dr. Amon to conclude that “[t]he only viable public health strategy is risk mitigation,” with the release of medically vulnerable detainees such as Plaintiffs being “a key part of a risk mitigation strategy.” Amon Decl. ¶ 47.

36. Dr. Norton Kalishman, a retired physician and former Chief Medical Officer of the New Mexico Department of Health (“NMDOH”) who has decades of experience in overseeing public health services and managing responses to public health emergencies, has declared that people within congregate settings, like that of Otero, are “vulnerable to transmission” of COVID-19.” Kalishman Decl. ¶ 21. Dr. Kalishman also characterized the

³ Phaedra Haywood, *Medical providers ask state to release inmates, Santa Fe New Mexican* (Mar. 30, 2020), available at https://www.santafenewmexican.com/news/coronavirus/medical-providers-ask-state-to-release-inmates/article_28ec48ee-7089-11ea-8873-5b52a107906d.html. Zafar Decl., Ex. C.

COVID-19 virus as a “deadly virus that has proven to be extremely dangerous for those with chronic underlying health issues.” *Id.* ¶ 22. He has also reviewed Plaintiffs’ medical conditions and concluded that they are at a “high risk of serious illness or death” if they are infected with the COVID-19 virus. *Id.* ¶ 23-25.

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

38. Plaintiff Rando Betancourt Barco is a citizen of Cuba who has been detained at Otero since March 20, 2020. Barco Decl. ¶ 1. Mr. Barco arrived at the United States on October 23, 2019, when he turned himself in to U.S. Customs and Border Protection at the border. Barco Decl. ¶ 3. Mr. Barco has no criminal convictions in Cuba or the United States and is awaiting the final resolution on his application for asylum. Barco Decl. ¶¶ 7-8.

39. Mr. Barco was diagnosed with asthma in Cuba when he was seven years old. Barco Decl. ¶ 4. He has used an inhaler to mitigate his severe asthma ever since. Barco Decl. ¶ 4. Mr. Barco is currently using an inhaler at Otero. Barco Decl. ¶ 4. Mr. Barco was diagnosed with diabetes while in ICE custody in El Paso, after a diabetic attack. Barco Decl. ¶ 5. He now takes two pills every morning and one pill every evening. Barco Decl. ¶ 5. Mr. Barco gets very sick and dizzy from this illness. Barco Decl. ¶ 5.

40. Mr. Barco is particularly vulnerable to severe illness or death if he exposed to COVID-19 due to his asthma and diabetes. Kalishman Decl. ¶ 25.

41. If released, Mr. Barco would stay with his brother’s father in Miami, Florida. Barco Decl. ¶ 16. While staying in Miami, Mr. Velasquez would maintain a safe distance from

others and/or quarantine as necessary. He would also have access to treatment for his medical conditions.

42. Plaintiff Michel Fuentes Luis is a citizen of Cuba who has been detained at Otero for nearly 6 months. Luis Decl. ¶ 1. Mr. Luis entered the United States on June 30, 2019, when he was immediately taken into CBP custody and transferred to ICE custody. Luis Decl. ¶ 3. Mr. Luis has no criminal convictions in Cuba or the United States and is awaiting the final disposition on his application for asylum. Luis Decl. ¶¶ 8-9.

43. Mr. Luis was diagnosed with asthma when he was three years old and has used an inhaler ever since. Luis Decl. ¶ 5.

44. Mr. Luis is particularly vulnerable to severe illness or death if he exposed to COVID-19 due to his asthma. Kalishman Decl. ¶23.

45. If released, Mr. Luis would stay at his family's home in Arizona. Luis Decl. ¶ 20. While staying with his family, Mr. Velasquez would maintain a safe distance from others and/or quarantine as necessary. He would also have access to treatment for his medical conditions.

46. Plaintiff Louis Alfonzo Mejia Velasquez is a citizen of Honduras who has been detained since February 1, 2020. Velasquez Decl. ¶ 1. Mr. Velasquez reentered the United States on January 30, 2020, when he was immediately taken into custody by U.S. Customs and Border Protection. Velasquez Decl. ¶ 3. Mr. Velasquez fled Honduras because he feared for his life, and he is in the process of applying for asylum. Velasquez Decl. ¶ 10. Mr. Velasquez has a misdemeanor conviction from Louisiana for resisting arrest, and completed all obligations of that case years ago. Velasquez Decl. ¶ 9. Mr. Velasquez has a 13-year-old U.S. citizen son who lives in Louisiana with his extended family. Velasquez Decl. ¶ 4.

47. In 2012, while living in Louisiana, Mr. Velasquez was diagnosed with high blood pressure and was prescribed medications. Velasquez Decl. ¶ 5. He has been hospitalized three times in Honduras due to his high blood pressure. Velasquez Decl. ¶ 5. Mr. Velasquez's recurring symptoms include chest pain, difficulty breathing, severe headaches, and dizziness. Velasquez Decl. ¶ 5. At Otero, the staff checks his blood pressure daily and has tried different medicines to reduce his blood pressure. Velasquez Decl. ¶ 6. Lately, Mr. Velasquez has been experiencing dizziness, frequent headaches, and chest pain almost every night. Velasquez Decl. ¶ 7.

48. Mr. Velasquez is particularly vulnerable to severe illness or death if he is exposed to COVID-19 due to his high blood pressure. Kalishman Decl. ¶ 24.

49. If released, Mr. Velasquez would stay at his cousins' home in Louisiana. Velasquez Decl. ¶ 18. While staying with his cousins, Mr. Velasquez would maintain a safe distance from others and/or quarantine as necessary. He would also have access to treatment for his medical conditions.

ARGUMENT

A. Defendants Violate Plaintiffs' Constitutional Rights by Confining them at Otero Amidst the COVID-19 Pandemic

50. “[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.” *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189, 199-200 (1989). As civil detainees, Plaintiffs' detention is governed by the Fifth Amendment. *Bell v. Wolfish*, 441 U.S. 520, 539 (1979). Under the Fifth Amendment, civil

detention may not “amount to punishment of the detainee.” *Bell*, 441 U.S. at 535.

51. According to *Bell*, the test for whether the conditions of confinement for civil detention amounts to punishment of the detainee is whether those conditions are “reasonably related to a legitimate governmental objective.” *Bell*, 441 U.S. at 539; *see also Colbruno v. Kessler*, 928 F.3d 1155, 1163 (10th Cir. 2019) (holding that the *Bell* test contains no subjective component, and objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose is sufficient to establish a due process violation). When there is no such rational nexus between the challenged conditions of confinement and a legitimate governmental objective, those conditions are instead “arbitrary or purposeless,” and thus amount to punishment of the civil detainee. *Bell*, 441 U.S. at 539.

52. Plaintiffs are particularly vulnerable to serious illness and death from the coronavirus, making their continued detention at Otero amidst the COVID-19 pandemic a substantial risk to their health and safety. Several courts have held that continued detention in light of such risks amounts to punishment in violation of the Due Process Clause because it bears no rational relationship to a legitimate government objective. *See, e.g., Malam*, 2020 WL 1672662, at *12; ; *Thakker*, 2020 WL 1671563, at *8 (ordering immediate release of immigrant petitioners because “we can see no rational relationship between a legitimate government objective and keeping Petitioners detained in unsanitary, tightly-packed environments.”).

53. Further, the Tenth Circuit has held that an individual in pretrial detention can establish a due process violation if he can “show deliberate indifference to his serious medical needs.” *McCowan v. Morales*, 945 F.3d 1276, 1290 (10th Cir. 2019) (citations omitted). In order

to establish that defendants acted with deliberate indifference, a plaintiff must satisfy two prongs: 1) the challenged conditions must be “sufficiently serious so as to deprive [detainees] of the minimal civilized measure of life’s necessities” or in the alternative that “a condition must be sufficiently serious so as [to] constitute a substantial risk of serious harm”; and 2) the defendants must have known of and disregarded that substantial risk of serious harm to the plaintiff’s health and safety. *Shannon v. Graves*, 257 F.3d 1164, 1168 (10th Cir. 2001) (citations omitted); *Farmer v. Brennan*, 511 U.S. 825, 837–38 (1994); *Burke v. Regalado*, 935 F.3d 960, 992 (10th Cir. 2019).

54. Given their medical vulnerabilities, Plaintiffs’ continued detention at Otero during the COVID-19 pandemic represents a deliberate indifference to a substantial risk of serious harm. The Tenth Circuit has held that a risk of contracting “infectious diseases such as Hepatitis A, shigella, and others” can satisfy the substantial risk of serious harm prong and “[t]here is no requirement that an inmate suffer serious medical problems before the condition is actionable.” *Shannon*, 257 F.3d at 1168. Where a risk is obvious, such as during a contagious disease outbreak, it is fair for a factfinder to assume that the government official was aware of the risk. *See, e.g., Farmer*, 511 U.S. at 842. Defendants are also aware of the serious risks that COVID-19 poses in detention settings with underlying medical conditions. Medical experts for DHS have specifically identified the risk of COVID-19 spreading to ICE detention centers. Schriro Decl. ¶ 41.

55. When the government fails to meet its obligation to protect the health and safety of its incarcerated populations, including by providing adequate medical care, courts have a responsibility to remedy the resulting constitutional violation. *See Brown v. Plata*, 563 U.S. 493,

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

56. In order to vindicate the due process rights of civil detainees amidst the COVID-19 pandemic, federal and state courts across the country have ordered the release of detained individuals. See, e.g., *Malam*, 2020 WL 1672662 (ordering release of detainee in Michigan due to threat of COVID-19); *Bahena Ortuno v. Jennings*, No. 20-cv-020640-MMC (N.D. Cal. Apr. 8, 2020) (same); *Hernandez v. Wolf*, No. 20-60017-TJH (C.D. Cal. Apr. 1, 2020) (same); *Thakker v. Doll*, No. 1:20-cv-480, —F. Supp. 3d—, 2020 WL 1671563 (M.D. Pa. Mar. 31, 2020) (same for 13 detainees in Pennsylvania); *Coronel v. Decker*, No. 20-cv-2472, —F. Supp. 3d—, 2020 WL 1487274 (S.D.N.Y. Mar. 27, 2020) (ordering release of four medically vulnerable immigrant plaintiffs held in New York and New Jersey detention centers due to threat of COVID-19); *Basank v. Decker*, No. 20-cv-2518, 2020 WL 1481503, at *1 (S.D.N.Y. Mar. 26, 2020) (same, for ten immigrant plaintiffs who “suffer[] from chronic medical conditions, and face[] an imminent risk of death or serious injury in immigration detention if exposed to COVID-19”). On March 23, 2020, the Ninth Circuit ordered, sua sponte, the release of an immigrant petitioner “[i]n light of the rapidly escalating public health crisis, which public health authorities predict will especially impact immigration detention centers.” *Xochihua-Jaimes*, No. 18-71460, —F. App’x—, 2020 WL 1429877, at *1 (9th Cir. Mar. 23, 2020).

CLAIM FOR RELIEF

57. Plaintiffs repeat and reallege each of the foregoing allegations, as if set forth

herein.

58. The Fifth Amendment establishes that civil detainees, including persons held in immigration detention, may not be subjected to punishment. The federal government violates this substantive due process rights when it subjects persons held in immigration detention to conditions of confinement which present a serious risk to their health and safety.

59. The conditions of confinement at Defendants' Otero County facility subject Plaintiffs' to a significant risk of being infected with COVID-19, which has no vaccine, known treatment, or cure. By continuing to hold Plaintiffs in these conditions, Defendants are subjecting Plaintiffs to a substantial risk of serious harm, including severe illness and death.

60. Leading public health experts agree that Plaintiffs are at a grave risk of severe illness and death if they remain confined at Otero. As such, Defendants are holding Plaintiffs in conditions that amount to punishment and that present significant risks to their health and safety.

61. There is no reasonable relationship between any legitimate government interest and subjecting Plaintiffs to conditions of confinement which present a serious risk to their health and safety.

62. In addition, the risk posed by COVID-19 is "serious" and that Defendants are being deliberately indifferent to that risk. While a layperson would surely recognize the risks posed by COVID-19 under the circumstances, Plaintiffs have submitted expert evidence demonstrating the seriousness of the risk COVID-19 poses to Plaintiffs if they remain in the Otero facility.

63. Plaintiffs in this case are at specific and heightened risk because of their serious health conditions that render them particularly vulnerable to serious illness or death due to

COVID-19. Defendants are also aware of the serious risks that COVID-19 poses in detention settings to detainees with underlying medical conditions. Medical experts for DHS have specifically identified the risk of COVID-19 spreading to ICE detention centers. Schriro Decl. ¶¶ 41. And Defendants are aware that courts around the country are already releasing individuals detained for immigration and/or criminal purposes from detention centers, jails and prisons because the risk of contagion is overwhelming. Defendants' failure to release detained individuals from these conditions constitute deliberate indifference to that risk, in violation of Plaintiffs' constitutional rights.

PRAYER FOR RELIEF

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

- a. Issue a writ of habeas corpus and order the immediate release of Plaintiffs, with appropriate precautionary public health and safety measures, on the ground that their continued detention violates the Due Process Clause of the Fifth Amendment;
- b. Issue injunctive relief ordering Defendants, their officers, agents, servants, employees, attorneys, and all other persons in active concert or participation with any of the foregoing persons to immediately release Plaintiffs, with appropriate precautionary public health and safety measures, on the grounds that their continued detention violates the Due Process Clause of the Fifth Amendment;
- c. Issue a declaration that the conditions under which Defendants have confined Plaintiffs and others at Otero place Plaintiffs at an unreasonable risk of contracting serious illness and death, in violation of the Due Process Clause of the

Fifth Amendment;

- d. Grant Plaintiffs their reasonable attorneys' fees and expenses pursuant to 28 U.S.C. § 2412, and other applicable law; and
- e. Grant such other relief as this Court deems just and proper.

Dated: April 20, 2020

Respectfully submitted:

/s/ María Martínez Sánchez

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** Motions to appear pro hac vice
forthcoming*

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forthcoming; not admitted in DC;
practice limited to federal courts.*