UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

ARISTOTELES SANCHEZ MARTINEZ MICHAEL ROBINSON PETER OWUSU HUGH TINARWO SHEHZA KHAN Stewart County Detention Center 146 CCA Road Lumpkin, GA 31815; and JOSEPH LLOYD THOMPSON ANSUMANA JAMMEH KAREN LOPEZ NILSON FERNANDO BARAHONA MARRIAGA SHELLEY DINGUS KIMBERLY SALAZAR SONIA CABRERA BENITEZ Irwin County Detention Center 132 Cotton Drive Ocilla, GA 31774; Petitioners/Plaintiffs, v. RUSSELL WASHBURN Warden, Stewart Detention Center 146 CCA Road P.O. Box 248 Lumpkin, GA 31815; and DAVID PAULK Warden, Irwin County Detention Center 132 Cotton Drive Ocilla, GA 31774; and THOMAS GILES Field Office Director U.S. Immigration and Customs Enforcement Atlanta Field Office	Case No.: 7:20-cv-0062-CDL-MSH **HEARING REQUESTED**

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,
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.

SECOND AMENDED PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2241 AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF PURSUANT TO 28 U.S.C. § 1331

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I. INTRODUCTION

1. The COVID-19 pandemic is wreaking havoc throughout the world. The United States has now surpassed every other country in number of confirmed cases, and more than 50,000 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 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 and many of its cities and counties—have issued "shelter-in-place" orders requiring residents to stay in their homes. These extreme measures all seek to reduce the spread of the virus and, ultimately, save lives.

4. 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 detained immigrants 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. Federal judges across the country have ordered the urgent release of numerous immigrants, explaining the pressing health risks created by ICE detention and other types of imprisonment.[1]

[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.*

6. In immigration detention facilities—including Stewart Detention Center ("Stewart") in Lumpkin, Georgia and Irwin County Detention Center ("Irwin") in Ocilla, Georgia, where Plaintiffs-Petitioners ("Petitioners") are imprisoned—social distancing is impossible. In these congregate environments, hundreds or thousands of people live, eat, and sleep together in close quarters. Contact with other detained individuals and ICE personnel is a fact of life. ICE detention facilities are also notorious for their unsanitary conditions, inadequate medical care, and meager provision of hygiene products. Under these circumstances, an outbreak of COVID-19 will "spread like wildfire," according to a former high-level ICE official.

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

8. Increasing the immediate risks to Petitioners at Stewart, the facility has drastically decreased the amount of food provided to detained people in recent weeks—providing a fraction

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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); *Thakker v. Doll*, No. 1:20-cv-00480-JEJ (M.D. Pa. Mar. 31, 2020), ECF No. 47; *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, at *2 (S.D. N.Y. Mar. 19, 2020); *Matter of Extradition of Toledo Manrique*, 2020 WL 1307109, at *1 (N.D. Cal. Mar. 19, 2020).

of the amount of food normally served. The food it has provided is served at unpredictable times, including very late at night, and is less nutritious than the food normally served. While chronic underfeeding of detained people is unacceptable at any time, depriving detained people of nourishment in the context of a pandemic further demonstrates Respondents' inability to provide constitutionally adequate care.

9. Petitioners bring this action to remedy ICE's violations of their constitutional rights and to protect themselves—as well as others detained or employed at Stewart and Irwin or living in the surrounding communities—from the imminent harm that will result from their continued detention.

II. PARTIES[2]

10. Petitioner Michael Robinson[3] is a 54-year-old citizen of Jamaica, who has been detained at Stewart since around February 2020. He has six U.S. citizen children and has family in both Florida and New York. He is seeking asylum, withholding of removal, and protection under the Convention Against Torture based on persecution he experienced in Jamaica. Mr. Robinson's request for release on bond was denied. Mr. Robinson suffers from hypertension, asthma, cardiac murmur, high blood pressure, and benign prostatic hyperplasia. As a consequence of his health conditions, he is at high risk for severe illness, long-term organ damage, or death if he contracts COVID-19.

[2] On April 16, 2020, Petitioner Aristoteles Sanchez Martinez was released on humanitarian parole under an order of supervision. To the extent he is re-detained, he reserves the right to rejoin this litigation as a petitioner. Facts relating to his medical history and conditions of detention can be found in the Original Complaint. *See* Dkt. 1.

[3] Petitioners Michael Robinson, Peter Owusu, and Karen Lopez are proceeding in this action using pseudonyms, as permitted by order of the Court on April 13, 2020. Dkt. 15. Petitioner Kimberly Salazar will file a motion to proceed pseudonymously, with Respondents' consent.

11. Petitioner Peter Owusu is a 40-year-old citizen of Ghana who has been detained at Stewart since January 2020. He is seeking asylum, withholding of removal, and protection under the Convention Against Torture based on persecution he experienced in Ghana. His request for release on parole was denied. Mr. Owusu has difficulty breathing due to a stab wound he suffered prior to fleeing Ghana. He received a breathing machine at a previous detention center but has not been able to access it at Stewart. His stab wound has also led to other complications, including improperly healed stitches, ongoing stomach pain, digestion issues, dizziness, headaches, heart issues, and constant pain all over his body. As a consequence of his health conditions, he is at high risk for severe illness, long-term organ damage, or death if he contracts COVID-19.

12. Petitioner Hugh Tinarwo is 31 years old and came with his parents from Zimbabwe to the United States when he was eight. He is currently detained at Stewart and has been in ICE custody since approximately October 18, 2019. His parents live in Winston-Salem, North Carolina, and he has five U.S. citizen children who also live in North Carolina. Mr. Tinarwo has an order of removal to Zimbabwe, but he is unlikely to be deported there in the foreseeable future because Zimbabwe has no record of his citizenship. Mr. Tinarwo was recently hospitalized due to shortness of breath and chest pain and was diagnosed with an enlarged heart. Since this hospitalization, he has required medical care at Stewart on three separate occasions for shortness of breath and chest pain. He also has hypertension that requires daily medications and is confined to a wheelchair due to complications from a surgery for ruptured discs in his back. As a consequence of his health conditions, he is at high risk for severe illness, long-term organ damage, or death if he contracts COVID-19.

13. Petitioner Shehza Khan is a 59-year-old citizen of Pakistan who is currently detained at Stewart and has been in ICE custody since June 1, 2018. His parents are U.S. citizens, and he has

lived in the U.S. since 1984. He is currently appealing the second denial of his application for protection under the Convention Against Torture. Mr. Khan has severe asthma that requires him to have an inhaler at all times. He also takes medication for epilepsy and depression and has been diagnosed with delusional disorder. As a consequence of his age and health conditions, he is at high risk for severe illness, long-term organ damage, or death if he contracts COVID-19.

14. Petitioner Joseph Lloyd Thompson is a 49-year-old citizen of Jamaica, lawful permanent resident of the United States, and long-term resident of Georgia. He is currently detained at Irwin and has been in ICE custody since approximately January 2018. Mr. Thompson has two sons who are 5 and 22 years old. Before he was detained, he worked at a country club as a sous chef. He is working with his immigration attorneys to apply for cancellation of removal. Mr. Thompson suffers from diabetes, hypertension, depression, and a severe aortic aneurysm requiring surgery that ICE has repeatedly refused to facilitate. He has a history of hospitalization for pneumonia and cardiac issues. His attorneys have submitted two parole requests with details about his medical problems, but ICE denied both. As a consequence of his health conditions, he is at high risk for severe illness, long-term organ damage, or death if he contracts COVID-19.

15. Petitioner Ansumana Jammeh is a 43-year-old citizen of the Gambia who has been detained at Irwin since March 2019. His Board of Immigration Appeals (BIA) appeal of his removal order is currently pending. His request for release on bond was denied. He suffers from diabetes and severe hemorrhoids that have required surgery and cause him extreme pain. He was also hospitalized in December 2019 for inflammation of his intestine. As a consequence of his health conditions, he is at high risk for severe illness, long-term organ damage, or death if he contracts COVID-19.

16. Petitioner Karen Lopez is a 42-year-old citizen of Honduras who has been held at Irwin since March 2020. She has a partner and five children, ages 13 to 27 years old, with whom she lived in Atlanta, Georgia before she was detained. She is pursuing deferral of removal under the Convention Against Torture and is also eligible for a U visa. Ms. Lopez has a pacemaker due to a heart condition that caused her to suffer a stroke. She additionally suffers from multiple sclerosis, which causes severe chronic pain, as well as problems with her vision, balance, muscle control, and other bodily functions. As a consequence of her health conditions, she is at high risk for severe illness, long-term organ damage, or death if she contracts COVID-19.

17. Petitioner Nilson Fernando Barahona Marriaga is a 38-year-old citizen of Honduras who has been detained at Irwin since October 2019 and been denied both parole and bond. He has lived in the U.S. for more than ten years and has been married to a U.S. citizen for over six years. He has a six-year-old son, a U.S. citizen father, a mother who is a lawful permanent resident, and two U.S. citizen sisters. Mr. Barahona Marriaga is eligible for adjustment of status through a pending I-130, Petition for Alien Relative, and may be eligible for a U visa based on a kidnapping in 2011. He is also appealing a denial of his application for cancellation of removal. Mr. Barahona Marriaga suffers from diabetes and hypertension, both of which he has struggled to manage while in detention. His condition has deteriorated since he has been detained, and many of his requests for medical services have been ignored. As a consequence of his health conditions, he is at high risk for severe illness, long-term organ damage, or death if he contracts COVID-19.

18. Petitioner Shelley Dingus is a 52-year-old citizen of England who is currently detained at Irwin. She has lived in the U.S. for over nine years and has been married for 21 years to a U.S. citizen who is a U.S. Air Force veteran. She has five children, ages 17 to 28 years old. Prior to detention, she lived in Norton, Virginia and worked as a senior healthcare specialist. Her request

for release on parole was denied. Ms. Dingus suffers from asthma, chronic obstructive pulmonary disease, severe migraines, depression, anxiety, and eczema that causes severe skin allergies and open wounds that are easily infected. As a consequence of her health conditions, she is at high risk for severe illness, long-term organ damage, or death if she contracts COVID-19.

19. Petitioner Kimberly Salazar is a 44-year-old citizen of Honduras who has been detained at Irwin since December 31, 2019. She is seeking asylum in the United States from persecution suffered in Honduras and is a survivor of domestic violence. She was denied release on bond on April 1, 2020. Ms. Salazar has asthma, tuberculosis, hypertension, and anemia. She is also pre-diabetic. At Irwin, she has been experiencing problems breathing and a painful cough from her tuberculosis but has had trouble obtaining an inhaler and other medical care. Her respiratory issues have only been exacerbated by her detention and some of the cleaning routines at the facility. As a consequence of her health conditions, Ms. Salazar is at high risk for severe illness, long-term organ damage, or death if she contracts COVID-19.

20. Petitioner Sonia Cabrera Benitez is a 33-year-old citizen of El Salvador who is currently detained at Irwin and has been in ICE custody since May 2018. She is a single mother of three and prior to detention, lived in Arkansas and worked as a housekeeper to provide for her children. She has an order of removal to El Salvador but is unlikely to be removed soon because of the COVID-19 pandemic. Ms. Cabrera Benitez has asthma and currently experiences asthmatic attacks and difficulty breathing. She has not received the medication or care she needs for her respiratory health at Irwin. To the contrary, the cleaning routines at Irwin have exacerbated her asthma. She also had recent surgery to remove a tumor from her breast and has a large cyst in her ovary. As a consequence of her health conditions, Ms. Cabrera Benitez is at high risk for severe illness, long-term organ damage, or death if she contracts COVID-19.

21. Respondent-Defendant ("Respondent") Russell Washburn is the Warden of Stewart County Detention Center. Pursuant to a contract with ICE, Mr. Washburn is responsible for the operation of Stewart, where Mr. Robinson, Mr. Owusu. Mr. Tinarwo, and Mr. Khan are detained.

22. Respondent David Paulk is the Warden of Irwin County Detention Center. Pursuant to a contract with ICE, Mr. Paulk is responsible for the operation of Irwin, where Mr. Thompson, Mr. Jammeh, Ms. Lopez, Mr. Barahona Marriaga, Ms. Dingus, Ms. Salazar, and Ms. Cabrera Benitez are detained.

23. Respondent Thomas Giles is the Field Office Director for the ICE Atlanta Field Office. The ICE Atlanta Field Office has complete control over the transfer to and release of noncitizens from Stewart and Irwin. Respondent Giles is a legal custodian of Petitioners. He is sued in his official capacity.

24. 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.

25. 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.

26. 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

27. 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.

28. Federal district courts have jurisdiction to hear habeas corpus claims by noncitizens challenging the lawfulness of their detention. *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).

29. Venue is proper in the Middle District of Georgia pursuant to 28 U.S.C. § 1391(e) because Respondents are federal officers sued in their official capacity; Respondents Paulk and Donahue reside 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 Respondents exercise control over Petitioners.

IV. EXHAUSTION OF ADMINISTRATIVE REMEDIES

30. Petitioners need not exhaust administrative remedies. *See Santiago-Lugo v. Warden*, 785 F.3d 467, 474 (11th Cir. 2015) (there is no exhaustion requirement under Section 2241); *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).

31. Moreover, Petitioners have no administrative remedies to exhaust because no administrative process exists to raise a constitutional challenge to their detention. "[A] petitioner need not exhaust their administrative remedies where the administrative remedy will not provide relief commensurate with the claim." *Boz v. United States*, 248 F.3d 1299, 1300 (11th Cir. 2001). Thus, "[b]ecause the BIA does not have the power to decide constitutional claims—like the validity of a federal statute— . . . certain due process claims need not be administratively exhausted." *Warsame v. U.S. Att'y Gen.*, 796 F. App'x. 993, 1006 (11th Cir. 2020). *See also Haitian Refugee Ctr., Inc. v. Nelson*, 872 F.2d 1555, 1561 (11th Cir. 1989), *aff'd sub nom. McNary*

v. Haitian Refugee Ctr., Inc., 498 U.S. 479 (1991) (exhaustion had "no bearing" where petitioner sought to make a constitutional challenge to procedures adopted by the INS).

V. STATEMENT OF FACTS

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

32. Coronavirus disease 2019 ("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.[4]

33. On March 11, 2020, the World Health Organization ("WHO") declared the outbreak a global pandemic,[5] and COVID-19 has now touched nearly every country on the planet.[6] As of April 24, 2020, the number of confirmed cases worldwide has surpassed 2.8 million, including

[4] Berkeley Lovelace Jr., et al., CNBC, *Coronavirus pandemic is accelerating as cases eclipse 350,000, WHO says* (last updated Mar. 23, 2020), https://www.cnbc.com/2020/03/23/coronavirus-pandemic-is-accelerating-as-cases-eclipse-350000-who-says.html.

[5] Tedros Adhanom Ghebreyesus, *WHO Director-General's opening remarks at the media briefing on COVID-19 – 11 March 2020* (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.

[6] *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.

over 903,775 people in the United States. Over 195,218 people have died as a result of COVID-19 worldwide, including at least 50,988 in the United States.[7]

34. 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.[8] On March 23, 2020, the WHO warned that the United States could become the next epicenter of the pandemic.[9] And indeed on March 26, 2020, the United States surpassed every other country in the world in number of confirmed COVID-19 cases.[10]

35. In the state of Georgia, transmission of COVID-19 has also been rampant. On March 14, 2020, Governor Brian Kemp declared a public health state of emergency, describing the spread of COVID-19 as an "unprecedented public health threat."[11] At the time, there were 64 diagnosed COVID-19 cases spread across 15 counties.[12] As of April 24, 2020, the number of reported cases

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[7] Worldometer: Coronavirus, https://www.worldometers.info/coronavirus/#countries (last accessed Apr. 24, 2020).

[8] 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.

[9] 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.

[10] *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.

[11] 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.

[12] *Id.*

had jumped to 22,147 with 157 counties now affected.[13] Governor Kemp issued a shelter-in-place order for the state of Georgia on April 3, 2020.[14]

36. With 892 fatalities reported as of April 24, 2020, Georgia is the state with the eleventh highest number of COVID-19-related deaths in the United States.[15] Approximately 19% of individuals with confirmed diagnoses have been hospitalized and 4.03% 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 incidence of diabetes, hypertension, obesity, and stroke in the country, particularly in areas with high poverty rates.[17] It is also among the top three states that have experienced the largest number of rural hospital closures in the last ten years.[18]

37. 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. As of April 24, 2020, approximately 4,692,797 tests have been administered in the entire United

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[13] *Georgia Department of Public Health COVID-19 Daily Status Report* (Apr. 24, 2020), https://dph.georgia.gov/covid-19-daily-status-report.

[14] Governor Brian P. Kemp, *Governor Kemp Issues Shelter in Place Order*, Office of the Governor (Apr. 2, 2020), https://gov.georgia.gov/press-releases/2020-04-02/governor-kemp-issues-shelter-place-order.

[15] Listing of United States Total Coronavirus Cases (last updated Apr. 23, 2020), https://www.worldometers.info/coronavirus/country/us/.

[16] *Georgia Department of Public Health COVID-19 Daily Status Report* (Apr. 24, 2020), https://dph.georgia.gov/covid-19-daily-status-report.

[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.

States; in Georgia, only about 101,433.[19] Because of the shortage of tests in the United States—admitted to be a "failing" by top infectious disease expert Dr. Anthony Fauci[20]—the CDC currently recommends prioritizing testing for symptomatic healthcare providers and hospitalized patients[21]—which means that the number of diagnosed COVID-19 cases may be only the tip of a very large iceberg.[22]

i. Transmission of COVID-19

38. 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.[23] The coronavirus can survive up to four hours on copper, 24 hours on cardboard, and two to three days on plastic and stainless steel.[24]

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[19] The COVID Tracking Project, Our most up-to date data and annotations (last accessed Apr. 24, 2020), https://covidtracking.com/data/.

[20] 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.

[21] 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.

[22] 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.

[23] 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.

[24] 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.

39. COVID-19 can also be transmitted through inhalation of smaller virus-carrying particles an infected person emits when they breathe.[25] 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.[26] Coronavirus may also be spread through viral shedding in stool.[27]

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

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

41. 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 death.

42. 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

[25] 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.

[26] *Id.*

[27] 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.

or death from COVID-19 for individuals of any age include blood disorders, chronic kidney or liver disease, compromised immune system, diabetes and other endocrine disorders, metabolic disorders, heart and lung disease, neurological and neurodevelopmental conditions, and current or recent pregnancy.

43. 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.[28] Preliminary data from the United States shows a high prevalence of one or more underlying medical conditions among patients requiring ICU admission.[29]

44. 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

45. 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,

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[28] 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.

[29] 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.

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.[30]

46. The CDC advises that physical distancing is "especially important for people who are at higher risk of getting very sick."[31] 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.[32]

47. 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.[33] Thus, for a room to be safe for someone not wearing personal protective equipment ("PPE") to enter, the CDC advises following its general guidance on airborne pathogen clearance rates under differing ventilation conditions.[34]

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[30] 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.

[31] *Id.*

[32] 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.

[33] 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.

[34] *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).

48. 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.

49. 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.

50. 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 in the next several days, extending to 60 million people in China.[35] Following the lockdown, Wuhan saw a sustained decrease in transmission of COVID-19, and two months later, the daily number of reported cases dropped to zero.[36]

51. 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.[37] Overall, countries encompassing an estimated one third of

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[35] 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/.

[36] *Id.*

[37] 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.

the world's population have enacted similar restrictions.[38] Across the United States, cities and states are imposing increasingly stringent measures to effectuate social distancing. As of April 20, 2020, at least 42 states, 3 counties, 10 cities, the District of Columbia, and Puerto Rico had ordered their residents to "shelter in place" or stay at home.[39]

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

52. 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."[40]

53. 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.[41]

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[38] 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.

[39] Sarah Mervosh, Denise Lu, and Vanessa Swales, *See Which States and Cities Have Told Residents to Stay at Home*, The New York Times (last updated Apr. 20, 2020) https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html.

[40] 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 Apr. 18, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html [hereinafter CDC Guidance].

[41] 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.

54. 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.[42] 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 that are already at maximum capacity. They also expressed concern that "isolation may be misused and place individuals at higher risk of neglect and death."

55. Like these and other experts,[43] 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, which would then spread the virus to the surrounding community and create a demand for ventilators far exceeding the supply.

56. 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.[44] The severe outbreaks of COVID-19 in congregate environments, such as

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[42] 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.

[43] *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.").

[44] 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.

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.

57. 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.

58. Despite the global pandemic and shelter-in-place orders across the country, ICE continues to bring new people into detention centers and to transfer previously detained people between facilities.[45] Some detained people have staged public protests, including initiating hunger strikes and threatening suicide, to express their outrage at being housed with newly arriving individuals who may have been exposed to COVID-19.[46]

[45] *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.

[46] *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.

59. Correctional staff is also an especially dangerous vector for a COVID-19 outbreak within a detention center since they regularly travel back and forth between the outside world and the detention facilities where they work.

60. 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—including Stewart—led to almost 900 cases of mumps contracted inside the facilities[47] before the outbreak spread to surrounding communities.[48] ICE and CBP facilities have also been sites of other infectious outbreaks in recent years,[49] as have other prisons and jails.[50]

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[47] 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/.

[48] *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.

[49] Christina Potter, Outbreak Observatory *supra* n. 44, (describing outbreaks of acute respiratory illnesses like influenza, and other diseases like scabies and chickenpox).

[50] 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).

61. COVID-19 is indeed already spreading inside prisons and jails across the United States,[51] including in Georgia.[52] 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. [53] As of April 19, 2020, a single prison in Ohio had 1,828 confirmed cases among its incarcerated population of 2,500 and more than 100 cases among its staff—all together accounting for more than 17% of the state's entire caseload.[54] A new analysis studying the spread of COVID-19 through jails projects that nearly 100,000 more people could die of the virus in the U.S. unless "drastic reforms" are made at jails, including significant population reductions and strict social distancing.[55]

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[51] 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/.

[52] 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/.

[53] 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.

[54] Sam Allard, *Marion Correctional Institution Now Has More COVID-19 Cases Than Any Single County in Ohio,* Cleveland Scene (April 20, 2020), https://www.clevescene.com/scene-and-heard/archives/2020/04/20/marion-correctional-institution-now-has-more-covid-19-cases-than-any-single-county-in-ohio.

[55] 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.

62. Nationally and internationally, governments and jail and prison staff are responding to the threat posed by COVID-19. Authorities in Iran,[56] Ethiopia,[57] the Democratic Republic of Congo,[58] Indonesia,[59] Poland[60], and several states across the U.S., including Texas,[61]Minnesota, Nevada, Alabama, Pennsylvania, New York, California, Maine, and Louisiana,[62] have all released people to mitigate the harm that the impending spread of COVID-19 will cause. Some jails in Georgia have done the same,[63] including Dougherty County Detention Center in Albany, which is suffering

[56] 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.

[57] 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.

[58] 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#.

[59] 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.

[60] 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.

[61] 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/.

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

[63] 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/.

from one of the most severe outbreaks in the state.[64] 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."[65]

63. Even with the known significant gaps in ICE's tracking of COVID-19 cases, data shows that COVID-19 has already hit ICE detention facilities. As of April 23, 2020, ICE has publicly reported that 297 detained individuals and 35 employees in at least 33 detention facilities have tested positive for COVID-19.[66] 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.[67]

64. These numbers also fail to capture the scores of detained individuals who have been exposed to COVID-19 but not tested. As of April 17, 2020, ICE had reportedly tested only 300 individuals in its custody.[68] Respondent Albence admitted to Members of Congress that the agency

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[64] 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/.

[65] 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.

[66] U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement, *ICE Guidance on COVID-19* (last updated Apr. 23, 2020), https://www.ice.gov/covid19 [hereinafter *ICE Guidance on COVID-19*].

[67] 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.

[68] *Id.*

has a limited number of test kits but would "certainly do more testing" if more test kits were available.[69]

C. Stewart and Irwin Detention Centers Are Primed for COVID-19 Exposure and Severe Outbreaks

i. Existing Conditions at Stewart and Irwin Will Further Enable COVID-19 Transmission

65. The ICE Atlanta Field Office currently detains approximately 2,000 noncitizens in total at Stewart and Irwin.

66. Preventing the spread of COVID-19 inside Stewart and Irwin is impossible. The design of these facilities requires detained individuals to remain in close contact with one another—the opposite of the social distancing recommended for stopping the spread of lethal coronavirus.

67. Both Stewart and Irwin house 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 feet apart from each other—and use shared toilets and showers. The facilities also have some smaller cells housing 2-4 people with shared bathrooms. People regularly congregate in common areas of their housing units.[70] At Irwin, people also continue to eat together at times in shared cafeterias.

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[69] 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*].

[70] Project South, Center for Immigrants' Rights Clinic, *Imprisoned Justice: Inside Two Georgia Immigrant Detention Centers* (May 2017), *available at* https://projectsouth.org/wp-content/uploads/2017/06/Imprisoned_Justice_Report-1.pdf at 31, 43 [hereinafter Imprisoned Justice].

68. The conditions at Stewart and Irwin are also flagrantly unsanitary and dangerous to the health of detained individuals. Private contractors operate Stewart and Irwin, 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.[71]

69. The bathrooms in these facilities are often unsanitary, poorly maintained, or lack hot or cold water. For example, at Irwin, detained individuals have reported that water from the showers is so hot that it has caused hair to fall out after washing and that the "moldy infection-riddled bathrooms" are "consistently dirty."[72]

70. Access to items necessary for personal hygiene, such as soap, clean clothing, and cleaning supplies, has historically been insufficient at both Stewart and Irwin. [73] In a pending class action lawsuit, people detained at Stewart allege that they are forced to work in the facility for cents an

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[71] *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; *see also* U.S. Department of Homeland Security, Office of Inspector General, Office of Inspections & Evaluations, Adult Detention Oversight, 16-047-ISP-ICE (Feb. 2017), https://www.oig.dhs.gov/sites/default/files/assets/FOIA/OIG_FOIA_Stewart-Detention-Center-Work-Papers.pdf [hereinafter OIG Stewart Work Papers].

[72] U.S. Department of Homeland Security, Office of Inspector General, OIG-18-32, *Concerns about ICE Detainee Treatment and Care at Detention Facilities* (Dec. 11, 2017), https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-32-Dec17.pdf at 7 [hereinafter *Concerns about ICE Detainee Treatment*]; Imprisoned Justice, *supra* n. 70, at 31, 43-44.

[73] Imprisoned Justice, *supra* n. 70, at 30, 33, 42-45; OIG Stewart Work Papers; *Concerns about ICE Detainee Treatment*, *supra* n. 72, at 7.

hour in order to buy additional hygiene supplies like soap and toilet paper at the commissary.[74] Detained people in Irwin have reported that bleach is used only "on special occasions" and that detained people are forced to wear the same pair of shoes in the moldy showers as they do around the rest of their housing unit.[75]

71. Reports indicate that the water quality at Stewart is shockingly poor. Detained individuals have reported boiling water in their cells before drinking it, developing rashes after showers, water turning their white clothes green, and getting headaches or long bouts of diarrhea after drinking the water. One attorney visiting Stewart reported to an advocacy group that a sympathetic guard urged the attorney not to drink water out of the drinking fountain.[76]

72. At both facilities, food preparation and service are communal with little opportunity for surface disinfection. Detained people, overseen by food service contractors, still staff the kitchens at Irwin. People detained in these facilities have for years reported being served food that is undercooked, rotten, or rancid and that contains hair and foreign objects such as rocks, insects, mice, plastic, a tooth, and a nail.[77]

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[74] *Wilhen Hill Barrientos, et al. v. Corecivic, Inc.*, No. 18-cv-00070-CDL (M.D. Ga. Apr. 17, 2018), Dkt. 1, Complaint for Declaratory and Injunctive Relief and Damages, https://projectsouth.org/wp-content/uploads/2018/04/Complaint-Barrientos-v.-Core-Civic.pdf.

[75] Imprisoned Justice, *supra* n. 70, at 32, 45.

[76] Imprisoned Justice, *supra* n. 70, at 32; Southern Poverty Law Center, *Shadow Prisons: Immigrant Detention in the South* (Nov. 21, 2016), https://www.splcenter.org/20161121/shadow-prisons-immigrant-detention-south [hereinafter Shadow Prisons] at 16, 42.

[77] Imprisoned Justice, *supra* n. 70, at 30, 44, 47; OIG Stewart Work Papers, *supra* n. 71; Shadow Prisons, *supra* n. 76, at 16, 26, 42.

ii. Stewart and Irwin Detention Centers Have a Dismal Medical Care Track Record

73. Respondents have consistently failed to provide even minimally adequate medical care to individuals detained at Stewart and Irwin.[78] 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.

74. At both detention centers, critical medical care is routinely delayed—sometimes for months—or denied outright.

75. At Irwin, requests for medical attention have been met with punishment, such as placement in solitary confinement. People detained at Irwin have reported that the facility lacks a medical alert system to notify guards of an emergency, leaving detained people helpless in the event of a medical emergency in the living area. An inspection at Irwin in 2017 found that its medical unit cells were so dirty that "floors needed to be mopped, walls wiped down, toilets cleaned, and trash and refuse removed."[79] Accessing appropriate medical care at Irwin remains difficult to this day.

76. Accessing medical care at Stewart is also incredibly difficult. In 2018, there was no way for an individual even to request medical attention in writing. During a stakeholder tour of the

[78] U.S. Department of Homeland Security, Immigration and Customs Enforcement, Office of Professional Responsibility, Inspections and Detention Oversight Division, Compliance Inspection, Enforcement and Removal Operations, ERO Atlanta Field Office, Stewart County Detention Center, Lumpkin, Georgia (Aug. 21-23, 2012), https://www.ice.gov/doclib/foia/odo-compliance-inspections/2012stewart_detntn_cntr_lumpkin_GA_aug21-23-2012.pdf; Imprisoned Justice, *supra* n. 70 at 46-49; *Concerns about ICE Detainee Treatment*, *supra* n. 72; Shadow Prisons, *supra* n. 76, at 14-15, 17, 23-25, 40-41.

[79] U.S. Department of Homeland Security, Immigration and Customs Enforcement, Office of Professional Responsibility, Inspections and Detention Oversight Division, Compliance Inspection, Enforcement and Removal Operations, ERO Atlanta Field Office, Irwin County Detention Center, Ocilla, Georgia (Mar. 7-9, 2017), https://www.ice.gov/doclib/foia/odo-compliance-inspections/2017IrwinCountyGA.pdf at 6.

facility in 2018, a detained man in the waiting room of the medical unit said to the tour participants, "nos están tratando mal," or *they're mistreating us*. Accessing appropriate medical care at Stewart remains difficult to this day.

77. When detained people at Stewart and Irwin do manage to get the attention of a medical provider, they are often given the wrong diagnostic tests or type or dosage of medication or prescribed only painkillers, regardless of the source of their complaints.[80]

78. The facilities also face consistent understaffing, including "chronic shortages of almost all medical staff positions."[81]

79. Detained individuals with diabetes—a condition that the CDC considers a risk factor for severe COVID-19, "particularly if not well controlled"[82]—have reported diets that are inadequate given their medical needs, consisting largely of potatoes, white rice, and bread.[83]

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[80] Imprisoned Justice, *supra* n. 70, at 35-36; *Concerns about ICE Detainee Treatment*, *supra* n. 72, at 7; Shadow Prisons, *supra* n. 76, at 40; DHS Office for Civil Rights and Civil Liberties, *Formal Complaint – Stewart Detention Center, Lumpkin, GA* (Oct. 11, 2019), https://www.detentionwatchnetwork.org/sites/default/files/CRCL%20complaint%20-%20SDC%20-%20Oct%2011%20-%20translation_Redacted.pdf; Project South, Institute for the Elimination of Poverty & Genocide, *Letter to Members of the Georgia Delegation to the 116th United States Congress Re: Requesting an Investigation of the Stewart Detention Center* (Oct. 17, 2019), https://projectsouth.org/wp-content/uploads/2019/10/10.17.2019-Letter-to-Georgia-Congressional-Delegates-.pdf.

[81] Imprisoned Justice, *supra* n. 70, at 35; OIG Stewart Work Papers, *supra* n. 71.

[82] 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/specific-groups/people-at-higher-risk.html.

[83] Imprisoned Justice, *supra* n. 70, at 22-23, 32; Shadow Prisons, *supra* n. 76, at 17, 42.

80. Failing to address people's medical needs has already had deadly consequences at Stewart and Irwin. Four people detained at Stewart have died since spring 2017.[84] One man died from complications of pneumonia, despite being a healthy 33-year-old before entering detention.[85] According to ICE's own records, facility staff failed to properly monitor the man's documented symptoms of hypertension (a condition that increases the risk of a serious case of COVID-19), failed to immediately authorize emergency medical services after a provider ordered them to do so, and failed to suspend the man's food service work duties even though he had symptoms that could "potentially transmit[ ] contagious illnesses."[86]

81. A whistleblower within the ICE Health Service Corps (IHSC) alleged in 2018 that medical staff at Stewart delayed a critically ill man's care after receiving a lab report that should have resulted in immediate intervention. Even though IHSC determined that medical staff's actions "may have caused harm that could have resulted in fatality," IHSC leadership "failed to take appropriate action."[87]

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[84] José Olivares, *How Solitary Confinement Kills: Torture and Stunning Neglect End in Suicide at Privately Run ICE Prison*, The Intercept (Aug. 29, 2019), https://theintercept.com/2019/08/29/ice-solitary-mental-health-corecivic/.

[85] Jeremy Redmon, *Brother: Cuban was healthy before dying of pneumonia in ICE custody*, The Atlanta Journal-Constitution (Feb. 20, 2018), https://www.ajc.com/news/state--regional-govt--politics/brother-cuban-was-healthy-before-dying-pneumonia-ice-custody/9TNpiI95CYQPyiGPoSyzmJ/.

[86] U.S. Department of Homeland Security, Immigration and Customs Enforcement, Report of Investigation, Case No. 201803734, Castro-Garrido, Yulio/non-employee/0109 Detainee/Alien – Death (Known Cause – Terminal Illness)/Jacksonville, Duval, FL (Jan. 31, 2018), at 12 https://projectsouth.org/wp-content/uploads/2019/06/OPR-Release-of-2019-ICLI-00033.pdf.

[87] U.S. Department of Homeland Security, Office for Civil Right and Civil Liberties, Memorandum for Ronald Vitiello, Deputy Director and Senior Official (ICE), from Cameron P. Quinn, Officer for Civil Rights and Civil Liberties and Marc Pachon, Attorney Advisor – Legal Division, Office of General Counsel, *Subject: ICE Health Service Corps (IHSC) Medical/Mental*

82. Preliminary data suggests that a person with COVID-19 is most infectious during the early stage of the disease.[88] Early, proactive action is necessary to prevent the virus's spread. The well-documented failure to provide adequate and timely medical care at Stewart and Irwin is the mark of a system that cannot possibly cope with the spread of COVID-19.

iii. It Is Only a Matter of Time Before Petitioners are Exposed to COVID-19 at Stewart and Irwin Detention Centers

83. COVID-19 has already reached Stewart and Irwin. Now that the virus is present in these facilities, it is inevitable that it will spread among the detained population.

84. According to ICE, there are at least 9 confirmed and dozens of suspected cases among detained people at Stewart and 1 confirmed case among ICE employees at Stewart.[89] In addition, at least 23 staff employed by CoreCivic at Stewart have tested positive for COVID-19, up from 2 on April 6.[90] The total number of confirmed cases in Stewart County has recently increased to 17.[91]

Care and Oversight (Mar. 20, 2019), https://www.documentcloud.org/documents/6575024-ICE-Whistleblower-Report.html.

[88] 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/.

[89] *ICE Guidance on COVID-19*, *supra* n.66; Dkt. 12-1 ¶ 14.

[90] Shaquira Speaks, *23 employees at Stewart Detention Center test positive for COVID-19*, wbrl.com (last updated Apr.22, 2020), https://www.wrbl.com/news/georgia-news/23-employees-at-stewart-detention-center-test-positive-for-covid-19/; Alex Jones, *Second Stewart Detention Center employee tests positive for COVID-19*, WTVM (last updated April 6, 2020) https://www.wtvm.com/2020/04/06/second-stewart-detention-center-employee-tests-positive-covid-/.

[91] *Georgia Department of Public Health COVID-19 Daily Status Report* (Apr. 24, 2020), https://dph.georgia.gov/covid-19-daily-status-report.

85. According to ICE, there is also at least one confirmed case among the detained population at Irwin, as well as one confirmed case among staff—an "outside transportation officer."[92]

86. In roughly the last two weeks, confirmed cases of COVID-19 in Stewart County jumped from zero to 17.[93] Cities and counties surrounding Lumpkin also have growing numbers of confirmed cases of COVID-19. Lumpkin is only about 50 miles from Albany, which, as of April 7, 2020, had the fourth highest number of COVID-19 cases per capita in the country[94] and, as of March 26, 2020, the third highest number of COVID-19 deaths per capita in the entire world.[95] Phoebe Putney Memorial Hospital, located in Albany, which typically operates three ICUs is now running five—four of which are dedicated exclusively to critically ill COVID-19 patients.[96] As of April 24, 2020, Dougherty County, which encompasses Albany, had the third highest number of reported COVID-19 diagnoses—1,487—and the highest number of COVID-19-related deaths—

[92] *ICE Guidance on COVID-19*, *supra* n. 66; Dkt. 12-3 ¶ 3.

[93] *Georgia Department of Public Health COVID-19 Daily Status Report* (Apr. 24, 2020), https://dph.georgia.gov/covid-19-daily-status-report.

[94] Graham Rapier, *How a small Georgia city far from New York became one of the worst coronavirus hotspots in the country*, Business Insider (Apr. 7, 2020), https://www.businessinsider.com/coronavirus-hotspot-albany-georgia-funderals-covid-19-cases-per-capita-2020-4.

[95] Nate Cohn, et al., *Some U.S. Cities Could Have Coronavirus Outbreaks Worse Than Wuhan's*, The New York Times (Mar. 27, 2020), https://www.nytimes.com/interactive/2020/03/27/upshot/coronavirus-new-york-comparison.html.

[96] Phoebe Health, *Phoebe Reports Tuesday Covid-19 Numbers* (March 31, 2020), https://www.phoebehealth.com/media-center/media-center-news-story?news=4580.

108—among all 159 counties in Georgia.[97] Lumpkin is also about 50 miles from another COVID-19 "hot spot"—Lee County, Alabama, which had 331 confirmed cases as of April 23, 2020.[98]

87. There were fifteen confirmed cases of COVID-19 in Irwin County as of April 23, 2020, up from seven cases on April 6, with confirmed cases in all bordering counties as well.[99] Like Lumpkin, Ocilla is only roughly 60 miles from Albany.

88. There is great risk that people traveling in and out of Stewart and Irwin will expose Petitioners to COVID-19. Indeed, two of the three earliest-known cases in Stewart County were staff at Stewart Detention Center.

89. ICE employees, detention center staff and vendors at Stewart and Irwin arrive and leave on a shift basis. Attorneys also make legal visits to clients at Stewart and Irwin and, in some cases, visit the facilities to attend immigration court hearings with their clients. There is limited ability to adequately screen incoming people for new, asymptomatic infection.

90. There are myriad ways in which additional cases of people with COVID-19 are likely to enter Stewart and Irwin, none of which Respondents can meaningfully address without blanket testing of every individual who enters. However, testing shortages make that impossible. As noted above, *supra* ¶ 64, Respondent Albence reported to Members of Congress that ICE's access to test

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[97] *Georgia Department of Public Health COVID-19 Daily Status Report* (Apr. 24, 2020), https://dph.georgia.gov/covid-19-daily-status-report.

[98] *COVID-19 map of Alabama: latest coronavirus cases by county*, wvtm13.com (last updated Apr. 23, 2020), https://www.wvtm13.com/article/coronavirus-map-alabama/31919956#; Paul Gattis, *Alabama's new coronavirus 'hot spot': Auburn area*, al.com (Mar. 25, 2020), https://www.al.com/news/2020/03/alabamas-new-coronavirus-hotspot-lee-county.html; Alabama Department of Public Health, Division of Infectious Diseases & Outbreaks, Alabama's COVID-19 Data and Surveillance Dashboard (last updated Apr. 23, 2020), https://alpublichealth.maps.arcgis.com/apps/opsdashboard/index.html#/6d2771faa9da4a2786a509d82c8cf0f7.

[99] *Georgia Department of Public Health COVID-19 Daily Status Report* (Apr. 23, 2020), https://dph.georgia.gov/covid-19-daily-status-report.

kits is quite limited and that the agency would "certainly do more testing" if only it had more test kits.

91. Now that the virus has appeared in these facilities, it will be effectively impossible for Petitioners to protect themselves from infection through social distancing and vigilant hygiene—the only known mitigation measures—if they remain detained. If they do contract COVID-19, Petitioners—who will be at particularly high risk of serious illness, long-term organ damage, and death—are unlikely to receive the medical care they need.

D. The Lack of Hospital Resources Near the Georgia Detention Centers Will Put Petitioners at Even Greater Risk

92. The local and regional hospitals near Stewart and Irwin are ill-equipped to handle a COVID-19 outbreak within these facilities, increasing the life-threatening risks to Petitioners.

93. An outbreak of COVID-19 at Stewart or Irwin 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 these facilities, diverting crucial and limited medical resources.

94. Patients who are hospitalized for COVID-19 commonly require intensive care and a ventilator to assist with breathing. Even some younger and healthier individuals who contract COVID-19 may require supportive care.[100] 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.

[100] 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.

95. Stewart and Irwin are geographically isolated from appropriate levels of medical care to treat COVID-19. The closest hospitals to these facilities are either critical access hospitals without the necessary facilities or regional hospitals that serve many counties and are already overwhelmed or will quickly become overwhelmed if there are outbreaks within these detention centers.

96. 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 them.

97. Stewart is at least one hour away from two facilities where the necessary level of care could be provided, one of which—Phoebe Putney in Albany—is already completely overwhelmed with COVID-19 patients. A hospital closer to Stewart—Southwest Georgia Regional Medical Center in Cuthbert, Georgia—has no long-term ICU beds.

98. The nearest hospital to Irwin with ICU capabilities is Tift Regional Medical Center, approximately 18 miles away. Tift Medical Center has 181 hospital beds, including 20 ICU beds. As a regional hospital, it serves 12 counties. A coronavirus outbreak in any of these counties would overwhelm the hospital and its ICU beds.

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

99. Respondents' failure to recognize the inevitability of outbreaks at Stewart and Irwin and to take adequate precautions, including releasing people, ensuring detained people have enough to eat, and following CDC guidance related to COVID-19, demonstrates their complete disregard for the lives of Petitioners.

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

100. 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.[101] Indeed, no Petitioner in this action has, to their knowledge, received an individualized or specialized medical evaluation related to COVID-19.

101. 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.[102] In addition, the policy treats medically vulnerable individuals differently based on which immigration detention statute governs their detention.[103] And by delegating the custody re-evaluation process to field directors 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.

102. As of April 17, ICE had released fewer than 700 medically vulnerable noncitizens under this custody re-evaluation process. According to Respondent Albence, ICE does not plan to

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

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

[103] *Id.*

release any more individuals under the policy to mitigate the risks of spreading COVID-19 from congregate environments.[104] As of April 23, 2020, at least 30,000 men and women remained in detention facilities across the country.

103. 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.[105]

104. 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.

105. 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 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. Stewart and Irwin do not have the space or staff to safely care for patients for this period of time.

106. 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

[104] *DHS Officials Refuse to Release Asylum Seekers*, *supra* n.69.

[105] *Id.* ("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.").

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.

107. 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 larger community at risk of a preventable disaster.

ii. Respondents Are Failing to Provide Adequate Food to Petitioners at Stewart

108. In the last few weeks, Petitioners and other detained individuals have reported alarming changes in when and how much they are fed. The staff at Southern Poverty Law Center's Southeast Immigrant Freedom Initiative ("SIFI"), who regularly receive calls from people detained at Stewart, have received multiple reports that (1) some meals are not provided, (2) meals are served at unpredictable and often late hours, (3) smaller portions of food are served, (4) meals sometimes do not meet special dietary restrictions, and (5) people have less access to the commissary to supplement the small portions.

109. On the night of April 20, 2020, dinner was not served at Stewart until around 9:00 pm—four hours later than normal—and consisted of only a small sandwich with a single slice of bologna, a scoop of potatoes, and a scoop of applesauce. The untimeliness of the meal and the quality of the food reportedly incited a disturbance in one of the units, which caused a lockdown of the detention center, including cutting off phone access until the following afternoon.

110. According to reports received by SIFI staff, many members of the kitchen staff, which is mostly comprised of detained individuals, have been quarantined. Thus, the kitchen is no longer sufficiently staffed, leading to significant delays in meals. While lunch is typically served around 11:00 A.M. and dinner around 5:00 P.M., callers from the detention center reported that breakfast is now sometimes delayed until after 10:30 A.M. lunch until around 5:00 P.M., and dinner until late at night. One caller estimated that the meal portions are 10% of what they were before the COVID-19 pandemic; another reported being served a dinner of bread and apples at 9:00 P.M.—and only after banging on the doors to demand food. Callers also reported that they struggle to purchase supplemental food at the commissary because access has been restricted to certain days of the week, and when they are able to request food to purchase they may not receive it for days.

111. Petitioners Owusu and Tinarwo have confirmed the inadequacy of food at Stewart. They both received smaller portions and lower quality food than usual, including low-nutrition tortilla shells and cereal. Petitioner Tinarwo is being fed cold eggs and oatmeal and estimates that he is receiving only about 30% of the normal amount of food. Both are very hungry and afraid.

iii. Respondents Are Failing to Adhere to CDC Guidance

112. The CDC has issued Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities ("CDC Guidance"),[106] which

[106] CDC Guidance, *supra* n.40. The CDC Guidance uses a number of specially defined terms, as follows:

> An individual is considered a "close contact" if they have been within approximately 6 feet of a COVID-19 case for a prolonged period of time or have had direct contact with infectious secretions from such a person, such as coughing. "Close contact can occur while caring for, living with, visiting, or sharing a common space with a COVID-19 case."

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).[107]

A person with a "confirmed case" is one who "has received a positive result from a COVID-19 laboratory test, with or without symptoms," while a "suspected case" involves the showing of symptoms. Symptoms "include fever, cough, and shortness of breath."

"Quarantine" is "the practice of confining individuals who had close contact with a COVID-19 case to determine whether they develop symptoms," and it "should last a period of 14 days." "Ideally, each quarantined individual would be quarantined in a single cell with solid walls and a solid door that closes." "If symptoms develop during the 14-day period, the individual should be placed under medical isolation and evaluated for COVID-19."

"Medical isolation refers to confining a confirmed or suspected COVID-19 case (ideally to a single cell with solid walls and a solid door that closes), to prevent contact with others and to reduce the risk of transmission." "Medical isolation ends when the individual meets pre-established clinical and/or testing criteria for release from isolation, in consultation with clinic providers and public health officials" as detailed in the CDC's Guidance.

"Cohorting refers to the practice of isolating multiple laboratory-confirmed COVID-19 cases together as a group, or quarantining close contacts of a particular case together as a group." "Ideally, cases should be isolated individually, and close contacts should be quarantined individually."

[107] 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

113. 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.

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

115. 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.[108] In testimony before this Court, Respondents Washburn and Paulk repeatedly referenced "CDC guidance" as the authority guiding their practices and generally asserted that Stewart and Irwin are in compliance with measures outlined by the CDC. ICE previously provided to the Court written declarations from Patrick Musante, ICE Assistant Field Office Director, and John Bretz, ICE Officer in Charge at Stewart, asserting that ICE applies CDC

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infrastructure workers" to include federal law enforcement and workers, including contractors at government facilities.

[108] *See* U.S. Immigration and Customs Enforcement, *ERO COVID-19 Pandemic Response Requirements* (Version 1.0, April 10, 2020). ICE's contracts with CoreCivic and LaSalle also require 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) guidelines for the prevention and control of infectious and communicable diseases shall be followed.") (applies to Stewart) [hereinafter "2011 PBNDS"]; Performance-Based National Detention Standards 2008 Part 4.22 section V.C.1, https://www.ice.gov/detention-standards/2008 ("Facilities shall comply with current and future plans implemented by federal, state or local authorities addressing specific public health issues including communicable disease reporting requirements.") (applies to Irwin) [hereinafter "2008 PBNDS"].

Guidance at Stewart and Irwin and that the facilities are generally in compliance with CDC Guidance.[109]

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

117. 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 or detention settings.

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

118. 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)."[110] Under the CDC Guidance, Respondents must enforce social distancing between individuals in all locations and at all times, including in holding cells, in lines and waiting areas, in recreation spaces, in housing spaces, and during meal times.

119. 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

[109] Dkt. 12-2 ¶¶ 8, 12, 14, 22; Dkt. 12-2 ¶¶ 8, 12, 14.

[110] All quoted language in Section V.E.iii. is from the CDC Guidance, *supra* n.40, unless otherwise indicated.

necessary "to remove potentially infectious particles" from spaces that a person with COVID-19 has occupied.[111]

120. Respondents have not implemented social distancing at Stewart or Irwin, and indeed it would be impossible for them to do so in these facilities.

121. A man detained at Stewart reported to advocates on March 26, 2020, that a staff member told detained individuals that social distancing "doesn't apply" to them because they "are in detention."

122. Respondent Washburn testified that at Stewart, "there's no way to say across [sic] we can 100 percent keep people 6 feet or greater," Dkt. 19 at 25-26, and that "there are going to be times where they may not necessarily be able to achieve the full 6 feet," *id.* at 27.

123. Respondent Paulk testified that he would rely on staff at Irwin to enforce social distancing if Irwin had a housing pod for high-risk individuals, but admitted that, currently, staff is only "recommending" and "verbalizing" social distancing based on the "tone and tempo" of the unit. *Id.* at 55, 58.

124. At both facilities, some people are housed in pairs in cells are so small that two individuals cannot be in the cell at the same time and remain six feet apart. Petitioner Robinson describes having five or six different cellmates since arriving at Stewart in February 2020. Other detained people sleep in crowded, open rooms in beds that are very close together. Petitioner

[111] 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.

Owusu described being housed at Stewart in bunk beds "so close together that [they] can easily reach out and touch each other," and as of April 15, 2020, he was still being housed with another person in the bunks above and beside his. As of April 23, 2020, Petitioner Dingus was housed in an open dorm at Irwin with almost 40 other women, in bunk beds "less than three feet from each other." Similarly, an individual detained at Stewart reported that as recently as April 21, he was on a top bunk in an open dorm and that, even though nobody was on the bottom bunk, there were other people on the top bunks on both sides of him in close proximity.

125. Respondent Washburn testified that at Stewart, people are still sleeping within six feet of each other and that he "[doesn't] know that [social distancing] would be something that would be attainable at this point." Dkt. 19 at 12-13; *id.* at 25, 27.

126. Respondent Paulk testified that Irwin was in the process of "spreading . . . bodies out" in the detention center; that it had been "discussing" this issue for four weeks; and that it was "in the process of proceeding to" segregate high-risk individuals from the general population to be placed in housing that would enable them to be "right at 6 feet" apart when they were static on their bunks. *Id.* at 54-55, 59.

127. The plan—housing two people in four-man cells—would require putting one person on the top bunk on one side of the cell and another on the bottom bunk on the other side. Respondent Paulk could not state with certainty that this plan would achieve six feet of distance between cellmates even when both people are lying in their beds—only that "it would be close" but that he "would have to get the measurements." *Id.* at 73. Moreover, the plan does not account for times when cellmates would necessarily come within six feet of each other, such as when one or both sit, stand up, use the toilet or sink, or essentially do anything other than lie motionless in bed.

128. At both facilities, detained individuals are still forced to shower and use the toilet in close quarters. Toilets at both facilities do not have lids. 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. For example, Petitioner Owusu is in the latter category, and about 50 people in his pod unit use the same set of toilets, which are cleaned only in the mornings and evenings, not after each use. In either situation, detained individuals are not able to bathe or use the bathroom while maintaining six feet of distance from other people.

129. Detained people at Stewart and Irwin continue to eat in close quarters as well. At Irwin, they continue to line up with the rest of their pod units to get their food. As recently as April 17, Petitioner Salazar was still required to eat in the cafeteria, which is a space that is shared with all the other pod units at Irwin. Petitioner Dingus reported the same as of April 23; she also reported that when the detained people in her unit line up to go to the cafeteria, they "get yelled at if [they] don't stay close to each other." Even when people are permitted to take their food back to their pod units to eat there instead of in the cafeteria, there is still not enough space at the shared tables to maintain adequate distance at either detention center. The chairs are also sometimes secured to the floor, leaving people without even the option to rearrange their seats to achieve greater physical distance. They must still also use the same microwave, telephones, and televisions in the common area.

130. 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, they line up close to one another to go to the recreational area, the library, and the medical unit, as well as to pick up medication. When waiting for medical services, people are seated right next to each other on small benches. As recently as April 16, 2020, Irwin was still

permitting people to play basketball, soccer, and other contact sports in the recreational area together.

b. Respondents Are Violating the CDC Guidance Related to Hygiene

131. 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 second 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.

132. Contrary to Respondents Washburn and Paulk's testimony that hand sanitizer and soap are available in unlimited supply, 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. Petitioner Robinson, for example, describes using less soap than he needs to avoid running out. Another detained person at Stewart also recently reported being unable to wash their hands because supplies were even more meager than usual. In some units of the facilities, Respondents have installed a single hand soap dispenser for shared use by every person in that unit. However, some people are afraid to use these dispensers because of how many people touch them every day.

133. Detained people at Stewart and Irwin also have limited or no access to hand sanitizer. For example, Petitioner Owusu reported that there was recently no hand sanitizer or soap available for two full days. Another detained person at Stewart also indicated that the one hand sanitizer dispenser in his large housing unit was left empty for 24 hours.

134. On information and belief, Respondent Paulk has, in the last few weeks, threatened to shut off access to water at Irwin in retaliation for demonstrations against abysmal detention conditions.

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

135. 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.

136. On information and belief, Respondents are failing to ensure sufficient stocks of PPE at Stewart and Irwin and lack adequate plans for rapid restocking. Indeed, Respondent Washburn testified that staff and detained individuals at Stewart are "encouraged" to wear masks but acknowledged that securing a sufficient number of masks is a challenge. Dkt. 19 at 20.

137. Detained people at Irwin and Stewart receive either no PPE or, in some cases, limited PPE with no way to sanitize it after use. Guards at Stewart have prevented the use of PPE and even forced detained people to remove makeshift masks fashioned from towels. For example, guards at Stewart took a mask away from Petitioner Robinson because "[he is] not allowed to wear a mask." Individuals at both Stewart and Irwin have been denied gloves when they have requested them. Even those who should use PPE in the scope of their work at the facilities 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.

138. Detained immigrants and visiting attorneys have not observed ICE staff routinely using PPE, even during close interactions, or regularly washing their hands since the start of the COVID-19 outbreak. At Stewart, guards reportedly have had to purchase their own PPE or make their own face masks at home. Staff use the same gloves for long periods of time without changing them, cross-contaminating medication, food, and various parts of the detention center.

d. Respondents Are Violating the CDC Guidance Related to Cleaning

139. 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.

140. 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. "Individuals handling laundry from COVID-19 cases should wear disposable gloves, discard after each use, and clean their hands after."

141. At Stewart and Irwin, detained people are responsible for cleaning their personal living spaces, as well as the common areas of housing units, but are often not provided with adequate cleaning supplies. Reports indicate that cleaning solutions provided at the facilities are significantly diluted. Petitioner Thompson, for example, describes receiving cleaning solution "so diluted that it's basically clear" even though the "original" containers of the same type of solution contain liquid that is a "very strong green color, like seaweed." Due to the inadequate provision of cleaning supplies, detained individuals who are responsible for cleaning sometimes have no choice but to "just wipe [spaces] down with water." The facilities also commonly fail to provide detained

individuals with gloves or face masks to use while cleaning or train them on hygiene measures to limit the spread of infectious disease while cleaning.

142. At Irwin, detention center staff only spray living spaces with Lysol once in a while, if at all, and even this task is at times passed off to detained individuals. This type of spraying not only fails to comply with CDC Guidance on cleaning but also exacerbates the medical conditions of many people, particularly those with asthma. Petitioner Dingus reported that although the Lysol spray in her dorm has made her asthma much worse, Irwin has not provided face masks to protect her or others with asthma and has "ignored [their] pleas for help." Petitioner Salazar reported guards spraying her unit with bleach, which caused her and other detained people to suffer shortness of breath.

143. Petitioners have also reported that other sporadic cleaning of the facility has negatively affected their health. For example, Petitioner Thompson reported that a maintenance staff "used a brush to sweep out the dust from the air vents," which irritated Petitioner Thompson's eyes, nose, and throat. He and the other detained people were not provided face masks for their protection while this was happening.

e. Respondents Are Violating the CDC Guidance by Failing to Screen Detained People at Stewart and Irwin

144. The CDC Guidance 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."

145. Respondents have been on notice for over two weeks that there is some fear of reporting symptoms among the detained population at Stewart.[112]

[112] Dkt. 5-9 ¶ 14 ("detainees with symptoms are afraid to report them because of fears of being placed in segregation, where a number of detainees have died by suicide," and "people who are

146. Respondents have also been on notice for over two weeks that staff at Irwin threatened detained women with "lockdown" for reporting that others in their unit were experiencing fever and coughing but had to wait three to four days for medical attention.[113]

147. On information and belief, Respondents are failing to implement daily temperature checks in all housing units where COVID-19 cases have been identified. Detained individuals are not informed about any suspected or confirmed cases of COVID-19 in their units so they are unable to ensure that they are being properly monitored for the development of symptoms. At Stewart, there is no ongoing screening of the general population for symptoms. Dkt. 19 at 42-44. At Irwin, staff monitor for "sniffles" and rely on self-reporting of COVID-19 symptoms. *Id.* at 79. Only one Petitioner, Petitioner Barahona Marriaga, has reported getting daily temperature checks, because he has been placed in medical isolation to monitor his blood pressure.

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

148. 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." When 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."

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sick might not ask for a medical appointment because they do not believe they will be treated with appropriate measures").

[113] *Id.* ¶ 22.

149. 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."

150. 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."

151. 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.

152. Instead of responding immediately to symptoms among the detained population at Stewart and Irwin 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 who exhibit COVID-19 symptoms to remain sleeping and eating within feet of others.

153. For example, at Irwin, Petitioner Dingus reported that women in her dorm presented COVID-19 symptoms, including cough, sore throat, and fever, but were provided only cough drops, if anything at all. To Petitioner Dingus's knowledge, these women have not been tested for COVID-19. Similarly, at Stewart, one of Petitioner Robinson's cellmates put in a request to see a doctor because he had a cough, but was neither allowed to access medical care nor isolated from

other detained people. A woman in Petitioner Salazar's unit who reported a fever and a sore throat was told by ICE officers "to stop talking about the virus."

154. Many others at Stewart with COVID-19 symptoms have similarly been deprived of access to medical care. One man has had COVID-19 symptoms since April 9 but had not, as of April 15, been given a medical appointment because he did not have a fever—even though others in his pod have been removed because they were sick. Another man has had a fever and cough for several weeks but has been unable to have his temperature checked regularly, even though several people from his pod have been removed and placed into quarantine. Another symptomatic person was reportedly denied a medical appointment simply because he had seen a medical provider several days before. Even individuals who have been specifically quarantined and cohorted because of potential exposure to COVID-19 have trouble receiving medical attention when they develop COVID-19 symptoms. At times, quarantined cohorts have had to engage in group demonstrations in order to get staff to take a symptomatic person to the medical unit.

155. One individual, who was hospitalized for COVID-19 on April 17, 2020, was sick in bed for three full days before he was medically evaluated at all, and had to wait a week and a half before he was finally transferred to a hospital. He was never isolated from the rest of his unit after developing symptoms and before being taken to the hospital. And only three days after he was admitted to the hospital and shackled to his bed there, he was transferred back to Stewart.

156. There are also reports from Stewart that symptomatic people are not always medically isolated to reduce the risk of exposure to other detained individuals. For example, one man reported that people who seek medical care for a cough are returned to the general population, rather than isolated, after their appointments.

157. As for requirements for staff interacting with people in medical isolation, the CDC Guidance use of PPE, including eye protection, gloves, a hospital gown or disposable coveralls, and an N95 respirator (or a face mask when the supply 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." On information and belief, Respondents are not in compliance with this Guidance at Stewart and Irwin.

g. Respondents Are Violating the CDC Guidance Regarding Quarantine of People Who Have Been Exposed to a Known or Suspected Case of COVID-19

158. 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 requires them to wear face masks at all times to prevent transmission from infected to uninfected individuals.

159. Cohorting in a detained person's "regularly assigned housing but with no movement outside of the unit (if an entire housing unit has been exposed)," is an option provided in the CDC Guidance, but it is the lowest on the list of preferred arrangements, aside from transferring the person to another facility with the ability to quarantine more effectively. This method of quarantining is only recommended if it is possible for all cohorted people to wear face masks and "to maintain at least 6 feet of space between individuals." The last option of transfer "should be avoided due to the potential to introduce infection to another facility."

160. Rather than using individual quarantining of people who have been exposed to COVID-19, Respondents routinely use en masse cohort quarantining, despite the CDC's statements that this measure will facilitate the spread of the virus among those quarantined and throughout the facility and outside community. Respondent Washburn testified that Stewart defaults to cohorting exposed individuals together with others who have had contact with a person with confirmed COVID-19. Dkt. 19 at 16. He acknowledged the risk that this could spread COVID-19 through exposure in that cohort. *Id.* at 17. Respondent Paulk testified that Irwin has six medical isolation cells for individuals who test positive, *id.* at 61, but indicated that those who have had contact with an individual diagnosed with COVID-19 would all be cohorted together rather than in available individual cells. *Id.* at 63.

161. ICE's cohorting practice contravenes the CDC Guidance. Cohorting is not the same as individual quarantine or medical isolation. The CDC Guidance makes clear that cohorting is to be used only as a last resort. ICE, however, is using cohorting as the planned—and primary—response to a known COVID-19 exposure, not as a practice of last resort.

162. Moreover, cohorted groups are confined in spaces that prevent them from practicing social distancing and are not consistently provided masks, as required by the CDC Guidance. Monitoring cohorted groups as set out in the CDC Guidance is also not happening. For example, one individual detained in a cohort at Stewart after coming into contact with a guard who tested positive reported that he and others in his cohort had to regularly remind the guards to take their temperatures twice a day.

163. Furthermore, Respondents fail to quarantine—either individually or in a cohort—scores of people who have likely been exposed to the virus. For example, one individual at Stewart reported that after symptomatic individuals were taken from his unit, the staff took the

temperatures of the remaining detainees in the unit and cohorted only those who had a fever, rather than quarantining all who had been exposed. And given that both facilities are ignoring reports of COVID-19 symptoms, it is likely that additional people who have been exposed to the virus have not been quarantined at all.

164. Finally, release is an option for people in civil detention, such as Petitioners. The CDC Guidance acknowledges that *even if* a person is subject to medical isolation, they may be released with appropriate planning. Because Respondents can and should release Petitioners and those similarly situated, "cohort quarantine" is not the only "available option."

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

165. 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.

166. 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.

167. 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."

168. 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)."

169. 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.

170. 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 Stewart and Irwin and failing to consistently impose intake quarantining. On information and belief, Respondents also continue to engage in transfers that are not "absolutely necessary."

171. Detained immigrants at both Stewart and Irwin have observed new people being moved in and out of the facilities during the COVID-19 outbreak. Some new people were transferred from other ICE facilities; others were brought in from the community. As recently as April 21, 2020, an individual at Stewart reported to advocates that new intakes had been placed in his unit only days before.

172. Respondents have been placing new intakes with other detained individuals without first taking appropriate screening, isolation, or quarantining measures. Former Petitioner Sanchez Martinez was transferred to Stewart on March 22, 2020, along with fifty other transfers. He noted that they only received a "cursory" screening when they arrived at the facility. Petitioner Khan

also reported that the screening of new arrivals to Stewart consists only of a temperature check. At Irwin, a woman from North Carolina was placed in Petitioner Lopez's pod in late March without first being isolated from the rest of the detained population, even though she had a fever.

i. Respondents Are Violating the CDC Guidance Related to Screening of Visitors

173. The CDC Guidance requires that visitors, like staff, have their temperatures taken and be screened for symptoms in the last 24 hours and any contact with known cases in the last 14 days prior to entry into Stewart or Irwin. Staff performing this screening should wear PPE 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 the facilities.

174. Attorneys continue to visit their detained clients in Stewart and Irwin because most immigration court hearings for detained individuals are still proceeding and many filing deadlines still apply. Reports from immigration attorneys indicate that staff at Stewart 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.

175. Since the pandemic began, Respondents have permitted attorneys to enter both facilities without taking adequate precautions to limit exposure in the event that a visiting attorney is a COVID-19 carrier.

176. As recently as March 23, 2020, Stewart—which houses an immigration court—was holding hearings with more than ten people inside the court room. At one hearing, an attorney reported the presence of an interpreter who, according to the judge, had traveled from a New York court where a judge had a presumed case of COVID-19. After this hearing, the attorney went to visit her client and was permitted to enter the visitation lobby at Stewart without any PPE. When

she met with her client in one of the legal visitation rooms at Stewart, the client did not have gloves, a mask, or hand sanitizer.

177. Another immigration attorney reported that, as recently as April 6, 2020, no guards or other court staff wore any PPE during hearings at Stewart Immigration Court. ICE also refused to let the attorney supply his clients with PPE. Later that day, the same attorney was permitted to visit clients at Stewart without being screened for symptoms or potential exposure to COVID-19.

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

178. The CDC Guidance requires Respondents to post signage throughout Stewart and Irwin 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."

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

180. 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."

181. Several Petitioners and other detained immigrants at Irwin and Stewart indicate that ICE personnel have never informed them of COVID-19 or advised them on recommended hygiene or social distancing practices. The minimal information that has been provided does not comply

with the CDC Guidance. For example, the only precaution that Petitioner Barahona Marriaga and other kitchen workers were instructed to take was to replace plastic ware with disposable plates. Any notices or flyers about COVID-19 are provided only in English, and some Petitioners cannot understand them.[114] Most Petitioners get information about COVID-19 from the news on television or their families.

k. Respondents Are Violating the CDC Guidance Related to Testing

182. The CDC Guidance directs testing of symptomatic individuals based on the CDC's general testing guidance. 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 have developed fever and/or symptoms of acute respiratory illness (e.g., cough, difficulty breathing)."[115]

183. The CDC 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.[116]

184. Respondents are not complying with the CDC standards for COVID-19 testing. Scores of symptomatic individuals at Stewart and Irwin have not been tested or even evaluated by a medical provider—a necessary antecedent to making the testing determination under the CDC Guidance.

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[114] Respondent Washburn represented that there are COVID-19 informational flyers in languages other than English posted at Stewart, *see* Dkt. 12-4 ¶ 29 & Attach. B, but the flyers pictured in languages other than English provide information about mumps, not COVID-19.

[115] 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.

[116] *Id.*

185. Respondent Washburn testified that Stewart has "no shortage in the tests on site." Dkt. 19 at 31. But only a week later, Respondent Albence reported to Congress that ICE has only tested about 300 people in detention and that the agency would "certainly do more testing" if only it had more test kits.

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

186. 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 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.

187. 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."[117] It accordingly provides specific instructions on reducing the risks of COVID-19 for people with each underlying medical condition,[118] including continuing prescribed medications and maintaining treatment plans provided by doctors.[119] For people with asthma in particular, the CDC recommends continuing use of inhalers, avoiding asthma triggers, and avoiding close contact

[117]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.

[118] 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.

[119] *Id.*

with cleaning and disinfecting products, particularly those that are sprayed directly onto a cleaning surface.[120]

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

189. 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. Petitioners with asthma do not consistently receive their medication either, including inhalers needed for adequate breathing. Moreover, Respondents' cleaning methods, *supra* ¶¶ 142-43, trigger asthmatic attacks for Petitioners who have asthma.

190. Petitioner Jammeh was told by a guard that medical staff would take him to the hospital only "if they see [him] dying."

191. Simply placing all high-risk individuals into special units fails to adequately protect them. Petitioners Robinson and Khan have been placed in units specifically designated for medically vulnerable individuals at Stewart. But in these new units, they are still in close contact with other people at high risk of severe illness from the virus and continue to share the same showers and eat meals together. Petitioner Robinson is afraid that, because everyone in the unit has an underlying medical condition, "if one of [them] gets sick, [they] will all get sick very soon." While in this high-risk unit, Petitioner Khan has been taken to the recreational area with detained people from other units.

[120] *Id.*

192. In addition, Respondents' numerous violations of the CDC Guidance discussed above, *supra* ¶¶ 112-91, all increase the risk that COVID-19 will continue to spread within Stewart and Irwin, magnifying the risk of infection to medically vulnerable people.

193. Given the realities of detention at Stewart and Irwin, 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.

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

194. Public health experts with experience in immigration detention and correctional settings have unequivocally concluded that medically vulnerable people, like Petitioners, will be safer if they are released from custody.

195. **Michael Robinson.** Mr. Robinson has been detained by ICE at Stewart since February 2020. Mr. Robinson suffers from asthma, cardiac murmur, high blood pressure, and benign prostatic hyperplasia. He was recently hospitalized for an abnormal electrocardiogram (EKG) and told by a doctor that the "left side of [his] heart is swollen."

196. Mr. Robinson's medical condition has been deteriorating since being detained. He recently experienced an incident at Stewart during which he was exposed to pepper spray, which made him cough blood. New medication in detention has also led to severe side effects including constant headaches, numbness in his mouth, and uncontrollable shaking. The medical staff at Stewart have not responded to his requests for his medical records after the hospitalization. At Stewart, he lives in very close quarters, is not provided enough soap, and is fearful of the confirmed case of COVID-19 at the facility.

197. Mr. Robinson is critically vulnerable to COVID-19 because of his age and his significant health problems. Upon his release, he plans to self-quarantine with either his family in Florida, sister in Long Island, New York, or mother in Brooklyn, New York.

198. **Peter Owusu.** Mr. Owusu has been detained at Stewart since January 2020. Before he fled Ghana, he suffered a stab wound that causes him difficulty breathing. At a previous detention center, he received a breathing machine, but he has not been able to access it at Stewart. He has trouble breathing without the machine, particularly at night and when it is cold. Without the machine, he cannot sleep well. The wound he sustained also led to other complications, including improperly healed stitches, ongoing stomach pain, digestion issues, dizziness, headaches, and heart issues. He has also recently begun to experience constant pain all over his body, concentrated in his joints and veins. Mr. Owusu has requested to see a doctor multiple times at Stewart, but ICE has not taken him to see one, and instead told him to take a painkiller.

199. Mr. Owusu is critically vulnerable to COVID-19 because of his significant health problems. Upon his release, he plans to self-quarantine with his uncle in Houston, Texas.

200. **Hugh Tinarwo.** Mr. Tinarwo is currently detained at Stewart, and has been in ICE custody since October 2019. He was recently hospitalized while in ICE custody, due to the shortness of breath and chest pain. At the hospital, medical staff did an X-ray and diagnosed him with an enlarged heart. He was told that he would have a follow-up appointment for the hospitalization with the doctor at Stewart, but has not received this. However, since this hospitalization, Mr. Tinarwo has needed medical care at Stewart on three separate occasions for shortness of breath, chest pain, and vomiting. On one of the occasions, he was held at medical for three days. Mr. Tinarwo also has hypertension that requires daily medications and is confined to a wheelchair due to complications from a surgery for ruptured discs in his back. Being in a

wheelchair makes it difficult for him to get around the detention center as required to be able to shower, eat, and go to medical, and difficult for him to clean his cell. Although Stewart was instructed by the hospital to assign him a detainee assistant to help him get around, and told that he needs to receive therapy or see a neurologist to help him regain mobility in his legs, Mr. Tinarwo has not received either.

201. Mr. Tinarwo is critically vulnerable to COVID-19 because of his significant health problems. Upon his release, he plans to self-quarantine with his parents and youngest child in Winston-Salem, North Carolina.

202. **Shehza Khan.** Mr. Khan is currently detained at Stewart, and has been in ICE custody since June 2018. He has severe asthma that requires him to have an inhaler at all times and has been aggravated by the air inside the detention center. While at Stewart, Mr. Khan has not been consistently provided with an inhaler. In fact, during the COVID-19 pandemic, he has gone over a week without receiving a new one, and is forced to share the inhaler of another detained person in his unit. Mr. Khan also has epilepsy and depression, which he takes medication for, and has been diagnosed with delusional disorder. He has been housed with other detained people with pre-existing medical conditions, but continues to be in close contact with other detained people and has not received personal protective equipment.

203. Mr. Khan is critically vulnerable to COVID-19 because of his age and significant health problems. Upon his release, he plans to self-quarantine with his parents in Annapolis, Maryland.

204. **Joseph Lloyd Thompson.** Mr. Thompson is currently detained at Irwin. Mr. Thompson has diabetes, hypertension, depression, and a severe heart aneurysm that requires a surgery that ICE has repeatedly refused to facilitate. He has been hospitalized three times for

pneumonia, and many times for his heart problems. During his time in ICE custody, Mr. Thompson has been hospitalized on at least ten occasions.

205. While in ICE custody, including at Irwin, Mr. Thompson has consistently been denied adequate medical care. While detained in North Carolina, he was assaulted by ICE and detention officers, to the point that he could not swallow and that he still has nerve damage in his right hand from being handcuffed so violently. He did not receive any treatment for his hand.

206. Mr. Thompson has not received adequate care for chest pain from his aneurysm. When he was detained at Folkston previously, he was transferred to several other facilities, but instead of approving necessary operations to address his aneurysm, ICE continues to only medicate his symptoms. At Irwin, Mr. Thompson described an incident wherein he began experiencing severe chest pain while in his cell, and pressed a buzzer in the cell to request medical assistance. It was not until his cellmate banged on the door of the cell that someone came to help. Mr. Thompson was sent to a local hospital for two weeks after this. He has been hospitalized multiple times after that as well after experiencing chest pains, and each time "ICE was always very delayed in getting [him] medical attention." There is also typically no follow-up to his hospitalizations by staff at Irwin. The only treatment provided by ICE is medication, and even then, there was a two week period in March 2020 during which Mr. Thompson received no medication at all. Even though doctors have told him he is a "walking time bomb" because of his aneurysm, ICE has not provided Mr. Thompson with the surgery or care he needs. He is also forced to live in unsanitary conditions and drink unhygienic water.

207. Mr. Thompson is critically vulnerable to COVID-19 because of his significant health problems. Upon his release, he will self-quarantine at his U.S. Citizen sister's home in Snellville, Georgia.

208. **Ansumana Jammeh**. Mr. Jammeh has been detained by ICE at Irwin since March 2019. Mr. Jammeh suffers from diabetes for which he requires insulin pills and blood sugar checks, as well as a special diabetic diet that he is not provided at Irwin. Recently Mr. Jammeh has also been struggling to ensure that he gets his insulin pills daily as required, because Irwin has begun bringing a pill cart around and calling for pill distribution at 4am in the morning. Mr. Jammeh is forced to wake up and run to the pill cart to be sure that he gets the medication he needs. He has also faced challenges in getting his blood sugar levels checked each afternoon.

209. Mr. Jammeh also has severe hemorrhoids that developed while in ICE custody, cause him extreme pain, and recently required surgery in March 2020. He was prescribed antibiotics after the surgery but has not received them, instead receiving only prescription pain medication and Ibuprofen, which have not managed his pain. He will likely require a second surgery to treat other hemorrhoids. In December 2019, he was taken to the emergency room for severe abdominal pain caused by inflammation in his intestines. When he returned to Irwin, ICE similarly failed to provide most of the medications prescribed by the doctor.

210. At Irwin, in addition to repeatedly struggling to obtain the medications and medical services that he requires, Mr. Jammeh is also not provided with enough hygiene products each week, including soap, and was told by staff that he had to clean his own room while he was bedridden from the hemorrhoids surgery.

211. Due to his significant health problems, Mr. Jammeh is critically vulnerable to COVID-19. Upon his release, he plans to self-quarantine at the home of a close friend in Atlanta, Georgia. He also has two cousins in Marietta, Georgia who are willing to take him in as well.

212. **Karen Lopez.** Ms. Lopez has been detained by ICE at Irwin since March 2020. She has a pacemaker due to a heart condition that also caused her to suffer a stroke about six years

ago. Her heart condition makes it difficult for her to even climb in and out of a top bunk bed. Irwin has delayed care for her heart condition. She also suffers from multiple sclerosis (MS), which causes her severe chronic pain along with problems with her vision, balance, muscle control, and other bodily functions.

213. Three weeks ago, ICE forced her to have a mammogram against her wishes, which, because of her pacemaker, made her feel very sick and weak for several days and develop severe chest pain and difficulty breathing. She had to be taken to the emergency room before stabilizing. Ms. Lopez also may have a stomach ulcer. Despite all of her serious medical conditions, ICE has not provided her with the medications and medical services she needs. She has only been given Ibuprofen and aspirin for her pain, and not a specialized medication or diet for her MS.

214. Ms. Lopez is critically vulnerable to COVID-19 because of her significant health problems. Upon her release, she plans to return home and self-quarantine with her partner and children in Atlanta, Georgia, who eagerly await her return.

215. **Nilson Barahona Marriaga.** Mr. Barahona Marriaga has been detained by ICE at Irwin since approximately October 2019. He has diabetes and hypertension, both of which he struggles to manage while in detention. ICE does not provide the necessary diet and access to exercise that he needs to manage his diabetes, so his condition has deteriorated and many of his requests for medical services have been ignored. He is also forced to remain in very crowded, unsanitary quarters, and is fearful of COVID-19 because he knows there are detained people in quarantine at Irwin. Mr. Barahona Marriaga is currently housed in the medical unit at Irwin, but not long ago was in "solitary confinement in a 7 feet by 7 feet cell with another detained person.

216. Mr. Barahona Marriaga is critically vulnerable to COVID-19 because of his significant health problems. Upon his release, he would self-quarantine in his home in Lawrenceville, Georgia, where his wife and child eagerly await his return.

217. **Shelley Dingus.** Ms. Dingus is currently detained by ICE at Irwin, and has been in ICE custody since January 2020. She suffers from asthma, chronic obstructive pulmonary disease, severe migraines, depression, anxiety, and eczema that causes severe skin allergies and open wounds that are easily infected. She requires an inhaler and other medicines for her asthma every day. She also requires lotion and cream for her skin condition, medication for her migraines, anti-depressants, and hormone replacement tablets due to a full hysterectomy.

218. ICE does not consistently provide her with her medications, or provides her with improper medications. She relies on the medication Singulair to prevent wheezing and shortness of breath from her asthma, and on April 23, 2020, the medical staff at Irwin told her they did not have it for her because they "ran out." They did not provide an alternative medication. Ms. Dingus states that "Irwin almost always forgets to bring at least one [medication]." Her requests for medical care are also often ignored or delayed, and she is not provided enough hygiene products. She states she has feels "like a child having to beg to get the [asthma] medicine [she] need[ed]."

219. Ms. Dingus is critically vulnerable to COVID-19 because of her age and her significant health problems. Her husband and two younger sons await her return; upon her release, she plans to self-quarantine at their home in Virginia.

220. **Kimberly Salazar.** Ms. Salazar has been detained at Irwin since December 2019. She has asthma and tuberculosis, which cause her to have trouble breathing and painful cough attacks. She also suffers from hypertension, pre-diabetes, and anemia. The conditions at Irwin, including some of the cleaning routines of the detention center staff, have made her respiratory

issues worse. For example, when guards spray bleach in her pod unit, she "can barely breathe at all." She has also begun to experience headaches and body aches since being detained.

221. Despite her health condition, Ms. Salazar has had difficulty accessing medical care at Irwin. Although she was first detained at Irwin in December 2019, she did not receive an inhaler for her asthma until April 2020. Medical staff have also failed to address the cough she has due to her tuberculosis. She continues to be forced to share one big room with 16 other women and sleep in beds that are a foot apart from each other and interact both with new immigrants brought into her unit and guards who do not wear masks or gloves.

222. Ms. Salazar is critically vulnerable to COVID-19 because of her significant health problems. Upon her release, she would self-quarantine at her sister's home in Staten Island, New York.

223. **Sonia Cabrera Benitez.** Ms. Cabrera Benitez has been detained at Irwin since June 2019, and in ICE custody since May 2018. She suffers from asthma, and often has asthma attacks in the mornings. She also recently had surgery to remove a tumor from her breast, and has a large cyst in her ovary.

224. While Ms. Cabrera Benitez has a lot of difficulty breathing due to her asthma, she has not been able to obtain medication or even an adequate medical evaluation of her respiratory condition. She has experienced so many delays in medical care at Irwin, and heard of other detained people facing delayed or ignore requests for medical care, that she resorts to using the hot water in the showers to help her breathe instead. The cleaning sprays that guards at Irwin have been using to spray the cells in her unit have only made these breathing problems worse. Despite the ongoing COVID-19 pandemic, she continues to be forced to live in a small, dirty cell with another woman and interact with guards without protective gear.

225. Ms. Cabrera Benitez is critically vulnerable to COVID-19 because of her significant health problems. Upon her release, she would self-quarantine with her family, including her youngest child, near Fairfax, Virginia.

i. ICE's Alternatives to Detention Program

226. 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.

227. 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.[121] ICE has repeatedly told Congress that the ATD program increases ICE's operational effectiveness and individual compliance with release conditions.

[121] 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.

228. 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.[122]

229. 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.[123] According to 2017 contract data, 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.[124]

230. As of April 18, 2020, ICE has 89,490 individuals enrolled in ATD, including 3,068 in the Atlanta area.[125]

VI. LEGAL FRAMEWORK

231. By continuing to detain Petitioners at Stewart and Irwin at this time, Respondents are in violation of three different substantive standards flowing from the Fifth Amendment Due Process Clause: (1) the right to be free from punishment; (2) the right to reasonable safety; and (3)

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[122] 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.

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

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

[125] ICE, Detention Management, https://www.ice.gov/detention-management#tab2 (last visited Apr. 24, 2020).

the *Accardi* doctrine. 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

232. 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.*

233. 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 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).

234. 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).

235. 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).

236. 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).

237. 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

238. "[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).

239. 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).

240. 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).

241. A deliberate indifference to a substantial risk of serious harm may be established by the knowing denial of an "identifiable human need such as food." *See Wilson v. Seiter*, 501 U.S. 294, 304 (1991).

242. 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).

243. 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).

244. "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).

245. 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), 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.

246. 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."

247. "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).

248. 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.").

249. 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.

250. 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.

251. 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*, No. 1:20-cv-21553-MGC, (S.D. Fla. Apr. 22, 2020) ECF No. 63 at 55 (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.").

252. 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.").

253. 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.

254. 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.

255. 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.[126] 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 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).

256. 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.*

[126] 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).

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).

257. 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).

258. 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 v. Meade*, Report and Recommendation at 55 (S.D. Fla. Apr. 22, 2020); *see also 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).

259. 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.

260. 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

261. 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.").

262. A violation of the *Accardi* doctrine may constitute a violation of the Fifth Amendment 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)).

263. 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.

264. Respondents operate Stewart pursuant to ICE's 2011 Performance-Based National Detention Standards, as amended in 2016 ("2011 PBNDS"),[127] which specify certain measures that must be taken to protect the health of detained people.

265. Section 4.3(II)(10) of the 2011 PBNDS requires that "Centers for Disease Control and Prevention (CDC) guidelines for the prevention and control of infectious and communicable diseases shall be followed."[128]

266. Section 4.3(V)(C)(1) of the 2011 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."[129]

[127] 2011 PBNDS, *supra* n. 108.

[128] *Id.* at 258.

[129] *Id.* at 261-62.

267. Respondents operate Irwin pursuant to ICE's 2008 Performance-Based National Detention Standards ("2008 PBNDS"),[130] which specify certain measures that must be taken to protect the health of detained people.

268. Part 4.22 section V.C.1 of the 2008 PBNDS requires that "Facilities shall comply with current and future plans implemented by federal, state or local authorities addressing specific public health issues including communicable disease reporting requirements."[131]

269. Additionally, on April 10, 2020, ICE released agency guidance ("April 10 Guidance") stating that both dedicated and non-dedicated ICE detention facilities "must" comply with the CDC Guidance.[132] ICE considers compliance with the April 10 Guidance by detention centers to be "mandatory."[133]

270. Respondents are required to comply with the April 10 Guidance (both facilities), the 2011 PBNDS (Stewart), and the 2008 PBNDS (Irwin), all of which in turn require compliance with the CDC Guidance, pursuant to their own regulations and policy statements. Yet, as discussed *supra*, Section V.E.iii, their efforts to do so have been woefully inadequate.

271. 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

[130] 2008 PBNDS, *supra* n. 108.

[131] *Id.*, Part 4.22 at 6.

[132] *See ERO COVID-19 Pandemic Response Requirements*, *supra* n. 101.

[133] Dkt. 34-2 ¶ 7.

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

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

273. 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.

274. 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.

275. Respondents' continued detention of Petitioners at Stewart and Irwin during the COVID-19 pandemic, especially without consistent adherence to CDC Guidance, and especially without access to sufficient food (at Stewart), 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.

276. Respondents' continued detention at Stewart and Irwin, especially without consistent adherence to CDC Guidance, and especially without access to sufficient food (at Stewart), subjects them to conditions tantamount to punishment.

277. 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.

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

279. 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

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

281. 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.

282. 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.

283. In addition, by knowingly failing to provide sufficient and nutritionally adequate food to Petitioners at Stewart, Respondents are acting with deliberate indifference, either separately or in combination with Respondents' other acts constituting deliberate indifference.

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

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

THIRD CLAIM FOR RELIEF

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

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

287. 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.

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

289. Stewart and Irwin are subject, respectively, to ICE's 2011 PBNDS (Stewart) and 2008 PBNDS (Irwin), which set forth certain measures that must be taken to protect the health of detained people. Both versions of the PBNDS require Respondents to follow federal guidelines for the prevention and control of infectious disease.

290. Stewart and Irwin are subject to ICE's April 10 Guidance, which sets out the mandatory requirement that the facilities comply with the CDC Guidance.

291. Respondents have an obligation under the PBNDS and the April 10 Guidance to protect the Petitioners by following the CDC Guidance. However, Respondents have failed to comply with the CDC Guidance in their management of the COVID-19 pandemic at Stewart and Irwin.

292. In particular, Respondents have failed to follow the CDC Guidance related to social distancing, hygiene, supplies (including PPE), cleaning, screening of detained people, medical evaluation and treatment of COVID-19 symptoms, medical isolation of suspected and confirmed COVID-19 cases, quarantine of people who have been exposed to known or suspected cases of COVID-19, 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 Stewart and Irwin. Respondents have thereby failed to mitigate the risk of COVID-19 at Stewart and Irwin.

293. Respondents have violated the *Accardi* doctrine and the Fifth Amendment Due Process Clause by failing to comply with their obligations under the April 10 Guidance and 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:

1. Respondents to immediately comply with CDC Guidance regarding COVID-19 at Stewart and Irwin, including the provisions requiring:
    i. Implementation and enforcement of social distancing (maintaining at least 6 feet of distance) among all people in the detention centers 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 the facilities 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 Stewart and Irwin 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 Stewart and Irwin;

xi. Consistent and accurate screening of all visitors to the detention centers, 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 facilities 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 the facilities; and

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

2. 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;
3. 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;
4. Respondents to absolutely cease all transfers into Stewart and Irwin until this Court is satisfied that both detention centers are fully complaint with CDC Guidance as outlined above;
5. 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;
6. Respondents to provide nutritionally appropriate meals three times per day at regular and consistent times to Petitioners at Stewart;

7. 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)(1)-(6);

d. Appoint a Special Master to assist the Court and the Parties with 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 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 and the *Accardi* doctrine;

g. Issue a declaration that Respondents' failure to provide adequate food to Petitioners at Stewart violates the Due Process Clause;

h. 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

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

Dated: May 18, 2020

Respectfully submitted,

SOUTHERN POVERTY LAW CENTER

By: /s/ Gracie Willis
Gracie Willis (GA Bar #851021)
Rebecca Cassler (GA Bar #487886)
Lorilei Williams* (NY Bar #5302617)
150 E. Ponce de Leon Ave., Ste. 340
Decatur, GA 30030

ASIAN AMERICANS ADVANCING JUSTICE-ATLANTA

By: /s/ Hillary Li
Hillary Li (GA Bar #898375)
Phi Nguyen (Ga Bar #578019)
5680 Oakbrook Pkwy, Ste. 148
Norcross, GA 30093

Tel: (404) 521-6700
Fax: (404) 221-5857
gracie.willis@splcenter.org
rebecca.cassler@splcenter.org
lorilei.williams@splcenter.org

Paul Chavez* (FL Bar #1021395)
Victoria Mesa-Estrada*(FL Bar #076569)
2 S. Biscayne Blvd., Ste. 3200
Miami, FL 33101
Tel: (786) 347-2056
paul.chavez@splcenter.org
victoria.mesa@splcenter.org

Caitlin J. Sandley (GA Bar # 610310)
400 Washington Ave.
Montgomery, AL 36104
Tel: (334) 303-6822
Fax: (334) 956-8481
cj.sandley@splcenter.org

Melissa Crow** (DC Bar #453487)
1101 17th Street, NW, Ste. 705
Washington, DC 20036
Tel: (202) 355-4471
Fax: (404) 221-5857
melissa.crow@splcenter.org

**admitted pro hac vice*
***pro hac vice motion forthcoming*

Tel: (404) 585-8466
Fax: (404) 890-5690
hli@advancingjustice-atlanta.org
pnguyen@advancingjustice-atlanta.org
KILPATRICK TOWNSEND & STOCKTON LLP

By: /s/ Tayah Woodard
Tayah Woodard (GA Bar #312548)
Tamara Serwer Caldas (GA Bar #617053)
Kathryn E. Isted (GA Bar #908030)
Amanda Brouillette (GA Bar #880528)
1100 Peachtree St., NE, Ste. 2800
Atlanta, GA 30309
Tel: (404) 815-6006
Fax: (404) 541-4754
twoodard@kilpatricktownsend.com
tcaldas@kilpatricktownsend.com
kisted@kilpatricktownsend.com
abrouillette@kilpatricktownsend.com