UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

JENNER BENAVIDES
DAVID FERNANDEZ
GERARDO ARRIAGA
AJIT KUMAR
SCOTT JAMES
WINSTON BROWN
Folkston ICE Processing Center
P.O. Box 248
Folkston, GA 31537

Petitioners/Plaintiffs,

v.

PATRICK GARTLAND
Warden, Folkston ICE Processing Center
3026 Hwy 252 E
P.O. Box 98
Folkston, GA 31537;

and

THOMAS GILES
Field Office Director U.S. Immigration and Customs Enforcement
Atlanta Field Office,
180 Ted Turner Drive, SW, Suite 522
Atlanta, GA 30303;

and

MATTHEW T. ALBENCE
Deputy Director and Senior Official Performing the Duties of the Director
U.S. Immigration and Customs Enforcement
500 12th Street, SW
Washington, D.C. 20536;

and

CHAD WOLF
Acting Secretary
Department of Homeland Security,

Case No.: 5:20-cv-46-LGW-BWC

HEARING REQUESTED

3801 Nebraska Avenue, NW
Washington, D.C. 20016;

and

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT
500 12th Street, SW
Washington, D.C. 20536;

Respondents/Defendants.

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

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I. INTRODUCTION

1. The COVID-19 pandemic is wreaking havoc throughout the world. The United States has more confirmed cases than any other country, and more than 74,810 Americans have died. Experts estimate that the coronavirus will ultimately infect between 160 and 214 million people and take the lives of up to 1.7 million people in the United States alone.

2. There is no vaccine against COVID-19 and no known cure. Currently, the only recognized strategies to reduce the risk of exposure to COVID-19 are strict social distancing and scrupulous hygiene, which have led to unprecedented public health measures around the world.

3. In light of the devastation COVID-19 has already caused and the extreme difficulty of stopping its transmission, the President has declared a national emergency; all fifty U.S. states and the District of Columbia have declared states of emergency; and numerous states and localities—including Georgia—have issued "shelter-in-place" orders requiring all, or some, residents to stay in their homes. These extreme measures all seek to reduce the spread of the virus and, ultimately, save lives.

4. Jails and prisons across the nation—including in Georgia—have also implemented drastic measures to mitigate the spread of COVID-19, including reducing incarcerated populations, releasing medically vulnerable individuals, and slowing arrests. Unfortunately, U.S. Immigration and Customs Enforcement (ICE), which detains immigrants who may be subject to removal from the United States, has failed to follow suit. Despite warnings from thousands of medical and public health professionals that releasing people—especially those who are medically vulnerable—is the only viable option to avert an imminent public health threat, the agency has generally refused to do so in the absence of court intervention.

5. Since the pandemic began, numerous judges across the country have ordered the urgent release of individuals from ICE detention facilities, jails, and prisons, explaining the pressing health risks created by ICE detention and other types of imprisonment.[1]

6. Petitioners, who are detained at Folkston ICE Processing Center ("Folkston"), now seek the same relief from this Court. COVID-19 is already present inside of Folkston, and rapid

[1] *See, e.g.*, *Xochihua-Jaimes v. Barr*, 2020 WL 1429877 (9th Cir. Mar. 24, 2020); *Roman v. Wolf*, No. 5:20-cv-00768-TJH-PVC, 2020 WL 1952656 (C.D. Cal. Apr. 23, 2020) (Findings of Fact and Conclusions of Law), and ECF No. 55 (Preliminary Injunction Order); *Vazquez Barrera v. Wolf*, Case No. 4:20-cv-01241 (S.D. T.X. Apr. 17, 2020), ECF No. 41; *Barbecho v. Decker*, Case No. 1:20-cv-02821 (S.D. N.Y. Apr. 15, 2020), ECF No. 20; *Hope v. Doll*, Case No. 1:20-cv-00562-JEJ (M.D. Pa. Apr. 7, 2020), ECF No. 11; *Martin Munoz v. Wolf*, Case No. 20-cv-00625-TJH-SHK (C.D. Cal. Apr. 2, 2020), ECF No. 14; *Robles Rodriguez v. Wolf*, 20-cv-00627-TJH-GJS (C.D. Cal. Apr. 2, 2020), ECF No. 37; *Hernandez v. Wolf*, CV 20-60017-TJH (KSx)(C.D. Cal. Apr. 1, 2020), ECF No. 17; *Arana v. Barr*, 2020 WL 1502039 (S.D.N.Y. Mar. 27, 2020); *Xuyue Zhang v. Barr*, 2020 WL 1502607 (C.D. Cal. March 27, 2020); *Basank v. Decker*, 2020 WL 1481503 (S.D.N.Y. Mar. 26, 2020); *Castillo v. Barr*, 2020 WL 1502864 (C.D. Cal. March 27, 2020); *Coronel v. Decker*, 2020 WL 1487274 (S.D.N.Y. Mar. 27, 2020); *Fraihat v. Wolf*, No. ED CV 20-00590 TJH (KSx) (C.D. Cal. Mar. 30, 2020); *Calderon Jimenez v. Wolf*, No. 18 Civ. 10225 (D. Mass. Mar. 26, 2020), ECF No. 507; *United States v. Stephens*, 2020 WL 1295155 (S.D. N.Y. Mar. 19, 2020); *Matter of Extradition of Toledo Manrique*, 2020 WL 1307109 (N.D. Cal. Mar. 19, 2020); *Alcantara v. Archambeault*, No. 3:20-cv-00756-DMS-AHG (S.D. Cal. Apr. 30, 2020), ECF No. 38; *Dada v. Witte*, No. 1:20-cv-00458-DDD-JPM (W.D. La. April 30, 2020), ECF No. 17; *Gayle v. Meade*, 2020 WL 2086482 (S.D. Fl. Apr. 30, 2020); *Favi v. Kolitwenzew*, No. 2:20-CV-02087 2020 U.S. Dist. LEXIS 77772 (C.D. Ill. May 4, 2020); *Hernandez v. Kolitwenzew*, No. 2:20-cv-02088-SLD (C.D. Ill. Apr. 9, 2020), ECF. No. 9; *Essien v. Barr*, No. 20-cv-1034-WJM, 2020 WL 1974761 (D. Colo. Apr. 24, 2020); *Savino v. Hodgson*, No. 1:20-cv-10617-WGY (D. Mass. Apr. 4, 2020), ECF No. 44; *United States v. Ramos*, No. 3:18-cr-30009-FDS (D. Mass. Mar. 26, 2020), ECF No. 168; *United States. v. Barkman,* No. 3:19-cr-0052-RCJ-WGC, 2020 WL 1811343 (D. Nev. Mar. 17, 2020), ECF No. 21; *United States v. McLean*, No. 1:19-cr-00380-RDM (D. D.C. Mar. 28, 2020), ECF No. 21; *Cristian A.R. v. Decker*, No. 20-3600, 2020 WL 2092616 (D.N.J. Apr. 12, 2020); *Durel B. v. Decker*, No. 20-3430 (KM), 2020 WL 1922140 (D.N.J. Apr. 21, 2020); *United States v. Kennedy*, No. 18-20315, 2020 WL 1493481 (E.D. Mich. Mar. 27, 2020); *Bent v. Barr*, No. 19-cv-06123-DMR, 2020 WL 1812850 (N.D. Cal. Apr. 9, 2020); *United States v. Grobman*, No. 1:18-CR-20989[2] ALTMAN/GOODMAN (S.D. Fla. Mar. 29, 2020), ECF No. 397; *Avendano Hernandez v. Decker*, No. 20-CV-1589 (JPO), 2020 WL 1547459 (S.D.N.Y. Mar. 31, 2020); *Umana Jovel v. Decker*, No. 1:20-cv-00308-GBD-SN (S.D.N.Y. Mar. 26, 2020), ECF No. 27.

spread is inevitable. At Folkston, hundreds of people live, eat, and sleep together in tight quarters; daily close contact with guards and other facility staff is also a fact of life. Social distancing and proper hygiene are impossible, and ICE has failed to take measures—including following their own guidelines—to mitigate the risk of a COVID-19 outbreak. ICE also continues to move new immigrants into the facility. Under these circumstances, COVID-19 will, in the words of a former high-level ICE official, "spread like wildfire."

7. Due to their underlying medical conditions, Petitioners are particularly vulnerable to serious cases of COVID-19. If they contract coronavirus, there is a high risk they will require critical care—largely unavailable in South Georgia where Folkston is located—and face serious illness, including long-term organ damage, and possibly death.

8. Petitioners bring this action to remedy Respondents' violations of their constitutional rights and to protect themselves—as well as others detained or employed at Folkston or living in the surrounding community—from the imminent harm that will result from their continued detention.

II. PARTIES

9. Petitioner Jenner Benavides[2] is a 27-year-old transgender woman and citizen of Mexico who has been detained by ICE at Folkston since May 2019. She entered the U.S. at the age of 10 and later became a DACA recipient. In 2014, her mother died from stomach cancer, leaving Ms. Benavides as the sole caretaker and custodian for her four minor siblings in Nashville, Tennessee. She applied for asylum based on sexual assault and abuse she endured as a child in

[2] Petitioners Jenner Benavides, David Fernandez, and Gerardo Arriaga are proceeding in this action using pseudonyms, as permitted by oral order of the Court on April 15, 2020. Petitioners Ajit Kumar and Winston Brown also use pseudonyms herein and will file a motion to proceed pseudonymously. Respondents have indicated that they will not take a position on Petitioners' motion.

Mexico, as well as her gender identity and sexual orientation. She is currently appealing the denial of this relief to the BIA and applying for a U-visa. Ms. Benavides' immigration attorney submitted a humanitarian parole request on her behalf on April 2, 2020, which ICE denied on April 5, 2020. On April 24, 2020, Ms. Benavides' immigration attorney submitted a request for re-consideration of the parole request and custody re-determination under *Fraihat v. ICE,* No. 5:19-cv-01546-JGB-SHK, at 21 (C.D. Cal. Apr. 20, 2020), ECF No. 132. On May 1, 2020, this request was denied as well. Ms. Benavides is HIV positive and suffers from bipolar disorder and severe depression and anxiety. As a consequence of her health conditions, she is at high risk for severe illness or death if she contracts COVID-19.

10. Petitioner David Fernandez is a 45-year-old citizen of Mexico who has been detained by ICE at Folkston since December 2019. He has lived in the United States for nearly 18 years and has worked consistently in labor jobs, including farming, construction, and roofing. He is currently seeking asylum. Mr. Fernandez suffers from diabetes and has a history of tuberculosis. ICE has not consistently provided him with his necessary insulin injections, so his health has deteriorated while in detention. As a consequence of his health conditions, he is at high risk for severe illness or death if he contracts COVID-19.

11. Petitioner Gerardo Arriaga is a 24-year-old citizen of Peru who is detained at Folkston and has been in ICE custody since March 2020. He is married to a U.S. citizen and was living in Atlanta, Georgia before ICE detained him. Mr. Arriaga suffers from lupus, an autoimmune disease that causes him to be immunocompromised and causes inflammation and damage to his joints, skin, kidneys, blood, heart, and lungs. He has not been receiving adequate medical care at Folkston for his lupus, and on May 5, 2020, he signed a voluntary departure order, choosing to be deported to Peru to obtain medical care for his lupus instead of remaining at

Folkston. However, he was informed by the Peruvian Consulate that Peru is not currently accepting deported people back into the country. Mr. Arriaga's previous requests for release on parole and bond were denied. As a consequence of his health conditions, he is at high risk for severe illness or death if he contracts COVID-19.

12. Petitioner Ajit Kumar is a 29-year-old citizen of Sri Lanka who has been detained by ICE at Folkston since January 2019. He fled Sri Lanka to escape persecution and sought asylum in the U.S. but was denied protection. However, he does not have a passport or travel document and cannot be deported without them. Mr. Kumar currently suffers from tuberculosis, which causes coughing and fatigue, but Folkston recently stopped providing him medication for his tuberculosis. He also suffers from severe headaches, depression, and anxiety; he previously attempted suicide due to the effects of detention on his mental health. As a consequence of his health conditions, Mr. Kumar is at high risk for severe illness or death if he contracts COVID-19.

13. Petitioner Scott James is a 58-year-old citizen of Belize who is detained at Folkston and has been in ICE custody since October 2018. He is married to a U.S. citizen, and he and his wife have four U.S. citizen children. He has lived in the U.S. since 1978; prior to his detention, he lived in Atlanta, Georgia with his family. He is seeking asylum, withholding of removal, and protections under the Convention Against Torture. Mr. James suffers from severe asthma and chronic obstructive pulmonary disease (COPD), which are aggravated by the conditions of his detention. He also has hypertension and a history of pre-diabetes. As a consequence of his age and health conditions, he is at high risk for severe illness or death if he contracts COVID-19.

14. Petitioner Winston Brown is a 61-year-old citizen of Jamaica who is detained at Folkston and has been in ICE custody since March 2019. He has lived in the United States since 1995 and been married to a U.S. citizen for over twenty years. They have two U.S. citizen children.

He sought asylum based on violence committed against him in Jamaica by the police, but his application was denied. He is appealing the denial to the BIA. Mr. Brown suffers from diabetes and hypertension, and he has prostate issues as well. For a few weeks, he has also been experiencing shortness of breath and chest pain. As a consequence of his age and health conditions, he is at high risk for severe illness or death if he contracts COVID-19.

15. Respondent-Defendant ("Respondent") Patrick Gartland is the Warden of Folkston ICE Processing Center. Pursuant to a contract with ICE, Respondent Gartland is responsible for the operation of Folkston, where Petitioners are detained. He is sued in his official capacity.

16. Respondent Thomas Giles is the Field Office Director for the ICE Atlanta Field Office. The ICE Atlanta Field Office has complete control over the admission and release of noncitizens detained at Folkston. Respondent Giles is a legal custodian of Petitioners. He is sued in his official capacity.

17. Respondent Matthew T. Albence is the Deputy Director and Senior Official Performing the Duties of the Director of ICE. Respondent Albence is responsible for ICE's policies, practices, and procedures, including those relating to the detention of immigrants. He is sued in his official capacity.

18. Respondent Chad Wolf is the Acting Secretary of the United States Department of Homeland Security (DHS). In this capacity, he is responsible for the implementation and enforcement of immigration laws and oversees ICE. He is sued in his official capacity.

19. Respondent ICE is a federal law enforcement agency within DHS. ICE is responsible for the criminal and civil enforcement of the immigration laws, including the detention and removal of immigrants.

III. JURISDICTION AND VENUE

20. This Court has subject matter jurisdiction over this matter under 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1346 (United States as defendant), 28 U.S.C. § 2241 (habeas jurisdiction), 28 U.S.C. § 1651 (All Writs Act), Article I, Section 9, clause 2 of the U.S. Constitution (the Suspension Clause), and the Due Process Clause of the Fifth Amendment to the U.S. Constitution.

21. Federal district courts have jurisdiction to hear habeas corpus claims by noncitizens challenging the lawfulness of their detention. *See Jennings v. Rodriguez*, 138 S. Ct. 830 (2018); *Demore v. Kim*, 538 U.S. 510, 516-17 (2003); *Zadvydas v. Davis*, 533 U.S. 678, 687 (2001).

22. Venue is proper in the Southern District of Georgia pursuant to 28 U.S.C. § 1391(e) because Respondents Giles, Wolf, and Albence are federal officers sued in their official capacity; Respondent Gartland resides in this District; Petitioners are currently detained in this District; and a substantial part of the events or omissions giving rise to this action occurred in this District. Venue is also proper under 28 U.S.C. § 2241 because Petitioners are currently detained in this District.

IV. EXHAUSTION OF ADMINISTRATIVE REMEDIES

23. Petitioners need not exhaust any administrative remedies before seeking habeas relief under 28 U.S.C. § 2241. *See Santiago-Lugo v. Warden*, 785 F.3d 467, 474 (11th Cir. 2015) (there is no exhaustion requirement under Section 2241).

24. Moreover, there is generally no exhaustion requirement for constitutional challenges that an agency cannot address. *See Tefel v. Reno*, 972 F. Supp. 608, 616 (S.D. Fla. 1997) (citing *Haitian Refugee Ctr., Inc. v. Nelson*, 872 F.2d 1555, 1560 (11th Cir. 1989)); *see also Crayton v. Callahan*, 120 F.3d 1217, 1222 (11th Cir. 1997) ("Exhaustion may be excused when

the only contested issue is constitutional, collateral to the consideration of [the] claim [before the agency], and its resolution therefore falls outside the agency's authority. . . .").

25. Exhaustion of administrative remedies is also not required where it would be futile; where administrative remedies are inadequate; or where irreparable harm would result from requiring exhaustion. *See Nierenberg v. Heart Ctr. of Sw. Fla., P.A.*, 835 F. Supp. 1404, 1407 (M.D. Fla. 1993); *see also Curry v. Contract Fabricators, Inc. Profit Sharing Plan*, 891 F.2d 842, 846 (11th Cir. 1990) (exceptions to exhaustion requirement exist when resort to the administrative route is futile or the remedy inadequate). Under the exigent circumstances here, requiring exhaustion would cause irreparable injury.

V. STATEMENT OF FACTS

A. COVID-19 Is a Global Pandemic that Poses a Significant Risk of Death or Serious Illness to Petitioners

26. COVID-19 is a highly contagious respiratory disease caused by a newly discovered coronavirus. Since the first case was reported in December 2019, the transmission of COVID-19 has been growing exponentially. The number of reported cases climbed from 1 to 100,000 in 67 days; from 100,000 to 200,000 in only 11 days; and from 200,000 to 300,000 in just 4 days.[3]

27. On March 11, 2020, the World Health Organization ("WHO") declared the outbreak of a global pandemic,[4] and COVID-19 has now touched nearly every country on the

[3] Berkeley Lovelace Jr., et al., *Coronavirus Pandemic Is Accelerating as Cases Eclipse 350,000, WHO Says*, CNBC (last updated Mar. 23, 2020 20:14 EDT), https://www.cnbc.com/2020/03/23/coronavirus-pandemic-is-accelerating-as-cases-eclipse-350000-who-says.html.

[4] Tedros Adhanom Ghebreyesus, *WHO Director-General's Opening Remarks at the Media Briefing on COVID-19 – 11 March 2020*, World Health Organization (Mar. 11, 2020), https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020.

planet.[5] As of May 7, 2020, the number of confirmed cases worldwide has surpassed 3.8 million, including over 1.2 million people in the United States. At least 265,877 people have died as a result of COVID-19 worldwide, including 74,810 in the United States.[6]

28. Nationally, projections by the Centers for Disease Control and Prevention ("CDC") indicate that over 200 million people in the United States could be infected with COVID-19 over the course of the pandemic without effective public health intervention, with as many as 1.7 million deaths in the most severe projections.[7] On March 23, 2020, the WHO warned that the United States could become the next epicenter of the pandemic.[8] And indeed on March 26, 2020, the United States surpassed every other country in the world in number of confirmed COVID-19 cases.[9]

29. In the state of Georgia, transmission of COVID-19 has been rampant. On March 14, 2020, Governor Brian Kemp declared a public health state of emergency, describing the spread

[5] *Coronavirus Disease 2019 (COVID-19) Situation Report – 73*, World Health Organization (April 2, 2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200402-sitrep-73-covid-19.pdf?sfvrsn=5ae25bc7_4https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200330-sitrep-70-covid-19.pdf?sfvrsn=7e0fe3f8_2.

[6] Worldometer: Coronavirus, https://www.worldometers.info/coronavirus/#countries (last accessed May 7, 2020).

[7] Sheri Fink, *Worst-Case Estimates for U.S. Coronavirus Deaths,* The New York Times (last updated Mar. 18, 2020), https://www.nytimes.com/2020/03/13/us/coronavirus-deaths-estimate.html.

[8] Sarah Boseley, *US may become next centre of coronavirus pandemic, says WHO*, The Guardian (Mar. 24, 2020), https://www.theguardian.com/world/2020/mar/24/us-may-become-centre-of-coronavirus-pandemic-who-says.

[9] *U.S. Now Leads the World in Confirmed Cases*, The New York Times (last updated Apr. 1, 2020), https://www.nytimes.com/2020/03/26/world/coronavirus-news.htmlhttps://www.nytimes.com/2020/03/26/world/coronavirus-news.html.

of COVID-19 as an "unprecedented public health threat."[10] At the time, there were 64 diagnosed COVID-19 cases spread across 15 counties.[11] As of May 7, 2020, the number of reported cases had jumped to 31,150 with 158 counties now affected.[12] A shelter-in-place order for particularly high risk individuals, including those with chronic lung disease, went into effect on March 24, 2020[13] and is scheduled to remain in effect until at least June 12, 2020.[14]

30. With 1,328 fatalities reported as of May 7 2020, Georgia is the state with the thirteenth highest number of COVID-19-related deaths in the United States.[15] Approximately 19% of individuals with confirmed diagnoses have been hospitalized and 4.3% have died.[16] The risk of serious illness or death from COVID-19 is greater in Georgia than in other parts of the United States because the population is overall much less healthy. Georgia has among the highest incidences of diabetes, hypertension, obesity, and stroke in the country, particularly in areas with

[10] Governor Brian P. Kemp, *Kemp Declares Public Health State of Emergency*, Office of the Governor (Mar. 16, 2020), https://gov.georgia.gov/press-releases/2020-03-16/kemp-declares-public-health-state-emergency.

[11] *Id.*

[12] *Georgia Department of Public Health COVID-19 Daily Status Report* (May 7, 2020), https://dph.georgia.gov/covid-19-daily-status-report.

[13] Governor Brian P. Kemp, Executive Order No. 03.23.20.01 (March 23, 2020), file:///Users/aaajatl3/Downloads/03.23.20.01.pdf.

[14] Governor Brian P. Kemp, *Gov. Kemp Extends Protections for Vulnerable Georgians, Releases Guidance for Businesses* (April 30, 2020), https://gov.georgia.gov/press-releases/2020-04-30/gov-kemp-extends-protections-vulnerable-georgians-releases-guidance.

[15] Listing of United States Total Coronavirus Cases (last updated May 7, 2020), https://www.worldometers.info/coronavirus/country/us/.

[16] *Georgia Department of Public Health COVID-19 Daily Status Report* (May 7, 2020), https://dph.georgia.gov/covid-19-daily-status-report.

high poverty rates.[17] It is also in the top three states with the largest number of rural hospital closures in the last ten years.[18]

31. Moreover, elected leaders, medical professionals, and other public health experts have expressed concern over Governor Kemp's recent decision to lift the statewide shelter-in-place order and permit the reopening of certain businesses.[19] Indeed, early data shows that the incidence rate of COVID-19 (*i.e.*, the number of cases for every 100,000 people) has increased by more than 40% since the reopening of the state.[20]

32. Due to the lack of widespread testing available in the United States, including in Georgia, the number of confirmed cases is likely but a fraction of the true number of COVID-19 cases. A new Harvard analysis shows that several states—and the United States as a whole—still

[17] Alan Judd, *In hard-hit Georgia, virus expected to linger*, The Atlanta Journal-Constitution (Mar. 26, 2020), https://www.ajc.com/news/hard-hit-georgia-virus-expected-linger/AYMvVN9SIq8A0RUgUzIt5O/.

[18] Ayla Ellison. *State-by-state breakdown of 113 rural hospital closures*, Becker's Hospital Review (August 26, 2019), https://www.beckershospitalreview.com/finance/state-by-state-breakdown-of-113-rural-hospital-closures-082619.html.

[19] Ryan Kruger, *Health officials worry Gov. Kemp reopening Georgia too soon*, 11 Alive (April 21, 2020), https://www.11alive.com/article/news/health/coronavirus/georgia-reopening-too-soon-some-health-officials-worry/85-c19f2070-2d3e-4ed3-96f2-657d7a8f6c0f; Eric Bradner, *Georgia Gov. Brian Kemp faces resistance over move to reopen economy*, CNN (April 21, 2020), https://www.cnn.com/2020/04/21/politics/georgia-governor-coronavirus-backlash/index.html

[20] Kevin Murnane, *The Risk Of Exposure To Covid-19 In Georgia Has Increased By More Than 40% Since The State Reopened for Business*, Forbes (May 4, 2020), https://www.forbes.com/sites/kevinmurnane/2020/05/04/the-risk-of-exposure-to-covid-19-in-georgia-has-increased-by-more-than-40-since-the-state-reopened-for-business/#4a5393d221b9

fall far short of the level of testing needed to safely relax shelter-in-place orders.[21] According to the study, Georgia should be performing 9,600 to 10,000 tests daily but currently averages only 4,000 tests per day.[22] Because of the shortage of tests in the United States—admitted to be a "failing" by top infectious disease expert Dr. Anthony Fauci[23]—the CDC currently recommends prioritizing testing for symptomatic healthcare providers and hospitalized patients[24]—which means that the number of diagnosed COVID-19 cases may be only the tip of a very large iceberg.[25]

i. Transmission of COVID-19

33. COVID-19 easily spreads through respiratory droplets that an infected person expels when they cough, sneeze, speak, or breathe. Transmission occurs if these virus-carrying droplets land directly on a nearby person's nose or mouth. It can also occur when a person inhales these droplets or touches a contaminated surface and then touches their mouth, nose, or eyes.[26]

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[21] Sharon Begley, *Many states are far short of Covid-19 testing levels needed for safe reopening, new analysis shows* (April 27, 2020), https://www.statnews.com/2020/04/27/coronavirus-many-states-short-of-testing-levels-needed-for-safe-reopening.

[22] *Id.*

[23] Elizabeth Chuck, *'It is a failing. Let's admit,' Fauci says of coronavirus testing capacity* NBC News (Mar. 12, 2020), https://www.nbcnews.com/health/health-news/it-failing-let-s-admit-it-fauci-says-coronavirus-testing-n1157036.

[24] Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), *Evaluating and Testing Persons for Coronavirus Disease 2019 (COVID-19)* (last updated Mar. 24, 2020), https://www.cdc.gov/coronavirus/2019-nCoV/hcp/clinical-criteria.html.

[25] George Citroner, *How Many People in the United States Actually Have COVID-19?*, Healthline (Mar. 18, 2020), https://www.healthline.com/health-news/how-many-coronavirus-cases-are-there.

[26] Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), *How Coronavirus Spreads* (last reviewed Apr. 13, 2020), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html.

The coronavirus can survive up to four hours on copper, 24 hours on cardboard, and two to three days on plastic and stainless steel.[27]

34. COVID-19 can also be transmitted through inhalation of smaller virus-carrying particles an infected person emits when they breathe.[28] Compared with droplets, which are heavier and thought to travel only a short distance before falling to the floor or onto other surfaces, these particles can linger in the air for much longer (*i.e.*, become aerosolized), travel farther, and build up over time in enclosed spaces.[29] Coronavirus may also be spread through viral shedding in stool.[30] New studies on the potential transmission of COVID-19 through aerosolized viral particles emphasize the importance of good ventilation, limiting crowds, and careful sanitation efforts.[31]

35. Many people with COVID-19 remain completely asymptomatic but can still spread the disease. Likewise, infected people who eventually develop symptoms are contagious even when they are pre-symptomatic and may account for 50% of transmissions. Interventions that

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[27] Harvard Health Publishing, *COVID-19 Basics*, Harvard Medical School, Coronavirus Resource Center (last updated Apr. 22, 2020), https://www.health.harvard.edu/diseases-and-conditions/covid-19-basics.

[28] Lisa Brosseau, ScD, *Commentary: COVID-19 transmission messages should hinge on science*, University of Minnesota Center for Infectious Disease Research and Policy (March 16, 2020), https://www.cidrap.umn.edu/news-perspective/2020/03/commentary-covid-19-transmission-messages-should-hinge-science.

[29] *Id.*

[30] Joshua L. Santarpia, Danielle N Rivera, and Vicki Herrera, et al., *Transmission Potential of SARS-CoV-2 in Viral Shedding Observed at the University of Nebraska Medical Center* (March 26, 2020), https://www.medrxiv.org/content/10.1101/2020.03.23.20039446v2.

[31] Marthe Foucade, *Coronavirus Lingers in the Air of Crowded Spaces, New Study Finds* (April 27, 2020), https://www.bloomberg.com/news/articles/2020-04-27/coronavirus-lingers-in-air-of-crowded-spaces-new-study-finds.

isolate or quarantine only symptomatic individuals, therefore, cannot effectively contain transmission.

ii. Symptoms of COVID-19, Underlying Risks Factors, and Long-Term Effects

36. Even though it causes only mild symptoms or no symptoms at all for some, COVID-19 can, for others, result in more serious injury, including respiratory failure, kidney failure, other long-term organ damage, and even death.

37. Older individuals and those with certain medical conditions are at particularly high risk for serious illness or death from COVID-19. Medical conditions that increase the risk of severe illness or death from COVID-19 for individuals of any age include blood disorders, chronic kidney or liver disease, diseases that compromise the immune system (*e.g.*, HIV), diabetes and other endocrine disorders, metabolic disorders, heart and lung disease, neurological and neurodevelopmental conditions, and current or recent pregnancy.

38. Infected individuals can face prolonged treatment and recovery periods, requiring intensive hospital care and ventilators that are in increasingly short supply. Those who do not die can suffer serious damage to the lungs, heart, liver, or other organs.[32] Preliminary data from the United States shows a high prevalence of one or more underlying medical conditions among patients requiring Intensive Care Unit ("ICU") admission.[33]

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[32] Lisa Maragakis, M.D., M.P.H., *I've been diagnosed with the new coronavirus disease, COVID-19. What should I expect?* Johns Hopkins Medicine (last updated Apr. 17, 2020), https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/diagnosed-with-covid-19-what-to-expect.

[33] CDC COVID-19 Response Team, Centers for Disease Control and Prevention, *Preliminary Estimates of the Prevalence of Selected Underlying Health Conditions Among Patients with Coronavirus Disease 2019 – United States, February 12-March 28, 2020* (Apr. 3, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6913e2.htm?s_cid=mm6913e2_w.

39. Complications from COVID-19 can manifest at an alarming pace. Patients can go from being medically stable with no need for supplemental oxygen to requiring intubation and ventilator-assisted breathing within 24 hours. Various studies estimate that the average length of time from onset of symptoms to hospitalization or the development of severe symptoms is only 7-9 days.

iii. Prevention of COVID-19 Transmission

40. There is currently no vaccine against or cure for COVID-19. Nor are there any known prophylactic medications that will prevent or reduce the risk of a COVID-19 infection. Therefore, the only effective way to protect people against the risk of serious illness or death from COVID-19 is to limit their exposure to the virus through social distancing—*i.e.*, physical separation of at least six feet from all others and staying at home as much as possible—vigilant hygiene, including frequent and thorough handwashing with soap and water, and frequent cleaning and disinfecting.[34]

41. The CDC advises that social distancing is "especially important for people who are at higher risk of getting very sick."[35] The CDC also now recommends that everyone wear cloth face coverings in public, though emphasizes that face coverings are in no way a replacement for social distancing measures.[36]

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[34] Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), *How to Protect Yourself* (last reviewed Apr. 13, 2020), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html.

[35] *Id.*

[36] Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), *Recommendation Regarding the Use of Cloth Face Coverings, Especially in Areas of Significant Community-Based Transmission* (last reviewed Apr. 3, 2020), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html.

42. The CDC also advises that after an infected person has been present in a room for more than a few minutes while coughing or sneezing, it is possible that air inside the room could remain potentially infectious.[37] Thus, for a room to be safe for someone not wearing personal protective equipment ("PPE"), the CDC advises following its general guidance on airborne pathogen clearance rates under differing ventilation conditions.[38]

43. The high incidence of asymptomatic transmission, alongside the nationwide dearth of diagnostic tests to identify and isolate infected individuals, necessitate strict social distancing measures to interrupt transmission.

44. Social distancing reduces the average number of contacts between people, which lowers every individual's risk both for acquiring COVID-19 and transmitting it to another person.

45. Strict social distancing measures have proven effective in reducing the transmission of COVID-19. On January 23, 2020, the Chinese government instituted a complete lockdown of Wuhan, China, where the COVID-19 outbreak began, to attempt to fight the spread of the virus. They shut down all schools, offices, and factories and banned private vehicles from city streets. This lockdown expanded to other cities in Hubei province over the next several days, eventually extending to some 60 million people in China.[39] Following the lockdown, Wuhan saw a sustained

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[37] Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), *Healthcare Infection Prevention and Control FAQs for COVID-19* (last visited Apr. 23, 2020), https://www.cdc.gov/coronavirus/2019-ncov/hcp/infection-control-faq.html.

[38] *Id.* (citing Centers for Disease Control and Prevention, Infection Control, *Appendix B. Air* (last reviewed July 22, 2019), https://www.cdc.gov/infectioncontrol/guidelines/environmental/appendix/air.html#tableb1).

[39] Amy Gunia, *China's Draconian Lockdown Is Getting Credit for Slowing Coronavirus. Would It Work Anywhere Else?*, Time Magazine (Mar. 13, 2020), https://time.com/5796425/china-coronavirus-lockdown/.

decrease in transmission of COVID-19, and two months later, the daily number of reported cases dropped to zero.

46. Throughout the world, other countries have also implemented drastic social distancing measures in an effort to control the COVID-19 pandemic and protect people's health and lives. France, for example, imposed a strict nationwide lockdown, prohibiting gatherings of any size and ordering all residents to stay at home.[40] Overall, countries encompassing an estimated one third of the world's population have enacted similar restrictions.[41] Across the United States, cities and states have also imposed different measures to effectuate social distancing.[42]

B. COVID-19 Will Likely Ravage Jails, Prisons, and Detention Centers

47. Imprisoned populations, including those in ICE detention facilities, are at higher risk for infectious disease, as compared to the general population. Factors that heighten their risk include poor sanitation, high population density, and "a higher prevalence of infectious and chronic diseases and . . . poorer health than the general population, even at younger ages."[43]

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[40] Bryan Pietsch, *'We are at war': France's president just announced a 15-day lockdown, banning public gatherings and walks outdoors*, Business Insider (Mar. 16, 2020), https://www.businessinsider.com/coronavirus-france-president-macron-announces-15-day-lockdown-2020-3.

[41] Juliana Kaplan, Lauren Frias, & Morgan McFall-Johnson, *A Third of the Global Population Is On Coronavirus Lockdown*, Business Insider (last updated Apr. 23, 2020) https://www.businessinsider.com/countries-on-lockdown-coronavirus-italy-2020-3.

[42] Sarah Mervosh Jasmine C. Lee, Lazaro Gamio, and Nadja Popovich, *See Which States Are Reopening and Which Are Still Shut Down*, The New York Times (last updated May 6, 2020) https://www.nytimes.com/interactive/2020/us/states-reopen-map-coronavirus.html.

[43] Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities* (Mar. 23, 2020, last reviewed May 6, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html [hereinafter CDC Guidance].

48. Dr. Scott Allen and Dr. Josiah Rich, experts in the fields of detention health, infectious disease, and public health who advise DHS's Office of Civil Rights and Civil Liberties, have urged Congress to take immediate actions to slow the spread of COVID-19 in ICE detention centers, including releasing immigrants to facilitate social distancing—which, they say, is an "oxymoron" in congregate settings.[44]

49. In March 2020, over 3,000 medical professionals across the United States also urged ICE to release individuals and families from detention "to prevent the spread of COVID-19 and mitigate the harm of an outbreak" to detained individuals, as well as to facility staff.[45] They warned that social distancing measures recommended by the CDC are nearly impossible in immigration detention and that large-scale quarantines may be unfeasible at ICE facilities. They also expressed concern that "isolation may be misused and place individuals at higher risk of neglect and death."

50. Like these and other experts,[46] Drs. Allen and Rich also warned of the dire consequences that a COVID-19 outbreak within an ICE detention facility would have on the community outside the facility. They describe a "tinderbox" scenario where a rapid outbreak inside a facility would result in the hospitalization of multiple detained people in a short period of time,

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[44] Scott A. Allen, MD, FACP and Josiah Rich, MD, MPH Letter to Congress (Mar. 19, 2020) https://assets.documentcloud.org/documents/6816336/032020-Letter-From-Drs-Allen-Rich-to-Congress-Re.pdf.

[45] Janus Rose, *Thousands of Doctors Demand ICE Release Detainees to Stop a COVID-19 Disaster*, Vice.com (Mar. 18, 2020), https://www.vice.com/en_us/article/4agp4w/thousands-of-doctors-demand-ice-release-detainees-to-stop-a-covid-19-disaster.

[46] *See, e.g.*, Rich Schapiro, *Coronavirus could 'wreak havoc' on U.S. jails, experts warn*, NBC News (Mar. 12, 2020), https://www.nbcnews.com/news/us-news/coronavirus-could-wreak-havoc-u-s-jails-experts-warn-n1156586 ("An outbreak of the deadly virus inside the walls of a U.S. prison or jail is now a question of when, not if, according to health experts.").

which would then spread the virus to the surrounding community and create a demand for ventilators far exceeding the supply.

51. Once a disease is introduced into a jail, prison, or detention facility, it spreads faster than under most other circumstances due to overcrowding, poor sanitation and hygiene, poor ventilation, and lack of access to adequate medical services. For these same reasons, the outbreak is harder to control.[47] The severe outbreaks of COVID-19 in congregate environments, such as cruise ships and nursing homes, illustrate just how rapidly and widely COVID-19 would rip through an ICE detention facility. On the Diamond Princess cruise ship, for example, approximately 700 passengers and crew on board were infected over the course of three weeks despite the initiation of quarantine protocols.

52. Good hygiene is also critical to reducing exposure to COVID-19, but the notoriously unsanitary conditions in detention centers and ICE's meager provision of hygiene and cleaning products rob detained individuals of the ability to practice good hygiene.

53. ICE's past inept handling of infectious disease outbreaks in detention centers foreshadows the impact once COVID-19 hits these facilities. In 2019, a mumps outbreak across 57 immigration detention facilities throughout the country led to almost 900 cases of mumps

[47] Christina Potter, *Outbreaks in Migrant Detention Facilities*, Outbreak Observatory (Jul. 11, 2019), https://www.outbreakobservatory.org/outbreakthursday-1/7/11/2019/outbreaks-in-migrant-detention-facilities.

contracted inside the facilities[48] before the outbreak spread to surrounding communities.[49] ICE and CBP facilities have also been sites of other infectious outbreaks in recent years,[50] as have other prisons and jails.[51]

54. COVID-19 is indeed already spreading rapidly inside prisons and jails across the United States,[52] including in Georgia.[53] A jail in Chicago exploded from two confirmed cases to more than 350 in the course of two weeks—despite isolation of the first two confirmed cases. [54] A

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[48] Leung J, Elson D, Sanders K, et al. *Notes from the Field: Mumps in Detention Facilities that House Detained Migrants—United States, September 2018–August 2019*, MMWR Morb Mortal Wkly, 749–50 (Aug. 30, 2019), https://www.cdc.gov/mmwr/volumes/68/wr/pdfs/mm6834a4-H.pdf; Roxanne Scott, *Stewart Detention Center Watches For New Cases Of Mumps*, WABE (Mar. 8, 2019), https://www.wabe.org/stewart-detention-center-watches-for-new-cases-of-mumps/.

[49] *See* Terrence McDonald, *Bergen County Won't Say if Mumps Outbreak Affects Only Immigrant Detainees*, Northjersey.com (Jun. 13, 2019), https://www.northjersey.com/story/news/bergen/2019/06/13/bergen-county-nj-wont-say-if-jail-mumps-outbreak-hit-only-ice-inmates/1448708001. In addition, in 2019, thousands of individuals in 39 immigration detention centers across the country were exposed to chickenpox. *See* Emma Ockerman, *Migrant Detention Centers Are Getting Slammed with Mumps and Chickenpox*, Vice News (Jun. 14, 2020), https://www.vice.com/en_us/article/mb8k5q/migrant-detention-centers-are-getting-slammed-with-mumps-and-chicken-pox.

[50] Christina Potter, Outbreak Observatory *supra* n. 48, (describing outbreaks of acute respiratory illnesses like influenza, and other diseases like scabies and chickenpox).

[51] J. O'Grady, et al., *Tuberculosis in prisons: anatomy of global neglect*, European Respiratory Journal (2011), https://erj.ersjournals.com/content/38/4/752.short (stating that tuberculosis prevalence among prisoners worldwide can be up to 50 times higher than national averages).

[52] Emma Grey Ellis, *Covid-19 Poses a Heightened Threat in jails and Prisons*, wired.com (Mar. 24, 2020), https://www.wired.com/story/coronavirus-covid-19-jails-prisons/.

[53] Joshua Sharpe and Christian Boone, *Ga. Inmate dies from COVID-19 as virus hits more prisons*, The Atlanta Journal-Constitution (Mar. 27, 2020), https://www.ajc.com/news/local/breaking-inmate-dies-from-covid-outbreak-worsens-prison/TzQZL4uXfK4GzH9ebSFNQN/.

[54] Timothy Williams and Danielle Ivory, *Chicago's Jail Is Top U.S. Hot Spot as Virus Spreads Behind Bars*, New York Times (April 8, 2020), https://www.nytimes.com/2020/04/08/us/coronavirus-cook-county-jail-chicago.html.

single prison in Ohio has reported that nearly 2,000 imprisoned individuals—approximately 80% of the total incarcerated population—have tested positive for COVID-19; so far, five prisoners and one correctional officer have died from this outbreak.[55] In Louisiana, nearly every woman in a prison dormitory—approximately 200 in total—recently tested positive for COVID-19.[56] At a privately run prison in Tennessee, 1,299 of 2,444 incarcerated individuals were confirmed to have COVID-19 as of May 1, 2020.[57] A new analysis studying the spread of COVID-19 through jails projects that nearly 100,000 more people could die of coronavirus in the U.S. unless "drastic reforms" are made at jails, including significant population reductions and strict social distancing.[58]

55. These large prison outbreaks were discovered only after prison officials undertook mass testing that included asymptomatic individuals. At the Ohio prison, 95% of people who tested positive did not have any symptoms; in the case of the prison dormitory in Louisiana, two thirds. And at the prison in Tennessee where roughly half of the incarcerated population is infected, the vast majority of positive cases also exhibited no symptoms, prompting Tennessee to plan to test

[55] Mohammed Syed and Jareen Imam, *Inmates fear death as Ohio prison is overwhelmed by coronavirus*, NBC News (April 29, 2020), https://www.nbcnews.com/news/us-news/inmates-fear-death-ohio-prison-overwhelmed-coronavirus-n1194786

[56] Janet McConnaughey, *Nearly entire Louisiana prison dorm tests positive for virus*, Associated Press (May 5, 2020), https://apnews.com/f31d0a19272193a0f461eb96e5c3d23d

[57] Jonathan Mattise, *1,299 inmates test positive for virus at Tennessee prison*, Associated Press (May 1, 2020), https://apnews.com/5d0dde8eaa0385c9fd97e1545a5857da

[58] American Civil Liberties Union, *Flattening the Curve: Why Reducing Jail Populations Is Key to Beating COVID-19*, (last visited Apr. 24, 2020) https://www.aclu.org/report/flattening-curve-why-reducing-jail-populations-key-beating-covid-19?redirect=covidinjails. This analysis applies to jails alone, and "[doesn't] even account for prisons and immigration detention centers." *Id.* at 4.

its entire state prison population and all state prison staff. The significant spread through asymptomatic people in each of these cases suggests that the true number of cases is grossly underreported in congregate settings where aggressive testing is not done.[59]

56. Even with insufficient testing and other known gaps in ICE's data collection, the numbers show significant spread in ICE detention facilities. As of May 7, 2020, ICE had publicly reported that 705 detained individuals and 39 employees in at least 44 detention facilities had tested positive for COVID-19.[60] These numbers do not include any contract staff, any detained individuals who tested positive after leaving ICE premises, or any individuals held in facilities not run by ICE.[61]

57. These numbers also fail to capture the scores of detained individuals who have been exposed to COVID-19 but not tested. Respondent Albence recently admitted to Members of Congress that the agency has a limited number of test kits but would "certainly do more testing" if more test kits were available.[62] As of May 6, 2020, ICE had reportedly tested only 1,460 individuals in its custody, representing roughly 4.9% of its total detained population.[63] Less than

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[59] *See supra* n. 56, 57, 58.

[60] U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement, *ICE Guidance on COVID-19* (last updated May 6, 2020), https://www.ice.gov/covid19 [hereinafter *ICE Guidance on COVID-19*].

[61] Tanvi Misra, *ICE's COVID-19 test figures hint at health crisis in detention*, Roll Call (April 17, 2020), https://www.rollcall.com/2020/04/17/ices-covid-19-test-figures-hint-at-health-crisis-in-detention/?emci=28c66e67-2a80-ea11-a94c-00155d03b1e8&emdi=cf21f97e-6182-ea11-a94c-00155d03b1e8&ceid=6006620.

[62] House Committee on Oversight & Reform, *DHS Officials Refuse to Release Asylum Seekers and Other Non-Violent Detainees Despite Spread of Coronavirus* (Apr. 17, 2020), https://oversight.house.gov/news/press-releases/dhs-officials-refuse-to-release-asylum-seekers-and-other-non-violent-detainees [hereinafter *DHS Officials Refuse to Release Asylum Seekers*].

[63] ICE Guidance on COVID-19 (last updated May 6, 2020).

20% of the 7 million COVID-19 tests conducted nationally have come back positive; of the people in ICE detention who have been tested, roughly 50% have been infected.[64]

58. Nationally and internationally, governments and jail and prison staff are responding to the unique threat posed by COVID-19 in carceral settings. Authorities in Iran,[65] Ethiopia,[66] the Democratic Republic of Congo,[67] Indonesia,[68] Poland[69], and several states across the U.S., including Texas,[70]Minnesota, Nevada, Alabama, Pennsylvania, New York, California, Maine, and

[64] Gaby Del Valle and Jack Herrera, *ICE Detention Centers First Brought Jobs to the Rural South. Now, They're Bringing Covid-19*, Politico (May 5, 2020), https://www.politico.com/news/magazine/2020/05/05/coronavirus-ice-detention-rural-communities-186688

[65] Babk Dehghanpisheh and Stephanie Nebehay, *Iran Temporarily Releases 70,000 Prisoners as Coronavirus Cases Surge*, Reuters (Mar. 9, 2020), https://www.reuters.com/article/us-health-coronavirus-iran/iran-temporarily-releases-70000-prisoners-as-coronavirus-cases-surge-idUSKBN20W1E5.

[66] Bukola Adebayo, *Ethiopia pardons more than 4,000 prisoners to help prevent coronavirus spread*, CNN (Mar. 26, 2020), https://www.cnn.com/2020/03/26/africa/ethiopia-pardons-4000-prisoners-over-coronavirus/index.html.

[67] Human Rights Watch, *SDR Congo: Prisons Face Covid-19 Catastrophe* (Apr. 17, 2020), https://www.hrw.org/news/2020/04/17/dr-congo-prisons-face-covid-19-catastrophe#.

[68] Nicky Aulia Widadio and Erric Permana, *Indonesia releases 22,000 prisoners over COVID-19 fears*, AA (Mar. 4, 2020), https://www.aa.com.tr/en/asia-pacific/indonesia-releases-22-000-prisoners-over-covid-19-fears/1791209.

[69] Adela Suliman, Andy Eckardt, and Gabe Joselow, *Coronavirus prompts prisoner releases around the world*, NBC News (March 26, 2020), https://www.nbcnews.com/news/world/coronavirus-prompts-prisoner-releases-around-world-n1169426.

[70] Dillon Collier, *Bexar County jail population down more than 500 inmates after release of nonviolent offenders*, KSAT.com (last updated Mar. 25, 2020), https://www.ksat.com/news/local/2020/03/25/bexar-county-jail-population-down-more-than-500-inmates-after-release-of-nonviolent-offenders/.

Louisiana,[71] have all released people to mitigate the harm that the spread of COVID-19 will cause. Some jails in Georgia have done the same,[72] including Dougherty County Detention Center in Albany, which is suffering from one of the most severe outbreaks in the state.[73] The Federal Bureau of Prisons has also instructed prison directors to prioritize releasing federal inmates to home confinement, taking into consideration factors including "[t]he age and vulnerability of the inmate to COVID-19, in accordance with the [CDC] guidelines."[74]

59. ICE, on the other hand, continues to bring new people into detention centers and to transfer previously detained people between facilities.[75] Some detained people have staged public protests, including initiating hunger strikes and threatening suicide, to express their fear and

[71] Prison Policy Initiative, *Responses to the COVID-19 Pandemic* (last updated April 23, 2020), https://www.prisonpolicy.org/virus/virusresponse.html.

[72] Christian Boone, *Hall, Fulton counties releasing nonviolent offenders early as virus looms*, The Atlanta Journal-Constitution (Mar. 23, 2020), https://www.ajc.com/news/crime--law/hall-fulton-counties-releasing-nonviolent-offenders-early-virus-looms/lOZTaZ9lVSwoy38Cp6XJIP/.

[73] Stanley Dunlap, *Georgia jailers cope with COVID-19; release inmates, quarantine arrivals*, Georgia Recorder (Mar. 30, 2020), https://georgiarecorder.com/2020/03/30/georgia-jailers-cope-with-covid-19-release-inmates-quarantine-arrivals/.

[74] Office of the Attorney General, Washington, DC, Memorandum for Director of Bureau of Prisons, *Prioritization of Home Confinement As Appropriate in Response to COVID-19 Pandemic* (Mar. 26, 2020), https://www.politico.com/f/?id=00000171-1826-d4a1-ad77-fda671420000.

[75] *See* Richard Hall, Coronavirus: ICE Crackdown Stokes Fears for Safety of Undocumented Immigrants During Pandemic, Independent (Mar. 13, 2020), https://www.msn.com/en-gb/news/world/coronavirus-ice-crackdown-stokes-fears-for-safety-of-undocumented-immigrants-during-pandemic/ar-BB119hw8 (noting that "[i]n New York, immigration advocates have noted a marked increase in ICE activity in recent months, which has not slowed as the coronavirus outbreak has worsened."). On March 18, 2020, ICE announced it would "temporarily adjust" its enforcement practices during the COVID-19 outbreak," but declined to say it would stop arresting people altogether. *See* Rebecca Klar, *ICE Pausing Most Enforcement During Coronavirus Crisis*, The Hill (Mar. 18, 2020), https://thehill.com/latino/488362-ice-pausing-most-immigration-enforcement-during-coronavirus-crisis.

outrage at being housed with newly arriving individuals who may have been exposed to COVID-19.[76] The transference of detained people between different facilities is particularly risky because ICE often transports people over vast distances across multiple states.[77] According to one immigration attorney, a typical trip for someone arrested by ICE might include a three-day stay at a jail in one state, then a transfer to another jail in another state—all before ending up at an ICE detention center in yet another state. During that time period, detained people are shuffled through different cramped jails, buses, and flights and come into contact with dozens, if not hundreds, of other people. By the time they enter the general population at an ICE detention facility, they are carrying germs from countless different places and people.[78]

60. Staff is also an especially dangerous vector for a COVID-19 outbreak within a detention center since they regularly travel back and forth between their outside communities and the detention facilities where they work. In addition, one public health expert worried that detention facility workers who juggle multiple jobs may feel pressure to downplay or even hide symptoms as they struggle to support their families.[79] This unfortunate economic reality can have potentially deadly consequences to detained individuals.

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[76] *Ice detainees threaten suicide, stage protests over coronavirus fears*, The Washington Post (Mar. 25, 2020) https://www.washingtonpost.com/video/national/ice-detainees-threaten-suicide-stage-protests-over-coronavirus-fears/2020/03/25/8232738e-0b1e-4fdb-8538-456e269a8eb7_video.html.

[77] Gaby Del Valle and Jack Herrera, *ICE Detention Centers First Brought Jobs to the Rural South. Now, They're Bringing Covid-19*, Politico (May 5, 2020), https://www.politico.com/news/magazine/2020/05/05/coronavirus-ice-detention-rural-communities-186688.

[78] *Id.*

[79] *Id.*

61. At the same time, infection will also flow in the opposite direction, from within a detention facility to the outside community. COVID-19 can spread from a detained individual to facility staff to family members of staff and, ultimately, to nearby cities and towns. An outbreak of COVID-19 within an ICE facility thus poses grave danger not only to the incarcerated population but also to guards, other facility staff, and everyone who lives and works in the surrounding local communities. Detention facility workers have expressed fear that ICE's detention practices during the COVID-19 pandemic will endanger them and their families.[80] In late April, two guards at an ICE detention facility in Louisiana died after contracting COVID-19.[81]

C. Folkston Detention Center Is Primed for COVID-19 Exposure and Severe Outbreaks

i. Existing Conditions at Folkston Will Further Enable COVID-19 Transmission

62. The ICE Atlanta Field Office currently detains an estimated 1,000 noncitizens at Folkston.

63. ICE cannot prevent the spread of COVID-19 inside Folkston. The design of immigration detention facilities generally, and Folkston in particular, requires detained individuals to remain in close contact with one another.

64. Folkston houses people in very close quarters, making social distancing and the recommended hygiene measures effectively impossible. Most people sleep in bunk rooms housing dozens of immigrants—where beds are only a few feet apart from each other—and use shared

[80] *Id.*

[81] Nomann Merchant, *2 guards at ICE jail die after contracting coronavirus* (April 29, 2020), https://abcnews.go.com/Health/wireStory/guards-ice-jail-die-contracting-coronavirus-70412840.

toilets and showers. Folkston also has some smaller cells housing multiple people with shared bathrooms. People regularly congregate in common areas of their housing units.[82]

65. The conditions at Folkston are also flagrantly unsanitary and dangerous to the health of detained individuals. Private contractors operate Folkston, and the DHS Office of Inspector General has repeatedly concluded that ICE fails to hold detention facility contractors accountable for meeting performance standards required to ensure humane conditions.[83]

66. At Folkston, food preparation and service are communal with little opportunity for surface disinfection. Detained people, overseen by food service contractors, staff the kitchens. People detained in Folkston have reported being served food that is undercooked or spoiled.

ii. Folkston Has a Dismal Medical Care Track Record and Are Currently Ignoring Reported COVID-19 Symptoms Among the Detained Population

67. Respondents have consistently failed to provide even minimally adequate medical care to individuals detained at Folkston. They cannot possibly be trusted to protect those in their custody from a potentially lethal infectious disease outbreak that has overwhelmed healthcare systems around the world.

68. Critical medical care is routinely delayed—sometimes for months—or denied outright.

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[82] Keith Gardner, dvids.net, Folkston Processing Center B-Roll (Apr. 4, 2017), https://www.dvidshub.net/video/529423/folkston-processing-center-b-roll

[83] *See* U.S. Department of Homeland Security, Office of the Inspector General, OIG-19-18, *ICE Does Not Fully Use Contracting Tools to Hold Detention Facility Contractors Accountable for Failing to Meet Performance Standards*, 1 (Jan. 29, 2019), https://www.oig.dhs.gov/sites/default/files/assets/2019-02/OIG-19-18-Jan19.pdf; U.S. Department of Homeland Security, Office of the Inspector General, OIG-18-67, *ICE's Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements*, 1 (Jun. 26, 2018), https://www.oig.dhs.gov/sites/default/files/assets/20//18-06/OIG-18-67-Jun18.pdf.

69. Detained people at Folkston have reported to advocates that medical staff regularly dismiss detained people's medical concerns or ridicule them as "dramatic." On one occasion, other detained individuals had to stage a protest to demand a response to a person exhibiting signs of severe medical distress. In another case, Folkston staff ignored a man and his attorney's repeated requests to go to the emergency room due to excruciating abdominal pain. His appendix later ruptured.

70. When detained people at Folkston do manage to get the attention of a medical provider, they are often given substandard care or are not provided with the proper medications.

71. Detained individuals with diabetes—a condition that the CDC considers a risk factor for severe COVID-19, "particularly if not well controlled"[84]—have reported diets that are inadequate given their medical needs. Petitioner David Fernandez has received as few as three out of the fourteen insulin injections per week he requires to manage his diabetes, which has left him so weak and tired that he could not stand up.

72. The history of inadequate medical care at Folkston is consistent with an alarming pattern of medical neglect among ICE detention facilities generally. Government records recently obtained through the Freedom of Information Act reveal several instances where investigators found that ICE's medical negligence contributed to the death of an individual in its custody.[85]

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[84] Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), *People who are at higher risk for severe illness* (last reviewed Mar. 31, 2020), https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/people-at-higher-risk.html

[85] Katherine Hawkins and Emma Stodder, *Past Deaths in Custody Highlight Dire Risks for Immigration Detainees During Coronavirus Outbreak* (April 29, 2020), https://www.pogo.org/investigation/2020/04/past-deaths-in-custody-highlight-dire-risks-for-immigration-detainees-during-coronavirus-outbreak/

73. In the context of the COVID-19 pandemic, early reports indicate that ICE is using the same playbook—ignoring pleas for help, threatening those who seek medical care with punishment, and waiting until it may be too late.

74. Preliminary data suggests that a person with COVID-19 is most infectious during the early stage of the disease.[86] Early, proactive action is necessary to prevent the virus's spread. The well-documented failure to provide adequate and timely medical care at Folkston is the mark of a system that cannot possibly cope with the spread of COVID-19.

iii. COVID-19 Has Already Reached Folkston Detention Center and Will Continue to Spread

75. As of May 6, 2020, there was at least one confirmed case of COVID-19 among the detained people at Folkston.[87] And in Charlton County, where Folkston is located, there were 13 reported cases as of May 6, 2020.[88] Jacksonville, Florida—which is about 45 miles away and the closest metro area to Folkston—is also experiencing community spread. In Duval County, where Jacksonville is located, there were 1,077 confirmed cases as of May 6, 2020.[89]

[86] Helen Branswell, *People 'shed' high levels of coronavirus, study finds, but most are likely not infectious after recovery begins*, statnews.com (Mar. 9, 2020), https://www.statnews.com/2020/03/09/people-shed-high-levels-of-coronavirus-study-finds-but-most-are-likely-not-infectious-after-recovery-begins/

[87] ICE Guidance on COVID-19 (last updated May 6, 2020), https://www.ice.gov/coronavirus; Dkt. 29-1 ¶ 3.

[88] *Georgia Department of Public Health COVID-19 Daily Status Report* (lasted updated May 6, 2020).

[89] Florida Department of Health, Division of Disease Control and Health Protection, Florida's COVID-19 data and Surveillance Dashboard, (last updated May 6, 2020) https://experience.arcgis.com/experience/96dd742462124fa0b38ddedb9b25e429

76. Given the evidence of community spread in Folkston and other surrounding communities, the frequent comings and goings of people at the detention center increase Petitioners' risk of exposure to COVID-19.

77. In particular, staff at Folkston arrive and leave on a shift basis, and there is limited ability to adequately screen incoming staff for new, asymptomatic infections.

78. Attorneys also continue to visit their detained clients in Folkston because most immigration court hearings are still proceeding. Filing deadlines still apply and must be met.

79. Detained people at Folkston have reported that transfers of new immigrants into Folkston have continued throughout the COVID-19 pandemic.

80. There are myriad ways in which COVID-19 is likely to enter or has already entered Folkston, none of which Respondents can meaningfully address without blanket testing of every individual who enters. Testing shortages, however, make that impossible.

81. Since the virus is already inside Folkston and additional sources of infection continue to be daily introduced to the facility, it will be effectively impossible for Petitioners to protect themselves from infection through social distancing and vigilant hygiene.

D. The Lack of Hospital Resources Near Folkston Will Put Petitioners at Even Greater Risk

82. The local and regional hospitals near Folkston are ill-equipped to handle a COVID-19 outbreak within the facility, increasing the life-threatening risks to Petitioners.

83. An outbreak of COVID-19 at Folkston would put at risk not only detained populations but also the thousands of ICE officers, medical personnel, contract workers, and many others who work in the facility, diverting crucial and limited medical resources.

84. Patients who are hospitalized for COVID-19 commonly require intensive care and a ventilator to assist breathing. Even some younger and healthier individuals who contract COVID-

19 may require supportive care.[90] The disease requires an intensive care unit with specialized medical equipment and medical staff trained to care for critically ill patients. This level of support is especially difficult to provide to detained individuals because ICE detention facilities lack adequate medical care infrastructure.

85. Folkston is geographically isolated from appropriate levels of medical care to treat COVID-19. The closest hospitals to Folkston are either critical access hospitals without the necessary facilities or regional hospitals that serve many counties and will quickly become overwhelmed if there is an outbreak within Folkston Detention Center.

86. Critical access hospitals, which are common in rural areas, generally have fewer than 25 beds and are designed to care for patients who will require fewer than 96 hours of care. Importantly, even if some have ICU-type beds, they do not have capacity for the type of long-term treatment required for COVID-19 patients. Critical access hospitals are not designed to care for critically ill patients; they are designed to stabilize and transfer patients.

87. The nearest hospital to Folkston Detention Center with ICU capabilities is Southeast Georgia Health System in Camden with only 40 beds, including 5 ICU beds, approximately 26 miles away. Patients would likely require initial transport or transfer to Southeast Georgia Health System – Brunswick with 300 beds, including 24 ICU beds, which is about 45 miles away and serves five different counties in Southeast Georgia. A coronavirus outbreak in any of these counties would overwhelm the hospital and its ICU beds.

[90] Fei Zhou, MD, et al., *Clinical course and risk factors for mortality of adults in patients with COVID-19 in Wuhan, china: a retrospective cohort study*, The Lancet, vol. 395, issue 10229 (Mar. 11, 2020), *available at* https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30566-3/fulltext

E. Respondents' Actions to Address the Pandemic Thus Far Have Been Woefully Inadequate, and Release is the Only Adequate Response to Protect Petitioners

88. Respondents' failure to recognize the inevitability of an outbreak at Folkston and to take adequate precautions, including releasing people and following CDC Guidance related to COVID-19, demonstrates its complete disregard for the lives of detained immigrant, including Petitioners.

i. Respondents' Custody Review of High-Risk Individuals Has Been Largely Illusory

89. ICE has engaged in extremely limited efforts to re-evaluate the necessity of detaining medically vulnerable people. The current ICE guidance governing custody re-evaluation does not mandate or meaningfully encourage the release of Petitioners or other medically vulnerable individuals from ICE custody.[91] Indeed, no Petitioner in this action has, to their knowledge, received an individualized or specialized medical evaluation related to COVID-19.

90. Instead, the policy merely directs ICE field office directors to review the custody of detained individuals with certain underlying medical conditions to determine on a "case-by-case" basis whether their continued detention is appropriate. For these custody reviews, the medical condition that puts an individual at high risk for a serious COVID-19 infection is not necessarily the "determinative factor" in the decision-making process.[92] In addition, the policy treats medically vulnerable individuals differently based on which immigration detention statute governs their detention.[93] And by delegating the custody re-evaluation process to field directors

[91] U.S. Immigration and Customs Enforcement, *ERO COVID-19 Pandemic Response Requirements* (Version 1.0, April 10, 2020).

[92] U.S. Immigration and Customs Enforcement, *Updated Guidance: COVID-19 Detained Docket Review* (April 4, 2020), https://www.ice.gov/doclib/coronavirus/attk.pdf.

[93] *Id.*

and their staff, requiring only after-the-fact consultation with any medical professionals, and failing to include all risk factors identified by the CDC, this docket review process apparently left many people with true risk factors in detention.

91. As of April 17, 2020 ICE had released fewer than 700 medically vulnerable noncitizens under this custody re-evaluation process and indicated it does not plan to release any more.[94] As of April 25, 2020, at least 29,675 men and women remained in detention facilities across the country.[95]

92. DHS also made clear that it considered factors aside from risk of flight, danger to the community, and risk of harm from COVID-19 as part of its custody re-determination process; indeed, Respondent Albence testified to the House Oversight Committee on April 17, 2020, that continued detention of the majority of the detained population was intended to promote deterrence of additional migration.[96]

93. Experts believe release from custody is both the most effective public health measure to curb transmission of COVID-19 and the only meaningful and ethical strategy to protect medically vulnerable people like Petitioners from harm.

94. The limited options available to ICE to mitigate the risk of COVID-19 to people with medical vulnerabilities, like solitary confinement, are unsafe. Placing an individual with significant medical needs in solitary confinement not only exacerbates the underlying medical

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[94] *DHS Officials Refuse to Release Asylum Seekers*, *supra* n.63.

[95] ICE Guidance on COVID-19 (last updated April 25, 2020).

[96] *DHS Officials Refuse to Release Asylum Seekers, supra* n.63 ("Acting Director Albence asserted that releasing non-violent immigrants to protect them from being infected and sickened with coronavirus could give the impression that the Administration is 'not enforcing our immigration laws,' which would be a 'huge pull factor' and create a 'rush at the borders.'").

conditions but also creates significant, life-threatening risks. This is particularly true given the rapid and severe progression of COVID-19 and the need for responsive medical observation. Folkston does not have the space or staff to safely care for patients for this period of time.

95. Locking any detained person, with or without underlying medical conditions, in a jail cell for extended periods of time is psychologically damaging and could lead to a spike in severe depression, suicides, and other medical emergencies. In the context of an infectious disease outbreak, where onsite medical staff are operating at or over capacity, these problems will only accelerate. Isolation also increases the amount of physical contact between detention center staff and detained people due to increased handcuffing, escorting individuals to and from the showers, and increased use of force due to the increased psychological stress of isolation.

96. ICE's response to the COVID-19 pandemic, as reflected by its half-hearted custody re-evaluation process, makes clear that it is not committed to establishing special protections for high-risk patients and is instead waiting until people become symptomatic before taking action. This puts not only Petitioners but ICE's own personnel and the community at large at risk of a preventable disaster.

ii. Respondents Are Failing to Adhere to CDC Guidance

97. The CDC has issued Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities ("CDC Guidance") which incorporates a variety of other CDC materials on specific topics, such as recommendations for protecting people with underlying medical vulnerabilities, recommendations for healthcare providers (including

providers within detention centers), and recommendations for employers of essential workers (including law enforcement and workers at government facilities).[97]

98. The CDC Guidance stresses the vital importance of ensuring social distancing, proper hygiene, access to testing, individual isolation of people who have the virus, and quarantine of people exposed to the virus.

99. The CDC Guidance states that it is intended for ICE, as a law enforcement agency with custodial authority of detained populations.

100. Respondents recognize the CDC Guidance as an authoritative source regarding the standard of care required of them during the COVID-19 pandemic. ICE has released agency guidance stating that both dedicated and non-dedicated ICE detention facilities "must" comply with the CDC Guidance.[98] In a written declaration submitted to this Court, Respondent Gartland

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[97] *See supra* n.44; Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), *People Who Are at Higher Risk for Severe Illness* (last reviewed Apr. 15, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html; Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), *Interim Infection Prevention and Control Recommendations for Patients with Suspected or Confirmed Coronavirus Disease 2019 (COVID-19) in Healthcare Settings* (last updated Apr. 13, 2020), https://www.cdc.gov/coronavirus/2019-ncov/hcp/infection-control-recommendations.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Finfection-control%2Fcontrol-recommendations.html; Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), *Implementing Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19* (last reviewed Apr. 20, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/critical-workers/implementing-safety-practices.html. The CDC defines "critical infrastructure workers" to include federal law enforcement and workers, including contractors, at government facilities.

[98] *See* U.S. Immigration and Customs Enforcement, *ERO COVID-19 Pandemic Response Requirements* (Version 1.0, April 10, 2020). ICE's contract with Geo Group also requires compliance with federal guidelines related to communicable diseases. *See* Performance-Based National Detention Standards 2011 Section 4.3(II)(10), https://www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf ("Centers for Disease Control and Prevention (CDC)

confirmed that "Folkston has implemented a number of procedures in accordance with the guidelines published by the [CDC]," and repeatedly referenced the CDC Guidance as the authority guiding their practices.[99] Respondent Gartland generally asserted that Folkston is in compliance with measures outlined by the CDC.[100] ICE also provided to the Court a written declaration from Brian Allen, Acting ICE Assistant Field Office Director, asserting that ICE applies the CDC Guidance at Folkston and that Folkston is generally in compliance with the CDC Guidance.[101]

101. But reports from detained individuals and their attorneys indicate that, contrary to Respondents' testimony, conditions at Folkston fall short of the CDC Guidance in many respects.

102. Respondents' failure to comply with the CDC Guidance is unsurprising. ICE is unlikely to be able to ensure compliance with the CDC Guidance due to longstanding lack of information systems, quality assurance, and oversight mechanisms that are standard in other carceral settings.

a. Respondents Are Violating the CDC Guidance Regarding Social Distancing and Air Regulation

103. The CDC Guidance instructs detention facilities to "[i]mplement social distancing strategies to increase the physical space between detained/incarcerated persons (ideally 6 feet between all individuals, regardless of the presence of symptoms)."[102] Under the CDC Guidance, Respondents must enforce social distancing between individuals in all locations and at all times,

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guidelines for the prevention and control of infectious and communicable diseases shall be followed.") [hereinafter "2011 PBNDS"].

[99] *See generally* Dkt. 29-1.

[100] *Id.*

[101] Dkt. 29-2.

[102] All quoted language in Section V.E.ii. is from the CDC Guidance, *supra* n.44, unless otherwise indicated.

including in holding cells, in lines and waiting areas, in recreation spaces, in housing spaces, and during meal times.

104. The CDC Guidance also recognizes that exposure to COVID-19 may occur through "contaminated air" and that, therefore, air circulation, air exchange, and ventilation all impact whether a space is safe. For example, the CDC specifies periods of time and numbers of air changes necessary "to remove potentially infectious particles" from spaces that a person with COVID-19 has occupied.[103]

105. Respondent Gartland attested that "[t]o stop the spread of COVID-19, Folkston has implemented a program of enhanced social distancing" by reducing pod unit counts "to the greatest extent possible."[104] He further attested that "detainees [at Folkston] have been afforded every opportunity . . . to practice social distancing measures," and detainees "are repeatedly advised by staff to practice social distancing measures."[105]

106. Contrary to Respondent Gartland's representations, any social distancing measures implemented at Folkston do not come close to complying with those set forth in the CDC Guidance. Instead of having "every opportunity" to practice social distancing, *see* Dkt. 29-1 ¶ 9,

[103] Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), *Interim Infection Prevention and Control Recommendations for Patients with Suspected or Confirmed Coronavirus Disease 2019 (COVID-19) in Healthcare Settings* (last updated Apr. 13, 2020), https://www.cdc.gov/coronavirus/2019-ncov/hcp/infection-control-recommendations.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Finfection-control%2Fcontrol-recommendations.html; Centers for Disease Control and Prevention, Infection Control, *Appendix B. Air* (last reviewed July 22, 2019), https://www.cdc.gov/infectioncontrol/guidelines/environmental/appendix/air.html#tableb1.

[104] Dkt. 29-1 ¶ 9.

[105] *Id.*

every day, on multiple occasions, detained individuals at Folkston have no opportunity to stay a safe distance away from other people.

107. At Folkston, detained people continue to be housed in pairs in cells so small that two individuals cannot be in the cell at the same time and remain six feet apart. In some parts of the facility, they even continue to be housed in crowded, open dorms with bunk beds lined up no more than a few feet apart. Indeed, Petitioner Kumar reports in his May 4, 2020 declaration that he is housed in an open dormitory with approximately 58 other detainees who sleep in bunk beds 2 to 3 feet apart.

108. For some detained people, housing conditions have worsened since the TRO hearing on April 15, 2020. For example, on Friday, May 1, 2020, Petitioner Fernandez and others in his pod unit were forced to transfer from pod unit B5 to pod unit B3, despite the concerns they voiced that pod unit B3 may be contaminated with COVID-19. At the time Petitioner Fernandez was relocated, he was in a cell by himself. He is now sharing a cell and a bunk bed with another person. His current cell is smaller than his prior cell.

109. Social distancing outside cells also continues to be impossible at Folkston. The common areas shared by all detained people in each pod unit are too small and crowded to allow people to remain six feet apart. Each day, people detained in pod units together have no choice but to touch many shared items, such as microwaves, phones, door handles, water containers, and televisions.

110. Similarly, detained people at Folkston are still forced to shower and use the toilet in very close quarters. Some people have a shower and a toilet inside their small cells; others use communal showers and toilets that they share with their entire pod unit. Petitioner Kumar is in the latter category, and about 59 people in his pod unit use the same set of four toilets, two urinals,

and six working showers. In both pod units with shared cells and dormitory housing, the toilets and showers are not cleaned between uses and the toilets do not have lids. In either situation, detained individuals are not able to shower or use the bathroom while maintaining six feet of distance from other people.

111. In addition to when they sleep, eat, shower, and use the toilet, there are numerous other times throughout the day when detained people cannot avoid close contact with each other. For example, at least three times a day, detained people are required to line up close together to go to the cafeteria or other places, often standing so close to one another that they are "back-to-belly." When walking from their pod units to the cafeteria, yard, or medical unit, detained people not only come in contact with people from their own units, but also with individuals from other units they pass on their way.

112. Finally, contrary to directives in the CDC Guidance, the minimal social distancing practices implemented by Respondents are not enforced.

b. Respondents Are Violating the CDC Guidance Related to Hygiene

113. The CDC Guidance requires Respondents to "[p]rovide a no-cost supply of soap" to the detained population "sufficient to allow frequent handwashing" for 20 seconds at a time; to "provide and continually restock hygiene supplies throughout the facility"; and to provide "no-cost access to" running water and either hand drying machines or disposable paper towels for hand washing. They must also supply detained individuals with tissues and no-touch trash receptacles for their disposal.

114. Contrary to Respondent Gartland's testimony that hand sanitizer and soap are available in unlimited supply, detained immigrants at Folkston report that, until recently, the only soap provided for handwashing and showering was liquid soap or shampoo in single-use packages

that ICE periodically passed out. Some petitioners report that they started receiving one bar of soap per week in April or May 2020.

115. No additional soap is available in the showers or pod units. Petitioner Brown reports having seen soap and paper towel dispensers in the bathroom in the medical unit, which are often empty. Petitioners report that facility staff have been unreceptive to requests for additional soap.

116. Detained people at Folkston have no access to hand sanitizer, which is not even available for purchase at the commissary.

c. Respondents Are Violating the CDC Guidance Related to Supplies, Including PPE

117. The CDC Guidance requires Respondents to "[e]nsure that sufficient stocks of hygiene supplies," including PPE, "are on hand and available" and to have a plan in place to restock rapidly if needed. The CDC Guidance also specifies the circumstances under which staff and detained people are to wear PPE and mandates that those who are required to use PPE within the scope of their responsibilities be "trained to correctly don, doff, and dispose of" PPE.

118. Some detained people at Folkston state that they have recently begun to receive PPE, but generally in limited supply, and they have no way to sanitize it after use. Petitioner Benavides reports that she was denied both a face mask and gloves when she requested them. Even those who should use PPE in the scope of their work at Folkston do not consistently receive it. On information and belief, such individuals are also not properly trained on how to use PPE, and to the extent respirators are required, they are not properly fit tested.

119. Detained immigrants and visiting attorneys have observed ICE staff failing to regularly use PPE, even during close interactions, since the start of the COVID-19 outbreak. The ICE staff continue to move in and out of the facility and between units within the facility without consistent PPE.

d. Respondents Are Violating the CDC Guidance Related to Cleaning

120. The CDC Guidance identifies "intensified cleaning and disinfecting procedures" to be used during the pandemic, including cleaning and disinfecting frequently touched surfaces with household cleaners and EPA-registered disinfectants effective against the virus, "as appropriate for the surface." Respondents should also comply with manufacturer instructions on precautions to take while using these products, such as wearing gloves and ensuring good ventilation.

121. The CDC Guidance identifies a higher level of cleaning and disinfection of facilities and vehicles after a person has been identified as a suspected or confirmed COVID-19 case. Respondents must "[c]lose off areas used by the infected individual," open doors and windows to increase air circulation if possible, and wait as long as practical ("up to 24 hours under the poorest air exchange conditions") before cleaning begins. All areas where the suspected or confirmed case was located must be cleaned and disinfected according to specific procedures by individuals wearing appropriate PPE, including, at a minimum, gloves and a hospital gown or disposable coveralls.

122. At Folkston, detained people are responsible for cleaning their personal living spaces, as well as the common areas of housing units, but often are not provided with adequate cleaning supplies. Reports indicate that the facility often runs out of cleaning supplies and that the cleaning solutions provided are significantly diluted or not proper disinfectants. Petitioners Benavides and Brown state that the cleaning sprays they received were so diluted they had almost no chemical smell at all. Petitioner Arriaga stated that he was only provided with glass cleaner to clean his cell. Due to the inadequate provision of cleaning supplies, Petitioners Fernandez and Brown reported that they had no choice but to clean their cells with soap or shampoo provided for personal hygiene.

123. Folkston also commonly fails to provide detained individuals with gloves or face masks to use while cleaning.[106]

124. Detained people at Folkston who have respiratory issues, like asthma, find that their health is negatively affected by some of the cleaning sprays provided. Petitioner James, who has asthma and COPD, for example, stated that "[o]n a daily basis [he has] issues breathing while at the detention center," but those issues are only "aggravated by the fact that they . . . use certain cleaning sprays that affect my breathing."

e. Respondents Are Violating the CDC Guidance by Ignoring Symptoms Among the Detained Population and Failing to Place Sick People in Medical Isolation

125. The CDC Guidance requires immediate action in response to symptoms of COVID-19, even if the person has not yet been tested. "As soon as an individual develops symptoms . . . , they should wear a face mask (if it does not restrict breathing) and should be immediately placed under medical isolation in a separate environment from other individuals." While under medical isolation, a detained person should wear a face mask "at all times when outside of the medical isolation space and whenever another person enters that space," and be provided with a clean mask "at least daily, and when visibly soiled or wet."

126. The CDC Guidance directs facilities to provide "medical evaluation and treatment at the first signs of COVID-19 symptoms," including an initial evaluation as to whether the "symptomatic individual is at higher risk for severe illness from COVID-19" due to an underlying condition. "If a facility is not able to provide such evaluation and treatment, a plan should be in place to safely transfer the individual to another facility or local hospital."

[106] Dkt. 29-1 ¶ 8.

127. The CDC Guidance further states that "[f]acilities should make every possible effort to place suspected and confirmed COVID-19 cases under medical isolation individually. Each isolated individual should be assigned their own housing space and bathroom where possible. Cohorting should only be practiced if there are no other available options."

128. If cohorting is necessary because there are "no other available options," the CDC Guidance states that cohorted cases must "wear face masks at all times"; that "[o]nly individuals who are laboratory confirmed COVID-19 cases should be placed under medical isolation as a cohort"; and that confirmed cases should not be cohorted with suspected cases or case contacts.

129. For staff interacting with people in medical isolation, the CDC Guidance requires use of PPE, including eye protection, gloves, a hospital gown or disposable coveralls, and an N95 respirator (or a face mask when the supple chain of N-95 masks cannot meet demand). Staff monitoring those in medical isolation should be designated to do so exclusively where possible, and "should limit their own movement between different parts of the facility to the extent possible."

130. Instead of responding immediately to symptoms among the detained population at Folkston as required by the CDC Guidance, Respondents routinely do the opposite. They ignore reports of COVID-19 symptoms and requests for medical attention and allow people with COVID-19 symptoms to continue sleeping and eating within a few feet of others.

131. For example, on March 19, 2020, a man detained at Folkston reported that he was afraid of contracting COVID-19 because he feared Folkston would not provide proper medical treatment. Another man at Folkston reported that there was at least one person in his housing unit who was experiencing coughing, fever, and shortness of breath but had not been moved to another

location. Petitioner James observed that Folkston was not taking steps to evaluate detained people who had coughs.

f. Respondents Are Violating the CDC Guidance Related to Transfers and Screening of New Entrants to the Detained Population

132. CDC Guidance states that transfers of detained individuals between detention facilities should be "restricted" unless "absolutely necessary" (if COVID-19 is not already present in either facility) and transfers should be "suspended" unless "absolutely necessary" (if there has been a suspected or confirmed case of COVID-19 inside either facility). The Guidance further states that receiving facilities must have capacity to isolate symptomatic patients upon arrival.

133. The Guidance sets out required infection control measures for the transportation of detained people. These measures demand far more staffing and training than ICE has available for large scale transfers:

> If a transfer is absolutely necessary, perform verbal screening and a temperature check as outlined in the Screening section below, before the individual leaves the facility. If an individual does not clear the screening process, delay the transfer and follow the protocol for a suspected COVID-19 case – including putting a face mask on the individual, immediately placing them under medical isolation, and evaluating them for possible COVID-19 testing. If the transfer must still occur, ensure that the receiving facility has capacity to properly isolate the individual upon arrival. Ensure that staff transporting the individual wear recommended PPE . . . and that the transport vehicle is cleaned thoroughly after transport.

134. For new entrants into a facility, the CDC Guidance directs detention centers to conduct "pre-intake screening and temperature checks" and to place any new intakes with symptoms (fever, cough, or shortness of breath) in medical isolation "immediately."

135. If COVID-19 is already present inside a facility, the CDC Guidance requires routine intake quarantining, which means "quarantining all new intakes for 14 days before they enter the facility's general population (SEPARATELY from other individuals who are quarantined due to contact with a COVID-19 case)."

136. As symptoms of COVID-19 can present anywhere from 2 to 14 days after exposure, individuals can expose other detained individuals, as well as detention center staff, if the CDC's new intake quarantining protocols are not followed.

137. On information and belief, Respondents are not complying with the CDC Guidance regarding transfers, including by failing to sufficiently screen all transfers out of and into Folkston and failing to consistently impose adequate intake quarantining.[107] On information and belief, Respondents also continue to engage in transfers that are not "absolutely necessary."

138. Folkston received new intakes transferred from other facilities as late as the second half of April.[108] Detained immigrants have observed new people being moved in and out of the facility as well, throughout the last month. As recently as May 4, 2020, Petitioner Benavides reported that she observed new people being brought into the building she is in just a few days prior.

139. On information and belief, Respondents have been placing new intakes with other detained individuals without first taking appropriate screening, isolation, or quarantining measures.

g. Respondents Are Violating CDC Guidance on Screening of Visitors

140. The CDC Guidance requires that visitors, like staff, have their temperatures taken and be screened before entering Folkston. Staff performing this screening should wear PPE

[107] Dkt. 29-1 ¶ 7.

[108] Monique O. Madan, *'It's like a Shell game': Immigration lawyers move to close ICE loophole in federal ruling*, Miami Herald (May 2, 2020), https://hrld.us/35wS7td (noting that ICE transferred people to Folkston from south Florida detention facilities, including one facility with confirmed cases of COVID-19 (Krome Detention Center) sometime after April 13, 2020).

including a face mask, eye protection, gloves, and a hospital gown or disposable coveralls. Visitors who do not clear the screening process should not be permitted to enter Folkston.

141. Attorneys continue to visit their detained clients in Folkston because most immigration court hearings for detained individuals are still proceeding and many filing deadlines still apply. Contrary to testimony from Respondent Gartland,[109] reports from immigration attorneys indicate that staff at Folkston are inconsistent in performing even the minimal screening that ICE purports to have implemented. They also do not comply with CDC Guidance on use of PPE during the visitor screening process.

142. Since the pandemic began, Respondents have permitted attorneys to enter Folkston without taking adequate precautions to limit exposure in the event that a visiting attorney is a COVID-19 carrier. Attorneys were permitted to enter Folkston for legal visits in late March 2020 without wearing any PPE. They merely had to submit to temperature checks and answer a brief set of questions about whether they had traveled recently or had contact with a confirmed case of COVID-19. As recently as April 10, 2020, an attorney entering Folkston reported that these screenings interviews were not always conducted in full or properly – on one occasion, for example, a guard filled out a questionnaire on her behalf without even asking her the screening questions.

143. On March 25, 2020, an attorney visiting Folkston observed 50-60 detained people in the same room, sitting inches away from each other, waiting for their court hearings to be conducted by video teleconferencing (VTC). She attended two hearings with clients that day in small VTC rooms that provide just enough space for two people to sit next to each other facing the VTC camera.

[109] Dkt. 29-1 ¶ 6.

h. Respondents Are Violating the CDC Guidance Related to Communication with Detained People

144. The CDC Guidance requires Respondents to post signage throughout Folkston advising detained people of the symptoms of COVID-19. Respondents should also provide instructions advising detained people on proper hand hygiene and cough etiquette; to avoid touching their faces without first washing their hands; to avoid sharing dishes and utensils; to avoid non-essential physical contact; and to report any symptoms to staff. Respondents must "[e]nsure that materials can be understood by non-English speakers and those with low literacy, and make necessary accommodations for those with cognitive or intellectual disabilities and those who are deaf, blind, or low-vision."

145. The CDC Guidance also directs Respondents to "[c]ommunicate clearly and frequently" with detained people about "how they can contribute to risk reduction."

146. Once COVID-19 has entered a facility, the CDC Guidance directs that facilities should "[p]rovide clear information" to detained people "about the presence of COVID-19 cases within the facility."

147. Several Petitioners and other detained immigrants at Folkston have indicated that ICE personnel have never informed them of the symptoms of COVID-19, provided information about confirmed cases at Folkston, or advised them on recommended hygiene or social distancing practices. Detained people at Folkston have reported that when they asked for explanations and information regarding COVID-19 or expressed their concern about the risk of exposure, guards and staff responded by threatening to take away their possessions and put them in solitary confinement. Petitioner Benavides stated that when she asked for information regarding COVID-19, she was told simply that "they are following CDC Guidance." The minimal information that has been provided is not sufficiently comprehensive to comply with the CDC Guidance.

148. Notices or flyers about COVID-19 are sometimes provided only in English, and some Petitioners cannot understand them. Petitioner Fernandez also reported that while Folkston had previously posted signs about handwashing in his pod unit, many of them were taken down around April 27, 2020.

i. Respondents Are Violating the CDC Guidance Related to Testing

149. The CDC Guidance directs testing of symptomatic individuals based on the CDC's general testing guidelines. The CDC's testing guidelines direct that "[c]linicians should use their judgment to determine if a patient has signs and symptoms compatible with COVID-19 and whether the patient should be tested. Most patients with confirmed COVID-19 cases have developed fever and/or symptoms of acute respiratory illness (e.g., cough, difficulty breathing)."[110]

150. The CDC's testing guidelines include as a priority rapid identification and appropriate triage of "those who are at highest risk of complication of infection," including people with underlying conditions with symptoms.[111]

151. On information and belief, Respondents are not complying with CDC testing guidelines at Folkston. *See supra* n. 63-64 (Respondents Albence and ICE stating that the number of available tests is limited and the number of tests conducted among those in ICE custody is low).

j. Respondents Are Violating CDC Guidance Related to Care and Protection of Medically Vulnerable Individuals in Their Custody

152. The CDC Guidance includes additional precautions for persons, such as Petitioners, who are at higher risk of severe illness or death from COVID-19. For example, when

[110] Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), *Evaluating and Testing Persons for Coronavirus Disease 2019 (COVID-19)* (last updated Mar. 24, 2020) https://www.cdc.gov/coronavirus/2019-nCoV/hcp/clinical-criteria.html.

[111] *Id.*

recommending medical isolation of confirmed or suspected COVID-19 cases and quarantine of close contacts of COVID-19 cases, the CDC Guidance requires facilities to "be especially mindful of cases who are at higher risk." Additionally, the CDC Guidance requires that symptomatic individuals should be immediately evaluated for medical vulnerability.

153. The CDC advises that the risk of severe illness from COVID-19 for people with underlying medical conditions is even higher when the underlying medical condition is "not well controlled."[112] It accordingly provides specific instructions on reducing the risks of COVID-19 for people with each underlying medical condition,[113] including continuing prescribed medications and maintaining treatment plans provided by doctors.[114] For people with asthma in particular, the CDC recommends continuing use of inhalers, avoiding asthma triggers, and avoiding close contact with cleaning and disinfecting products, particularly those that are sprayed directly onto a cleaning surface.[115]

154. Respondents fail to provide adequate and consistent medical care to detained people with medical conditions that give rise to a heightened risk of serious COVID-19 infection, including all Petitioners, in violation of the CDC Guidance.

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[112]Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), *People Who Are at Higher Risk for Severe Illness* (last reviewed Apr. 15, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html.

[113] Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), *Groups at Higher Risk for Severe Illness* (last reviewed Apr. 17, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html.

[114] *Id.*

[115] *Id.*

155. Respondents routinely provide medically vulnerable people with incorrect medications or care, and delay or ignore medical requests. Diabetic Petitioners are not receiving the special diets they need to manage their diabetes and are not consistently provided with medically necessary insulin. Petitioner Kumar, who suffers from tuberculosis, was not provided medication for more than six months after he was brought to Folkston. He passed tuberculosis to his cellmate before Folkston started providing medication. On April 14, 2020, he stopped receiving medication for tuberculosis, even though he is still actively symptomatic. Moreover, Respondents' cleaning methods, *supra* ¶124, exacerbate breathing issues for Petitioners with asthma and other respiratory conditions. Petitioner Arriaga found the lack of medical care at Folkston for his lupus so egregious that he agreed to voluntary departure.

156. In addition, Respondents' numerous violations of the CDC Guidance discussed above, *supra* ¶¶ 97-155, all increase the risk that COVID-19 will continue to spread within Folkston, magnifying the risk of infection to medically vulnerable people. Given the realities of detention at Folkston, no conditions of confinement can possibly protect Petitioners from the heightened risk of COVID-19 posed by their detention. As long as Petitioners remain detained, they are at greater risk of exposure than they would be if permitted to comply with state stay-at-home orders and self-isolate outside of detention.

k. Respondents Must Follow Other CDC Guidance on COVID-19

157. On information and belief, Respondents are also not in compliance with other portions of the CDC Guidance.

158. As COVID-19 is now confirmed to be within the detained population at Folkston, Respondents must also comply with portions of the CDC Guidance relevant to addressing this situation – including but not limited to quarantining people who have been exposed to a known or suspected case of COVID-19 and screening people in units where COVID-19 has been identified.

159. The CDC Guidance requires that "detained persons who are close contacts of a confirmed or suspected COVID-19 case (whether the case is another incarcerated/detained person, staff member, or visitor)" be placed under quarantine for 14 days. Facilities should "make every possible effort" to quarantine these people individually. Cohort quarantine for close contacts of a COVID-19 case "should only be practiced if there are no other available options" because it can cause COVID-19 to be transmitted to people who are not yet infected. If quarantined individuals are cohorted, the CDC Guidance requires them to wear face masks at all times to prevent transmission from infected to uninfected individuals.

160. The CDC Guidance also requires that facilities must "[i]mplement daily temperature checks in housing units where COVID-19 cases have been identified, especially if there is concern that … detained individuals are not notifying staff of symptoms."

F. Petitioners Are Particularly Vulnerable to Serious Illness or Death if Infected by COVID-19 and Should Be Released from Detention

161. Petitioners in this case are individuals who are currently detained at Folkston and are particularly vulnerable to serious illness or death if infected by COVID-19.

162. **Jenner Benavides.** Ms. Benavides is currently detained at Folkston and has been in ICE custody since May 2019. She is living with HIV and bipolar disorder. She also suffers from depression, anxiety, and suicidal ideation exacerbated by her conditions of confinement. At Folkston, she is constantly bullied and harassed by other immigrants detained there. She was recently sexually assaulted more than once by men in her pod unit. When she reported the assault, she was put on suicide watch, and then moved to protective custody, which further worsens her anxiety and depression. She has also experienced delays and inconsistencies in medical services at Folkston, and she has not been provided with face masks or gloves despite multiple requests for them.

163. Ms. Benavides is critically vulnerable to COVID-19 because of her autoimmune disease and other health problems. Upon her release, she plans to self-quarantine with her U.S. citizen friend in Nashville, where her two youngest siblings also eagerly await her return.

164. **David Fernandez.** Mr. Fernandez has been detained at Folkston since December 2019. He has diabetes and has suffered from tuberculosis in the past. A doctor has told him that if he does not manage his blood sugar levels, he is at risk of suffering a heart attack. Prior to his detention by ICE, he had his sugar levels under control, and he felt well. However, maintenance of his diabetes requires fourteen injections of insulin per week, and he has not consistently received all of these necessary injections. Some weeks he receives as few as three. His health has deteriorated, and he sometimes cannot stand up from fatigue. Mr. Fernandez is now forced to remain in a facility where he cannot practice social distancing, he is not provided sufficient soap, testing for COVID-19 is unavailable, and staff are not taking precautions to protect him from infection.

165. Mr. Fernandez is critically vulnerable to COVID-19 because of his significant health problems. Upon his release, he plans to self-quarantine in South Carolina, where friends eagerly wait to welcome him home.

166. **Gerardo Arriaga.** Mr. Arriaga is currently detained at Folkston, and has been in ICE custody since March 2020. He has lupus, an autoimmune disease that causes him to be immunocompromised and causes inflammation and damage to his joints, skin, kidneys, blood, heart, and lungs. Because of his condition, he is predisposed to infections, and needs medications and topical creams to manage the symptoms. While he has been at Folkston, he has not received these necessary medications. He has also requested medical attention that has been ignored, and staff are not taking precautions to protect him from COVID-19. The medical care has been so

inadequate that, on May 5, 2020, he agreed to voluntary departure to Peru to get medical care there instead of remaining at Folkston.

167. Mr. Arriaga is critically vulnerable to COVID-19 because of his significant health problems. Upon his release, he plans to self-quarantine with his wife in Atlanta, Georgia before they both return to Peru.

168. **Ajit Kumar.** Mr. Kumar has been detained at Folkston since January 2019. He is currently suffering from tuberculosis, which causes him to cough and experience general fatigue. He also has severe headaches, depression, and anxiety. When Mr. Kumar was first transferred to Folkston, he informed staff that he had tuberculosis, but was not tested for it for over six months. This delay not only caused Mr. Kumar to suffer without medication, but also caused his cellmate to contract tuberculosis. Folkston then began providing Mr. Kumar with medication for his tuberculosis and his headaches, but recently stopped. The only medication he receives now is an antidepressant. Mr. Kumar continues to be detained in a crowded open dormitory at Folkston.

169. Mr. Kumar is critically vulnerable to COVID-19 because of his significant health problems. Upon his release, he plans to self-quarantine at his home with his brother-in-law in Baltimore, Maryland.

170. **Scott James.** Mr. James is currently detained at Folkston, and has been in ICE custody since October 2018. He suffers from severe asthma and chronic obstructive pulmonary disease (COPD), and needs to have an inhaler at all times. The conditions under which Mr. James is detained aggravate his respiratory conditions. He also has hypertension and a history of pre-diabetes. Many of his health issues are related to being shot in 2002 and a resultant surgery.

171. Mr. James is critically vulnerable to COVID-19 because of his age and significant health problems. Upon his release, he plans to self-quarantine with his wife and four children in Atlanta, Georgia.

172. **Winston Brown.** Mr. Brown is currently detained at Folkston and has been in ICE custody since March 2019. About a year ago, he was diagnosed with diabetes and high blood pressure. He also has problems with his prostate. For the last few weeks, he has been experiencing shortness of breath and chest pain as well. He has been taking medications for all of these conditions. At Folkston, he does not receive the proper diet he needs to manage his diabetes effectively. The stress of detention and the risk of COVID-19 also causes his blood pressure to fluctuate dangerously.

173. Mr. Brown is critically vulnerable to COVID-19 because of his age and significant health problems. Upon his release, he plans to return to his home and self-quarantine with his family in Boynton Beach, Florida.

G. ICE's Alternatives to Detention Program

174. ICE has a longstanding practice of exercising its authority to release from custody particularly vulnerable immigrants with significant medical or humanitarian needs, including on bond, parole, or under other alternatives to detention ("ATD") such as GPS monitoring and telephone check-ins. *See, e.g.,* 8 U.S.C. §§ 1182(d)(5)(a), 1226(a); 8 C.F.R. § 212.5(a)-(d); 8 C.F.R. § 235.3(b)(2)(iii), (b)(4)(ii); 8 C.F.R. § 241.4. The INA also provides for what is commonly known as "mandatory" detention for people with a history of certain criminal convictions under 8 U.S.C. § 1226(c), but despite the nominally "mandatory" nature of this detention, ICE has always, in fact, exercised discretion over individuals in this category, even if rarely exercising that discretion to release individuals.

175. For over 15 years, DHS/ICE has sought and obtained congressional funding for its ATD program, which uses supervised release, case management, and monitoring of individuals instead of detention.[116] ICE has repeatedly told Congress that the ATD program increases ICE's operational effectiveness and individual compliance with release conditions.

176. The DHS FY2021 Congressional Budget Justification for ICE states that it costs $125.06 per day to jail an adult immigrant in ICE custody. The average cost per ATD participant is $4.43 per day. The DHS FY2021 funding request seeks to support 120,000 daily participants in the ATD program.[117]

177. A 2014 GAO Report found that 95% of those on full-service ATD (*i.e.* those that include case management) appear for their final hearings.[118] According to 2017 contract data,

[116] ICE's current ATD program is called Intensive Supervision Appearance Program III (ISAP III). The program features different levels of case management including in-person or telephonic meetings, unannounced home visits, scheduled office visits, and court and meeting alerts. Some participants are also enrolled in technology-based monitoring including telephonic monitoring, GPS monitoring via ankle bracelet, and smart phone application monitoring called SmartLink that uses facial recognition and location monitoring via GPS. The private contractor that operates the program for ICE is BI, Inc., a wholly-owned subsidiary of The GEO Group, Inc. *See* CRS Report R45804, Immigration: Alternatives to Detention (ATD) Programs, (Jul. 8, 2019). On March 23, 2020, DHS awarded BI, Inc. a 5-year $2.2 billion contract for continued ISAP support. https://beta.sam.gov/opp/2479131ff88f405999e126b52ff105f5/view.

[117] DHS/ICE FY2021 Congressional Budget Justification, at Operations & Support 132, 171, 173, https://www.dhs.gov/sites/default/files/publications/u.s._immigration_and_customs_enforcement.pdf. Due to court backlogs and delays for those who are non-detained, ATD participants are enrolled for a longer periods of time than they would have been detained. However, even considering the average length of stay in detention and the average length of time in ATD, taxpayers are paying an average of $4,000 more per individual detained than for each of those released on ATD.

[118] GAO-15-26, Alternatives to Detention, at 30 (Nov. 2014), available at https://www.gao.gov/assets/670/666911.pdf.

supervision coupled with some case management results in a more than 99% appearance rate for all immigration court hearings, and a more than 91% appearance rate for final hearings.[119]

178. As of April 25, 2020, ICE has 89,490 individuals enrolled in ATD, including 3,078 in the Atlanta area.[120]

VI. LEGAL FRAMEWORK

179. By continuing to detain Petitioners at Folkston at this time, Respondents are in violation of two different substantive standards flowing from the Fifth Amendment Due Process Clause: (1) the right to be free from punishment; and (2) the right to reasonable safety. The Court has the power to remedy constitutional violations by ordering Petitioners' release or other available remedial actions short of release, either by issuing a writ of habeas corpus under 28 U.S.C. § 2241 and Art. I, § 9, cl. 2 of the U.S. Constitution, or alternatively, through the court's longstanding equitable power to enjoin unconstitutional conduct in suits brought under 28 U.S.C. § 1331 seeking injunctive or declaratory relief against federal actors acting in their official capacity.

A. Petitioners Have a Constitutional Right to Be Free from Punishment

180. All noncitizens in ICE custody, even those with prior criminal convictions, are detained pursuant to civil immigration laws. *Zadvydas v. Davis,* 533 U.S. 678, 690 (2001). Their constitutional protections while in civil custody are thus derived from the Fifth Amendment Due Process Clause. *Id.*

181. The Fifth Amendment Due Process Clause, which mirrors the Fourteenth Amendment, prohibits punishment of people in civil custody. *Bell v. Wolfish*, 441 U.S. 520, 535

[119] The Real Alternatives to Detention (June 2019), available at https://www.womensrefugeecommission.org/research-resources/alternatives-to-detention/.

[120] ICE, Detention Management, https://www.ice.gov/detention-management#tab2 (last visited May 6, 2020).

n.16 (1979); *Magluta v. Samples*, 375 F.3d 1269, 1273 (11th Cir. 2004); *Hamm v. Dekalb County*, 774 F.2d 1567, 1572 (11th Cir. 1985) (citing *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977)). (1989).

182. Civilly detained people "are generally 'entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." *Marsh v. Fla. Dep't of Corrections*, 330 F. App'x' 179 (11th Cir. 2009) (quoting *Youngberg v. Romeo*, 457 U.S. 307, 322 (1982)); *accord Heyer v. U.S. Bureau of Prisons*, 849 F.3d 202, 209 n.5 (4th Cir. 2017).

183. The government must provide detained individuals with basic necessities, such as adequate medical care, food, clothing, and shelter; the failure to provide these necessities violates due process. *Hamm*, 774 F.2d at 1573; *Cook ex rel. Estate of Tessier v. Sheriff of Monroe Cty.*, 402 F.3d 1092, 1115 (11th Cir. 2005).

184. To establish that a particular condition or restriction of detention constitutes impermissible punishment, a petitioner must show either (1) an expressed intent to punish; or (2) lack of a reasonable relationship to a legitimate governmental purpose, from which an intent to punish may be inferred. *See Wolfish*, 441 U.S. at 538. Absent an explicit intention to punish, a court must apply a two-part test: "First, a court must ask whether any 'legitimate goal' was served by the prison conditions. Second, it must ask whether the conditions are 'reasonably related' to that goal." *Jacoby v. Baldwin County*, 835 F.3d 1338, 1345 (11th Cir. 2016). "[I]f conditions are so extreme that less harsh alternatives are easily available, those conditions constitute 'punishment.'" *Telfair v. Gilberg*, 868 F. Supp. 1396, 1412 (S.D. Ga. 1994) (citing *Wolfish*, 441 U.S. at 538-39 n.20).

185. There is no legitimate interest in civil immigration detention of an individual for the purpose of deterring migration of others. *See Bell*, 441 U.S. at 539 n.20 ("Retribution and deterrence are not legitimate nonpunitive governmental objectives."); *see also R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 188-90 (D.D.C. 2015) (observing that deterring future mass migration is a "novel" justification for detention that is "out of line" with those endorsed by the Supreme Court, and ultimately holding that it is not a legitimate purpose for immigration detention).

B. Petitioners Have a Constitutional Right to Reasonable Safety in Custody

186. "[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 Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989).

187. At a minimum, the Fifth Amendment Due Process Clause prohibits Respondents' deliberate indifference to a substantial risk of serious harm that would rise to the level of an Eighth Amendment violation in the post-conviction criminal context. *Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244, (1983) ("[T]he due process rights of a [detainee] are at least as great as the Eighth Amendment protections available to a convicted prisoner."); *see also Hale v. Tallapoosa County*, 50 F. 3d 1579, 1582 n.4 (11th Cir. 1995).

188. In order to show that Respondents are acting with deliberate indifference, Petitioners must show exposure to a substantial risk of serious harm of which Respondents are aware and have disregarded. *Farmer v. Brennan*, 511 U.S. 825, 834, 837-38 (1994); *Marbury v. Warden*, 936 F.3d 1227, 1233 (11th Cir. 2019); *Hale v. Tallapoosa Cty.*, 50 F.3d 1579, 1582 (11th Cir. 1995).

189. The government may violate the Eighth Amendment, and by extension the Fifth Amendment, when it "ignore[s] a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year," including "exposure of inmates to a serious, communicable disease," even when "the complaining inmate shows no serious current symptoms." *Helling*, 509 U.S. at 33; *see also id.* at 34 (citing with approval *Gates v. Collier*, 501 F.2d 1291, 1300 (5th Cir. 1974), which held that prisoners were entitled to relief under the Eighth Amendment when they showed, *inter alia*, the mingling of "inmates with serious contagious diseases" with other prison inmates).

190. Thus, the harm that Petitioners fear—*i.e.*, that their confinement will result in a COVID-19 infection that will seriously injure and possibly kill them—need not become a reality to establish a violation of their constitutional rights. Courts do not require a plaintiff to "await a tragic event" before seeking relief from a condition of confinement that unconstitutionally endangers them. *See Helling*, 509 U.S. at 33 (holding prisoner's Eight Amendment claim could be based upon possible future harm to health, as well as present harm).

191. "Nor does it matter that some inmates may not be affected by the condition, and that the harm is thus, in a sense, only potential harm. The Court has found an Eighth Amendment violation 'even though it was not alleged that the likely harm would occur immediately and even though the possible infection might not affect all of those exposed.'" *Tittle v. Jefferson Cty. Comm'n*, 10 F.3d 1535, 1543 (11th Cir. 1994) (quoting *Helling*, 509 U.S. at 33).

192. The government may violate a detained person's due process rights even where it is exercising its "best efforts," *Thakker v. Doll*, 20 Civ. 480, 2020 WL 1671563, at *1, *10 (M.D. Pa. Mar. 31, 2020), *partially rev'd on other grounds, Thakker v. Doll,* --- F. Supp. 3d ---, 2020 WL 2025384, at *6 (M.D. Pa. Apr. 27, 2020), if "the protective measures in place . . . are not working,"

Hope v. Doll, No. 20 Civ. 562, ECF. No. 11 at 13–14 (M.D. Pa. Apr. 7, 2020) (ordering release of medically vulnerable detainees, noting the increase in positive cases of COVID-19 in the detention centers at issue).

C. The Court May Grant Petitioners' Release Through a Writ of Habeas Corpus

193. Petitioners may challenge their detention as unconstitutional under the federal habeas statute, 28 U.S.C. § 2241. Section 2241(c)(3) extends the writ of habeas corpus to any person who is "in custody in violation of the Constitution or laws or treaties of the United States."

194. "It is clear, not only from the language of [the federal habeas statute], but also from the common-law history of the writ, that . . . the traditional function of the writ is to secure release from illegal custody." *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) (The writ is an "integral part of [the United States'] common-law heritage," which "was given explicit recognition in the Suspension Clause of the Constitution, Art. I, § 9, cl. 2."). *See also Munaf v. Geren*, 553 U.S. 674, 693 (2008) ("Habeas is at its core a remedy for unlawful executive detention."). "[O]ver the years, the writ of habeas corpus [has] evolved as a remedy available to effect discharge from *any* confinement contrary to the Constitution or fundamental law . . . ." *Preiser*, 411 U.S. at 485 (emphasis added).

195. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." *Harris v. Nelson*, 394 U.S. 286, 291 (1969); *see also Jones v. Cunningham*, 371 U.S. 236, 243 (1963) ("[Habeas] is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose.").

196. Accordingly, habeas is undoubtedly an appropriate vehicle to obtain release from unlawful confinement when the illegality stems from the fact or duration of detention—what is

often referred to as the historical core of habeas. Cases seeking "immediate release from detention because there are no conditions of confinement that are sufficient to prevent irreparable constitutional injury" fall "squarely in the realm of habeas corpus." *See Vazquez Barrera*, Case No. 4:20-cv-01241, ECF No. 41 at 7-9.

197. Some circuit courts have drawn a distinction between *prisoners*' claims that challenge the fact or duration of confinement and those that merely seek a change in conditions of their confinement, stating that the former sound in habeas corpus while the latter should be brought as a civil rights action under 42 U.S.C. § 1983 or an equivalent federal constitutional cause of action.

198. In circuits that draw this distinction, courts generally conclude that remediation of the condition is sufficient to remedy the injury. *See, e.g.*, Report and Recommendations on Emergency Motion for Injunctive Relief, *Gayle v. Meade*, 2020 WL 1949737 (S.D. Fla. Apr. 22, 2020) at *26 (explaining that the Eleventh Circuit's rule on this point, is "based on the implicit assumption that a 'correction' or ['discontinuance' of the unconstitutional practice is actually *available*"); *Vazquez Barrera*, Case No. 4:20-cv-01241, ECF No. 41 at 8 ("[I]n most cases, unconstitutional conditions of confinement can be remedied through injunctions that require abusive practices be changed"). Alternatively, such courts sometimes determine that habeas is not the proper vehicle because the petitioner seeks a remedy other than release. *See Spencer v. Haynes*, 774 F.3d 467,a 469-70 (8th Cir. 2014) (claim that four-point physical restraints constituted cruel and unusual punishment did not sound in habeas where the prisoner did not "seek a remedy that would result in an earlier release from prison"); *cf. Vazquez Barrera*, Case No. 4:20-cv-01241, ECF No. 41 at 7 (noting that "even in its own cases limiting habeas petitions in conditions-of-

confinement challenges, the Fifth Circuit states that habeas is appropriate if a ruling in the petitioner's favor would 'automatically entitle [the petitioner] to accelerated release.").

199. Regarding the COVID-19 pandemic and the risk it presents to medically vulnerable individuals in detention, courts have acknowledged that the line between claims challenging conditions of confinement and claims challenging the fact or duration of confinement is blurry. *See Money*, 2020 WL 1820660, at *9 (both habeas and § 1983 claims by state prisoners could proceed because "the unprecedented circumstances" of the COVID-19 pandemic "collapse the utility and purpose of drawing distinctions between" conditions claims and fact-or-duration claims); *Malam v. Adducci*, No. 2:20-cv-10829-JEL-APP (E.D. Mich. Apr. 5, 2020), ECF No. 22 (construing claim as challenge to the *fact* of detention even though it arose out of the unconstitutionality of the conditions of confinement because there were "no conditions of confinement sufficient to prevent irreparable constitutional injury"); *Vazquez Barrera*, Case No. 4:20-cv-01241, ECF No. 41 at 8 ("The mere fact that Plaintiffs' constitutional challenge requires discussion of conditions in immigration detention does not necessarily bar such a challenge in a habeas petition.").

200. When release is the only remedy that will end unlawful punishment or ameliorate a condition that violates the Fifth Amendment Due Process Clause, there must be a vehicle available for a person in federal immigration detention to seek release from a court. If no other cause of action allows release, habeas corpus must be available pursuant to the Suspension Clause. Art. I, § XI clause 2.

201. Federal courts retain "broad discretion in conditioning a judgment granting habeas relief . . . 'as law and justice require.'" *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987) (quoting 28 U.S.C. § 2243). The Court is fully empowered to remediate the particular illegality here—exposure

to a highly contagious and potentially lethal virus that is substantially likely to harm Petitioners in the congregate environment where they are detained and that violates their constitutional rights to be free from arbitrary and punitive detention—by ordering their release.

D. The Court May Grant Petitioners' Release and Other Equitable Relief Under 28 U.S.C. § 1331 and the Fifth Amendment

202. Because of the operation of the Suspension Clause, if this Court determines that it does not have jurisdiction to consider release under habeas, it must be because it finds jurisdiction to do so under its broad implied injunctive authority. Petitioners may seek equitable relief for violation of their Fifth Amendment due process rights through an implied cause of action against Respondents in their official capacities.[121] Federal courts have long recognized an implicit private right of action under the Constitution "as a general matter" for injunctive relief barring unlawful government action. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010); *accord Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001) (equitable relief "has long been recognized as the proper means for preventing entities from acting unconstitutionally"); *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (holding that the Fifth Amendment and 28 U.S.C. § 1331 created a remedy for unconstitutional racial discrimination in public schools); *Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution"). Indeed, "federal courts have broad equitable powers to remedy proven constitutional violations." *See*

[121] The implied constitutional cause of action available to Petitioners is distinct from a suit brought under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). A *Bivens* suit seeks damages from a federal official in his individual capacity as a tortfeasor. Here, Petitioners instead seek to enjoin unconstitutional official conduct based on the federal courts' equity jurisdiction and the general grant of subject-matter jurisdiction in 28 U.S.C. § 1331. *See Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1230-33 (10th Cir. 2005).

Gibson v. Firestone, 741 F.2d 1268, 1273 (11th Cir. 1984); *see also Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15-16 (1971) (similar).

203. Federal courts' broad equitable powers include fashioning equitable remedies to address constitutional violations in custodial settings. *See Hutto v. Finney*, 437 U.S. 678, 687 n.9 (1978); *Stone v. City & County of San Francisco*, 968 F.2d 850, 861 (9th Cir. 1992) ("Federal courts possess whatever powers are necessary to remedy constitutional violations because they are charged with protecting these rights.")."When 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); *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).

204. Thus, there is both jurisdiction under 28 U.S.C. § 1331 and a cause of action under the Fifth Amendment to enjoin Petitioners' unconstitutional confinement, either through release or remediation of the injurious conditions. *See Malam*, 2020 WL 1672662, at *4 (explaining that apart from habeas, "the Fifth Amendment provides [the] [p]etitioner with an implied cause of action, and accordingly 28 U.S.C. 1331 would vest the Court with jurisdiction"); *cf. Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1231-32 (10th Cir. 2005) (implied cause of action under Eighth Amendment to enjoin unconstitutional prison conditions).

205. The Eleventh Circuit has never opined on whether a person in civil immigration detention is entitled to release under the Fifth Amendment when all steps short of release would fail to ameliorate a substantial risk of harm—as is the case here. In *Gomez v. United States*, the Eleventh Circuit held that the proper remedy for a prisoner who proves cruel and unusual punishment is discontinuance of the improper practice or correction of the unconstitutional

condition. 899 F.2d 1124, 1126 (11th Cir. 1990). But "the *Gomez* rule is based on the implicit assumption that a 'correction' or [']discontinuance' of the unconstitutional practice is actually *available*. If no correction is feasible, then the remedy which the Eleventh Circuit relied upon would become illusory." *Gayle*, 2020 WL 1949737 at *25-26 (S.D. Fla. Apr. 22, 2020); *see also id.* at 25 similarly distinguishing *Vaz v. Skinner*, which is based on the *Gomez* rule); *Gomez*, 899 F.2d at 1126 (asking whether adequate treatment within the prison system was possible, such that the unconstitutional condition could be corrected absent release, and concluding that such treatment was possible).

206. Releasing Petitioners, who are medically vulnerable to severe illness or death if they contract COVID-19, is the only remedy to cure the unconstitutionally high risk of injury that they suffer in detention. Petitioners' only defenses against COVID-19 are stringent social distancing and hygiene measures—both of which are simply impossible in the environment of an ICE detention facility. Petitioners face unreasonable harm from continued detention and should be released immediately.

207. Alternatively, the Court has broad authority under section 1331 to order remediation of conditions. The federal government's own source on appropriate standards for jails, prisons, and detention centers—the CDC Guidance—surely represents the minimum standard of care owed to Respondents under the Due Process Clause. This Court, then, has authority to order specific compliance with the terms of the CDC Guidance, or to order greater protections where necessary to address the constitutional harms Petitioners are suffering.

E. ICE's Failure to Comply with CDC Guidance Violates the *Accardi* Doctrine

208. When the government has promulgated "[r]egulations with the force and effect of law," those regulations "supplement the bare bones" of federal statutes. *United States ex rel.*

Accardi v. Shaughnessy, 347 U.S. 260, 265 (1954) (petitioner granted new hearing after review of denial of relief revealed prejudgment, contrary to existing regulations). Agencies must follow their own "existing valid regulations," even where government officers have broad discretion, such as in the area of immigration. *Id*. at 268; *see also Gonzalez v. Reno*, 212 F.3d 1338, 1349 (11th Cir. 2000) ("Agencies must respect their own procedural rules and regulations."); *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) ("[I]t is incumbent upon agencies to follow their own procedures . . . even where [they] are possibly more rigorous than otherwise would be required.").

209. A violation of the *Accardi* doctrine may constitute a violation of the Fifth Amendments Due Process Clause. *United States v. Teers*, 591 F. App'x 824, 840 (11th Cir. 2014) (recognizing that an *Accardi* violation may be a due process violation); *Jean v. Nelson*, 727 F.2d 957, 976 (11th Cir. 1984) ("[A]gency deviation from its own regulations and procedures may justify judicial relief in a case otherwise properly before the court." (citation omitted)).

210. While violations of "internal agency procedures" do not always require a remedy, *Accardi*'s rule applies with full force when "the rights or interests of the objecting party" are "affected." *Montilla v. INS,* 926 F.2d 162, 167 (2d Cir. 1991) (citing cases) ("The Accardi doctrine is premised on fundamental notions of fair play underlying the concept of due process"). The Due Process Clause is implicated here because Petitioners are relying on CDC Guidance promulgated for their benefit during the COVID-19 pandemic.

211. Respondents operate Folkston pursuant to its 2011 Performance-Based National Detention Standards, as amended in 2016 ("PBNDS"),[122] which specify certain measures that must be taken to protect the health of detained people.

[122] 2011 PBNDS, *supra* n. 99.

212. Section 4.3(II)(10) of the PBNDS requires that "Centers for Disease Control and Prevention (CDC) guidelines for the prevention and control of infectious and communicable diseases shall be followed." PBNDS at 258.

213. Section 4.3(V)(C)(1) of the PBNDS also provides that "[f]acilities shall comply with current and future plans implemented by federal, state or local authorities addressing specific public health issues including communicable disease reporting requirements." PBNDS at 261-262.

214. Respondents are required to comply with the PBNDS, which in turn requires compliance with the CDC Guidance, pursuant to their own regulations and policy statements. Yet, as discussed *supra*, Section V.E.ii, their efforts to do so have been woefully inadequate.

215. A court in this Circuit recently found the *Accardi* doctrine applicable to this very set of circumstances. *See Gayle v. Meade*, No. 20-21553-CIV, 2020 WL 2086482, at *6 (S.D. Fla. Apr. 30, 2020) (*Order Adopting in Part Magistrate Judge's Report and Recommendation*) ("It is abundantly clear that ICE is required to comply with CDC's guidelines pursuant to its own regulations and policy statements. Yet, ICE has flouted its own guidelines by, *inter alia*, failing to ensure that each detainee practices social distancing. . . . ICE's purported "substantial compliance" does not pass muster under the *Accardi* doctrine."). The same is true here.

VII. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

Violation of Fifth Amendment Right to Substantive Due Process

Detention Constituting Unlawful Punishment

216. Petitioners reallege and incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

217. The Due Process Clause of the Fifth Amendment guarantees individuals in immigration detention the right to be free from punishment. The government violates this

guarantee when conditions of confinement lack a reasonable relationship to any legitimate governmental purpose, *i.e.* when a custodian's actions are excessive in relation to their purpose.

218. Petitioners have chronic medical conditions that put them at high risk for serious injury or death if they contract COVID-19, which is significantly likely if they remain in detention.

219. Respondents' continued detention of Petitioners at Folkston during the COVID-19 pandemic, especially without consistent adherence to CDC Guidance, is excessive in relation to any legitimate governmental purpose. Less harsh measures are available to satisfy any government interest in continuing to detain Petitioners, including release with conditions.

220. Respondents' continued detention at Folkston, especially without consistent adherence to CDC Guidance, subjects them to conditions tantamount to punishment.

221. The government does not have a legitimate interest in continuing civil detention of Petitioners. Deterrence of migration to the United States—which Respondents state as a justification for refusing to release individuals in response to the COVID-19 pandemic—is not a proper justification for Petitioners' continued detention. Under these circumstances, Respondents' detention of Petitioners amounts to impermissible punishment.

222. Petitioners' ongoing confinement lacks a reasonable relationship to any legitimate governmental purpose or is excessive in relation to any such purpose.

223. Respondents' continued detention of Petitioners violates the Due Process Clause of the Fifth Amendment.

SECOND CLAIM FOR RELIEF

Violation of Fifth Amendment Right to Substantive Due Process

Detention Amounting to Deliberate Indifference to a Substantial Risk of Harm

224. Petitioners reallege and incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

225. Conditions of confinement for individuals in immigration detention also violate the Fifth Amendment when the government fails, with deliberate indifference, to safeguard the health and safety of those in custody. The government acts with deliberate indifference when it knowingly exposes an individual in its custody to a substantial risk of serious harm.

226. Respondents have subjected Petitioners to conditions of confinement that fail to comply with the CDC Guidance, and create a substantial risk that Petitioners will contract a serious case of COVID-19, for which there is no known treatment or cure. Respondents know or should be aware that Petitioners have underlying medical conditions that render them especially vulnerable to severe illness or even death if they contract COVID-19. Respondents are therefore knowingly subjecting Petitioners to an unreasonable risk of serious harm in violation of constitutional due process.

227. Respondents have knowingly exposed Petitioners to a substantial risk of serious harm.

228. Respondents have acted with deliberate indifference to Petitioners' health and safety.

THIRD CLAIM FOR RELIEF

***Accardi* Doctrine (Fifth Amendment) Violation of Detention Standards**

229. Petitioners reallege and incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

230. Under the *Accardi* doctrine, due process and the basic principles of administrative law dictate that rules promulgated by a federal agency regulating the rights and interests of others are controlling upon the agency. That doctrine is premised on the fundamental notion of fair play underlying the concept of due process.

231. The *Accardi* doctrine applies with particular force when "the rights of individuals are affected." *Morton*, 415 U.S. at 235.

232. Folkston is subject to ICE's PBNDS, which set forth certain measures that must be taken to protect the health of detained people.[123] The PBNDS require ICE to follow CDC guidelines for the prevention and control of infectious disease, as well as plans implemented by federal, state, or local authorities to address public health crises.

233. Respondents have an obligation under the PBNDS to protect the Petitioners by following the CDC Guidance. However, Respondents have failed to comply with the PBNDS or the CDC Guidance in their management of the COVID-19 pandemic at Folkston.

234. In particular, Respondents have failed to follow the CDC Guidance related to social distancing, hygiene, supplies (including PPE), cleaning, medical evaluation and treatment of COVID-19 symptoms, medical isolation of suspected and confirmed COVID-19 cases, transfers and screening of new entrants to the detained population, visitor screening, communication with detained people, testing, and care and protection of medically vulnerable individuals detained at Folkston. Respondents have thereby failed to mitigate the risk of COVID-19 at Folkston.

[123] 2011 PBNDS, *supra* n. 99.

235. Respndents have violated the *Accardi* doctrine and the Fifth Amendment Due Process Clause by failing to comply with their obligations under the PBNDS and failing to protect Petitioners.

VIII. PRAYER FOR RELIEF

WHEREFORE Petitioners request that the Court grant the following relief:

a. Issue a Writ of Habeas Corpus ordering Petitioners' immediate release, with appropriate precautionary public health measures, on the ground that Respondents' continued detention of Petitioners violates Petitioners' constitutional due process rights;

b. In the alternative, issue injunctive relief ordering Respondents to immediately release Petitioners, with appropriate precautionary public health measures, on the ground that continued detention violates Petitioners' constitutional due process rights;

c. In the alternative, issue injunctive relief ordering:

a. Respondents to immediately comply with CDC Guidance regarding COVID-19 at Folkston, including the provisions requiring:

i. Implementation and enforcement of social distancing (maintaining at least 6 feet of distance) among all people at Folkston at all times, with exceptions for emergency situations that require closer contact;

ii. No-cost universal access for detained populations at all times to: (1) soap and 60% alcohol hand sanitizer sufficient to allow frequent handwashing, (2) running water and either hand drying machines or disposable paper towels, and (3) no-touch trash receptacles for disposal;

iii. Maintaining sufficient stocks of PPE (N-95 respirators, face masks, eye protection, disposable gloves, disposable medical isolation gowns) at Folkston at all times and plans for rapid restocking when needed;

iv. Provision of appropriate PPE to all staff and detained people required to use them, training on use of the PPE, and enforcement of the use of the PPE;

v. Intensified cleaning and disinfecting practices, including: (1) cleaning, several times per day, of all frequently touched surfaces with household cleaners and EPA-registered disinfectants that are effective against COVID-19 and appropriate for the surface, (2) taking relevant precautions needed when using these products, particularly around detained people with underlying respiratory conditions, and (3) adapting cleaning and disinfecting practices when suspected or confirmed COVID-19 cases have been identified;

vi. Implementation of daily temperature checks in housing units where suspected, presumed, or positive COVID-19 cases have been identified, extending for fourteen days after the infected individual has been removed from the housing unit;

vii. Immediate response to symptoms of COVID-19, including: (1) placement of the symptomatic individual under medical isolation, with their own housing space and bathroom, and regular provision of a clean face mask to the individual, and (2) determination of whether the symptomatic individual is at higher risk for severe illness from COVID-19 due to an underlying condition, and provision of further evaluation and treatment as appropriate;

viii. Quarantine of all close contacts—defined as someone who has come within six feet of the infected individual in the last fourteen days—of a person with confirmed or suspected COVID-19 for 14 days, individually whenever

possible, and provision of PPE as required by the Guidance;

ix. Halting of transfers of detained people to and from Folkston unless "absolutely necessary," and adhering to infection control measures for the transportation of detained people if any transfers are "absolutely necessary";

x. Implementation of routine quarantining of new intakes for fourteen days at both Folkston;

xi. Consistent and accurate screening of all visitors to Folkston, and not permitting those who do not clear the screening process to enter;

xii. Clear and regular verbal and written communication about COVID-19 and risk reduction to the detained population, including: (1) posting signs throughout the Folkston that advise detained people of the symptoms of COVID-19, hand hygiene and cough etiquette, and other methods of protection against COVID-19, and that can be understood by non-English speakers and those with low literacy or needing other accommodations, and (2) clear and frequent in-person communication with detained people about risk reduction and the presence of COVID-19 cases inside Folkston; and

xiii. Testing of all symptomatic individuals, including rapid identification and appropriate triage of those at highest risk of complication of infection;

b. Respondents to provide adequate and consistent medical care to Petitioners for the medical conditions that put Petitioners at high risk of serious COVID-19 infection, as set out in CDC Guidance;

c. Respondents to refrain from transferring Petitioners to other detention centers under

ICE custody; if such transfer is absolutely necessary, this Court to retain jurisdiction over their claims at those detention centers;

d. Respondents to absolutely cease all transfers into Folkston until this Court is satisfied that Folkston is fully compliant with CDC Guidance as outlined above;

e. Respondents to immediately conduct custody redeterminations for all Petitioners, with specific consideration of the medical conditions that make Petitioners especially vulnerable to severe illness, long-term organ damage, or death from COVID-19;

f. Respondents to provide weekly reports to this Court and Petitioners' Counsel detailing progress toward compliance with the Court's order, with evidence of compliance with each of the specified provisions in (c)(a)(i)-(xiii);

d. Appoint a Special Master to assist the Court and the Parties in ensuring compliance with the relief ordered by the Court;

e. Issue a declaration that Respondents' continued detention of individuals at increased risk for severe illness, including all people fifty-five and older and persons of any age with underlying medical conditions that may increase the risk of serious harm due to COVID-19, violates the Due Process Clause;

f. Issue a declaration that Respondents' continued detention of individuals when not in compliance with CDC Guidance regarding COVID-19 violates the Due Process Clause;

g. Award Petitioners 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

h. Grant any other and further relief that this Court may deem fit and proper.

Dated: May 7, 2020

Respectfully submitted,

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**proceeding pro hac vice*
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