UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

ARISTOTELES SANCHEZ MARTINEZ, *et al.*, Petitioners/Plaintiffs, v. RUSSELL WASHBURN, *et al.*, Respondents/Defendants.	Case No.: 7:20-cv-0062-CDL-MSH **HEARING REQUESTED**

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION AND EMERGENCY WRIT OF HABEAS CORPUS

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Petitioners[1] are detained in ICE custody at Stewart Detention Center ("Stewart") and Irwin County Detention Center ("Irwin"), both in rural southern Georgia. Due to their medical conditions, Petitioners face serious illness or death if they contract COVID-19 and will likely require critical care, which is largely unavailable in southern Georgia. Given the conditions at Stewart and Irwin, it is impossible for Petitioners to practice the only known methods to avoid COVID-19—social distancing and diligent hand hygiene.

This Court denied Petitioners' previous request for emergency relief in the form of release, on the basis that conditions at Stewart and Irwin could be modified to reasonably eliminate the risk to Petitioners. Dkt. 14 at 3-4. Petitioners contend that, while release remains the sole remedy to prevent the irreparable harm they face, there are immediate steps this Court may take pursuant to 28 U.S.C. § 1331 to mitigate risk to Petitioners if they remain in custody, including ordering Respondents to comply with provisions of the Centers for Disease Control and Prevention ("CDC") Guidance; review the necessity of Petitioners' confinement; provide three on-time nutritionally appropriate meals per day; and report certain data to ensure compliance.

I. FACTUAL BACKGROUND

As of April 29, 2020, the COVID-19 pandemic has infected over three million people and taken over 226,411 lives globally, with almost 1.1 million confirmed cases and 60,757 deaths in the United States alone, including 25,304 cases and 1,054 deaths in Georgia.[2] COVID-19 is highly

[1] Petitioners Michael Robinson, Peter Owusu, and Karen Lopez are proceeding in this action using pseudonyms, as permitted by this Court. Dkt. 15. Petitioner Kimberly Salazar will file a motion to proceed pseudonymously, which Respondents do not oppose.

[2] Worldometer: Coronavirus, https://www.worldometers.info/coronavirus/#countries (last visited Apr. 29, 2020); *Georgia Department of Public Health COVID-19 Daily Status Report* (last visited Apr. 29, 2020), https://dph.georgia.gov/covid-19-daily-status-report. The number of cases is likely an underestimate "due to lack of availability of testing" in the United States. Dkt. 5-3 ¶ 3.

contagious and can be transmitted through respiratory droplets from coughing, sneezing, talking, breathing, or even flushing fecal matter in the toilet.[3] Dkt. 5-4 ¶ 7; *see also*; Ex. 11 ¶ 5a. It can require hospitalization and the use of a ventilator; may result in many months of recovery[4] from long-term illness or organ damage; and can even lead to death; there is no known vaccine or cure. Dkt. 5-3 ¶¶ 5, 7; Dkt. 5-4 ¶¶ 6, 10. Diligent hand hygiene and social distancing—staying at least six feet away from all other people—are the only known ways to avoid exposure. Dkt. 5-3 ¶¶ 5, 9, 11; Dkt. 5-4 ¶ 11; Dkt. 5-5 ¶¶ 11, 22.

A. Detention Endangers Petitioners and They Must Be Released

Petitioners have chronic medical conditions—including diabetes, heart and lung disease, neurological conditions, and compromised immune systems—that put them at high risk of life-threatening cases of COVID-19. *See generally* Dkt. 5-10 to 5-17; Ex. 1-4[5]; *see also* Dkt. 5-3 ¶¶ 6, 8; Dkt. 5-4 ¶¶ 4-5; Dkt. 5-5 ¶ 5.

1. Continued Detention Puts Petitioners at High Risk

Continued detention at Stewart or Irwin puts Petitioners at imminent risk of COVID-19 exposure. Detention centers are particularly susceptible to rapid spread of infectious disease due to their congregate nature. Dkt. 5-3 ¶¶ 11, 12, 21; Dkt. 5-5 ¶ 20; Dkt. 5-6 ¶ 5. A recent study estimates that, assuming a moderate rate of transmission, approximately 93% of people detained at Stewart and Irwin will be infected within 90 days of the date the first detained person at each facility was infected. Ex. 12 (data set available at www.icecovidmodel.com, which contains the

[3] *See* Lisa Brosseau, *Commentary: COVID-19 transmission messages should hinge on science*, U. Minn. Ctr. for Infectious Disease Res. & Pol'y (Mar. 16, 2020), https://bit.ly/2VOjKeg. **Error! Hyperlink reference not valid.**

[4] David Templeton, *Recovery from COVID-19 can take months or longer, local health experts say*, Pittsburgh Post-Gazette (Apr. 28, 2020), https://bit.ly/3aQ646w.

[5] All exhibits cited are attached to the Declaration of Amanda Brouillette, which is attached to this motion.

source data for the report). There are already confirmed cases among those detained and employed at both Stewart and Irwin, and the number of cases among detained people has risen at both facilities since the Court's prior order.[6] The outbreak appears to be well underway at Stewart: as of April 28, 2020, about 10% of CoreCivic staff at Stewart—forty-two employees—have tested positive, double the number CoreCivic reported just one week earlier.[7] Detention center staff, ICE officers, contractors, vendors, and legal visitors continue to enter and exit on a daily basis, and ICE continues to transfer immigrants between facilities. *See* Dkt. 5-3 ¶ 20a, 23; Dkt. 5-7 ¶ 3; Dkt. 5-8 ¶ 3; Dkt. 5-9 ¶ 12. Stewart and Irwin also continue to disregard basic CDC requirements for responding to COVID-19 symptoms, screening, and testing, *see infra* part I.C. Reports of ignored requests for medical attention and failures to segregate confirmed or suspected cases from the general population indicate that COVID-19 is more widespread than Respondents' reporting of positive tests indicates, particularly at Stewart. *See generally* Ex. 10. It is only a matter of time before COVID-19 touches Petitioners. Ex. 11 ¶¶ 9-12.

Both detention centers are ill-equipped to address this threat, as demonstrated by their long track records of failing to provide even basic medical care to detained people including Petitioners, resulting in needless deaths and other medical emergencies. Dkt. 20 ¶¶ 72-81 (collecting sources); Dkt. 5-9 ¶¶7, 21; Dkt. 5-10 ¶¶ 14-26; Dkt. 5-11 ¶¶ 4-6, 8, 19-20; Dkt. 5-12 ¶¶ 8, 10-12; Dkt. 5-13 ¶¶ 6-8, 14; Dkt. 5-14 ¶¶ 7, 9-12, 16; Dkt. 5-15 ¶¶ 5, 13, 18, 25; Dkt. 5-16 ¶¶ 23-25; Dkt. 5-17 ¶ 7; Ex. 1 ¶¶ 8, 25; Ex. 2 ¶ 6; Ex. 3 ¶¶ 18-20; Ex. 4 ¶¶ 6-7; *see also* Ex 11 ¶¶ 13-39 (chronicling ICE's failure to respond appropriately to COVID-19 since March 2020). Making matters worse, both

[6] ICE Guidance on COVID-19 (last updated Apr. 28, 2020), https://www.ice.gov/coronavirus (9 detainees and 2 ICE staff at Stewart, and 2 detainees at Irwin on April 28); Dkt. 12-3 ¶ 3 (1 detainee and 1 transportation officer at Irwin on April 9); Dkt. 12-4 ¶¶ 26, 58 (5 detainees and 5 Stewart employees on April 9).

[7] Stephannie Stokes, *More Than 40 Employees At Ga. Immigration Detention Center Test Positive For COVID-19*, WABE (Apr. 28, 2020), https://bit.ly/3f4zJfC.

Stewart and Irwin are geographically isolated from local hospitals with the capacity to treat COVID-19. Dkt. 5-5 ¶¶ 12-14.

2. Any Custody Reviews Respondents Have Conducted for Petitioners Have Been Largely Illusory

Release from custody is both the most effective public health measure to curb transmission of COVID-19 and the only viable strategy to protect medically vulnerable people like Petitioners. If release is not possible, at a minimum detention centers must strictly adhere to CDC Guidance.[8] *See* Dkt. 5-3 ¶¶ 20a-g (explaining that ICE's March 27 guidelines[9] are ineffective in part because they fall short of CDC Guidance); Dkt. 5-4 ¶¶ 9, 11, 16, 20 (noting that efficacy of ameliorative measures requires strict adherence and availability of PPE and other hygiene supplies); *see generally* Ex. 11 (identifying the CDC Guidance as an appropriate baseline for best practices where detention is necessary) *cf.* Dkt. 5-5 ¶¶ 8-9 (explaining why CDC-recommended isolation can cause additional harm). ICE recognizes the ongoing danger of detention; on April 4, 2020, it directed ICE field offices to conduct custody re-evaluations for people with some medical conditions.[10] Under this one-time re-evaluation, ICE released fewer than 700 medically vulnerable immigrants; Respondent Albence confirmed to the House Oversight Committee that the review process "has

[8] "CDC Guidance" throughout refers to the "Printer friendly version" of 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), https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html.

[9] ICE's current COVID-19 guidance incorporates these March 27 guidelines. U.S. Immigration & Customs Enforcement, *ERO COVID-19 Pandemic Response Requirements* (Version 1.0, April 10, 2020), at 5, https://www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities.pdf.

[10] *Id.* at 14; U.S. Immigration & Customs Enforcement, *Updated Guidance: COVID-19 Detained Docket Review* (Apr. 4, 2020), https://www.ice.gov/doclib/coronavirus/attk.pdf.

been completed."[11] At least 30,000 men and women remain in immigration detention.[12]

Under the April 4 ICE guidance, ICE field office directors were instructed to determine on a "case-by-case" basis the need for continued detention of medically vulnerable people.[13] However, this process was inherently flawed because it impermissibly considered the impact of individual custody decisions on deterring future migration generally.[14] In addition, the custody re-evaluation guidance gave significant discretion to individual officers to continue custody, regardless of a person's medical conditions, and did not require that the presence of a high risk medical condition be the "determinative" factor for assessing the appropriateness of release. [15] Moreover, the guidance allowed ICE officers with no medical training to identify potentially high risk individuals without seeking medical evaluations or otherwise consulting any medical professionals as part of the screening process. *See* Ex. 11 ¶ 25.

In violation of ICE guidance, Petitioners do not believe that they were identified for custody re-evaluation at all under this process, let alone that they received meaningful individualized custody reviews. They have not received specialized medical evaluations related to COVID-19 and were not given the opportunity to provide external records relevant to their risk of complications from COVID-19 to supplement potentially incomplete ICE medical records. *See*,

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[11] 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.

[12] ICE, Detention Management, https://www.ice.gov/detention-management#tab2 (last visited Apr. 29, 2020).

[13] *See ERO COVID-19 Pandemic Response Requirements*, *supra* n.10, at 14, (referring to a directive from April 4, 2020 guidance to re-evaluate custody); *see also Updated Guidance: COVID-19 Detained Docket Review*, *supra* n. 11.

[14] *DHS Officials Refuse to Release Asylum Seekers*, *supra* n.12 ("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.").

[15] *Updated Guidance: COVID-19 Detained Docket Review*, *supra* n.11.

e.g., Dkt. 5-13 ¶ 16; Dkt. 5-14 ¶ 22; Dkt. 5-17 ¶ 11; Ex. 1 ¶ 26; Ex. 2 ¶ 9; Ex. 3 ¶ 25; Ex. 4 ¶ 19; Ex. 6 ¶ 3; Ex. 9 ¶ 20; Ex. 13 ¶ 3.

B. Detention Remains Dangerous Because Under Constraints of Quarantine, Respondents Are Failing to Provide Adequate Food to Petitioners

Detained people at Stewart report recent failures to provide nutritionally adequate meals three times a day. Over the last few weeks, Petitioners and other detained individuals at Stewart and Irwin have reported alarming changes in the amount, quality, and timing of meals, including: (1) meals not being provided at all; (2) meals served at unpredictable, often very late hours; (3) lower quality and significantly smaller portions of food; (4) meals that do not meet dietary restrictions; and (5) lack of access to the commissary to supplement the small portions.[16] Ex. 10 ¶¶ 11-17. Reports indicate that these deficiencies may be due to quarantine of the detained individuals who typically work in the kitchen because of COVID-19 spread. *Id.* ¶ 14. Peaceful protests by individuals detained at Stewart have been met with violence, physical force, and lockdowns. *Id.* ¶¶ 14-17 (describing an April 20 violent repression of a peaceful demonstration by detained people related to food, including teargassing, "mace bullets" fired at a person in a wheelchair who continues to urinate blood, and a days-long lockdown during which detained people could not speak to their attorneys without special permission); Ex 1 ¶¶ 19-21. Petitioners are hungry and afraid of how the food shortages will affect their health, particularly their ability to

[16] The normal amount of food served at Stewart and Irwin was already quite small, making the reduction particularly shocking. *See, e.g.*, Project South & Penn. St. Ctr. for Immigrants' Rts. Clinic, *Imprisoned Justice: Inside Two Georgia Immigrant Detention Centers* (2017), at 18, 31-32, 34-35, 37, 44-45, https://bit.ly/2W3f5Uo (people at Stewart and Irwin report often going hungry and losing weight due to lack of food); Southern Poverty L. Ctr., *Shadow Prisons: Immigrant Detention in the South* (2016), https://bit.ly/2VPvxZH (reporting "food portions so small that [detained people] were forced to supplement their diets by purchasing items from the commissary").

fight COVID-19 if they contract the virus.[17] *See* Ex. 1 ¶ 18; Ex. 5 ¶ 11.

C. Detention Remains Dangerous Because Respondents Have Failed to Implement CDC Guidance

Respondents are also failing to take adequate steps to protect Petitioners from the risk of COVID-19 while they remain within the walls of Stewart and Irwin. Respondents recognize the CDC Guidance as an authoritative source regarding the standard of care required of them during the COVID-19 pandemic. Dkt. 12-2 ¶¶ 8, 12, 14; *see also* Dkt. 19 at 19-20, 60, 80. ICE guidance states that ICE detention facilities "must" comply with the CDC Guidance, which emphasizes the need for social distancing, proper hygiene and cleaning practices, access to testing, individual isolation of people with the virus, and quarantine of those who are exposed.[18] However, reports from detained individuals and their attorneys indicate that conditions at Stewart and Irwin continue to fall short of this guidance in many respects.

a. *Response to Symptoms of COVID-19*

The CDC Guidance requires that "[a]s soon as" symptoms of COVID-19 develop, detainees 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." CDC Guidance at 15. The symptomatic individual's movement outside isolation should be kept "to an absolute minimum," and they should receive immediate "medical evaluation and treatment" including an assessment of their risk factors for severe COVID-19. *Id.* at 15, 23. Cohorting (medically isolating or quarantining as a group) should be used only if there are "no other available options"; if

[17] *See, e.g.*, U.N., Food & Agric. Org., *Maintaining a healthy diet during the COVID-19 pandemic* (Mar. 27, 2020), http://www.fao.org/3/ca8380en/ca8380en.pdf ("Good nutrition is very important before during and after an infection. Infections take a toll on the body especially when these cause fever, the body needs extra energy and nutrients. Therefore, maintaining a healthy diet is very important during the COVID-19 pandemic.").

[18] *ERO COVID-19 Pandemic Response Requirements*, *supra* n.10, at 5-6; *see generally* CDC Guidance, *supra* n.9.

cohorting is required, confirmed cases (with laboratory confirmed diagnoses), suspected cases (those who are symptomatic who have not yet been confirmed through a test), and asymptomatic close contacts should all be cohorted separately from each other. *Id.* at 15-16, 19-20.

Despite this guidance, Respondents routinely ignore reports of COVID-19 symptoms at both facilities and fails to isolate, quarantine or cohort close contacts of these symptomatic suspected cases. Detained people at Stewart report that symptomatic individuals in the general population are regularly ignored and go unseen by medical staff despite requests for an appointment, and that some receive only small bags of Tylenol in lieu of a meaningful appointment with medical staff. Ex. 10 ¶¶ 19, 21 (medical requests ignored for men in general population at Stewart who so ill that they could not leave their beds), 14 (medical request at Stewart for COVID-19 symptoms ignored since April 9), 18 (medical appointment denied for detained person with a fever and a cough because he had had one several days before, and another detained person with close contact with quarantined people had not been screened or monitored despite symptoms and requests to see medical); Dkt. 5-16 ¶ 9. Petitioners describe a similar failure to respond appropriately to symptomatic individuals at Irwin. Ex. 3 ¶ 21 (guards told a symptomatic woman to stop mentioning COVID-19 when enforcing social distancing for herself); Dkt. 5-14 ¶ 21 (COVID-19 symptoms treated with cough drops, if anything).

The CDC prioritizes testing *any* symptomatic person in a congregate setting.[19] Testing is critical because it enables identification of those who have been exposed to the virus. *See* Dkt. 5-4 ¶ 9. Scores of symptomatic people at Stewart and Irwin have not been tested or even evaluated

[19] Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), *Evaluating and Testing Persons for Coronavirus Disease 2019 (COVID-19)*, https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-criteria.html (updated April 27, 2020), *cited in* CDC Guidance, *supra* n.9, at 22.

by a medical provider. *See, e.g.*, Ex. 10 ¶¶ 18-22. Despite Respondent Washburn's testimony that Stewart has "no shortage in the tests on site," Dkt. 19 at 31, as of April 28, 2020, ICE had only tested 705 detained people in their custody across the country, 60% of whom tested positive.[20] Respondent Albence reported to Congress only a week after Respondent Washburn's testimony that ICE would "certainly do more testing" if it had more test kits.[21] If Stewart has enough kits to test every symptomatic individual, then it should do so; it fails to, though, either because it lacks a sufficient number of tests or because symptomatic people are not seen by medical staff.

Respondents are failing to quarantine and cohort in a manner that complies with the Guidance. Ex. 2 ¶ 7 (high-risk cohort contains both symptomatic and asymptomatic individuals); Ex. 5 ¶ 8, 17 (similar); Ex. 10 ¶¶ 6 (symptomatic people in cohorted units are not consistently seen by medical or removed from cohort), 7 (instead of confirming diagnosis to determine close contacts, detainees with fevers were taken out of housing unit and all others were left in), 21 (close contact only cohorted 6 days; symptomatic and asymptomatic close contacts held together).

b. ***Social distancing***

The CDC Guidance directs social distancing of "6 feet between all individuals, regardless of the presence of symptoms" at all times and locations. CDC Guidance at 11. Respondents cannot possibly implement social distancing at Stewart or Irwin. Respondent Washburn admitted that he "[doesn't] know that [social distancing] would be something that would be attainable [for sleeping arrangements] at this point." Dkt. 19 at 12-13, 25, 27. Respondent Paulk stated that Irwin was not enforcing social distancing, but had simply been "discussing" plans to spread people out and segregate high-risk individuals for the past four weeks. *Id.* at 54-55, 59. At both detention centers, detained people continue to live and eat in extremely close quarters. *See e.g.*, Dkt. 5-10 ¶¶ 7-8; Ex.

[20] ICE Guidance on COVID-19, *supra* n.7 (425 positives out of 705 total tests).
[21] *DHS Officials Refuse to Release Asylum Seekers, supra* n.12.

6 ¶ 9; Dkt. 5-11 ¶ 10; Ex. 13 ¶ 8; Dkt. 5-12 ¶ 7; Ex. 9 ¶¶ 5-6; Dkt. 5-14 ¶¶ 13-14; Ex. 8 ¶ 3; Dkt. 5-16 ¶¶ 6-7, 10-11; Dkt. 5-17 ¶ 8; Ex. 5 ¶¶ 6, 17; Ex. 3 ¶ 7; Ex. 4 ¶ 8. They must also share showers and toilets. Dkt. 5-10 ¶ 7; Dkt. 5-11 ¶ 10; Dkt. 5-12 ¶ 7; Dkt. 5-14 ¶ 14; Ex. 1 ¶ 13; Ex. 3 ¶ 8; Ex. 4 ¶ 8; Ex. 5 ¶ 16. Petitioner Lopez stated that, on or about April 21, 2020, she was transferred within Irwin from a 40-person unit where she shared an individual cell with one other person to an open dorm with twice as many people sharing bunk beds. Ex. 9 ¶¶ 5-6. Petitioner Owusu is kept in a pod unit at Stewart with 50 other people where social distancing is not enforced. Ex. 5 ¶ 16. At Irwin, detained people continue to be required to line up with their pod unit to go to the cafeteria, recreation area, library, medical unit, and to take legal calls, and must eat together in the cafeteria or a crowded common area in their pod. Ex. 3 ¶¶ 9-10; Ex. 4 ¶ 12; Ex. 6 ¶¶ 9, 13-14; Ex. 7 ¶ 11; Ex. 13 ¶¶ 7, 9, 13, 15. At Stewart, detained people continue to eat in the crowded common areas of their pod as well. Dkt. 5-16 ¶ 10 (describing that tables and chairs in the dining hall are affixed to the floor); Ex. 10 ¶ 6 (some housing units at Stewart have begun eating in the dining hall again); Ex. 1 ¶ 10; Ex. 5 ¶ 10 (even when food is brought to the units, it is impossible eat be socially distant while eating).

c. ***Cleaning***

The CDC Guidance identifies "intensified cleaning and disinfecting procedures" to be used during the pandemic, including for frequently touched surfaces, and "lifting restrictions on undiluted disinfectants." CDC Guidance at 9, 17-19. Respondents must also take recommended precautions while using these products, such as wearing gloves and ensuring good ventilation. *Id.*

At Stewart and Irwin, detained people are responsible for cleaning their living spaces and common areas, but often are not provided with adequate—or, in some cases, any—cleaning supplies or gloves. Dkt. 5-10 ¶¶ 8, 11; Dkt. 5-11 ¶ 14; Ex. 1 ¶¶ 11, 14; Ex. 3 ¶ 12; Ex. 4 ¶¶ 9, 11; Ex. 13 ¶ 12 (detainees are given used goggles and gloves for cleaning). The cleaning solutions

provided are often significantly diluted. Dkt. 5-10 ¶ 11; Ex. 1 ¶ 11. They do not receive training on how to clean in a way that limits the spread of infectious disease. Dkt. 5-11 ¶ 14; Ex. 4 ¶ 11.

At Irwin, detention center staff or detainees sporadically spray living spaces with some sort of cleaning spray without ensuring proper ventilation. Dkt. 5-10 ¶ 13; Dkt. 5-14 ¶ 16; Ex. 8 ¶ 12; Ex. 3 ¶ 13; Ex. 4 ¶ 10,; Ex. 13 ¶ 12. This practice not only fails to comply with CDC Guidance on cleaning, but also aggravates asthma and other respiratory issues, making it difficult for Petitioners Dingus and Salazar to breathe.[22] Dkt. 5-14 ¶ 16; Ex. 8 ¶ 12; Ex. 3 ¶ 13.

d. ***Transfers of Detained People***

Under the CDC Guidance, transfers of detained individuals between detention facilities with confirmed cases, including Stewart and Irwin, should be "suspend[ed]" unless "absolutely necessary." CDC Guidance at 14. If a transfer is "absolutely necessary," detention centers must conduct specific screening for new entrants and immediately place any symptomatic intakes in medical isolation. *Id.* Where COVID-19 is already present inside a facility, the CDC advises quarantining of all new intakes for 14 days before they enter the general population. *Id*.

New people continue to be moved in and out of Stewart and Irwin during the COVID-19 outbreak. Dkt. 5-11 ¶ 18; Ex. 13 ¶ 16; Dkt. 5-12 ¶ 18; Ex. 9 ¶ 18; Ex. 2 ¶ 7; Ex. 3 ¶ 17; Ex. 5 ¶ 14; Ex. 6 ¶ 6; Ex. 10 ¶ 8. Respondents have integrated new intakes with other detained individuals without taking appropriate screening, isolation, or quarantining measures. Ex. 2 ¶ 11 (intake at Stewart consists of only a temperature check); Dkt. 5-12 ¶ 18 (new intake placed in general population with a fever); Ex. 3 ¶ 17 (intakes at Irwin immediately housed in general population).

[22] The CDC recommends that to "[r]educe [the] risk of getting sick with COVID-19," people with asthma should continue using prescribed medication including inhalers, avoid asthma triggers, and avoid exposure to cleaning and disinfecting products. 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.

e. ***Communication with Detained People***

The CDC Guidance requires Respondents to post signage throughout Stewart and Irwin regarding COVID-19 symptoms, risk mitigation practices, and instructions to report symptoms to staff. CDC Guidance at 6, 10. These materials need to be accessible to non-English speakers and those with low literacy or disabilities. *Id.* The CDC also requires ongoing communication with detained people about risk reduction and COVID-19 transmission in the facilities. *Id.*

Petitioners report that ICE has never informed them of COVID-19 or advised them of recommended hygiene or social distancing practices or the number of confirmed COVID-19 cases in the facilities. Dkt. 5-10 ¶ 13; Dkt. 5-12 ¶ 17; Dkt. 5-14 ¶ 18; Ex. 1 ¶ 15; Ex. 3 ¶ 22; Ex. 4 ¶ 17; Ex. 7 ¶ 10. Notices or flyers about COVID-19 are provided only in English, and some Petitioners cannot understand them. Ex. 3 ¶ 22; Dkt. 12-4 at ¶ 29 & p. 24. Some photos of multilingual flyers Respondent Washburn represented to the Court as providing COVID-19 information actually feature posters about mumps. *See* Dkt. 12-4 at ¶ 29 & p. 24.

f. ***Other CDC Guidance***

Respondents have failed to implement other aspects of the CDC Guidance at both Stewart and Irwin. Dkt. 20 ¶¶ 111-192. *First*, detained immigrants at Stewart and Irwin consistently receive soap for personal use only once or twice a week in quantities insufficient to last the entire week. CDC Guidance at 7-8, 10; Dkt. 5-11 ¶ 11; Ex. 13 ¶ 14; Dkt. 5-16 ¶ 13; Ex. 3. ¶ 11; Ex. 4 ¶ 14; Ex. 10 ¶ 10. They also have limited or no access to hand sanitizer. CDC Guidance at 7-8, 10; Dkt. 5-16 ¶ 13; Ex. 1 ¶ 19; Ex. 5 ¶ 5; Ex. 10 ¶ 10. In addition, Respondent Paulk reportedly threatened to turn off the water at Irwin in retaliation for protests against conditions in the detention center. CDC Guidance at 10; Ex. 7 ¶ 6. *Second*, staff use of personal protective equipment ("PPE") is inconsistent, and detained people often do not receive PPE at all. CDC Guidance at 8-10, 13-14, 16, 18, 20, 23-26; Dkt. 5-11 ¶ 17; Ex. 13 ¶¶ 10,11; Dkt. 5-12 ¶ 16; Ex. 9 ¶ 17; Dkt. 5-14 ¶¶ 15, 17;

Ex. 8 ¶ 11; Ex. 3 ¶ 15; Ex. 4 ¶ 16; Ex. 6 ¶¶ 9-10; Ex. 7 ¶ 7; *see also* Ex. 11 ¶ 11 (describing the difficulty detention center staff face in keeping PPE in working order). When detained people do receive PPE, they must use the same PPE for many days or weeks and receive no training on proper use. Ex. 1 ¶¶ 9, 19; Ex. 5 ¶ 13. *Third*, Respondents have not implemented daily temperature checks in all housing units where COVID-19 cases have been identified. Because detained people are not informed about suspected or confirmed cases of COVID-19 in their units, they are unable to ensure proper monitoring. CDC Guidance at 22; Ex. 5 ¶ 12; Ex. 6 ¶ 4; Ex. 8 ¶ 9; Ex. 13 ¶ 10. *Fourth*, Respondents routinely use group cohorting as a default despite the CDC's statements that this measure will facilitate the spread of the virus and should be used only as a last resort. CDC Guidance at 6, 15-16, 19; Dkt. 19 at 16-17, 63. *Fifth*, staff at Stewart are inconsistent in performing even the minimal screening of visitors that ICE purports to have implemented. CDC Guidance at 13-14, 26; Dkt. 5-18 ¶¶ 8. *Finally*, Respondents routinely provide medically vulnerable people with incorrect medications or care and delay or ignore medical requests. CDC Guidance at 2, 16, 23;[23] Dkt. 5-10 ¶¶ 14-15, 25; Dkt. 5-11 ¶¶ 5-8, 19; Ex. 13 ¶ 5; Dkt. 5-12 ¶¶ 11-12; Ex. 9 ¶ 15; Dkt. 5-16 ¶¶ 23-24; Dkt. 5-17 ¶¶ 6-7; Ex. 5 ¶ 4; Ex. 1 ¶¶ 6, 8; Ex. 3 ¶ 19; Ex. 8 ¶¶ 5-8. Diabetic Petitioners are not consistently provided with medically necessary insulin or diets, and Petitioners with asthma do not consistently receive inhalers or asthma medication. CDC Guidance at 2, 16, 23[24]; Dkt. 5-13 ¶ 6; Dkt. 5-14 ¶ 10; Ex. 8 ¶ 5; Ex. 2 ¶ 6; Ex. 4 ¶ 6; Ex. 13 ¶¶ 4, 5.

D. Releasing Petitioners, and to a Lesser Extent, Ordering Compliance with CDC Guidance, Would Reduce the Devastating Public Health Impact of COVID-19 on Georgia

[23] *See also* 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, *cited in* CDC Guidance, *supra* n.9, at 2, 16, 23.

[24] *See also People Who Are at Higher Risk for Severe Illness*, *supra* n. 24.

Petitioners' continued detention not only threatens their own health but also subjects all other detained individuals and staff at Stewart and Irwin to an increased risk of exposure to COVID-19. *See* Dkt. 5-3 ¶¶ 12, 25; Dkt. 5-6 ¶ 7; Dkt. 5-5 ¶¶ 15, 17. And the risks to staff are great: in the last week, two diabetic guards employed by LaSalle Corrections at a Louisiana ICE detention center died after contracting COVID-19. The facility reportedly had failed to provide staff with PPE and "told employees they would be required to work 12-hour shifts, seven days a week due to staff shortages cause by a 'high number of positive COVID 19 staff cases.'"[25] The release of vulnerable individuals mitigates the overall risk of a COVID-19 outbreak in any detention facility by reducing the total number of detained individuals, thereby permitting greater social distancing and reducing the staff's risks and workload. Dkt. 5-6 ¶ 9; Dkt. 5-3 ¶¶ 17, 24-27; Dkt. 5-5 ¶ 22.[26] At a minimum, ordering strict compliance with CDC Guidance is essential to protect Petitioners, as well as other detained individuals and staff, while this Court considers the merits of the case.

An outbreak of COVID-19 at Stewart or Irwin would likely overwhelm local health infrastructure. Dkt. 5-5 ¶¶ 14-15. The closest hospitals to these facilities equipped to manage serious cases of COVID-19 serve many counties that are already overwhelmed with COVID-19 cases, or could quickly become so in the event of a localized outbreak. *See, e.g.*, Dkt. 20 ¶ 96-97. If particularly vulnerable detained individuals like Petitioners fall critically ill, their need for intensive medical care would even further strain local hospitals. Dkt. 5-3 ¶ 25; Dkt. 5-4 ¶ 5 (fatality rates increase as hospitals become overburdened); Dkt. 5-5 ¶¶14-15.

The emergency nature of this situation cannot be overstated: because they are detained at Stewart and Irwin, Petitioners are at imminent risk of exposure to a virus that will likely cause

[25] Nomaan Merchant, *2 guards at ICE jail die after contracting coronavirus*, AP (Apr. 29, 2020), https://apnews.com/20a500736171a977c7aba10c1d077476.

[26] Already, prisons and detention centers in other countries and many U.S. states are releasing people from custody or reducing new arrests. *See, e.g.*, Dkt. 20 ¶ 61 (collecting examples).

them severe illness, long-term organ damage, or death, and they are unlikely to be able to access life-saving medical treatment while in detention. Civil detention with such odds of grave harm cannot be constitutional. Petitioners implore the Court to grant an emergency writ of habeas corpus or injunctive relief ordering their immediate release or ordering Respondents to review the necessity of Petitioners' custody; comply immediately with CDC Guidance; ensure Petitioners have adequate food, and demonstrate the efficacy of these measures in eliminating the risk to Petitioners with regular reporting to the Court.

II. ARGUMENT

A TRO is warranted when the movant demonstrates: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) threatened injury that outweighs any harm to the opposing party; and (4) the injunction would not undermine the public interest. *Levi Strauss & Co. v. Sunrise Int'l Trading Inc.*, 51 F.3d 982, 985 (11th Cir. 1995). "Where, as here, the 'balance of the equities weighs heavily in favor of granting the [injunction]' Petitioners need only show a 'substantial case on the merits.'" *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1289, 1298 (11th Cir. 2005) (alteration in original) (citation omitted). Petitioners easily satisfy all four factors.

A. Petitioners Are Likely to Succeed on the Merits

All individuals in immigration custody, including those with prior criminal convictions, are civilly detained and thus entitled to certain protections under the Fifth Amendment Due Process Clause. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Respondents' continued detention of Petitioners during the COVID-19 pandemic: (1) violates Petitioners' right to be free from punishment; and (2) constitutes deliberate indifference to a substantial risk of serious harm to Petitioners. To redress these constitutional injuries, Petitioners seek relief available to them, either through a writ of habeas corpus or injunctive relief under the Fifth Amendment.

1. Petitioners' Continued Detention During the COVID-19 Pandemic Constitutes Impermissible Punishment.

The Fifth Amendment Due Process Clause, like the Fourteenth Amendment, prohibits punishment of people in civil custody. *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979); *Magluta v. Samples*, 375 F.3d 1269, 1273 (11th Cir. 2004). 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 Corr.*, 330 F. App'x 179, 182 (11th Cir. 2009) (quoting *Youngberg v. Romeo*, 457 U.S. 307, 322 (1982)).

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 538-39. Absent explicit intent, courts must ask first "whether any 'legitimate goal' was served by the prison conditions" and second, "whether the conditions are 'reasonably related' to that goal." *Jacoby v. Baldwin County*, 835 F.3d 1338, 1345 (11th Cir. 2016) (citation omitted). "[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 539 n.20); *see also Wolfish*, 441 U.S. at 538 (punishment inferred when a restraint "appears excessive" in relation to its stated purpose).

Here, Respondents have openly admitted to an illegitimate purpose for continuing to keep people in immigration detention during the COVID-19 pandemic: general deterrence. *Supra* n.15 (Respondent Albence stated on April 17, 2020 that ICE declined to release more people during the pandemic to avoid the impression that it is "not enforcing our immigration laws," which would be a "huge pull factor" for future migration). "[G]eneral deterrence [is] reserved for the criminal system alone." *Kansas v. Hendricks*, 521 U.S. 346, 373 (1997) (Kennedy, J., concurring); *see also*

id. at 361-62 (majority opinion); *Wolfish*, 441 U.S. at 539 n.20 (similar). The government has no legitimate interest in using civil immigration detention to deter future migration. *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 188-90 (D.D.C. 2015) (relying on *Hendricks* to reject government argument that deterrence of mass migration can justify civil detention, and noting the government "conced[ed] that it ha[d] "no 'federal cases on point' to support" its argument).

Moreover, Petitioners' continued detention under the current conditions at Stewart and Irwin lacks a reasonable relationship to *any* legitimate governmental purpose, bolstering the inference that their detention is punitive. The threat of serious illness, life-altering complications, and death that COVID-19 poses to Petitioners is not reasonably related to, and vastly outweighs, any purported government interest in Petitioners' civil confinement. Detention inherently increases the chance of exposure to COVID-19.[27] And there is no question that exposure to COVID-19 for people like Petitioners, who have certain co-morbidities identified by the CDC, is especially dangerous.[28] "Preventing [Petitioners] from protecting their own health from a high risk of serious illness or death [by keeping them detained] does not reasonably relate to a legitimate governmental purpose and thus, violates the Fifth Amendment." *Vazquez Barrera v. Wolf*, --- F. Supp. 3d ---, 2020 WL 1904497, at *5 (S.D. Tex. Apr. 17, 2020).

Nonetheless, Respondents continue to hold Petitioners under conditions of confinement at odds with public health guidance. As detailed above, Stewart and Irwin are in widespread violation of CDC Guidance—among other things, they are completely ignoring symptoms of COVID-19

[27] CDC Guidance, *supra* n.9, at 2 (detained people live "within congregate environments, heightening the potential for COVID-19 to spread once introduced"); *see also supra* part I.A.1.
[28] *Supra* part I.A; *People Who Are at Higher Risk for Severe Illness*, *supra* n.24 ("Based on what we know now, those at high-risk for severe illness from COVID-19" include people with specified medical conditions); *Basank v. Decker*, 2020 WL 1481503, at *3 (S.D.N.Y. Mar. 26, 2020) (taking "judicial notice that, for people of advanced age, with underlying health problems, or both, COVID-19 causes severe medical conditions and has increased lethality," because this fact is "not subject to reasonable dispute" (quoting, *inter alia*, Fed. R. Evid. 201(b))).

and even moving detained people to *more* open and crowded dorms in the middle of the pandemic. *Supra* part I.C. And in utter disregard for Petitioners' most basic needs, Respondents have dramatically scaled back food availability at Stewart. *Supra* part I.B. Under these circumstances, detaining Petitioners is excessive in relation to any countervailing government interest.

Finally, any government interest in detaining Petitioners can be easily satisfied with less harsh alternatives. *Vazquez Barrera*, 2020 WL 1904497, at *6. For fifteen years, ICE has used Alternatives to Detention (ATD), a "flight-mitigation tool that utilizes a combination of technology and strong case management" to facilitate compliance with release conditions including court appearances.[29] Given the option of using ATDs, continuing to detain Petitioners is of little to no value in furthering the underlying reason for immigration detention: ensuring appearances at immigration court hearings. *Demore v. Kim*, 538 U.S. 510,531 (2003) (Kennedy, J., concurring) (noting the "ultimate purpose" of detention is "premised upon . . . deportability").

Detaining Petitioners in the context of the pandemic amounts to punishment for the following reasons: Respondent Albence expressly acknowledged an improper purpose; the conditions at Stewart and Irwin evince punitive intent; continued detention is not rationally related to a legitimate government purpose; and less harsh alternatives are readily available.

2. Petitioners' Continued Detention During the COVID-19 Pandemic Amounts to Deliberate Indifference to a Substantial Risk of Serious Harm

"[W]hen the State takes a person into its custody and holds him there against his will, the

[29] DHS, U.S. ICE Budget Overview, FY 2021 Congressional Justification, at ICE–O&S–165, https://www.dhs.gov/sites/default/files/publications/u.s._immigration_and_customs_enforcement.pdf. ATD "provides a high level of supervision," "enhances ICE's operational effectiveness," and has "significant program success rates while operating at a low average daily cost." *Id.* at 165, 171. ICE already uses ATD to monitor people "not suitable for detention" due to "significant medical issues." *Id.* at 171. In 2014, the Government Accountability Office found that 95% of those on ATD with case management appeared at their final hearings and 99% appeared overall at all scheduled hearings. GAO-15-26, Alternatives to Detention, at 30 (Nov. 2014), https://www.gao.gov/assets/670/666911.pdf.

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). To satisfy due process, the government must provide detained individuals with basic necessities, such as adequate medical care, food, clothing, and shelter. *Hamm v. Dekalb County*, 774 F.2d 1567, 1573 (11th Cir. 1985). At a minimum, the Fifth Amendment prohibits deliberate indifference to a substantial risk of serious harm that would violate the Eighth Amendment in the post-conviction criminal context.[30] *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244, (1983); *Hale v. Tallapoosa County*, 50 F. 3d 1579, 1582 n.4 (11th Cir. 1995).

To demonstrate deliberate indifference, Petitioners must show they are exposed to a substantial risk of serious harm and that Respondents are aware of, yet are disregarding this risk "by failing to respond to it in an (objectively) reasonable manner." *Rodriguez v. Sec'y for Dep't of Corr.*, 508 F.3d 611, 617 (11th Cir. 2007); *Farmer v. Brennan*, 511 U.S. 825, 834, 837-38 (1994). "Known noncompliance with generally accepted guidelines for inmate health strongly indicates deliberate indifference to a substantial risk of serious harm," even if the guidelines are not mandatory. *Hernandez v. County of Monterey*, 110 F. Supp. 3d 929, 943 (N.D. Cal. 2015) (failure to comply with CDC guidelines regarding screening and monitoring for tuberculosis could indicate deliberate indifference); *see also Holland v. Hanks*, 1998 WL 93974, at *4 (7th Cir. 1998) (suggesting similar). The government may violate a detained person's due process rights even where exercising its "best efforts," if protective measures in place are not working.

[30] Individuals in civil immigration detention should not have to satisfy the Eighth Amendment's requirement that a prison official have subjective knowledge of a substantial risk in order to establish a Fifth Amendment violation related to conditions of confinement. *See Gordon v. County of Orange*, 888 F.3d 1118, 1124-25 (9th Cir. 2018) (requiring only objective deliberate indifference), *cert. denied*, 139 S. Ct. 794 (2019); *Darnell v. Pineiro*, 849 F.3d 17, 32-36 (2d Cir. 2017) (same). The Eleventh Circuit has not squarely addressed this issue, and the court need not address it here because the evidence is clear that ICE is aware of the substantial risk of serious harm to Petitioners.

Thakker v. Doll, --- F. Supp. 3d ---, 2020 WL 2025384, at *6 (M.D. Pa. Apr. 27, 2020).

The government may violate the Eighth 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 v. McKinney*, 509 U.S. 25, 33 (1993); *see also id.* at 34 (citing *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).

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 in order to establish a constitutional violation. 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. "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) (Kravitch, J., concurring) (quoting *Helling*, 509 U.S. at 33).

a. ***Substantial Risk of Serious Harm***

Petitioners' continued detention under conditions that fail to mitigate their risk of exposure to COVID-19 subjects them a substantial risk of serious harm. As explained above, COVID-19 will be effectively impossible to control in detention centers once introduced, and if Petitioners are infected with COVID-19, they risk hospitalization requiring intensive care and use of a ventilator, long-term organ damage, and even death. *See supra* part I.A. And COVID-19 is already

present inside Stewart and Irwin. The number of confirmed cases at both facilities has increased since early April, and one can "only assume" that positive cases are undercounted, given that Respondents are failing to respond to reports of COVID-19 symptoms among the detained population. *Hope v. Doll*, No. 20 Civ. 562, ECF. No. 11 at 7-8 (M.D. Pa. Apr. 7, 2020).

b. ***Knowing Disregard of the Substantial Risk***

Where a risk is obvious, such as the threat posed to medically vulnerable people during an infectious disease outbreak, courts can presume that government officials are aware of the risk. *See, e.g.*, *Farmer*, 511 U.S. at 842**.** Moreover, there is ample evidence that Respondents have actual knowledge of the excessive risk of harm that the coronavirus presents to medically vulnerable individuals in their custody, given the February 25, 2020 DHS whistleblower report, the many letters from advocates, medical professionals, and Members of Congress, and the extensive news coverage the issue has received.[31]. The federal government's own public health agency—the CDC—recognizes the heightened risk to people like Petitioners, and has developed guidance to address the unique challenges of managing COVID-19 within carceral institutions, where social distancing and adequate hygiene measures are practically impossible.[32]

Having deprived Petitioners of their ability to practice the most effective defense against exposure to COVID-19—sheltering in place at home—Respondents must take reasonable

[31]*See, e.g.*, Letter from Scott Allen & Josiah Rich, Med. Experts for DHS, to House Comm. on Homeland Sec. (Mar. 19, 2020), https://bit.ly/2zAYTSO**Error! Hyperlink reference not valid.**; Dkt. 5-9 ¶ 30; Dkt. 7; Letter from 763 non-governmental organizations to Matthew T. Albence, ICE Acting Director (Mar. 19, 2020), https://bit.ly/2UUKtUG; Abigail Hauslohner et al., *Coronavirus Could Pose Serious Concern in ICE Jails, Immigration Courts*, Wash. Post (Mar. 12, 2020), https://wapo.st/2X5BxOY.

[32] *People Who Are at Higher Risk for Severe Illness*, *supra* n. 24 (recognizing heightened risk to people with medical vulnerabilities). Respondents appear to agree that the CDC Guidance sets the appropriate standard of care during the pandemic. *See ERO COVID-19 Pandemic Response Requirements*, *supra* n.10, at 5-6 (detention facilities "must" comply with the CDC Guidance); Dkt. 12-1 ¶¶ 8, 12, 14, 22; Dkt. 12-2 ¶¶ 8, 12, 14; Dkt. 12-3 ¶¶ 5-7, 12; Dkt. 12-4 ¶¶ 7,16, 24, 29, 39, 44; Dkt. 19 at 11-12, 19-22, 30-32, 37, 42, 45, 57, 60-64, 67, 79-80, 83.

precautions to reduce Petitioners' risk of infection. Even with only a limited factual record before the Court, Respondents' failure to implement the most crucial aspects of the CDC Guidance is clear. As explained in detail, *supra* part I.C, Respondents are failing to ensure social distancing, proper hygiene and cleaning practices, access to testing, individual isolation of people with the virus, and quarantine of those who are exposed. Respondents also continue to transfer new immigrants into both facilities, which not only makes social distancing more difficult by increasing the detained population but also introduces new potential sources of disease into the facilities. Worst of all, Respondents are ignoring requests for medical attention for COVID-19 symptoms, which both violates the CDC Guidance and independently evinces deliberate indifference. *See, e.g.*, *Farrow v. West*, 320 F.3d 1235, 1246-47 (11th Cir. 2003) (denial or delay in access to needed medical care may amount to deliberate indifference); *accord McElligott v. Foley*, 182 F.3d 1248 (11th Cir. 1999); *Brown v. Hughes*, 894 F.2d 1533 (11th Cir. 1990); *Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700, 704 (11th Cir. 1985). Respondents' widespread violations of the CDC Guidance—which are mandatory under ICE's own policy—amount to deliberate indifference to the substantial risk of serious harm that COVID-19 poses to Petitioners.

In addition to failing to take measures necessary to protect Petitioners from potential exposure to COVID-19, Respondents are also neglecting to provide Petitioners and other detained individuals at Stewart with adequate food. Denial of food alone can rise to the level of an Eighth Amendment violation in the prison context. *See, e.g.*, *Cooper v. Sheriff, Lubbock County*, 929 F.2d 1078, 1083 (5th Cir. 1991). Here, depriving Petitioners of adequate food amid a pandemic when their underlying medical conditions, even under the best of circumstances, impact their ability to fight COVID-19 deliberately disregards a substantial risk of serious harm to Petitioners.

Courts across the United States have recognized that urgent release of medically vulnerable individuals from immigration detention is the only appropriate course of action in the face of a

highly contagious disease with a death toll that continues to rise daily. *See* Dkt. 20 ¶ 5 n.1 (collecting cases). At a minimum, Respondents' deliberate indifference towards Petitioners warrants a court order immediately compelling Respondents to comply with CDC Guidance at Stewart and Irwin and an order that Petitioners at Stewart be adequately fed.

3. Petitioners Are Entitled to a Writ of Habeas Corpus

Petitioners may challenge their unconstitutional detention under 28 U.S.C. § 2241. Habeas vests federal courts with broad, equitable authority to "dispose of the matter as law and justice require." 28 U.S.C. § 2243. Habeas is not "static, narrow, [or] formalistic," but rather is "an adaptable remedy," *Boumediene v. Bush*, 553 U.S. 723, 779-80 (2008) (citation omitted), conferring "broad discretion" on courts to right wrongs, *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987). "The scope and flexibility of the writ—its capacity to reach all manner of illegal detention—its ability to cut through barriers of form and procedural mazes—have always been emphasized and jealously guarded by courts and lawmakers." *Harris v. Nelson*, 394 U.S. 286, 291 (1969). Accordingly, the Court has the power to issue a writ of habeas corpus ordering either release, or alternatively, individualized custody re-determinations taking each Petitioner's medical condition(s) into account. *See Boumediene*, 553 U.S. at 779 (courts may order release through habeas); *Sopo v. U.S. Att'y Gen.*, 825 F.3d 1199, 1221 (11th Cir. 2016) (ordering individualized custody determination through habeas), *vacated on other grounds*, 890 F.3d 952 (11th Cir. 2018).

"Habeas is at its core a remedy for unlawful executive detention." *Munaf v. Geren*, 553 U.S. 674, 693 (2008). "[T]he traditional function of the writ is to secure release from illegal custody." *Preiser v. Rodriguez*, 411 U.S.475, 484 (1973). "[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 . . . ." *Id.* at 485 (emphasis added). Because Petitioners have demonstrated that their detention amounts to unlawful punishment and that Respondents are acting

with deliberate indifference towards the substantial risk of serious harm that COVID-19 poses to them in detention, a writ of habeas corpus is the proper remedy.

Some circuits, including the Eleventh, do not allow habeas as a remedy for run-of-the-mill challenges to conditions of confinement in criminal custody.[33] These courts have generally concluded that "unconstitutional conditions of confinement can be remedied through injunctions that require abusive practices be changed." *Vazquez Barrera*, 2020 WL 1904497, at *4. *See, e.g.*, Dkt. 14 at 3; *Gayle v. Meade*, 2020 WL 1949737, at *26 (S.D. Fla. Apr. 22, 2020) (*report and recommendation*) (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*" and that "[i]f no correction is feasible, then the remedy which the Eleventh Circuit relied upon would become illusory") (emphasis in original); *Gomez v. United States*, 899 F.2d 1124, 1126 (11th Cir. 1990) (asking whether adequate treatment within prison system was possible to remediate unconstitutional condition, absent release, and concluding that such treatment was possible).

In contrast, 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. The historic event in our midst—the COVID-19 pandemic—blurs the line between claims challenging conditions of confinement and claims challenging the fact or duration of confinement because being near other people poses

[33] The purported distinction between habeas and "conditions" cases stems from the specific procedural interaction between statutory habeas for state prisoners under 28 U.S.C. § 2254, which unlike § 2241 requires state-court exhaustion, and statutory civil rights actions against state officials under 28 U.S.C. § 1983. *See Preiser*, 411 U.S. 475 (concluding § 1983 could not be used to circumvent the exhaustion requirements in § 2254); *Hutcherson v. Riley*, 468 F.3d 750, 754-55 (11th Cir. 2006) (similar). But § 1983 and § 2254 do not apply in federal detention. Indeed, the Department of Justice's own manual recognizes that § 2241 is the proper vehicle for federal prisoners to challenge conditions of confinement. Dep't of Justice, *Justice Manual* § 9-37.000 (2018), https://www.justice.gov/jm/jm-9-37000-federal-habeas-corpus.

an outsized risk to one's health. *See Money v. Pritzker*, 2020 WL 1820660, at *9 (N.D. Il.. Apr. 10, 2020) (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) (citation omitted); *Malam v. Adducci*, No. 2:20-cv-10829-JEL-APP (E.D. Mich. Apr. 5, 2020), ECF No. 22 (construing claim similar to Petitioners' as challenge to the *fact* of detention because "no conditions of confinement . . . [could] prevent irreparable constitutional injury"). Petitioners' only defenses against COVID-19 are stringent social distancing and hygiene measures—which are impossible in detention. The mere fact that Petitioners' challenge "requires discussion of conditions in immigration detention does not necessarily bar such a challenge in a habeas petition." *Vazquez Barrera*, 2020 WL 1904497, at *4. Petitioners face unreasonable harm from continued detention and should be released immediately.

Ultimately, cases such as this, 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*, 2020 WL 1904497, at *4-5. 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 detained person to seek release from a court. If no other cause of action allows release, habeas corpus must be available. U.S. Const. Art. I, § XI clause 2.

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). 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

violates their constitutional rights to be free from arbitrary and punitive detention—by ordering their release,[34] or at a minimum, individualized custody re-evaluations.

4. Petitioners Are Entitled to Injunctive Relief Under the Fifth Amendment

Because of the operation of the Suspension Clause, if this Court determines that it does not have jurisdiction to consider release or individualized custody re-evaluations under habeas, it must be because it finds jurisdiction to do so under its broad implied injunctive authority. "[T]he Fifth Amendment provides Petitioner[s] with an implied cause of action," and 28 U.S.C. § 1331 provides jurisdiction. *Malam v. Adducci*, 2020 WL 1672662, at *4 (E.D. Mich. Apr. 5, 2020). Petitioners may seek equitable relief for violation of their rights through an implied cause of action against Respondents in their official capacities that arises directly under the Fifth Amendment. *Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1230-33 (10th Cir. 2005) (implied cause of action against officials in their official capacity under Eighth Amendment to enjoin unconstitutional prison conditions, as distinct from *Bivens* constitutional tort claims). Federal courts have long recognized an implicit private right of action under the Constitution for injunctive relief barring unlawful government action. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010); *see also 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."); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001); *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

Courts' broad power to fashion equitable remedies to constitutional violations extends to custodial settings and includes the power to release or order injunctive measures short of release—such as CDC Guidance compliance and adequate feeding—as required to remedy the violations.

[34] Many other district courts around the country have ordered release from ICE detention for similar reasons. *See* Dkt. 20 ¶ 5 n.1 (collecting cases).

See Hutto v. Finney, 437 U.S. 678, 687 n.9 (1978); *Simmat*, 413 F.3d at 1230-33; *Stone v. City & County of San Francisco*, 968 F.2d 850, 861 (9th Cir. 1992).“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) (court had authority to order release of low-bond pretrial detainees to reach a population cap), *cert. denied*, 465 U.S. 1108 (1984) *Gomez* poses no barrier because it does not constrain courts from ordering injunctive relief—including release—when measures short of release will not remedy the constitutional violation. *Supra* at 24.

B. Petitioners Face an Imminent and Substantial Threat of Irreparable Harm from COVID-19

An injury is irreparable when a plaintiff cannot obtain adequate compensatory or corrective relief through the ordinary course of litigation. *Cunningham v. Adams*, 808 F.2d 815, 821 (11th Cir. 1987). The injury must be “actual and imminent, not remote or speculative.” *Odebrecht Constr., Inc. v. Sec'y, Fla. Dep’t of Transp.*, 715 F.3d 1268, 1288 (11th Cir. 2013). A harm need not be inevitable or have already happened to be irreparable. *See Helling*, 509 U.S. at 33; *Ball v. LeBlanc*, 792 F.3d 584, 593-94 (5th Cir. 2015) (lack of prior heat-related incidents at prison or signs of heat-related illness among plaintiffs did not preclude finding that prisoners had substantial risk of serious harm from excessive heat). Due to their medical conditions, Petitioners face the most fundamental kind of irreparable harm—imminent and substantial risk of serious illness, organ damage, or death—if they contract COVID-19. *See J.M. v. Crittendon*, 2018 WL 7079177, at *7 (N.D. Ga. May 21, 2018); *Vasquez Barrera*, 2020 WL 1904497, at *6 (alleged harm to medically vulnerable detained immigrants as a result of COVID-19 is “both imminent and irreparable”).

Petitioners are highly likely to contract COVID-19 if they remain in ICE detention. *See supra* part I.A, C, D. As of April 28, 2020, there were at least 53 confirmed cases of COVID-19

among the detained population and employees at Stewart and 3 at Irwin (including one outside transportation officer), up from roughly 10 at Stewart and 2 at Irwin on April 9. Dkt. 12-1 ¶ 14; Dkt. 12-4 ¶¶ 26, 58; Dkt. 12-3 ¶ 3; *see also supra* part I.A.1 & n.7-8. Given that the virus is highly contagious and that infected individuals can remain asymptomatic, the actual numbers of confirmed cases at both facilities are likely to be much higher. The daily flow of people into and out of these facilities, as well as ICE's continuing transfers of detained people between facilities, only increase the probability that the virus will spread more rapidly. Further exacerbating the risk of injury to Petitioners are Respondents' failure to comply with applicable CDC guidance for reducing the transmission of COVID-19, *see supra* part I.C; Respondents' failure to provide nutritionally adequate meals at Stewart, *see supra* Section I.B; and Petitioners' lack of access to life-saving medical treatment in the event of a serious COVID-19 infection, *see supra* I.A.1.

Continuing to detain Petitioners also violates the Fifth Amendment Due Process Clause. *Supra* part II.A. Deprivations of constitutional rights that cannot be compensated monetarily generally amount to irreparable injury as a matter of law. *See Cunningham*, 808 F.2d at 822. Petitioners' predicament is particularly dire given ICE's failure to comply with applicable CDC Guidance. Where detention is necessary, the CDC Guidance represents the most comprehensive set of standards for risk mitigation. However, as public health experts make clear, Respondents cannot ameliorate the life-threatening risk to Petitioners or the violations of their due process rights through any means other than immediate release.

C. The Balance of Equities and Public Interest Weigh Heavily in Petitioners' Favor.

The final two factors of the TRO inquiry "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). In contrast to Petitioners' significant risk of serious illness, organ failure, or death, an injunction will not harm Respondents. Indeed, it is in both the Respondents' and the broader public interest to release medically vulnerable individuals

from custody—or, at a minimum, comply with CDC Guidance and provide nutritionally adequate meals—rather than needlessly jeopardizing their health and lives. Moreover, "the public interest is served when constitutional rights are protected." *Jones v. Governor of Fla.*, 950 F.3d 795, 830 (11th Cir. 2020) (citation omitted); *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006). Here, continued detention violates Petitioners' constitutional rights.

The equities weigh in favor of granting relief. Petitioners' detention—especially under the existing conditions—threatens their own health and also subjects all other detained individuals, staff, and everyone else who has contact with Stewart and Irwin to an increased risk of harm. *See* Dkt. 5-3 ¶¶ 24-27; Dkt. 5-6 ¶ 7; Dkt. 5-5 ¶¶ 19, 21, 23. Far from injuring the government, releasing Petitioners, complying with the CDC Guidance, and providing nutritionally adequate meals would further Respondents' interests in maintaining a healthy and orderly environment.

These measures are also unquestionably in the public interest. Ex. 4 ¶ 6. *See, e.g.*, *Grand River Enters. Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 169 (2d Cir. 2005) (referring to "public health" as a "significant public interest[]"); *see also* Allen & Rich Ltr., *supra* n. 32 ("[I]t is essential to consider releasing all detainees who do not pose an immediate risk to public safety"). In the unprecedented and rapidly evolving circumstances of the COVID-19 crisis, continued civil detention of aging or ill individuals—especially under conditions that fall far short of CDC Guidance— does not serve the public's interest. An outbreak of COVID-19 at Stewart or Irwin would likely overwhelm the local health infrastructure in the surrounding communities. Dkt. 20 ¶¶ 96-97; Dkt. 5-3 ¶ 25; Dkt. 5-4 ¶ 5; Dkt. 5-5 ¶¶ 14-15 and contribute to more massive community spread and more deaths. According to a recent study:

> [D]ecisive action on the part of ICE will not only reduce morbidity and mortality outcomes in its population of detained immigrants, but minimize negative health outcomes in the communities that support ICE's detention facilities with health care resources. If hesitation prevails instead, and more limited measures on the part of ICE prove ineffective, then the successful social distancing strategies implemented in a community may be undone by the

large number of detainee infectious disease cases that its hospitals must care for. Ex. 12 at 9. The health and safety of the public would thus be best served by requiring Respondents to comply immediately with CDC Guidance and rapidly decrease the number of individuals detained at Stewart and Irwin. Dkt. 5-6 ¶ 9; *see also id.* at 7. Through these measures, ICE would reduce the spread and severity of infection inside Stewart and Irwin. This, in turn, would reduce the number of people who will become ill enough to require hospitalization and thereby decrease the health and economic burden on local communities. Dkt. 5-3 ¶ 25.

To the extent the equities weigh in favor of some restraint of Petitioners' liberty, that can be achieved by fashioning reasonable release conditions that ICE already uses and that have demonstrated success. *See supra* part II.A.1; Brief of Amicus Curiae at 36-37, *Jennings v. Rodriguez*, No. 15-1204, 2016 WL 6276890 (Oct. 24, 2016); *Vasquez Barrera*, 2020 WL 1904497, at *7. Because the Respondents' interests can be served through alternatives to detention and the Petitioners' interests will be irreparably harmed if they remain detained, particularly under current conditions, both the balance of equities and the public interest favor Petitioners.

D. The Court Should Not Require Petitioners to Provide Security Prior to Issuing a Preliminary Injunction.

Courts have discretion to waive the requirement in Federal Rule of Civil Procedure 65(c) that a movant provide a security upon the issuance of a preliminary injunction or TRO. *BellSouth Telecomms., Inc. v. MCImetro Access Transmission Servs., LLC*, 425 F.3d 964, 971 (11th Cir. 2005). District courts in this Circuit often exercise this discretion to require no security in cases brought by indigent and/or incarcerated people. *See, e.g.*, *Schultz v. Alabama*, 330 F. Supp. 3d 1344, 1376 (N.D. Ala. 2018) (county prisoners); *Campos v. I.N.S.*, 70 F. Supp. 2d 1296, 1310 (S.D. Fla. 1998) (indigent immigrants). This Court should do the same here.

III. CONCLUSION

For the foregoing reasons, Petitioners' requested preliminary injunction should be granted.

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Respectfully submitted,

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