JOSEPH H. HUNT
Assistant Attorney General
U.S. Department of Justice
Civil Division
WILLIAM C. PEACHEY
Director
Office of Immigration Litigation
District Court Section
JEFFREY S. ROBINS
Deputy Director
LINDSAY M. VICK (MA 685569)
ANNA L. DICHTER (NJ 304442019)
Trial Attorneys
450 5th Street, N.W., Rm 5223
Washington, D.C. 20530
Telephone: (202) 532-4023
Facsimile: (202) 305-7000
lindsay.vick@usdoj.gov
anna.l.dichter@usdoj.gov

Attorneys for Defendants

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

FAOUR ABDALLAH FRAIHAT, *et al.*, *Plaintiffs*, v. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *et al.*, *Defendants*.	Case No. 19-CV-01546-JGB(SHKx) **NOTICE OF SUPPLEMENTAL AUTHORITY AND SUPPLEMENTAL DECLARATIONS IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** **Before The Honorable Jesus G. Bernal** **Hearing Date:** April 13, 2020 **Hearing Time:** 9:00 a.m.

NOTICE OF SUPPLEMENTAL AUTHORITY AND SUPPLEMENTAL DECLARATIONS

Defendants respectfully submit the following supplemental authority in the form of updated declarations, recent decisions, and newly filed cases since Defendants filed their Opposition to Plaintiffs' Motion for Preliminary Injunction ("Opposition"), ECF No. 81, on April 3, 2020.

I. Recent Declarations and Documents

Defendants submit the attached Declaration of Gabriel Valdez, Assistant Field Office Director for Los Angeles, Enforcement and Removal Operations, U.S. Immigration and Customs Enforcement, dated April 7, 2020; Declaration of Michael Nelson, Assistant Field Office Director for the New Orleans Field Office, dated April 10, 2020; Declaration of John Bretz, Officer in Charge at the Stewart Detention Center, dated April 10, 2020. Mr. Valdez's declaration supports Defendants' argument at Part III.C. of their Opposition that ICE has implemented, and continues to monitor and update, many policies and procedures that protect detainees and prevent infection at ICE detention facilities, and therefore Plaintiffs fail to demonstrate a likelihood of success on the merits of their Fifth Amendment and Rehabilitation Act claims. In his declaration, Mr. Valdez provides further details about the numerous precautionary measures implemented at the Adelanto ICE Processing Center in response to COVID-19, including daily temperature checks for staff and all visitors, daily COVID-19 education, and cohorting for all new arrival detainees.

Defendants also submit—and note that Plaintiffs also filed this document with their reply in support of their preliminary injunction motion—the attached "COVID-19 Detained Docket Review" guidance, dated April 4, 2020, in support of Defendants' argument at Part III.C. of their Opposition that ICE's detention authority, which is authorized by Congress and has been affirmed by the Supreme Court, allows ICE to exercise discretion to release individuals on a case-by-case basis. Not only does ICE have

this discretionary authority, but it has exercised this authority since March 18, 2020, in light of the risks to certain groups of detained individuals due to COVID-19. This ICE memorandum updates guidance initially distributed March 18, 2020, that instructs field office directors and deputy field office directors to identify categories of individuals who are potentially at higher risk for serious illness from COVID-19 and to determine whether continued detention remains appropriate in light of the COVID-19 pandemic.

II. Recent Immigration Habeas Decisions.

While not exhaustive, the following additional decisions support Defendants' positions because they are examples of cases from other jurisdictions in which the courts found that the plaintiff, an immigration detainee, did not demonstrate likelihood of success on the merits on substantially the same issues as those in this case concerning ICE's COVID-19 response.

1. *Umarbaev v. Lowe*, No. 1:20-cv-00413 (M.D. Pa. Apr. 9, 2020) (denying petitioner's petition for a writ of habeas corpus because "it is not plain that [petitioner] has demonstrated deliberate indifference by failing to take reasonable steps to protect [p]etitioner from COVID-19 or to monitor and treat his medical symptoms." What is clear, the court noted, is that habeas review is entirely individualized and based on the circumstances of the petitioner before the court, and also on a "rapidly changing landscape that includes the state of the COVID-19 pandemic, current conditions in ICE facilities, and the evolving response by ICE and facility officials to medical needs.").
2. *Dawson v. Asher*, No. 2:20-cv-00409-JLR-MAT (W.D. Wash. Apr. 8, 2020) (denying petitioners' TRO because petitioners did "not present allegations or evidence to show an 'express intent' to punish petitioners," preventing "detained aliens from absconding and ensuring that they appear for removal proceedings is a legitimate governmental objective," there was no confirmed COVID-19 case among any detainees, staff, or visitors at the detention facility,

respondents submitted evidence that they were taking substantial measures to prevent an outbreak of COVID-19 at the detention facilities and contain an outbreak should one occur, and petitioners failed to meet their burden of showing irreparable harm. Additionally, the court rejected as irrelevant petitioners evidence of the conditions at detention facilities or jails that were not at issue in the case.).

3. *Almeida v. Barr*, No. 20-cv-0490-RSM-BAT (W.D. Wash. Apr. 6, 2020) (noting that cases in which temporary restraining orders had been granted diverged in "meaningful ways," including having confirmed cases of COVID-19 or lack of action by ICE to address the risks at a particular facility).
4. *A.S.M., et al., v. Donahue, et al*., No. 7:20-cv-00062-CDL-MSH (M.D. Ga.) (Apr. 10, 2020) (denying petitioners' TRO, including a Named Plaintiff in this case, because the court did not have jurisdiction to hear petitioners' habeas claims based on allegedly unconstitutional conditions of confinement and "release from custody is not an appropriate remedy for petitioners' implied equitable relief cause of action to remedy constitutional violations.").

III. Recent Criminal Release Decision

Defendants submit the following decision because it concerns claims and issues, similar to those raised in this case, by criminal prisoners in California. Several of the court's findings support Defendants argument in their Opposition that release is not an appropriate remedy for conditions of confinement claims and that Plaintiffs have failed to demonstrate a constitutional violation in this case that has caused their claimed risk of harm due to COVID-19.

1. *Coleman v. Newsom*, No. 2:90-CV-0520 KJM DB P, *8-9 (E.D. Cal./N.D. Cal. April 4, 2020) (finding that the risk of harm due to COVID-19 alleged by Plaintiffs is not caused by "constitutional shortcomings" but instead by

contagiousness and the nature of incarceration, which "is a problem shared by *all* prisons").

IV. Newly Filed Cases

Defendants bring to the Court's attention the following newly filed cases, which, while not exhaustive, demonstrates the access immigration detainees have to the courts to bring claims regarding their conditions of confinement and seek release without the need for certification of the class that Plaintiffs propose here.[1]

1. *Benavides, et al., v. Gartland, et al*., No 5:20-cv-00046-LGW-BWC (S.D. Ga.) (filed Apr. 8, 2020) (three petitioner habeas seeking release from the Folkston processing center and 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.").

[1] Additionally, Plaintiffs' counsel representation in these, and other cases, raises the question about whether counsel can meet the adequacy prong of Rule 23(a)(4). Plaintiffs' counsel represents the petitioners in these cases and other cases where individuals, groups, or classes seek outright release or changes in policy regarding their potential for release in light of COVID-19. *See also Mons v. Wolf*, No. 19-cv-1593, 1-2 (D.D.C. Mar. 31, 2020) (motion for temporary restraining order requesting "NOLA ICE to immediately conduct individualized (case-by-case) parole assessments for all present and future class members detained in the NOLA ICE region" and asking the court to grant parole to class members with "serious medical conditions, where continued detention would not be appropriate."). The two key inquiries for class certification are (1) whether there are conflicts within the class; and (2) whether plaintiff and counsel will vigorously fulfill their duties to the class. *See Ellis v. Costco Wholesale Corp*., 657 F.3d 970, 985 (9th Cir. 2011); *see also* Fed. R. Civ. Pro. 23(a)(4). Counsel's prosecution of these other cases potentially conflicts with their primary ask for policy reforms in detention facilities here because these interests of counsel's other clients in getting released or paroled because of Defendants' response to COVID-19 at their detention facilities is at odds with Plaintiffs' primary ask here, that the policies regarding those conditions be reformed such that Plaintiffs case remain at those facilities.

DATED: April 10, 2020

Respectfully Submitted,

JOSEPH H. HUNT
Assistant Attorney General
WILLIAM C. PEACHEY
Director
JEFFREY S. ROBINS
Deputy Director

/s/ Lindsay M. Vick
LINDSAY M. VICK
Trial Attorney
United States Department of Justice
Civil Division
Office of Immigration Litigation
District Court Section
Washington, D.C. 20044
Tel.: (202) 532-4023
Fax: (202) 305-7000
Email: Lindsay.Vick@usdoj.gov

Counsel for Defendants

DECLARATION OF GABRIEL VALDEZ

I, GABRIEL VALDEZ, pursuant to 28 U.S.C. § 1746, hereby declare under penalty of perjury that the foregoing is true and correct.

1. I am currently an Assistant Field Office Director ("AFOD") of Enforcement and Removal Operations ("ERO"), U.S. Immigration and Customs Enforcement ("ICE"), in the Los Angeles, California Field Office. I have held this position since January 2011. I am currently the Officer in Charge at the Adelanto ICE Processing Center (the "APC") in Adelanto, California. I have worked in various other positions within ICE and the former Immigration and Naturalization Service since June 21, 1998. The statements contained in this declaration are based upon my personal knowledge or upon information provided to me in my official capacity.

2. ICE contracts with the GEO Group, Inc. ("GEO") for the management and operation of the APC, pursuant to a direct contracting agreement.

3. Conditions of detention at the APC are governed by the ICE Performance-Based National Detention Standards 2011, revised 2016 (PBNDS). The PBNDS reflects ICE's ongoing effort to tailor the conditions of civil immigration detention to its unique purpose while maintaining a safe and secure detention environment for detainees and staff.

4. ERO at the APC is responsible for managing the immigration cases of detained individuals. In addition, ERO is responsible for observing, identifying, and notifying GEO of any perceived deficiencies in its adherence to the PBNDS in its management and operation of the APC.

5. As an AFOD, I manage the detained docket for the aliens who are detained at the APC, including supervising Supervisory Detention and Deportation Officers and other detention and deportation staff who are responsible for the review and tracking of aliens' removal proceedings and detention placements. My primary responsibilities include immigration case management for those detained at the APC and general oversight at the APC, including monitoring of adherence to the PBNDS.

6. In my current position, I work with an assigned IHSC Field Medical Coordinator (FMC) to conduct medical oversight at APC. FMCs serve as medical consultants to the ICE field offices and oversee clinical services at Inter-Governmental Service Agreement (IGSA) facilities and monitor clinical services at some Contract Detention facilities (CDF) that house ICE detainees, including the APC.

7. IHSC provides direct medical, dental, and mental health patient care to approximately 13,500 detainees housed at 20 IHSC-staffed facilities throughout the nation.

8. IHSC's FMCs ensure that the provision of medical care by contractors to the ICE detainees within the IGSA facilities meets detention standards, as required by the IGSA contract. The FMCs do not provide hands-on care or direct the care within the IGSAs but monitor the medical care and services provided by the contract facilities. Medical staff at the contract facilities are directly responsible for medical care at the facility.

9. IHSC comprises a multidisciplinary workforce that consists of U.S. Public Health Service Commissioned Corps (USPHS) officers, federal civil servants, and contract health professionals.

10. Since the onset of reports of Coronavirus Disease 2019 (COVID-19), I have been informed that ICE epidemiologists have been tracking the outbreak, regularly updating infection prevention and control protocols, and issuing guidance to field staff on screening and management of potential exposure among detainees.

11. In testing for COVID-19, I have been informed that IHSC is also following guidance issued by the Centers for Disease Control to safeguard those in its custody and care.

12. Each detainee is screened for disabilities upon admission. Identified disabilities are further evaluated and addressed as medically appropriate.

13. At the APC, during intake medical screenings, detainees are assessed for fever and respiratory illness, are asked to confirm if they have had close contact with a person with laboratory-confirmed COVID-19 in the past 14 days, and whether they have traveled from or through area(s) with sustained community transmission in the past two weeks. The APC has taken the position that all new arrivals may have been in areas with sustained community transmission.

14. The detainee's responses and the results of these assessments will dictate whether to isolate the detainee. Those detainees that present symptoms compatible with COVID-19 will be placed in isolation, where they will be tested. If testing is positive, they will remain isolated and treated. In case of any clinical deterioration, they will be referred to a local hospital. APC has procedures to continue monitoring the population's health, including additional temperature checks of detainees where medical circumstances trigger additional checks.

15. I have been informed that in cases of known exposure to a person with confirmed COVID-19, asymptomatic detainees are placed in cohorts with restricted movement for the duration of the most recent incubation period (14 days after most recent exposure to an ill detainee) and are monitored daily for fever and symptoms of

respiratory illness. Cohorting is an infection-prevention strategy which involves housing detainees together who were exposed to a person with an infectious organism but are asymptomatic. This practice lasts for the duration of the incubation period of 14 days, because individuals with these and other communicable diseases can be contagious before they develop symptoms and can serve as undetected source patients. Those that show onset of fever and/or respiratory illness are referred to a medical provider for evaluation. Cohorting is discontinued when the 14-day incubation period completes with no new cases. Per ICE policy, detainees diagnosed with any communicable disease who require isolation are placed in an appropriate setting in accordance with CDC or state and local health department guidelines.

16. APC manages both males and females, has daily access to sick call in a clinical setting, onsite mental health and dental services, and an infirmary equipped with negative pressure rooms onsite. The facility can admit patients to the local hospital for a higher level of care when needed.

17. I have been informed that IHSC has the following information:

a. As of April 7, 2020, there are no confirmed cases of COVID-19 at APC.

b. There were two ICE detainee suspected cases of COVID-19 at APC, whose test results were negative. The two patients have been cleared and returned to general population.

c. On March 26, 2020, there was one ICE detainee who arrived at APC with an unverifiable travel history. The detainee was asymptomatic and afebrile. The detainee is being monitored in medical observation for the development of signs and symptoms related to COVID-19 for 14 days as per CDC guidance.

d. On March 27, 2020, there were two ICE detainees transported to a local hospital for medical care unrelated to COVID-19. The hospital tested both detainees for COVID-19 as a local protocol. On March 30, 2020, the hospital reported the test results for both detainees returned as negative.

e. On April 4, 2020, a detainee presented with a fever and was placed in medical isolation. The detainee has been tested for COVID-19 and the results are pending. The detainee will remain in a negative pressure room in the medical infirmary pending the results of the test.

18. APC has a population within their approved capacities and is not overcrowded.

19. APC has increased sanitation frequency and provide sanitation supplies as follows:

a. All common areas in the facility are being disinfected multiple times per day. These areas include detainee housing areas, law libraries, dining halls, medical areas, Intake areas, door handles throughout the facility, desk and counter surfaces in high traffic areas, lobby seating areas, restrooms, court rooms and any other areas the facility identifies as needing such cleaning.

b. Additional cleaning products have been added to housing areas and are available to detainees.

c. Alcohol based disinfectant dispensers have been placed in lobby areas for public and staff use.

d. Internal facility areas have been equipped with disinfectant dispensers.

e. Detainees have been educated through in-person town halls on best practices to keep from spreading any contagions. Educational posters with illustrations and instructions in English and Spanish demonstrating good hygiene practices have been placed throughout the facility to include detainee living areas.

20. APC provides education on COVID-19 to staff and detainees to include daily video presentations in English and Spanish on housing unit televisions on hand washing hygiene. Detainees have been reminded to seek medical care if they feel ill. The APC provides detainees daily access to medical staff through a sick call process. Medical staff also visit housing units multiple times per day to provide medication distribution and welfare checks as warranted.

21. Due to the current COVID-19 global pandemic and for the safety of ICE detainees and facility staff, as of March 13, 2020, in-person social visitation and facility tours at APC have been suspended until further notice to mitigate the potential transmission of COVID-19.

22. However, APC detainees have access to dayrooms, telephones, law library computers, and tablets on a 24-hour basis. There are 12 telephones per housing unit, which are checked daily and rarely out of order. If a telephone is out of order, the vendor repairs it within a few days. The only interruptions to dayroom access and telephones are

during counts during which detainees must be by their beds. Counts take approximately 30-45 minutes. Access to dayrooms and telephones has not been impacted by COVID-19.

23. Talton Communications, ICE's telecommunications provider, is now providing all detainees with two free, five-minute telephone calls on Mondays and two free, five-minute telephone calls Thursdays, in light of the COVID-19 pandemic.

24. The APC has 232 tablets available to all detainees which have video visitation and audio capabilities, which detainees can use to call family, friends, and attorneys. ICE has expanded the hours for detainee access to the tablets to 24 hours a day due to the COVID-19 pandemic. Previously, the tablets were available approximately for 14 hours a day.

25. In-person legal visitation remains permitted at the APC. Non-contact legal visits (e.g., communication through a plexiglass barrier) are offered first and strongly encouraged, if available, to limit exposure to ICE detainees. However, if the attorney believes the legal visit requires contact, attorneys are able to meet with their clients at the APC in the attorney visiting rooms. For contact attorney visits, detainees must wear surgical masks, which are provided by GEO. All attorneys are allowed 24/7 access to contact and non-contact visitation with detainees.

26. All visitors who wish to enter the APC beyond the lobby must submit to a temperature check and complete a questionnaire to determine COVID-19 risk. All visitors, including attorneys, must also wear personal protective equipment (eye protection, surgical or N95 mask, and latex gloves or equivalent) in order to enter the facility.

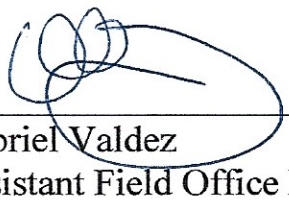
27. Staff entering on duty each day must submit to temperature checks and complete questionnaires to determine COVID-19 risk prior to assuming their posts and positions.

28. All new arrival detainees as well as detainees who are transported to any offsite location (hospitals, medical appointments, interviews) are, upon return, housed separate from the general population for 14 days to monitor for the onset of any symptoms related to COVID-19. This separate housing and monitoring process is in addition to the initial intake screenings and temperature checks described in paragraphs 13 and 14.

29. The APC has medical negative pressure rooms and can designate housing units for the cohort or quarantine of detainees who are suspected of or test positive for COVID-19 infection to be addressed as set forth in paragraphs 12, 13 and 14, *supra*.

30. ICE and GEO management at the APC are conducting daily assessments of detainee populations, modifying programming and housing detainees in a manner to promote social distancing. Detainees are encouraged to exercise social distancing protocols within their housing units and while participating in outdoor recreation. Dining halls are utilizing reduced group sizes and seat spacing to encourage social distancing. Occupancy limits have been temporarily reduced in law libraries, Intake, medical and court hold rooms. For group movements, detainees are reminded to practice social distancing protocols to further address social distancing efforts.

Executed this 7th day of April 2020 at Adelanto, California.



Gabriel Valdez
Assistant Field Office Director, Los Angeles
Enforcement and Removal Operations
U.S. Immigration and Customs
Enforcement

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FAOUR ABDALLAH FRAIHAT, *et al.*, *Plaintiffs*, v. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *et al.*, *Defendants*.	Case No. 5:19-CV-01546 JGB (SHKx)

DECLARATION OF MICHAEL NELSON, ASSISTANT FIELD OFFICE DIRECTOR, NEW ORLEANS FIELD OFFICE

I, MICHAEL NELSON, pursuant to 28 U.S.C. § 1746, hereby declare under penalty of perjury that the foregoing is true and correct.

1. I am currently an Assistant Field Office Director ("AFOD") of Enforcement and Removal Operations ("ERO"), U.S. Immigration and Customs Enforcement ("ICE"), in the New Orleans, Louisiana Field Office. I have held this position since March 2018. I supervise the officers in charge of the Etowah County Detention Center in Gadsden, Alabama. I have worked in various other positions within ICE and the former Immigration and Naturalization Service since May 2002. The statements contained in this declaration are based upon my personal knowledge or upon information provided to me in my official capacity.

2. ICE contracts with the Etowah County Alabama Sheriff's Office ("ECSO") for the management and operation of the Etowah County Detention Center ("ECDC"), pursuant to a rider agreement on a U.S. Marshal contract.

3. Conditions of detention at ECDC are governed by the ICE National Detention Standards 2000 ("NDS"). The NDS reflects ICE's ongoing efforts to tailor the conditions of civil immigration detention to its unique purpose while maintaining a safe and secure detention environment for detainees and staff.

4. ERO at ECDC is responsible for managing the immigration cases of detained individuals. In addition, ERO is responsible for observing, identifying, and notifying ECSO staff of any perceived deficiencies in its adherence to the NDS in its management and operation of the ECDC.
5. As an AFOD, I supervise the ERO Officers responsible for managing the detained docket for the aliens who are detained at ECDC, including supervising Supervisory Detention and Deportation Officers and other detention and deportation staff who are responsible for the review and tracking of aliens' removal proceedings and detention placements. My primary responsibilities include immigration case management for those detained at ECDC, and general oversight at ECDC, including monitoring of adherence to the NDS.
6. In my current position, I work with an assigned IHSC Field Medical Coordinator (FMC) to conduct medical oversight at ECDC. FMCs serve as medical consultants to the ICE field offices and oversee clinical services at Inter-Governmental Service Agreement (IGSA) facilities and monitor clinical services at some Contract Detention facilities (CDF) that house ICE detainees, including ECDC.
7. IHSC provides direct medical, dental, and mental health patient care to approximately 13,500 detainees housed at 20 IHSC-staffed facilities throughout the nation.
8. IHSC's FMCs ensure that the provision of medical care by contractors to the ICE detainees within the IGSA facilities meets detention standards, as required by the IGSA contract. The FMCs do not provide hands-on care or direct the care within the IGSAs but monitor the medical care and services provided by the contract facilities. Medical staff at the contract facilities are directly responsible for medical care at the facility.
9. IHSC comprises a multidisciplinary workforce that consists of U.S. Public Health Service Commissioned Corps (USPHS) officers, federal civil servants, and contract health professionals.
10. Since the onset of reports of Coronavirus Disease 2019 (COVID-19), I have been informed that ICE epidemiologists have been tracking the outbreak, regularly updating infection prevention and control protocols and issuing guidance to field staff on screening and management of potential exposure among detainees.
11. In testing for COVID-19, I have been informed that IHSC is also following guidance issued by the Centers for Disease Control to safeguard those in its custody and care.
12. Each detainee is screened for disabilities upon admission. Identified disabilities are further evaluated and addressed as medically appropriate.
13. At ECDC, during intake medical screenings, detainees are assessed for fever and respiratory illness, are asked to confirm if they have had close contact with a person with laboratory-confirmed COVID-19 in the past 14 days, and whether they have traveled from or through area(s) with sustained community transmission in the past two weeks. ECDC has taken the position that all new arrivals may have been in areas with sustained community transmission.

14. The detainee's responses and the results of these assessments will dictate whether to isolate the detainee. Those detainees that present symptoms compatible with COVID-19 will be placed in isolation, where they will be tested. If testing is positive, they will remain isolated and treated. In case of any clinical deterioration, they will be referred to a local hospital. ECDC has procedures to continue monitoring the population's health, including additional temperature checks of detainees where medical circumstances trigger additional checks.

15. I have been informed that in a case of known exposure to person with confirmed COVID-19, asymptomatic detainees are placed in cohorts with with restricted movement for the duration of the most recent incubation period (14 days after most recent exposure to an ill detainee) and are monitored daily for fever and symptoms of respiratory illness. Cohorting is an infection-prevention strategy which involves housing detainees together who were exposed to a person with an infectious organism but are asymptomatic. This practice lasts for the duration of the incubation period of 14 days, because individuals with these and other communicable diseases can be contagious before they develop symptoms and can serve as undetected source patients. Those that show onset of fever and/or respiratory illness are referred to a medical provider for evaluation. Cohorting is discontinued when the 14-day incubation period completes with no new cases. Per ICE policy, detainees diagnosed with any communicable disease who require isolation are placed in an appropriate setting in accordance with CDC or state and local health department guidelines.

16. ECDC manages male detainees and provides daily access to sick call in a clinical setting and onsite mental health and dental services. The facility can admit patients to the local hospital for a higher level of care when needed.

17. I have been informed that IHSC has the following information:

    a. As of April 8, 2020, there are no confirmed cases of COVID-19 at ECDC.

    b. There have been no ICE detainees suspected of having COVID-19 at ECDC.

18. ECDC has an ICE population within their approved capacities and is not overcrowded.

19. ECDC has increased sanitation frequency and provide sanitation supplies as follows:

    a. All common areas in the facility are being disinfected multiple times per day. These areas include detainee housing areas, law libraries, medical areas, intake areas, door handles throughout the facility, desk and counter surfaces in high traffic areas, lobby seating areas, restrooms, common areas, and any other areas the facility identified as needing such cleaning.

    b. Additional cleaning products have been added to housing areas and are available to detainees.

c. Alcohol based disinfectant dispensers have been placed in lobby areas for public and staff use.

d. Internal facility areas have been equipped with disinfectant dispensers.

e. Detainees have been educated through in-person town halls on best practices to keep from spreading any contagions. Educational posters with illustrations and instructions in English and Spanish demonstrating good hygiene practices have been placed throughout the facility to include detainee living areas.

20. ECDC provides education on COVID-19 to staff and detainees to include daily video presentations in English and Spanish on housing unit televisions on hand washing hygiene and risk exposure mitigation. Detainees have been reminded to seek medical care if they feel ill. ECDC provides detainees daily access to medical staff through a sick call process. Medical staff also visit housing units multiple times per day to provide medication distribution and welfare checks as warranted.

21. Due to the current COVID-19 global pandemic and for the safety of ICE detainees and facility staff, as of March 13, 2020, in-person social visitation and facility tours at ECDC have been suspended until further notice to mitigate the potential transmission of COVID-19.

22. However, ECDC detainees have access to dayrooms, telephones, and law library computers within NDS regulatory guidelines. There are telephones within each housing unit proportional to the population, which are checked daily and rarely out of order. If a telephone is out of order, the vendor repairs it within a few days. The only interruptions to dayroom access and telephones are during counts during which detainees must be by their beds. Counts take approximately 30-45 minutes. Access to dayrooms and telephones has not been impacted by COVID-19.

23. Indigent detainees may request free phone calls within NDS regulations.

24. In-person legal visitation remains permitted at ECDC. Non-contact legal visits (e.g., communication via tele video) are offered first and strongly encouraged, to limit exposure to ICE detainees. However, if the attorney believes the legal visit requires contact, attorneys are able to meet with their clients at ECDC in the attorney visiting rooms. For contact attorney visits, detainees must wear surgical masks, which are provided by ECDC. All attorneys are allowed 24/7access to contact and non-contact visitation with detainees.

25. All visitors who wish to enter the ECDC beyond the lobby must submit to a temperature check and complete a questionnaire to determine COVID-19 risk. All visitors, including attorneys, must also wear personal protective equipment (surgical or N95 mask, and latex gloves or equivalent) in order to enter the facility.

26. Staff entering on duty each day must submit to temperature checks and complete questionnaires to determine COVID-19 risk prior to assuming their posts and positions.

27. All new arrival detainees as well as detainees who are transported to any offsite location (hospitals, medical appointments, interviews) are, upon return, housed separate from the general population for 14 days to monitor for the onset of any symptoms related to COVID-19. This separate housing and monitoring process is in addition to the initial intake screenings and temperature checks described in paragraphs 13 and 14.

28. ECDC has designated housing units for the cohort or quarantine of detainees who are suspected of COVID-19 infection, to be addressed as set forth in paragraphs 12, 13 and 14, supra.

29. ICE, ECDC management, and the Etowah Health Services Administrator (HAS) at ECDC are conducting daily assessments of detainee populations, modifying programming and housing detainees in a manner to promote social distancing. Detainees are encouraged to exercise social distancing protocols within their housing units and while participating in outdoor recreation. Common areas have been temporarily limited in regard to group sizes and seat spacing to encourage social distancing. Occupancy limits have been temporarily reduced in law libraries, Intake, medical and court hold rooms. For group movements, detainees are reminded to practice social distancing protocols to further address social distancing efforts.

Executed this 10th day of April 2020 at Birmingham, Alabama.

Michael Nelson
Assistant FieldOffice Director, New Orleans
Enforcement and Removal Operations
U.S. Immigration and Customs Enforcement

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FAOUR ABDALLAH FRAIHAT, *et al.*, *Plaintiffs*, v. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *et al.*, *Defendants*.	Case No. 5:19-CV-01546 JGB (SHKx)

DECLARATION OF OFFICER IN CHARGE JOHN BRETZ

I, John Bretz, make the following statements under oath and subject to the penalty of perjury:

1. I am employed by U.S. Department of Homeland Security, Immigration and Customs Enforcement (ICE), and currently serve as the Officer in Charge. I have held this position since 2019.

2. I provide this declaration based on my personal knowledge, belief, reasonable inquiry, and information obtained from various records, systems, databases, other DHS employees, employees of DHS contract facilities, and information portals maintained and relied upon by DHS in the regular course of business.

3. In my current position, I am an Officer in Charge at the Stewart Detention Center, at the Atlanta Field Office, employed by the U.S. Department of Homeland Security (DHS), U.S. Immigration and Customs Enforcement (ICE), Enforcement and Removal Operations (ERO). In this capacity, I manage ERO personnel and provide oversight over ERO's operations at the Stewart Detention Center. I have been employed by the former Immigration and Naturalization Service (INS) and ICE since 1995.

4. ICE Health Service Corps (IHSC) provides direct medical, dental, and mental health patient care to approximately 13,500 detainees housed at 20 IHSC-staffed facilities throughout the nation.

5. IHSC's FMCs ensure that the provision of medical care by contractors to the ICE detainees within the IGSA facilities meets detention standards, as required by the IGSA contract. The FMCs do not provide hands-on care or direct the care within the IGSAs but monitor the medical care and services provided by the contract facilities. Medical staff at the contract facilities are directly responsible for medical care at the facility.

6. IHSC comprises a multidisciplinary workforce that consists of U.S. Public Health Service Commissioned Corps (USPHS) officers, federal civil servants, and contract health professionals.

7. Since the onset of reports of Coronavirus Disease 2019 (COVID-19), ICE epidemiologists have been tracking the outbreak, regularly updating infection prevention and control protocols, and issuing guidance to field staff on screening and management of potential exposure among detainees.

8. In testing for COVID-19, IHSC is also following guidance issued by the Centers for Disease Control (CDC) to safeguard those in its custody and care.

9. Each detainee is screened for disabilities upon admission by a qualified healthcare professional. Identified disabilities are further evaluated and reasonable accommodations are provided as medically appropriate.

10. At the facility, during intake medical screenings, detainees are assessed for fever and respiratory illness, are asked to confirm if they have had close contact with a person with laboratory-confirmed COVID-19 in the past 14 days, and whether they have traveled from or through area(s) with sustained community transmission in the past two weeks.

11. The detainee's responses and the results of these assessments will dictate whether to monitor or isolate the detainee. Those detainees who present symptoms compatible with COVID-19 will be placed in isolation, where they will be tested. If testing is positive, they will remain isolated and treated. In case of any clinical deterioration, they will be referred to a local hospital.

12. In cases of known exposure to a person with confirmed COVID-19, asymptomatic detainees are placed in cohorts with restricted movement for the duration of the most recent incubation period (14 days after most recent exposure to an ill detainee) and are monitored daily for fever and symptoms of respiratory illness. Cohorting is an infection-prevention strategy which involves housing detainees together who were exposed to a person with an infectious organism but are asymptomatic. This practice lasts for the duration of the incubation period of 14 days, because individuals with these and other communicable diseases can be contagious before they develop symptoms and can serve as undetected source patients. Those that show onset of fever and/or respiratory illness are referred to a medical provider for evaluation. Cohorting is discontinued when the 14-day incubation period completes with no new cases. Per ICE policy, detainees diagnosed

with any communicable disease who require isolation are place in an appropriate setting in accordance with CDC or state and local health department guidelines.

13. Stewart Detention Center has the following medical capabilities:

- The facility, which manages males only, provides daily access to sick calls in a clinical setting, and infirmary and access to specialty services and hospital care.

14. As of 9:22 a.m. on April 10, 2020, IHSC has the following information:

a. There are 30 ICE detainee suspected cases of COVID-19 in the facility who are on medical observation per CDC guidelines.

b. There are 5 confirmed cases of COVID-19 among ICE detainees in the facility. The 5 confirmed cases are isolated and receiving medical treatment consistent with CDC guidelines.

15. The facility has populations within their approved capacities and are not overcrowded.

16. The facility has increased sanitation frequency and provides sanitation supplies as follows:

- The facility provides 24-hour access to sanitation supplies including, disinfectants, hand sanitizer, and soap in every housing unit at the facility. The administration is encouraging both staff and the jail general population to use these tools often and liberally.

17. The facility has suspended in person social visitation and facility tours. Noncontact legal visitation is still permitted provided the visitor provides their own personal protective equipment and submits to screening prior to entering the facility.

18. The facility is screening all staff and vendors when they enter the facilities including body temperatures.

19. The facility is screening all detainee intakes when they enter the facilities including travel histories, medical histories and checking body temperatures and have procedures to continue monitoring the populations' health.

20. The facility provides education on COVID-19 to staff and detainees to include the importance of hand washing and hand hygiene, covering coughs with the elbow instead of with hands, and requesting to seek medical care if they feel ill. The facilities provide detainees daily access to sick call.

21. The facility has identified housing units for the quarantine of patients who are suspected of or test positive for COVID-19 infection to be addressed as set forth in paragraphs 8, 9 and 10, *supra*.

22. ICE has reviewed its detained "at risk population" as identified by the CDC guidelines to determine if detention remains appropriate, considering the detainee's health, public safety and mandatory detention requirements, and adjusted custody conditions, when appropriate, to protect health, safety and well-being of its detainees.

I declare, under penalty of perjury under 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my knowledge and based on information obtained from other individuals employed by ICE.

DATED: April 10, 2020

John Bretz

Enforcement and Removal Operations
U.S. Immigration and Customs Enforcement

From: Berg, Peter B
To: [redacted]
Cc: [redacted]
Subject: Updated Guidance: COVID-19 Detained Docket Review-- Effective Immediately
Date: Saturday, April 4, 2020 5:17:40 PM

UPDATE: Please see the updated guidance below. The previous version of this guidance is rescinded.

This message is sent from Peter B. Berg, (a)Assistant Director, Field Operations

To: Field Office Directors and Deputy Field Office Directors

Subject: COVID-19 Detained Docket Review

Background:

U.S. Immigration and Customs Enforcement (ICE) has taken a number of significant and proactive measures in response to the Coronavirus Disease 2019 (COVID-19) pandemic, in order to mitigate the spread of COVID-19 to aliens detained in its custody, its workforce, and stakeholders at its detention facilities. As more becomes known about the virus, ERO will continue to update its practices and guidance in this regard. General ICE COVID-19 guidance is available here and will be updated and supplemented on an ongoing basis.

On March 18, 2020, you were directed to review the cases of aliens detained in your area of responsibility who were over the age of 70 or pregnant to determine whether continued detention was appropriate. The Centers for Disease Control and Prevention (CDC) has developed a list of categories of individuals identified as potentially being at higher-risk for serious illness from COVID-19. Expanding on that list, ERO has identified the following categories of cases that should be reviewed to re-assess custody:

- Pregnant detainees or those having delivered in the last two weeks
- Detainees over 60 years old
- Detainees of any age having chronic illnesses which would make them immune-compromised, including but not limited to:
  - Blood Disorders
  - Chronic Kidney Disease
  - Compromised immune system (e.g., ongoing treatment such as chemotherapy or radiation, received an organ or bone marrow transplant, taking high doses of corticosteroids or other immunosuppressant medications)
  - Endocrine disorders

- Metabolic disorders
- Heart disease
- Lung disease
- Neurological and neurologic and neurodevelopment conditions

As part of your ongoing application of the CDC's Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities (available here), please identify all cases within your AOR that meet any of the criteria above and validate that list with assistance from IHSC or your Field Medical Coordinator to ensure the conditions listed are still present and do result in the detainee potentially having a higher risk for serious illness from COVID-19. After identifying a case as meeting any of the above criteria, you should review the case to determine whether continued detention remains appropriate in light of the COVID-19 pandemic.

The presence of one of the factors listed above should be considered a significant discretionary factor weighing in favor of release. To be clear, however, it may not always be determinative. Field offices must remain cognizant of the requirements of mandatory detention. Section 236(c) of the Immigration and Nationality Act (INA) mandates the detention of certain categories of criminal and terrorist aliens during the pendency of removal proceedings. Such aliens may not be released in the exercise of discretion during the pendency of removal proceedings even if potentially higher-risk for serious illness from COVID-19. INA § 236(c); 8 C.F.R. § 236.1(c)(1)(i). Such aliens may only be released following a final order issued by an immigration judge, the Board of Immigration Appeals, or a federal court granting the alien relief, dismissing proceedings, or terminating proceedings. Similarly, pursuant to section 241(a)(2), certain criminal and terrorist aliens subject to a final order of removal may not be released during the 90-day removal period even if potentially higher-risk for serious illness from COVID-19. INA § 241(a)(2). For alien's subject to discretionary detention under section 236(a), please remember that release is prohibited, even if the alien is potentially higher-risk for serious illness from COVID-19, if such release would pose a danger to property or persons. 8 C.F.R. § 236.1(c)(8).

When reviewing cases of alien's subject to discretionary detention under 236(a), the following must be completed:

- **Cases involving any arrests or convictions for any crimes that involve risk to the public regardless of the date of arrest or conviction must be reviewed and approved by a Deputy Field Office Director (DFOD) or higher before a determination is made to release.**
    - Examples of crimes that involve a risk to the public include any crime that: involves any form of violence, driving while intoxicated, threatening behaviors, terroristic threats, stalking, domestic violence, harm to a child, or any form of assault or battery. This list is not intended to be

comprehensive. If there is any doubt whether a crime involves risk to the public, consult with your Office of the Principal Legal Advisor (OPLA) field location and your respective Deputy Assistant Director for Domestic Operations before a custody redetermination is completed.

- You may consider the age of an arrest or conviction as a mitigating or an aggravating factor, but the age of an arrest or a conviction does not automatically outweigh public safety concerns.

With regard to arriving aliens and certain other aliens eligible for consideration of parole from custody, under current circumstances and absent significant adverse factors, the fact that an alien is potentially higher-risk for serious illness from COVID-19, may form the basis for a determination that "continued detention is not in the public interest," justify release under 8 C.F.R. § 212.5(b)(5).

For other aliens for whom there is discretion to release, field offices remain responsible for articulating individualized custody determinations, taking into consideration the totality of the circumstances presented in the case. The fact that an alien is potentially higher-risk for serious illness from COVID-19 should be considered a factor weighing in favor of release. You may also consider alternatives to detention consistent with ICE ATD policies, if ATD is determined to sufficiently mitigate the risk of flight.

Any releases attributed to reviews of COVID-19 susceptibility shall be documented in the ENFORCE Alien Removal Module (EARM) under Special Class - COVID-19 Chronic Care Release. As previously communicated, these individuals should be placed on ATD if possible.

Please contact your local OPLA field location should you have any questions or concerns regarding your authority to release in any individual case.

For any questions on this guidance, please contact your respective Deputy Assistant Director for Domestic Operations.

Limitation on the Applicability of this Guidance. This message is intended to provide internal guidance to the operational components of U.S. Immigration and Customs Enforcement. It does not, is not intended to, shall not be construed to, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any person in any matter, civil or criminal.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

KANAT UMARBAEV,	:	
Petitioner	:	
	:	**No. 1:20-cv-00413**
v.	:	
	:	**(Judge Kane)**
WARDEN CRAIG A. LOWE	:	
Respondent	:	

MEMORANDUM

Petitioner Kanat Umarbaev ("Petitioner") is currently confined at the Pike County Correctional Facility ("PCCF"), a detainee of the United States Department of Homeland Security ("DHS"), Immigration and Customs Enforcement ("ICE"). On March 10, 2020, Petitioner, then proceeding pro se, initiated the above-captioned action by filing a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 (Doc. No. 1), alleging that his continued detention by ICE had exceeded constitutional limits. Following an Order to show cause (Doc. No. 4), Respondent filed a response, contending that Petitioner's detention is lawful (Doc. No. 8). On March 30, 2020, counsel appeared on Petitioner's behalf. (Doc. No. 7.) On April 6, 2020, Petitioner filed a traverse supplementing his original § 2241 petition (Doc. No. 9) and a motion for expedited consideration and/or an emergency hearing raising an additional claim based upon the COVID-19 pandemic (Doc. No. 10). In an Order dated April 7, 2020, the Court directed Respondent to file a supplemental response addressing the arguments raised in Petitioner's traverse by 12:00 p.m. on April 8, 2020. (Doc. No. 11.) Respondent has done so. (Doc. No. 14.) Petitioner's § 2241 petition, therefore, is ripe for disposition. The Court will grant Petitioner's motion for expedited consideration (Doc. No. 10) to the extent that this Memorandum serves as the Court's expedited review of Petitioner's § 2241 petition (Doc. No. 1). For the reasons set forth below, Petitioner's § 2241 petition will be denied.

I. BACKGROUND

A. Petitioner's Immigration Proceedings

Petitioner is a native of the former Union of Soviet Socialist Republics ("USSR") and a citizen of Kyrgyzstan. (Doc. No. 8-1 at 12.) He was admitted to the United States on February 22, 2000, as a non-immigration visitor for pleasure. (Id.) Petitioner had authorization to remain in the United States until August 22, 2000. (Id.) On January 4, 2001, ICE issued a Notice to Appear, charging Petitioner with being removable pursuant to § 237(a)(1)(B) of the Immigration and Nationality Act ("INA") because he remained in the United States for a time longer than that permitted. (Id.) At a hearing before an immigration judge, Petitioner conceded his removability as charged. (Id.)

Thereafter, Petitioner filed applications for asylum and withholding of removal. (Id. at 9.) On March 14, 2003, an immigration judge denied Petitioner's applications for relief and ordered him removed to Kyrgyzstan. (Id.) On August 13, 2003, Petitioner was convicted in New York of driving while intoxicated ("DWI"). (Id. at 20.) On May 25, 2004, the Board of Immigration Appeals ("BIA") summarily dismissed Petitioner's appeal from the immigration judge's March 14, 2003 order because Petitioner had failed to file a brief or statement in support of his appeal. (Id. at 16.) On June 30, 2004, Petitioner sustained a second DWI conviction in New York. (Id. at 20.)

On August 28, 2019, a DHS Fugitive Operations Team apprehended and detained Petitioner. (Id. at 19.) ICE began taking steps to execute Petitioner's removal order, including requesting a travel document from the Embassy of Kyrgyzstan. (Id. at 4.) On October 8, 2019, Petitioner filed a motion to reopen his removal proceedings with the BIA. (Doc. No. 9 at 28-46.) Petitioner asserted that his recent conversion to Christianity, coupled with current conditions for

Christians in Kyrgyzstan, warranted reopening of his proceedings and supported a new application for asylum. (Id. at 28.) On December 15, 2019, DHS received a travel document for Petitioner from the Embassy of Kyrgyzstan and scheduled Petitioner for removal on January 3, 2020. (Doc. No. 8-1 at 4.) On January 2, 2020, the BIA denied Petitioner's request for a stay of removal pending consideration of his motion to reopen, stating that there was little likelihood that his motion to reopen would be granted. (Id. at 28.)

On January 3, 2020, DHS transported Petitioner to the John F. Kennedy International Airport to place him on a commercial flight to Moscow, Russia, with a connecting flight to Bishkek, Kyrgyzstan. (Id. at 5.) That same day, Petitioner filed a petition for review, along with an emergency motion for a stay of removal, with the United States Court of Appeals for the Second Circuit. (Id. at 30-39.) DHS attempted to place Petitioner on the airplane at the final boarding call. (Id. at 5.) Petitioner, however, "actively and physically fail[ed] to comply with ICE's orders by 'falling on the floor.'" (Id.) The removal attempt "was called off and [Petitioner] was removed from the airport and placed in the ICE transport vehicle." (Id.) Moments later, the Second Circuit granted Petitioner's emergency motion for a stay of removal. (Id. at 42.)

On January 21, 2020, DHS conducted a custody review and determined that Petitioner would remain detained pending a decision on his petition for review. (Id. at 44.) The DHS observed that Petitioner's final order of removal had been in effect since May 25, 2004 and that Petitioner had been an ICE fugitive from 2004 until 2019. (Id.) DHS also noted that Petitioner "ha[s] multiple convictions for driving under the influence." (Id.) DHS concluded that Petitioner posed "a flight risk and a significant public threat." (Id.)

Petitioner filed the instant § 2241 petition on March 10, 2020. (Doc. No. 1.) On March 16, 2020, an immigration judge conducted a bond hearing for Petitioner pursuant to Guerrero-Sanchez v. Warden York County Prison, 905 F.3d 208 (3d Cir. 2018). (Doc. No. 8-1 at 46.) The immigration judge denied Petitioner's request for a custody redetermination, concluding that Petitioner "remains a risk of danger to persons and property." (Id.) On March 24, 2020, Petitioner filed a motion for reconsideration of the immigration judge's decision. (Doc. No. 9 at 234-40.) That same day, Petitioner, through emails by counsel, requested that ICE release him from custody to "seek medical treatment for symptoms that may be related to the coronavirus." (Id. at 244.) Petitioner's counsel asserted that Petitioner was "experiencing a sore throat, shortness of breath[,] and [a] runny nose." (Id. at 245.) Counsel also noted that Petitioner "suffers from high blood pressure, which has not been well controlled during his detention." (Id.) On March 31, 2020, DHS denied Petitioner's request for release. (Id. at 244.) As of the date of this Memorandum and Order, Petitioner's motion to reopen is still pending before the BIA and his petition for review is still pending before the Second Circuit.

B. COVID-19 and Conditions at PCCF

Coronavirus Disease 2019 (COVID-19) "is an infectious disease caused by a newly discovered coronavirus." See Coronavirus Overview, WORLD HEALTH ORGANIZATION, https://www.who.int/health-topics/coronavirus#tab=tab_1 (last accessed Apr. 8, 2020). The COVID-19 virus "is spreading very easily and sustainably between people." See How COVID-19 Spreads, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html (last accessed Apr. 8, 2020). "Most people infected with the COVID-19 virus will experience mild to moderate respiratory illness and recover without requiring special treatment." Id. However,

some infected individuals will experience severe illness, and certain groups, including "[o]lder people[] and those with underlying medical problems like cardiovascular disease, diabetes, chronic respiratory disease, and cancer" are at a higher risk of developing serious illness. See id. In the past few weeks, governments have imposed policies designed to curb the spread of COVID-19. For example, businesses deemed not life sustaining have been closed in Pennsylvania since March 21, 2020. See Order of the Governor of the Commonwealth of Pennsylvania Regarding the Closure of All Businesses that Are Not Life Sustaining, https://www.scribd.com/document/452416027/20200319-TWW-COVID-19-Business-Closure-Order (Mar. 19, 2020). Additionally, on April 1, 2020, Governor Wolf issued an order for individuals to stay home that applies to the Commonwealth of Pennsylvania in its entirety through April 30, 2020. See Order of the Governor of the Commonwealth of Pennsylvania for Individuals to Stay at Home, OFFICE OF THE GOVERNOR OF PENNSYLVANIA, https://www.governor.pa.gov/wp-content/uploads/2020/04/20200401-GOV-Statewide-Stay-at-Home-Order.pdf (Apr. 1, 2020). Since the onset of the pandemic, "ICE epidemiologists have been tracking the outbreak, regularly updating infection prevention and control protocols, and issuing guidance to field staff on screening and management of potential exposure among detainees." (Doc. No. 14-1 at 4.)

PCCF "has the capacity to house 375 detainees and has historically often operated near capacity." (Id.) As of April 3, 2020, "there were only 250 combined inmates and detainees housed a[t] the facility." (Id.) Upon admission, each detainee is screened for disabilities. (Id.) During "intake medical screenings, detainees are assessed for fever and respiratory illness, are asked to confirm if they have had close contact with a person with laboratory-confirmed COVID-19 in the past 14 days, and whether they have traveled from or through area(s) with

sustained community transmission in the past two weeks." (Id.) Those who "present symptoms compatible with COVID-19 will be placed in isolation, where they will be tested." (Id.) If a test is positive, that inmate remains isolated and treated and, if necessary, is referred to a local hospital. (Id.) As of April 4, 2020, four (4) ICE detainees at PCCF have tested positive for COVID-19, as have five (5) correctional officers. (Id. at 7.) The detainees are in quarantine under medical observation, and the correctional officers are under self-quarantine. (Id.)

In the case of known exposure to someone who has been confirmed to have COVID-19, "asymptomatic detainees are placed in cohorts with restricted movement for the duration of the most recent incubation period . . . and are monitored daily for fever and symptoms of respiratory illness." (Id. at 5.) Cohorting "is an infection prevention strategy" that "involves housing detainees together who were exposed to a person with an infectious organism but are asymptomatic." (Id.) This practice lasts for fourteen (14) days "because individuals with these and other communicable diseases can be contagious before they develop symptoms and can serve as undetected source patients." (Id.) Those who show "onset of fever and/or respiratory illness are referred to a medical provider for evaluation." (Id.) Cohorting "is discontinued when the 14-day incubation period completes with no new cases." (Id.) Pursuant to ICE policy, "detainees diagnosed with any communicable disease who require isolation are placed in an appropriate setting in accordance with CDC or state and local health department guidelines." (Id.)

PCCF has "instituted a modified lockdown schedule" in response to COVID-19. (Id. at 8.) Movement throughout the facility is restricted. (Id.) "Detainees[']' ability to leave their cells is staggered in order to promote social distancing." (Id.) All detainees are required to maintain social distancing when not within the same cell, and meals are served to detainees within their

cells. (Id.) All staff members are required to wear masks. (Id.) "Daily temperature checks and screening for influenza like illness (ILI) symptoms have been implemented for all detainees." (Id.) "If any detainee displays ILI symptoms, they[,] along with any cell mates, are placed in quarantine." (Id.) Staff have also "increased the frequency of cleaning and disinfecting, including often used touch surfaces." (Id.)

C. Petitioner's Recent Medical History

On April 1, 2020, Petitioner presented to the medical department at PCCF with upper respiratory complaints. (Doc. No. 15 at 2.) Medical staff noted that Petitioner was unable to take certain medications because of his history of high blood pressure. (Id.) Petitioner was prescribed Tylenol, an antihistamine, and cough medication. (Id.) At that time, Petitioner's temperature was 98.3 degrees. (Id. at 8.) Medical staff educated Petitioner on reporting worsening symptoms and increasing his fluid intake. (Id. at 2.)

On April 3, 2020, Petitioner was placed into medical quarantine because of "possible" COVID-19 exposure. (Id. at 3.) Medical staff directed that his temperature be checked twice daily. (Id.) Any fever reducers were discontinued until the end of the fourteen (14)-day quarantine period. (Id.) On April 4, 2020, Petitioner complained that he had a sore throat. (Id. at 7.) Staff noted that he already had a cold pack, but that Tylenol and Motrin were unable to be used for his unit. (Id.) Petitioner's temperature on April 4, 2020 was 98.4 degrees at the first check and 97.6 at the second check. (Id.) Petitioner has not had a temperature over 98.9 degrees through April 7, 2020. (Id. at 5-6.)

II. LEGAL STANDARD

Under 8 U.S.C. § 2241(c), a prisoner or detainee may receive habeas relief only if he "is in custody in violation of the Constitution or laws or treaties of the United States." See 28

U.S.C. § 2241(c)(3); see also Maleng v. Cook, 490 U.S. 488, 490 (1989). Because Petitioner is currently detained within the jurisdiction of this Court and asserts that his continued detention violates due process, this Court has jurisdiction over his § 2241 petition. See Zadvydas v. Davis, 533 U.S. 678, 699 (2001); Spencer v. Kemna, 523 U.S. 1, 7 (1998).

III. DISCUSSION

In the instant case, the parties do not dispute that Petitioner is currently detained pursuant to 8 U.S.C. § 1231(a), which provides for the detention of individuals who are subject to a final order of removal. See 8 U.S.C. § 1231(a); cf. Diouf v. Mukasey, 542 F.3d 1222, 1229-30 (9th Cir. 2008) (concluding that the alien petitioner was detained under § 1231(a) because his pending appeal and stay of removal did not entail judicial review of a removal order but instead involved review of the denial of a motion to reopen). That section provides that "[e]xcept as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days." See 8 U.S.C. § 1231(a)(1)(A). During this ninety (90)-day period, "the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found . . . deportable under section 1227(a)(2)." See id. § 1231(a)(2). After the ninety (90)-day period expires, the alien's detention may continue, or he may be released on supervision. See id. § 1231(a)(3), (6).

The Supreme Court has concluded, however, that § 1231 "limits an alien's post-removal-period detention to a period reasonably necessary to bring about the alien's removal from the United States. It does not permit indefinite detention." See Zadvydas, 533 U.S. at 698. Thus, "[o]nce removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute." See id. at 699. To establish a uniform baseline, the Supreme Court concluded that a

period of six (6) months is a "presumptively reasonable period of detention." See id. at 701. Moreover, the United States Court of Appeals for the Third Circuit has concluded that "an alien detained under § 1231(a)(6) is generally entitled to a bond hearing after six months (i.e., 180 days) of custody." See Guerrero-Sanchez, 905 F.3d at 226. Following such a hearing, the alien "is entitled to be released from detention unless the government establishes that the alien poses a risk of flight or a danger to the community." See id. at 224 (quoting Diouf v. Napolitano, 634 F.3d 1081, 1092 (9th Cir. 2011)). "The Government must meet its burden in such bond hearings by clear and convincing evidence." See id. at 224 n.12.

As noted supra, Petitioner has been detained pursuant to § 1231(a)(6) since August 28, 2019. As of the date of this Memorandum, therefore, Petitioner has been detained for over seven (7) months, which is beyond the presumptively reasonable six (6)-month period set forth in Zadvydas and Guerrero-Sanchez. The parties do not dispute that on March 16, 2020, an immigration judge conducted a bond hearing pursuant to Guerrero-Sanchez and concluded that Petitioner should remain detained because he "remains a risk of danger to persons and property." (Doc. No. 8-1 at 46.) Petitioner, however, now asserts that he is entitled to habeas relief because: (1) the immigration judge violated his right to due process by applying the wrong legal standard, failing to afford the procedural safeguards mandated by Guerrero-Sanchez, and misapplying BIA precedent; and (2) his detention violates due process because "he is at higher than normal risk of serious illness or death if he contracts the COVID-19 virus and DHS is unable to mitigate the risk that he will be infected." (Doc. No. 9 at 22.) The Court considers each argument in turn.

A. Review of Petitioner's March 16, 2020 Custody Determination

On March 16, 2020, an immigration judge denied Petitioner's request for a custody determination. (Doc. No. 9 at 231.) The immigration judge noted that Petitioner's request was

brought pursuant to 8 C.F.R. § 1236 and denied his request, concluding that Petitioner "remains a risk of danger to persons and property." (Id.) Petitioner now asserts that the immigration judge violated his due process rights by applying the wrong legal standard and misapplying BIA precedent. (Id. at 10-16.) Respondent asserts that the Court lacks jurisdiction over Petitioner's claim because Petitioner failed to exhaust his administrative remedies. (Doc. No. 14 at 12-13.) For the reasons discussed below, the Court agrees with Respondent.

The Third Circuit has noted that requiring exhaustion of administrative remedies for habeas petitions fosters important goals because: "(1) allowing the appropriate agency to develop a factual record and apply its expertise facilitates judicial review; (2) permitting agencies to grant the relief requested conserves judicial resources; and (3) providing agencies the opportunity to correct their own errors fosters administrative autonomy." See Moscato v. Fed. Bureau of Prisons, 98 F.3d 757, 761-62 (3d Cir. 1996). "These very important purposes are frequently furthered by requiring aliens who receive a bond hearing before the immigration judge to exhaust their administrative remedies and raise any issues with the BIA prior to seeking federal habeas corpus relief." Chajchic v. Rowley, No. 1:17-cv-457, 2017 WL 4401895, at *3 (M.D. Pa. July 25, 2017), report and recommendation adopted, 2017 WL 4387062 (Oct. 3, 2017). In the instant case, the record before the Court reflects that on March 24, 2020, Petitioner filed a motion for reconsideration of the immigration judge's March 16, 2020 order denying his request for bond. (Doc. No. 9 at 234-40.) As of the date of this Memorandum and Order, that motion remains pending before the immigration judge. Thus, Petitioner's arguments regarding the alleged deficiencies in the immigration judge's orders have not yet been exhausted at the administrative level. Accordingly, to the extent Petitioner requests that the Court review the immigration

judge's March 16, 2020 order denying him bond, the Court lacks jurisdiction to do so at this time.[1]

B. COVID-19 Claim

Petitioner also maintains that his detention violates due process because he is at heightened risk of serious illness or death should he contract the COVID-19 virus. (Doc. No. 9 at 16-22.) Petitioner suggests that he is particularly unsafe because he is "an older person suffering from hypertension, high cholesterol[,] and possible immune compromising anemia." (Id. at 22.) Petitioner seeks immediate release, arguing that "DHS's inability to protect him and failure to release him amount to a life-threatening violation of his constitutional right to due process." (Id. at 22-23.)

As an initial matter, Respondent asserts that a § 2241 petition is not the proper vehicle for Petitioner's claim, maintaining that such a claim must instead be raised in a civil rights action. (Doc. No. 14 at 15-19.) While the issue of whether Petitioner may pursue such a claim in a § 2241 petition has not been resolved, the Court will examine his claim in the context of habeas corpus because Petitioner is seeking immediate release from confinement based upon the COVID-19 pandemic.[2] Nevertheless, for the reasons set forth below, the Court finds that

[1] In his § 2241 petition, Petitioner suggests that he is entitled to release pursuant to Zadvydas because his removal is not reasonably foreseeable. (Doc. No. 1 at 7.) Petitioner, however, presents no evidence to support this assertion, and he appears to abandon his Zadvydas claim in his traverse. Without any facts or evidence beyond conclusory allegations to support his Zadvydas claim, the Court will not grant relief on this ground. Petitioner, however, remains free to file a new § 2241 petition challenging his detention should he remain detained after he has exhausted his administrative remedies and may raise his Zadvydas claim again at that time.

[2] The Third Circuit has concluded that a habeas corpus petition is the proper vehicle for challenges to "the fact or length of confinement." See Tedford v. Hepting, 990 F.2d 745, 748 (3d Cir. 1993) (quoting Preiser v. Rodriguez, 411 U.S 475, 494 (1973)). A habeas petition is also the proper vehicle for challenging the "execution" of such confinement. See Woodall v. Fed. Bureau of Prisons, 432 F.3d 235, 241-42 (3d Cir 2005). When a petitioner seeks immediate

Petitioner has not demonstrated a likelihood of success on the merits for purposes of establishing entitlement to the requested injunctive relief.[3] "To establish a likelihood of success on the merits, a movant must produce sufficient evidence to satisfy the essential elements of the underlying cause of action." Pa. Prof'l Liab. Joint Underwriting Ass'n v. Wolf, 328 F. Supp. 3d 400, 407 (M.D. Pa. 2018) (citing Punnett v. Carter, 621 F.2d 578, 582-83 (3d Cir. 1980)). In

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release from custody, the "sole federal remedy" lies in habeas corpus. See Preiser, 411 U.S. at 500.

Respondents maintain that while the relief Petitioner requests may sound in habeas, his claim regarding unconstitutional conditions of confinement does not. The Third Circuit has stated that "a habeas attack on the conditions of confinement" is cognizable "only in extreme cases." See Ali v. Gibson, 572 F.2d 971, 975 n.8 (3d Cir. 1978), superseded by statute on other grounds as stated in Callwood v. Enos, 230 F.3d 627, 633 (3d Cir. 2000). As Chief Judge Conner of this Court recently noted, "[b]eyond the Third Circuit, a split has developed as to whether habeas corpus provides a remedy for a conditions-of-confinement claim that does not implicate the fact, duration or execution of the petitioner's confinement." See Camacho Lopez v. Lowe, No. 3:20-cv-563, 2020 WL 1689874, at *5 (M.D. Pa. Apr. 7, 2020) (citing cases). "This divide has been borne out in recent weeks, as courts across the country confront numerous habeas petitions citing the threat posed by the COVID-19 viral pandemic as a basis for immediate release." Id. Chief Judge Conner concluded that "certain extraordinary conditions of confinement may warrant a habeas remedy." See id.

In Camacho-Lopez, Chief Judge Conner concluded that an ICE detainee at PCCF who had contracted COVID-19 and claimed that staff at PCCF were unable to provide adequate medical care had sufficiently stated "the extreme case in which habeas relief might be available." See id. at *6. He, therefore, permitted the petitioner to proceed via his § 2241 petition. See id. This Court has also permitted ICE detainees who sought release based upon an increased risk of contracting the COVID-19 virus to pursue habeas relief. See Thakker v. Doll, No. 20-cv-480, Doc. No. 47 at 5 (M.D. Pa. Mar. 31, 2020). While Petitioner has not tested positive for COVID-19, as noted above, he has been placed in quarantine for "possible" COVID-19 exposure. Accordingly, in light of Petitioner's allegations, as well as the Camacho Lopez and Thakker decisions, the Court will assume, for purposes of this Memorandum, that Petitioner may pursue his claims via his § 2241 petition.

[3] The Court recognizes that Petitioner has not explicitly requested injunctive relief in the form of immediate release because of the COVID-19 pandemic. In light of Petitioner's motion to expedite and his challenge to his conditions of confinement based upon COVID-19, however, the Court concludes that Petitioner's request for release is similar to those presented in the motions for temporary restraining orders presented to this Court in recent cases. See Camacho Lopez, 2020 WL 1689874, at *6-9; Hope v. Doll, No. 20-cv-562, Doc. No. 11 at 4-15 (M.D. Pa. Apr. 7, 2020); Thakker, No. 20-cv-480, Doc. No. 47 at 5-25 (M.D. Pa. Mar. 31, 2020). Thus, the Court finds it appropriate to discuss the likelihood of Petitioner's success on the merits of his claim.

determining whether such a showing has been made, a court "must examine the legal principles controlling the claim and the potential defenses available to the opposing party." See id. (citing BP Chems. Ltd. v. Formosa Chem. & Fibre Corp., 229 F.3d 254, 264 (3d Cir. 2000)).

In his motion to expedite, Petitioner asserts "that his right to Due Process under the Fifth Amendment is being violated due to DHS's inability to provide reasonable protection for his health and safety as a result of his detention in a facility, where at least four detainees under the jurisdiction of DHS and four staff members have tested positive for COVID-19, and at least one has been hospitalized with serious illness." (Doc. No. 10 at 2.) The Due Process Clause provides that the federal government shall not deprive any person "of life, liberty, or property, without due process of law." See U.S. CONST. amend. V. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." Zadvydas, 533 U.S. at 690. "[T]he Due Process Clause applies to all persons within the United States, including aliens, whether their presence is lawful, unlawful, temporary, or permanent." Id. at 693. The due process rights of a pretrial detainee "are at least as great as the Eighth Amendment protections available to a convicted prisoner." See City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983). Civil immigration detainees "are entitled to the same due process protections" as pretrial detainees. See E.D. v. Sharkey, 928 F.3d 299, 306-07 (3d Cir. 2019) (citing Charles v. Orange Cty., 925 F.3d 73 (2d Cir. May 24, 2019); Chavero-Linares v. Smith, 782 F.3d 1038, 1041 (8th Cir. 2015); Belbachir v. Cty. of McHenry, 726 F.3d 975, 979 (7th Cir. 2013); Porro v. Barnes, 624 F.3d 1322, 1326 (10th Cir. 2010); Edwards v. Johnson, 209 F.3d 772, 778 (5th Cir. 2000)).

Petitioner's substantive due process claim may be viewed under the theory of deliberate indifference to serious medical needs. See Jones v. Wolf, No. 20-cv-361, 2020 WL 1643857, at

*3 (W.D.N.Y. Apr. 2, 2020) (addressing an immigration detainee's substantive due process claims pertaining to COVD-19-related risks under theories of deliberate indifference to serious medical needs and unconstitutional conditions of confinement). "The Supreme Court has held that 'deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain . . . proscribed by the Eighth Amendment.'" Tate v. Wiggins, No. 19-1242, 2020 WL 882880, at *2 (3d Cir. 2020) (internal quotations marks omitted) (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976)). Such claims asserted by pretrial detainees are evaluated under the same Eighth Amendment standard. See Natale v. Camden Cty. Corr. Facility, 318 F.3d 575, 581-82 (3d Cir. 2003); see also Bakhtiari v. Madrigal, No. 18-cv-38, 2019 WL 1531861, at *10 (evaluating such a claim asserted by a civil immigration detainee under the same standard). "In order to establish a violation of [a detainee's] constitutional right to adequate medical care, evidence must show (i) a serious medical need, and (ii) acts or omissions by prison officials that indicate deliberate indifference to that need." Natale, 318 F.3d at 582.

Additionally, Petitioner's claim may be viewed under the theory of unconstitutional conditions of confinement. See Jones, 2020 WL 1643857, at *3 (addressing an immigration detainee's substantive due process claims pertaining to COVD-19-related risks under theories of deliberate indifference to serious medical needs and unconstitutional conditions of confinement). In evaluating whether a pretrial detainee's conditions of confinement violate his substantive due process rights, "the proper inquiry is whether those conditions amount to punishment of the detainee." See Bell v. Wolfish, 441 U.S. 520, 535 (1979). "To determine whether challenged conditions of confinement amount to punishment, [a court must] determine[] whether a condition of confinement is reasonably related to a legitimate governmental objective." Sharkey, 928 F.3d at 307 (quoting Hubbard v. Taylor, 538 F.3d 229, 232 (3d Cir. 2008)). If the Court determines

that the condition is not so related, it "may infer 'that the purpose of the governmental action is punishment that may not be constitutionally inflicted upon detainees qua detainees.'" See id. (quoting Hubbard, 538 F.3d at 232).

Upon review of the instant petition, the parties' arguments, and the applicable law, the Court finds that Petitioner has not demonstrated an entitlement to relief based on his assertion that his health and safety are at risk due to the presence of COVID-19 at PCCF. The Court notes that, in his traverse, Petitioner states that: he "is under a doctor's care for hypertension and high cholesterol"; "[h]e has a history of significant bleeding after a recent hip fracture that required emergency surgery"; "[d]uring his last doctor's visit before he was detained, Petitioner's hemoglobin levels were abnormally low, a sign of anemia, which can affect the immune system"; and that "[h]is doctor ordered further blood testing, colonoscopy, and upper endoscopy, which has not been performed due to his detention." (Doc. No. 9 at 10.) Respondent has stated, however, that "[t]he fact that [it] has taken proactive measures [with respect to COVID-19]—such as cohorting and modified lockdowns, social distancing, increased sanitation measures—indicates that [it] is not deliberately indifferent to the risk of infection." (Doc. No. 14 at 22.) Respondent adds that although Petitioner has reported respiratory issues and a sore throat, "[h]e is being checked at least twice daily and has not exhibited any symptoms that have not been treated." (Id. at 24.) As of April 3, 2020, Petitioner was placed in quarantine for "possible" COVID-19 exposure. (Doc. No. 15 at 3.) His medical records indicate that he has not had a temperature over 98.9 degrees through April 7, 2020. (Id. at 5-6.) Petitioner will remain in quarantine until fourteen (14) days have passed. (Id. at 3.) The Court finds Respondent's representations and exhibits persuasive and sees no reason to question them at this juncture.

Moreover, based on the record presently before the Court, the Court cannot conclude that Petitioner has demonstrated a deliberate indifference to a serious medical need. See Camacho Lopez, 2020 WL 1689874, at *7 (finding that the detainee-petitioner who had tested positive for COVID-19 did not demonstrate deliberate indifference where, prior to the detainee's hospitalization, his medical records "establish[ed] that [he] was being regularly monitored and appropriately treated"). Additionally, to the extent that Camacho Lopez is distinguishable from the instant case because in Camacho Lopez, the petitioner already tested positive for COVID-19 and had been hospitalized, while Petitioner in this case has not reported a positive test result, the Court finds that Petitioner is still not entitled to release based on the potential risk of contracting the virus. While the Court is sympathetic to Petitioner's health-related concerns, the Court must conclude that on the basis of the record before it, including Petitioner's specific medical needs, Respondent's response to those specific medical needs, as well as its response to the presence of COVID-19 at PCCF, Petitioner has failed to demonstrate a constitutional violation based on deliberate indifference to his medical needs.[4] Accordingly, the Court finds Petitioner's arguments in favor of release to be without merit.

The Court is mindful that its review raises the specter of disparate results. Like one of the petitioners in Thakker, Petitioner is past the age of forty (40), has some recorded history of

[4] Moreover, the Court notes the Third Circuit's recent commentary that "the mere existence of COVID-19 in society and the possibility that it may spread to a particular prison alone" should not be viewed as a reason to order release from custody. See United States v. Raia, No. 20-1033, 2020 WL 1647922, at *2 (3d Cir. Apr. 2, 2020). While the Court in Raia considered the issue of release in the context of a motion for compassionate release by a defendant in a criminal case, this Court finds the Third Circuit's discussion persuasive in the case at bar, especially in light of the Court of Appeals' emphasis on the Bureau of Prisons' "extensive and professional efforts to curtail the virus's spread." See id. In a similar vein, as this Court has noted supra, Petitioner's place of detention—PCCF—has taken measures to combat the spread of the virus, specifically with regard to Petitioner. Accordingly, the Court finds that this point also warrants the denial of Petitioner's request.

treated hypertension, and has a self-reported history of high cholesterol.[5] These conditions may place him at a higher risk of experiencing complications should he contract COVID-19. See How COVID-19 Spreads, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html (last accessed Apr. 8, 2020). Though it may seem axiomatic, this fact does not ipso facto dictate relief from this Court. The ultimate question before the Court is not whether, on balance, Petitioner's health concerns outweigh the interests of the community in his continued detention. Rather, the critical question before this Court is whether Petitioner is entitled to relief under the demanding standards of the writ of habeas corpus. To exercise jurisdiction and empower relief, it must be clear to this Court that Petitioner has established a constitutional violation through deliberate indifference to a serious medical need. Notwithstanding the state of the entire record in some other case, under the facts now before this Court, it is not plain that PCCF has demonstrated deliberate indifference by failing to take reasonable steps to protect Petitioner from COVID-19 or to monitor and treat his medical symptoms. As is clear from the differing results in this very district, see Camacho Lopez, 2020 WL 1689874, at *6-9, Thakker, No. 20-cv-480, Doc. No. 47 (M.D. Pa. Mar. 31, 2020), habeas review is entirely individual. The success of each petition will depend not only on the circumstances of the petitioner before the Court, but also on a rapidly changing landscape that includes the state of the COVID-19 pandemic, current conditions in ICE facilities, and the evolving response by ICE and facility officials to medical needs.

[5] See Thakker, No. 20-cv-480, Doc. No. 47 at 2-3 (M.D. Pa. Mar. 31, 2020) (noting that some of the petitioners experienced the following conditions: leukemia; high blood pressure and cholesterol; kidney failure; diabetes; a compromised immune system resulting from a prior kidney transplant; and heart issues).

Each individual case requires the careful weighing of the medical needs of the individual against the safety of the community and the enforcement of federal laws. That balancing must occur not on federal habeas review but in the first instance before the immigration judge. This Court trusts that ICE will provide Petitioner the timely bond review to which he is legally and ethically entitled. When the immigration judge conducts this review, she will have available information that this Court does not, including current conditions at detention centers, such as population density, that bears on the risk to detainees, Petitioner's complete medical records, Petitioner's personal history as it informs the assessment of whether he is a flight risk and a danger to the community, and Petitioner's plan for relocation on release and available assurances of reappearance when the pandemic is ended.

IV. CONCLUSION

For the foregoing reasons, Petitioner's motion to expedite (Doc. No. 10) will be granted to the extent that this Memorandum serves as expedited review of Petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 (Doc. No. 1). The Court, however, will deny Petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. (Doc. No. 1.) This denial, however, will be without prejudice to Petitioner's right to file a new § 2241 petition should he remain detained after he has exhausted his administrate remedies regarding his detention. An appropriate Order follows.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KARLENA DAWSON, et al., Petitioner-Plaintiffs, v. NATHALIE ASHER, et al., Respondent-Defendants.	CASE NO. C20-0409JLR-MAT ORDER DENYING PETITIONERS' SECOND MOTION FOR A TEMPORARY RESTRAINING ORDER

I. INTRODUCTION

Before the court are (1) Petitioner-Plaintiffs Karlena Dawson, Norma Lopez Nunez, Marjoris Ramirez-Ochoa, Maria Gonzalez-Mendoza, Joe Hlupheka Bayana, Kelvin Melgar-Alas, Jesus Gonzalez Herrera, Alfredo Espinoza-Esparza, and Leonidas Plutin Hernandez's (collectively, "Petitioners") second motion for a temporary restraining order ("TRO") (2d TRO Mot. (Dkt. # 36)) and (2) Petitioners' response to the court's order to show cause regarding standing (Pet. OSC Resp. (Dkt. # 46); *see also* OSC (Dkt. # 34)).

Respondent-Defendants Nathalie Asher, Matthew T. Albence, Steven Langford, and United States Immigration and Customs Enforcement's ("ICE") (collectively, "Respondents"[1]) oppose Petitioners' second TRO motion (2d TRO Resp. (Dkt. # 64)) and filed a reply regarding the issue of Petitioners' Article III standing (Res. OSC Resp. (Dkt. # 63)). The court has reviewed Petitioners' motion and the parties' submissions related to that motion and the court's order to show cause, the relevant portions of the record, and the applicable law. Being fully advised,[2] the court (1) concludes that Petitioners have Article III standing; (2) concludes that the court has jurisdiction to adjudicate Petitioners' Fifth Amendment claim under the habeas statute, 28 U.S.C. § 2241; and (3) DENIES Petitioners'second motion for a TRO.

II. BACKGROUND

A. Procedural Background

On March 16, 2020, Petitioners filed their petition-complaint, seeking a writ of habeas corpus, or in the alternative, injunctive relief, against Respondents. (*See* Pet. at 20.) Petitioners represent that they are "particularly vulnerable to serious illness or death if infected by COVID-19" due to their age and/or medical conditions. (*See id.* ¶¶ 39-66.)

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[1] Petitioners' filing is a "petition for writ of habeas corpus . . . and complaint for injunctive relief." (*See* Pet. (Dkt. # 1) at 1.) Because the court concludes that it has jurisdiction to review Plaintiffs' Fifth Amendment claim under 28 U.S.C. § 2241, *see infra* § III.D, the court now refers to petitioner-plaintiffs as "Petitioners" and respondent-defendants as "Respondents."

[2] Neither party requests oral argument (*see* 2d TRO Mot. at 1; 2d TRO Resp. at 1), and the court finds oral argument unnecessary to its disposition of the motion, *see* Local Rules LCR 7(b)(4); LCR 65(b)(3).

On the same day, Petitioners filed their first TRO motion seeking "immediate release" from detention as they awaited adjudication of their immigration cases. (*See* 1st TRO Mot. (Dkt. # 2) at 7.) Petitioners argued that "[t]he conditions of immigration detention facilities pose a heightened public health risk for the spread of COVID-19" because of "crowding, the proportion of vulnerable people detained, and often scant medical care resources," in addition to the inability to achieve the social distancing needed to effectively prevent the spread of COVID-19. (*See id.*) Petitioners contended that their continued detention in the face of the COVID-19 pandemic violated their Fifth Amendment right to reasonable safety while in custody. (*See id.* at 12.) Respondents opposed the motion and argued that Petitioners' lack Article III standing and that the court lacked jurisdiction to hear Petitioners' claim in the form of a habeas petition. (*See* 1st TRO Resp. (Dkt. # 28) at 7-11.)

On March 19, 2020, the court denied Petitioners' first TRO motion because Petitioners had not shown a likelihood of success on the merits or a likelihood of irreparable harm. (*See* 3/19/20 Order (Dkt. # 33) at 4-6.) The following day, the court ordered Petitioners to respond to Respondents' arguments regarding Article III standing. (*See* OSC at 2.) On the same day, Petitioners requested a status conference and sought expedited discovery from Respondents. (*See* Discovery Request (Dkt. # 35).)

On March 24, 2020, Petitioners filed their second TRO motion, and on March 25, 2020, they filed their response to the court's order to show cause. (*See* 2d TRO Mot.; *see* Pet. OSC Resp.) Petitioners' second TRO motion is premised on the following developments: (1) the Ninth Circuit Court of Appeals' March 23, 2020, *sua sponte* order

releasing an individual from immigration detention "[i]n light of the rapidly escalating public health crisis, which public health authorities predict will especially impact immigration detention centers" (*see* 2d TRO Mot. at 2 (quoting *Xochihua-Jaimes v. Barr*, No. 18-71460, 2020 WL 1429877, at *1 (9th Cir. Mar. 24, 2020)));[3] (2) other federal court orders releasing individuals "on bail or delay[ing] their imprisonment in light of the COVID-19 crisis" (*see id.* at 2); (3) a letter from "two doctors who serve as subject matter experts for the Department of Homeland Security" warning of "tinderbox" conditions at detention centers (*see id.* at 2-3 (citing Ngo Decl. (Dkt. # 37) ¶ 4, Ex. A ("Allen-Rich Ltr.") at 4); and (4) the fact that individuals have tested positive for COVID-19 "at other immigration detention facilities in the United States" (*see id.* at 3).

After filing their second TRO motion, Petitioners filed notices of supplemental authority informing this court of several orders in other districts granting TROs on the basis of conditions at detention facilities that increase the risk of contracting COVID-19. (*See* 1st Pet. Not. of Supp. Auth. (Dkt. # 56) ¶ 1 (citing *Basank v. Decker*, No. 20 CIV. 2518 (AT), 2020 WL 1481503 (S.D.N.Y. Mar. 26, 2020)); ¶ 2 (citing *Coronel v. Decker*, --- F. Supp. 3d ---, 2020 WL 1487274, at *10 (S.D.N.Y. Mar. 27, 2020)); 2d Pet. Not. of Supp. Auth. (Dkt. # 61) at 1 (citing *Castillo et al. v. Barr et al.*, --- F. Supp. 3d ----, 2020 WL 1502864 (C.D. Cal. Mar. 27, 2020)); 3d Pet. Not. of Supp. Auth. (Dkt. # 71) at 1

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[3] The Ninth Circuit's order was initially marked for publication, but subsequently the Ninth Circuit entered an order stating that the "for publication" designation was a clerical error and removed it. *Xochihua-Jaimes*, No. 18-71460, Dkt. # 54 (9th Cir. Mar. 24, 2020). Moreover, the order does not set forth its analysis in a manner that allows this court to apply it to Petitioners' case.

(citing *Thakker et al. v. Doll et al.*, No. 1:20-CV-480, 2020 WL 1671563, at *1 (M.D. Pa. Mar. 31, 2020)).) Respondents also filed a notice of supplemental authority, citing cases in which courts in this district denied motions for TROs to release immigration detainees on Fifth Amendment grounds. (*See* Resp. Not. of Supp. Auth. (Dkt. # 85) at 1-2 (citing *Almeida v. Barr*, No. C20-490RSM-BAT, Dkt. # 11 (W.D. Wash. Apr. 6, 2020); *Patel v. Barr*, C20-488RSM-BAT, Dkt. # 9 (W.D. Wash. Apr. 2, 2020)).)

On March 31, 2020, in a separate but related development, the Ninth Circuit transferred to this district several emergency motions for release from the Tacoma Northwest Detention Center ("NWDC") due to the COVID-19 pandemic and construed the motions as petitions for habeas corpus under 28 U.S.C. § 2241. *See, e.g.*, *Almeida*, No. C20-490RSM-BAT, Almeida Transfer Order (Dkt. # 1-1) at 2 (W.D. Wash. Mar. 31, 2020); *Patel*, No. C20-0488RSM-BAT, Patel Transfer Order (Dkt. # 1-1) at 2 (W.D. Wash. Mar. 31, 2020); *Pablo v. Barr*, No. C20-489RSM-BAT, Pablo Transfer Order (Dkt. # 1-1) at 2 (W.D. Wash. Mar. 31, 2020).[4]

B. Petitioners and Their Detention Status

Petitioners are five individuals who ICE is currently holding in civil detention at the NWDC in Tacoma, Washington and four who ICE has released.[5] (*See* Pet. ¶¶ 39-66.)

[4] The petitioner in *Pablo* voluntarily dismissed his case on April 3, 2020. *See Pablo*, No. C20-489RSM-BAT, Not of Vol. Dismissal (Dkt. # 10) at 1 (W.D. Wash. Apr. 3, 2020).

[5] On March 27, 2020, Petitioners notified the court that Mr. Espinoza-Esparza and Mr. Hernandez were released from detention. (*See* 1st Not. of Release (Dkt. # 57) at 1.) On March 30, 2020, Respondents notified the court that ICE has released Ms. Dawson from immigration custody on an order of supervised release. (*See* 2d Not. of Release (Dkt. # 70) at 1.) On April 7, 2020, Respondents notified the court that ICE has released Ms. Gonzalez-Mendoza. (*See* 3d Not. of Release (Dkt. # 88) at 1.)

Ms. Ramirez-Ochoa is 43 years old and a citizen of Cuba who suffers from high blood pressure, chronic kidney disease, epilepsy, and respiratory problems. (*See* Ramirez-Ochoa Decl. (Dkt. # 9) ¶¶ 1-2, 5-7, 9.) Ms. Ramirez-Ochoa has several convictions for shoplifting, petit theft, and a 2016 conviction for theft in the third degree. (*See* 1st Bostock Decl. (Dkt. # 66) ¶ 36.) On April 3, 2019, Ms. Ramirez-Ochoa was convicted of felony robbery in the second degree, an offense that involved the use of a firearm. (*See id.*) She was sentenced to six months and placed into ICE custody on April 4, 2019. (*See id.*) On March 5, 2020, an immigration judge ordered Ms. Ramirez-Ochoa removed to Cuba. (*See id.*)

Mr. Bayana is 57 years old and a citizen of Zimbabwe who has type II diabetes and takes medication for seizures. (1st Bayana Decl. (Dkt. # 13) ¶¶ 1, 3-4.) Respondents believe his real name is Mketwa Phiri and that Joe Hlupheka Bayana is a false name that Mr. Bayana has used on a fraudulently obtained South African passport, which Mr. Bayana presented to an immigration judge to obtain bond on May 16, 2002. (*See* 1st Bostock Decl. ¶ 38.) After accepting an order of voluntary departure to South Africa, Mr. Bayana failed to depart voluntarily and subsequently failed to report for removal twice. (*See id.*) Mr. Bayana has been arrested approximately 22 times for charges that include trespassing, larceny, drugs, assault, and harassing communications. (*See id.*) Mr. Bayana was an immigration fugitive from August 30, 2012, until April 5, 2018. (*See id.*) After applying for work authorization, ICE took Mr. Bayana into custody on October 17, 2018. (*See id.*) The South African government subsequently notified ICE and provided

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documentation confirming that the real Joe Hlupheka Bayana was deceased, establishing that Joe Hlupheka Bayana is not Mr. Bayana's real name. (*See id.*)

Mr. Melgar-Alas is 40 years old and a citizen of El Salvador who has been in a wheelchair since a September 27, 2015, shooting that resulted in a spinal cord injury. (*See* Melgar-Alas Decl. (Dkt. # 15) ¶¶ 1, 4.) Mr. Melgar-Alas has a colonoscopy bag and "has to catheterized (sic) up to five times each day." (*Id.* ¶ 6.) Since first being detained at the NWDC in July 2018, he has been hospitalized five times, "including multiple times for probable pneumonia." (*Id.* ¶ 7.) Mr. Melgar-Alas has convictions for distribution of methamphetamine and was convicted in 2013 of a RICO offense for his membership and participation in the Mara Salvatrutcha gang, also known as MS-13. (*See* 1st Bostock Decl. ¶ 40.) He was sentenced to 27 months in prison and released to ICE on July 18, 2018. (*See id.*) On February 6, 2020, an immigration judge denied Mr. Melgar-Alas bond, finding him to be both a danger and a flight risk. (*See id.*)

Mr. Herrera is 46 years old and suffers from diabetes and high blood pressure. (*See* Herrera Decl. (Dkt. # 16) ¶¶ 1, 5.) He came into ICE custody following a conviction on July 22, 2019, for burglary. (*See* 1st Bostock Decl. ¶ 41.)

Ms. Lopez Nunez is a 65 year old citizen of Mexico who suffers from hypertension, heart disease, and mental health issues. (*See* Maltese Decl. (Dkt. # 8) ¶ 9, Ex. C.) She has multiple prior removals and approximately five prior convictions for illegal re-entry. (*See* 1st Bostock Decl. ¶ 35.) Ms. Lopez Nunez was transferred to the NWDC on April 28, 2017. She has been denied bond multiple times after being found to be a flight risk. (*See id.*)

C. Conditions at the NWDC

The parties rely on a series of declarations in support of and in opposition to Petitioners' second motion for a TRO. Petitioners rely primarily on (1) the individual declarations of Petitioners and other current and former NWDC detainees[6] (*see* Ramirez-Ochoa Decl.; Gonzalez-Mendoza Decl. (Dkt. # 11); Bayana Decl.; Melgar-Alas Decl.; Herrera Decl.; Maltese Decl.; Dawson Decl. (Dkt. # 78); Espinoza-Esparza Decl. (Dkt. # 79); Lopez Gonzalez Decl. (Dkt. # 80); Hernandez Decl. (Dkt. # 82); Lopez Nunez Decl. (Dkt. # 81)), and (2) declarations from a series of subject matter experts who opine on the COVID-19 pandemic and the conditions at detention centers generally (*see, e.g.*, Allen-Rich Ltr.; Rekart Decl. (Dkt. # 41); Gonza Decl. (Dkt. # 42)). Respondents rely primarily on the declarations declarations of (1) Drew H. Bostock, the Officer in Charge ("OIC") with DHS, ICE, Enforcement and Removal Operations ("ERO") in the Seattle Field Office ("ERO Seattle") (1st Bostock Decl.; 2d Bostock Decl. (Dkt. # 76); 3d Bostock Decl. (Dkt. # 84)), (2) NWDC Facility Administrator Stephen Langford (1st Langford Decl. (Dkt. # 68); 2d Langford Decl. (Dkt. # 74)), and (3) Clinical Director for the ICE Health Services Corps ("IHSC") Sheri Malakhova (1st Malakhova Decl. (Dkt. # 75); 2d Malakhova Decl. (Dkt. # 86)).

The NWDC is a private detention center run by The GEO Group, Inc. ("GEO"). (1st Bostock Decl. ¶ 4.) It has the capacity to house 1,575 detainees and historically

[6] On April 1, 2020, the court ordered Respondents to file additional evidence regarding the conditions at the NWDC and the measures Respondents are taking to prevent the spread of COVID-19 and allowed Petitioners to file additional evidence if they wished to do so. (*See* 4/1/2020 Order (Dkt. # 73) at 2-5.)

operates near capacity. (*Id.* ¶ 6.) However, as of April 3, 2020, the NWDC has only 794 detainees, which represents only 50.4% of its typical number of detainees. (2d Bostock Decl. ¶ 29.) Between March 1, 2020, and April 2, 2020, 407 detainees arrived at the NWDC and 399 detainees departed. (*Id.* ¶ 27.) One hundred and thirty-eight of the detainees who arrived at the NWDC during that span arrived on March 1, 2020, and most of those detainees were transferred from the southern border. (*Id.* ¶ 27 n.3.) However, ICE last transferred detainees from the southern border to the NWDC on March 5, 2020, and does not anticipate any additional transfers from that area in the reasonably foreseeable future. (1st Bostock Decl. ¶ 7.)

On March 18, 2020, ICE announced that due to the ongoing COVID-19 pandemic, it would adjust enforcement to focus on public safety risks and individuals subject to mandatory detention based on criminal grounds. (*Id.* ¶ 8.) For individuals who do not fall within these categories, ICE is currently exercising its discretion to delay enforcement actions until after the COVID-19 crisis or to use alternatives to detention, where appropriate. (*Id.*) Due to this change, ICE expects only a limited number of incoming detainees at the NWDC during the COVID-19 crisis—the majority of whom will be aliens who represent public safety risks and are subject to mandatory custody provisions. (*Id.* ¶ 9.)

As a response to the COVID-19 crisis, IHSC, which oversees medical care at the NWDC, implemented certain safety protocols. (*Id.* ¶ 11.) On March 26, 2020, IHSC implemented temperature and prescreening checks for all new detainees arriving at the NWDC prior to entrance into the facility. (*Id.*; 1st Malakohva Decl. ¶¶ 2-28.) Regular

procedures at the NWDC require that all incoming detainees' personal property and valuable are inventoried and stored. (1st Bostock Decl. ¶ 12.) Further, all incoming detainees are afforded the opportunity to shower and given clean clothing, bedding, towels, and personal hygiene items. (*Id.*) OIC Bostock testifies that GEO provides all detainees with an instructional flyer outlining proper hand washing hygiene and the importance of covering coughs, and that in response to the COVID-19 pandemic, additional posters in multiple languages concerning hand washing hygiene and covering coughs have been placed in each housing unit at the NWDC. (*Id.* ¶ 13.)

As of March 20, 2020, all incoming detainees who do not meet current IHSC protocol requirements for isolation monitoring due to possible COVID-19 symptoms, exposure, or testing, are placed in three separate housing units for 14 days of monitoring for signs or symptoms of COVID-19. (*Id.* ¶ 14; 2d Bostock Decl. ¶ 23.) Detainees in the 14-day observation period are not allowed to commingle with other detainees in common areas during the 14-day period. (1st Bostock Decl. ¶ 14.) Detainees admitted on the same date and who are determined to be at the same risk classification may be housed in the same cell for the 14-day observation period. (*Id.*) Detainees admitted on separate dates and those at different risk classification levels are not housed together. (*Id.*) If the 14-day period passes without any detainees in a cell displaying signs or symptoms of COVID-19, the detainees are released to other housing units in the facility. (*Id.*) A separate remote medical unit has been established to monitor detainees undergoing the 14-day observation. (*Id.*)

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In response to the COVID-19 pandemic, OIC Bostock testifies that GEO has enhanced its cleaning in all units, food preparation and service areas, intake rooms and other work centers with increased emphasis on cleaning contact areas with disinfectant cleaners approved as effective against COVID-19. (*Id.* ¶ 16.) GEO makes soap and cleaning supplies available to detainees in all housing units and work areas at the NWDC and has increased the amount of soap, disinfectant cleaner, and food service sanitizer in every housing unit in response to COVID-19. (*Id.* ¶ 17.) GEO also holds weekly town hall meetings with detainees in every housing unit to educate detainees on hand washing and covering coughs. (*Id.* ¶ 18.) Nevertheless, some current and former detainees declare that they did not receive adequate information on prevention techniques. (*See, e.g.*, Dawson Decl. ¶ 6; Nunez Lopez Decl. ¶ 14.) GEO instructs detainees to clean tables and horizontal surfaces before each meal and to disinfect such surfaces after each meal. (1st Bostock Decl. ¶ 18.) GEO also instructs detainees to clean countertops, microwave handles, door handles, exercise equipment, electronic tablets, telephones, and any high-risk contact areas with disinfectant cleaner. (*Id.*)

On March 13, 2020, ICE temporarily suspended social visitation at the NWDC, and other detention facilities, to prevent the spread of COVID-19, and cancelled all tours of the NWDC. (*Id.* ¶¶ 19-20.) GEO screens all contractors, vendors, attorneys, and court visitors through a questionnaire that covers whether the individual is currently experiencing any possible COVID-19 symptoms and recent travel history and prohibits entry to anyone who positively reports symptoms or possible exposure to COVID-19. (*Id.* ¶ 21.) Visitors are limited to noncontact visits unless a contact visit is absolutely

necessary and has been approved by the OIC or Assistant OIC. (*Id.* ¶ 22.) If an attorney's request for a contact visit is approved, the attorney must wear personal protective equipment ("PPE"), including a mask. (*Id.*) In addition, ICE has implemented a daily duty officer to facilitate unmonitored attorney-client phone calls from each housing unit so that detainees do not have to move throughout the facility. (*Id.*) ICE and GEO are collaborating on a process to implement temperature checks of all employees and staff for GEO, ICE, and Executive Office for Immigration Review ("EOIR") at the NWDC starting on March 27, 2020. (*Id.* ¶ 24.) ICE and GEO employees are instructed to stay home if they are sick, experiencing any possible COVID-19 symptoms, or have been in close contact with someone diagnosed with COVID-19. (*Id.* ¶ 25.) GEO is voluntarily notifying ICE if any of its employees test positive or are diagnosed with COVID-19. (*Id.*) As of March 27, 2020, no ICE or GEO employee or staff at the NWDC had reported testing positive for COVID-19.[7] (*Id.*) In addition, ICE instituted a telework program for its employees at the NWDC to minimize the number of employees present at the facility. (*Id.* ¶ 26.)

In response to the court's order to file additional evidence, the parties filed contrasting evidence regarding detainees' ability to engage in physical distancing. Mr. Langford declares that detainees at the NWDC have the ability to maintain at least six feet of physical distance from each other, that there is 2,848 square feet of day room

[7] Because the presence of an active COVID-19 case at the NWDC would be a significant development, the court ORDERS Respondents to inform Petitioners and the court as soon as practicable but at least within 24 hours after learning that any individual physically present at the NWDC tests positive for or is otherwise diagnosed with COVID-19.

space in Unit A-2, which when divided by 80 detainees, represents 35.6 square feet per detainee. (2d Langford Decl. ¶ 6.) However, several current and former detianees declare that it was difficult to maintain physical distance at the medical clinic (*see*, *e.g.*, Dawson Decl. ¶ 4; Espinoza-Esparza Decl. ¶ 4;), when eating (*see, e.g.*, Dawson Decl. ¶ 5; Espinoza-Esparza Decl. ¶ 5; Gonzalez Decl. ¶ 4), and while waiting to use the restroom (*see* Espinoza-Esparza Decl. ¶ 6). A detainee and attorney declare that maintaining physical distance is not possible while at immigration court. (Gonzalez Decl. ¶ 5 (declaring that detianees are "bunched together" in a holding room and in the hall prior to entering the courtroom); Augustine Decl. (Dkt. # 83) ¶¶ 3-5 (describing crowded conditions while waiting to enter the courtroom).)

When at maximum capacity, NWDC detainees would normally sleep less than six feet apart. (2d Langford Decl. ¶ 7.) However, NWDC has been operating at roughly half-capacity, and GEO has spread out the sleeping arrangements to allow for greater distance between detainees. (*Id.*) Dividing the available sleeping space by the present detainee population yields 31 square feet of sleeping space per detainee. (*Id.* ¶ 8.) When detainees are assigned to sleep in a bunk bed, there is only four feet of space between the top bunk and lower bunk. (*Id.* ¶ 14.) However, there is a metal and mattress barrier dividing that space. (*Id.*) Nevertheless, Ms. Dawson, who left the NWDC on March 30, 2020, declares that the beds were about a foot apart. (Dawson Decl. ¶ 3.) Mr. Espinoza-Esparza declares that detainees' beds were inches apart. (Espinoza-Esparza Decl. ¶ 3.) Mr. Langford declares that situations exist in which detainees may choose to be within six feet of each other, including meal preparation for those who volunteer, or

participatation in the voluntary work program ("VWP"), which is not required. (2d Langford Decl. ¶ 14.)

Director Malakhova declares that the medical clinic and the Medical Housing Unit ("MHU"), including the line where medications are dispersed, has posted signs and color footprints placed on the floor to assist detainees in maintaining physical distance. (1st Malakhova Decl. ¶ 2.)[8] To increase social distancing, MHU rooms at the NWDC are limited to single patient occupancy. (*Id.* ¶ 3.) Detainees may come within six feet of IHSC staff within the medical clinic and MHU. (*Id.* ¶ 4.) To mitigate the risk of contracting COVID-19, MHU, IHSC, and GEO have implemented measures that include temperature check screening all IHSC employees upon entry, implementing a universal mask policy for IHSC staff on April 1, 2020, requiring GEO staff in the medical clinic to wear surgical masks at all times, stocking N95 respirator masks for use by medical staff for individuals with COVID-19 presumptive symptoms, and cancelling outside elective medical appointments. (*Id.* ¶¶ 4-5.) Director Malakhova declares that IHSC has the necessary resources to execute all of its COVID-19 response plans. (*Id.* ¶ 23.)

Notwithstanding the above measures, current and former detainees complain of a number of other conditions at the NWDC. Those include using the same water fountain that is not cleaned between uses (Dawson Decl. ¶ 8); using the same toilets, showers, sink, and microwaves (*id.* ¶ 8); inadequate cleaning of food trays (*id.*); having to request

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[8] One released Petitioner, Ms. Dawson, declares that "[t]hey did not put any marks on the ground so we could tell how far apart six feet is." (Dawson Decl. ¶ 7.) However, it is unclear to which area of the NWDC Ms. Dawson refers.

access to the janitor's closet to obtain the cleaning solution for those on cleaning duty (*id.* ¶ 9); provision of a sanitizing spray instead of hand sanitizer (Espinoza-Esparza Decl. ¶ 6); and being forced to buy soap for showers (Gonzalez Decl. ¶ 10).

In late March 2020, ERO Tacoma began conducting a discretionary review of certain detainees who meet the current CDC criteria as at-risk due to COVID-19. (1st Bostock Decl. ¶ 31.) The review requires that IHSC and ICE identify detainees who fall within an at-risk category and who are not subject to various mandatory custody provisions based on their immigration and criminal histories. (*Id.*) If an identified detainee is not subject to mandatory custody, ERO Tacoma determines whether the detainee is otherwise a danger to the public and/or a flight risk such that release is not appropriate. (*Id.*) ICE is currently conducting this review on an individualized basis to determine in the totality of the circumstances whether each detainee is a danger to the community or a significant flight risk such that release is not appropriate. (2d Bostock Decl. ¶ 39.) As a result of this labor-intensive review, by March 27, 2020, ICE had already released seven detainees from custody, including four Petitioners in this case. (*See* 1st Bostock Decl. ¶¶ 31-32; *see also* 1st Not. of Release at 1; 2d Not. of Release at 2; 3d Not. of Release at 3.) Among the five Petitioners still detained at the NWDC, Ms. Lopez Nunez, Ms. Ramirez Ochoa, Mr. Melgar-Alas, and Mr. Bayana are subject to mandatory custody. (3d Bostock Decl. ¶ 12.) Mr. Herrera's custody is currently subject to ICE's review process described above. (*Id.*)

Finally, ICE has been regularly assessing current conditions and future projections regarding the course of the virus, regularly updating prevention and control protocols,

and working with IHSC, GEO, and EOIR staff to ensure appropriate procedures are implemented at the NWDC in compliance with CDC recommendations. (2d Bostock Decl. ¶ 30.)

III. ANALYSIS

Petitioners contend that their continued detention in the face of the COVID-19 pandemic violates their Fifth Amendment right to reasonable safety while in custody. (*See* 2d TRO Mot. at 12.) Respondents disagree, and further oppose Petitioners' motion on the grounds that Petitioners lack Article III standing and the court lacks jurisdiction to hear this case as a habeas petition under 28 U.S.C. § 2241. (*See generally* 1st TRO Resp.; 2d TRO Resp.; Res. OSC Resp.) For the reasons set forth below, the court (1) concludes that Petitioners have Article III standing, (2) concludes that the court has jurisdiction to adjudicate Petitioners' Fifth Amendment claims under the habeas statute, 28 U.S.C. § 2241, and (3) DENIES Petitioners' second motion for a TRO.

A. Article III Standing

Respondents contend that Petitioners lack Article III standing. (*See* 1st TRO Resp. at 7-11; Res. OSC Resp. at 1-9.) Standing has three elements: "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, --- U.S. ---, 136 S. Ct. 1540, 1547 (2016) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000)). The plaintiff bears the burden of establishing these elements, and when "a case is at the pleading stage, the plaintiff must

'clearly . . . allege facts demonstrating' each element." *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)). The standing inquiry is distinct from the merits of Petitioners' claims. *See, e.g.*, *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (stating that the court's "threshold inquiry into standing 'in no way depends on the merits'" of the plaintiff's claim).

"To establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Friends of the Earth, Inc.*, 528 U.S. at 181, (quoting *Lujan*, 504 U.S. at 560); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). Petitioners must show that the injury is "certainly impending" or "there is a substantial risk that the harm will occur." *Susan B. Anthony List v. Driehaus***,** 573 U.S. 149, 158 (2014) (internal quotation marks omitted). "A future injury need not be 'literally certain,' but there must be a 'substantial risk' that it will occur." *Nw. Requirements Utils. v. F.E.R.C.*, 798 F.3d 796, 805 (9th Cir. 2015) (quoting *Clapper*, 568 U.S. at 432). "[T]he question becomes whether any perceived threat . . . is sufficiently real and immediate to show an existing controversy." *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974). Nevertheless, unsafe conditions in a prison or detention center in and of themselves constitute a concrete injury, even if further resulting harm has not yet occurred. *See, e.g.*, *Hoptowit v. Spellman*, 753 F.2d 779, 784 (9th Cir. 1985) (holding that prisoners "have the right not to be subjected to the unreasonable threat of injury or death by fire and need not wait until actual casualties occur in order to obtain relief from such conditions."); *id.* ("Failure to provide adequate cell cleaning supplies, under

circumstances such as these, deprives inmates of tools necessary to maintain minimally sanitary cells, seriously threatens their health, and amounts to a violation of the Eighth Amendment.").

The court concludes Petitioners have Article III standing. Five Petitioners are currently detained at the NWDC. (*See* Pet. ¶ 39.) Petitioners allege that in the face of the COVID-19 pandemic, "social distancing and hygiene measures are Petitioners' only defense against COVID-19." (*See id.* ¶ 82.) Petitioners further allege that their current detention conditions make it "exceedingly difficult, if not impossible" to exercise distancing and hygiene measures because Petitioners "share toilets, sinks, and showers, eat in communal spaces, and are in close contact with the many other detainees and officers around them." (*See id.*)

Petitioners sufficiently allege a concrete injury in the form of unsafe conditions at the NWDC, where five Petitioners are currently detained. The detention conditions are fairly traceable to Respondents, who keep Petitioners in detention. Finally, Petitioners' adequately allege that their injury "is likely to be redressed" by the relief Petitioners seek—release from the NWDC.

B. Jurisdiction Under 28 U.S.C. § 2241

In addition to challenging Petitioners' Article III standing, Respondents also challenge this court's jurisdiction to adjudicate Petitioners' Fifth Amendment claim as a petition for a writ of habeas corpus because Plaintiffs' claim is about the conditions of their confinement, not the fact or duration of their confinement. (*See* 1st TRO Resp. at 11; 2d TRO Resp. at 2-3.) Petitioners disagree, and argue in part that they may pursue a

writ of habeas corpus because "their confinement is unlawful" and they are entitled to immediate release. (*See* 2d TRO Mot. at 21 n.16.)

The court disagrees with Petitioners that this is not a conditions of confinement claim. The basis for Petitioners' claim rests on specific conditions within the NWDC that Petitioners allege expose them to a greater risk of contracting COVID-19. (*See* Pet. ¶¶ 67-73 (discussing case law regarding, *e.g.*, "conditions of reasonable health and safety" and "[c]onditions that pose an unreasonable risk of harm."), ¶ 84 (alleging that the NWDC's "conditions of confinement" subject Petitioners to a heightened risk of contracting COVID-19.); 2d TRO Mot. at 9 ("[A]nything less than aggressive screening and testing of all detainees, staff, officials and others who enter the facility is insufficient to contain COVID-19's spread."), ¶ 21 (discussing constitutional prohibitions on "unsafe prison conditions" and "detention conditions amounting to punishment").) If those alleged conditions could be remedied—notwithstanding Petitioners' assertions that they cannot—Petitioners do not raise any separate challenge to the authority under which they were detained or the length of their detention. (*See generally* Pet.; 1st TRO Mot.; 2d TRO Mot.) Accordingly, this is a conditions of confinement case, and the court evaluates it as such.

The United States Supreme Court has not yet resolved the question of whether a conditions of confinement claim may be brought in the form of a petition for a writ of habeas corpus. *See Bell v. Wolfish*, 441 U.S. 520, 526 n.6 (1979) ("Thus, we leave to another day the question of the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement, as distinct from the fact or length of the

confinement itself."). The majority of federal circuit courts allow detainees to challenge their conditions of confinement via a habeas petition. *See Aamer v. Obama*, 742 F.3d 1023, 1036-37 (D.C. Cir. 2014) (citing *United States v. DeLeon*, 444 F.3d 41, 59 (1st Cir. 2006); *Thompson v. Choinski*, 525 F.3d 205, 209 (2d Cir. 2008); *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235, 242 & n.5 (3d Cir. 2005); *McNair v. McCune*, 527 F.2d 874, 875 (4th Cir. 1975); *Adams v. Bradshaw*, 644 F.3d 481, 482-83 (6th Cir. 2011)). The Ninth Circuit has not yet decided the issue. *See Nettles v. Grounds*, 830 F.3d 922, 931 (9th Cir. 2016) (holding that if a state prisoner's claim "would not necessarily spell speedier release," it does not lie at "the core of habeas corpus," and must be brought, if at all, under 42 U.S.C. § 1983; but explicitly stating that the Ninth Circuit would not address how this standard "applies to relief sought by prisoners in federal custody").

Nevertheless, a three-judge panel on the Ninth Circuit recently transferred to this district several emergency motions in other matters that the Ninth Circuit construed as habeas petitions. *See, e.g.*, Almeida Transfer Order; Patel Transfer Order; Pablo Transfer Order. In those emergency motions, like Petitioners' TRO motions here, the detainees challenge their detention at the NWDC based on conditions that allegedly increase the risk of COVID-19 infection. *See* Almeida Transfer Order at 2; Patel Transfer Order at 2; Pablo Transfer Order at 2. Like the Petition before this court, the transferred petitions challenge the conditions of confinement, not the fact or duration of confinement. *See generally Almeida*, No. C20-0490RSM-BAT, Almeida Pet. (Dkt. # 1) (W.D. Wash. Mar. 31, 2020); *Patel*, No. C20-0488RSM-BAT, Patel Pet. (Dkt. # 1)

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(W.D. Mar. 31, 2020); *Pablo*, No. C20-489RSM-BAT, Pablo Pet. (Dkt. # 1) (W.D. Wash. Mar. 31, 2020).

The Ninth Circuit's transfer orders holding that this district court should consider the transferred emergency motionss as habeas petitions are unpublished, and therefore the transfer orders do not definitively resolve this unsettled area of law. (*See* Almeida Transfer Order at 1; Patel Transfer Order at 1; Pablo Transfer Order at 1.) Nevertheless, because both the transferred emergency motions are similar to present Petition, this court will follow the Ninth Circuit's direction in the transfer orders—to adjudicate the emergency motions as petitions for writs of habeas corpus under 28 U.S.C. § 2241—and consider the present Petition under the rubric of 28 U.S.C. § 2241 as well.

C. Standards for a TRO

The standard for issuing a TRO is the same as the standard for issuing a preliminary injunction. *See New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1347 n.2 (1977). A TRO is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). "The proper legal standard for preliminary injunctive relief requires a party to demonstrate (1) 'that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest.'" *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009) (citing *Winter*, 555 U.S. at 20).

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As an alternative to this test, a preliminary injunction is appropriate if "serious questions going to the merits were raised and the balance of the hardships tips sharply in the plaintiff's favor," thereby allowing preservation of the status quo when complex legal questions require further inspection or deliberation. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011). However, the "serious questions" approach supports the court's entry of a TRO only so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest. *Id.* at 1135. The moving party bears the burden of persuasion and must make a clear showing that it is entitled to such relief. *Winter*, 555 U.S. at 22.

D. Petitioners' Motion

The court concludes that Petititioners have not made a clear showing that they are entitled to the extraordinary remedy they request.

1. Likelihood of Success on the Merits

To obtain a TRO, Petitioners must make a clear showing that they are likely to succeed on the merits or, alternatively, have raised serious questions going to the merits of their habeas petition on Fifth Amendment grounds. To succeed on a habeas petition, Petitioners must show that they are "in custody in violation of the Constitution or laws or treaties of the United States." *See* 28 U.S.C. § 2241. For the reasons stated below, the court concludes that Petitioners fail to make a clear showing that they are likely to succeed on the merits of their claim or that they have raised serious questions going to the merits.

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When the government detains a person pursuant to an immigration violation, the person is a civil detainee. See *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). To evaluate the constitutionality of a pretrial detention condition under the Fifth Amendment, a district court must determine whether those conditions "amount to punishment of the detainee." *Bell*, 441 U.S. at 535; *see also Kingsley v. Hendrickson*, --- U.S. ---, 135 S. Ct. 2466, 2473-74 (2015). Punishment may be shown through an express intent to punish or a restriction or condition that "is not reasonably related to to a legitimate governmental objective." *Bell*, 441 U.S. at 539; *see also Kingsley*, 135 S. Ct. at 2473-74 (clarifying that "a pretrial detainee can prevail by providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose"). In addition, "when 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).[9] Thus, for example, the government violates the Due Process Clause if it fails to provide civil detainees with "food, clothing, shelter, medical care, and reasonable safety." *Id.* at 200. In the context of a Due Process Clause failure-to-protect claim, the Ninth Circuit declared that "the defendant's conduct must be objectively unreasonable, a test that will necessarily 'turn on the facts and circumstances of each particular case.'"

[9] In *DeShaney*, the Supreme Court analyzed the petitioners' rights under the Fourteenth Amendment. *See* 489 U.S. at 194-95. Fifth Amendment due process claims and Fourteenth Amendment due process claims are analyzed in the same way. *See Paul v. Davis*, 424 U.S. 693, 702 n.3 (1976).

Castro v. Cty. of L.A., 833 F.3d 1060, 1071 (9th Cir. 2016) (quoting *Kingsley*, 135 S. Ct. at 2473) (alterations and internal quotation marks omitted).[10]

Petitioners do not present allegations or evidence to show an "express intent" to punish Petitioners. (*See generally* 2d TRO Mot.) Moreover, Plaintiffs do not dispute that preventing detained aliens from absconding and ensuring that they appear for removal proceedings is a legitimate governmental objective. See *Jennings v. Rodriguez*, --- U.S. ---, 138 S. Ct. 830, 836 (2018); *Demore v. Kim*, 538 U.S. 510, 520-22 (2003); *Zadvydas v. Davis*, 533 U.S. at 690-91. Therefore, Petitioners may succeed on their Fifth Amendment claim if their confinement is not reasonably related to to a legitimate governmental objective or is excessive in relation to the legitimate governmental objective, *see Kingsley*, 135 S. Ct. at 2473-74, or if Respondents fail to provide for Petitioners' reasonable safety, *see DeShaney*, 489 U.S. at 200.[11]

As of the date of this order, there is no confirmed COVID-19 case among any detainees, staff, or visitors at the NWDC. Nevertheless, Petitioners contend that due to

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[10] "[T]he Supreme Court has treated medical care claims substantially the same as other conditions of confinement violations including failure-to-protect claims." *Gordon v. Cty. of Orange*, 888 F.3d 1118, 1124 (9th Cir. 2018), *cert. denied sub nom. Cty. of Orange, Cal. v. Gordon*, 139 S. Ct. 794, 202 L. Ed. 2d 571 (2019).

[11] In addition to Petitioners' Fifth Amendment arguments, Petitioners rely on a series of court orders regarding bail and other discretionary determinations relating to confinement or release. (*See* 2d TRO Mot. at 13-14 (citing, among other cases, *United States v. Stephens*, No. 15-CR-95 (AJN), 2020 WL 1295155, at *1 (S.D.N.Y. Mar. 19, 2020) (granting bail); *United States v. Raihan*, No. 20-cr-68 (BMC) (JO), Dkt. # 20 at 10:12-19 (E.D.N.Y. Mar. 12, 2020) (continuing a criminal defendant on pretrial release)).) However, the decisions courts make with respect to bail, in addition to the other discretionary determinations, bear little on the task before the court, which involves adjudicating Petitioners' claim that Respondents violate their Fifth Amendment rights. That weighty analysis cannot be conducted on the basis of discretionary decisions made with respect to individuals and circumstances not before this court.

the rampant spread of COVID-19, it will inevitably sweep through the NWDC, and when it does, Petitioners will be powerless to protect themselves because they are unable to engage in the necessary physical distancing. (*See* 2d TRO Mot. at 2 (asserting that the COVID-19 pandemic "will, if it has not already," reach the NWDC).) Petitioners assert that "[p]reventive measures that may be effective . . . such as remaining separated from other persons and frequent disinfection after occasional contact with other persons, are simply not possible in the detention setting." (*See id.* at 22-23).

At the outset, the court rejects as irrelevant Petitioners' evidence of the conditions at detention facilities or jails that are not at issue in this case. For example, Drs. Allen and Rich testify about the potential risks to immigrant detainees generally due to the COVID-19 pandemic. (*See generally* Allen-Rich Ltr.) The court does not dismiss these concerns but notes that nothing in Drs. Allen and Rich's letter addresses the actual conditions at the NWDC. (*See generally id.*) Instead, Drs. Allen and Rich point to reported conditions at prisons in China and Iran, the presence of COVID-19 at New York's Rikers Island, the possible presence of COVID-19 among immigrant detainees at ICE's Aurora facility, and a reported positive COVID-19 test for a member of ICE's medical staff at a detention center in New Jersey. (*See id.* at 3.) The fact that other immigration detention centers "have faced outbreaks of other infectious diseases in recent years," or that, for example, "ICE mishandled and failed to take adequate measures to protect detainees in Virginia," is not evidence of the conditions facing Petitioners at the NWDC in this case. (*See id.* at 9; *see also* Stern Decl. (Dkt. # 6) ¶ 7 (discussing the conditions of "detention facilities" but not conditions at the NWDC specifically); 1st

Greifenger Decl. (Dkt. # 4) ¶¶ 10-12 (discussing the conditions at "[m]any immigration detention facilities"); Lorenzen-Strait Decl. (Dkt. # 40) ¶¶ 1-16 (discussing ICE policies generally).)

In contrast to the conditions at other facilities, here, Respondents submit evidence that they are taking substantial measures at this moment to prevent an outbreak of COVID-19 at the NWDC and contain an outbreak should one occur. Those measures include, among others, (1) policies under which the "[t]he last transfer of ICE detainees the [NWDC] received from the southern border occurred on or about March 5, 2020" (*see* 1st Bostock Decl. ¶ 6); (2) exercising discretion to delay enforcement actions that limit the number of new detainees at the NWDC (*id.* ¶¶ 8-9); (3) "temperature and prescreening checks of all new detainees arriving at the [NWDC] prior to entrance to the facility" (*id.* ¶ 11); (4) providing each detainee an instructional flyer "outlining proper hand washing hygiene and the importance of covering coughs" and placing in each housing unit "additional posters in multiple languages concerning hand washing hygiene and covering coughs" (*id.* ¶ 13); (5) enhancing cleaning measures, including "increased emphasis on cleaning contact areas with disinfectant cleaners approved as effective against COVID 19" (*id.* ¶ 16); (6) providing "[s]oap and cleaning supplies" to "detainees in all housing unites and work areas" (*id.* ¶ 17); (7) conducting weekly meetings "to educate detainees on hand washing and covering coughs" (*id.* ¶ 18); (8) suspending social visitation and cancelling all tours (*id.* ¶¶ 19-20); (9) providing extra hand sanitizer to ICE employees and disinfectant wipes so they can conduct extra cleaning of "high contact areas" such as door handles, phones, and computers (*id.* ¶ 23); (10) instituting

temperature checks and instructing ICE and GEO employees to stay home if they are sick or have been in close contact with someone diagnosed with COVID-19 (*id.* ¶ 25); and (11) implementing a telework program under which only half of ERO employees are present at the NWDC at any one time (*id.* ¶ 26). Further, the court notes that Respondents have made the discretionary decision to release four Petitioners, which provides these individuals with all of the relief they request pursuant to the present motion. (*See* 1st Not. of Release at 1; 2d Not. of Release at 1; 3d Not. of Releaese at 1.)

These measures generally track the recommendations of DHS's medical subject matter experts and other public health authorities in responding to COVID-19. (*See* Allen-Rich Ltr. at 6 (recommending processes for screening, testing, isolation and quarantine, limiting transport and transfer of immigrant detainees, rapidly identifying a positive COVID-19 case, "consultation with CDC and public health officials to forge optimal infection prevention control strategies to mitigate the health risks to detained patient populations and correctional workers," and considering the release of detainees who do not pose an immediate risk to public safety); 1st Bostock Decl. ¶ 28.) Although Drs. Allen and Rich may recommend "releasing all detainees in high risk medical groups" (*see* Allen-Rich Ltr. at 6), Respondents cannot do so without first assessing whether such release is otherwise authorized by law and in the public's interest in any given case. Indeed, ICE is presently engaged in such a case-by-case analysis and has begun to release high-risk detainees on this basis. (*See* 1st Bostock Decl. ¶¶ 31-32.)

Nevertheless, Petitioners raise additional concerns in declarations filed on April 3, 2020, regarding their ability to maintain social distancing in all circumstances while

detained. (*See, e.g.*, Dawson Decl. ¶¶ 4-5; Espinoza-Esparza Decl. ¶¶ 5-6; Gonzalez Decl. ¶ 4.) Indeed, Drs. Allen and Rich recommend implementing "immediate social distancing to reduce the likelihood of exposure to detainees, facility personnel, and the general public." (*See* Allen-Rich Ltr. at 6.) Nevertheless, under the Fifth Amendment, Respondents are not required to eliminate any risk to Petitioners. Instead, Respondents are required to provide for their "reasonable safety." *See DeSahney*, 489 U.S. at 200. In the face of the measures Respondents are taking to prevent and contain a potential COVID-19 outbreak, Petitioners' evidence of current conditions at the NWDC is insufficient to warrant the "extraordinary relief" of a TRO. The court is persuaded from the evidence filed in this case that Respondents are taking active and substantial measures to respond to a unique, unprecedented, and extremely challenging public health crisis. These measures create conditions that are reasonably related and not excessive in relation to the government's interests in preventing flight and protecting public safety—particularly when ICE is not authorized by statute to release several Petitioners and has legitimate concerns about releasing others with extensive criminal histories. Moreover, Respondents' measures generally track the recommendations of public health authorities. (*See* Allen-Rich Ltr. at 6.)

The court is aware that other district courts in other parts of the country have recently granted TRO motions in favor of immigration detainees on Fifth Amendment grounds. However, the evidence of current conditions at the NWDC differs in significant ways from the evidence before those other district courts. *See, e.g.*, *Basank*, 2020 WL 1481503, at *7 ("Each of the jails where a Petitioner is being housed has reported

confirmed cases of COVID-19."); *Coronel*, 2020 WL 1487274 at *4 (stating that, unlike in this case, "the record demonstrates that ICE has not taken any action to address the particular risks COVID-19 poses to high-risk individuals"); *Castillo*, 2020 WL 1502864 at *1 (stating that "[o]ver the years, and as recently as 2018, DHS's Office of the Inspector General had, repeatedly, found that significant and various health and safety risks existed at Adelanto"). It would be improper for this court to rely on conditions at other detention facilities to conclude that the conditions at the NWDC represent a Fifth Amendment violation.

2. Likelihood of Irreparable Harm

The court also concludes that Petitioners do not meet their burden to show that "irreparable injury is likely in the absence of an injunction." *Winter*, 555 U.S. at 22. As discussed above, given the measures Respondents are currently taking, the court cannot conclude either that the spread of COVID-19 inside the NWDC is inevitable, or that Respondents will be unable to contain it if it occurs. No one can entirely guarantee safety in the midst of a global pandemic. However, the standard under which the court evaluates Petitioners' second TRO motion is not guaranteed safety—an impossible standard to meet no matter the circumstances—but rather a likelihood of irreparable harm. The evidence before the court does not meet that standard. Therefore, the court DENIES Petitioners' second motion for a TRO.[12]

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[12] Having concluded that Petitioners fail to meet the first two prongs of the TRO standard, the court finds it unnecessary to address the third and fourth prongs.

IV. CONCLUSION

For the foregoing reasons, the court DENIES Petitioners' second motion for a temporary restraining order (Dkt. # 36) and ORDERS Respondents to inform Petitioners and the court as soon as practicable but within at least 24 hours after learning that any individual physically present at the NWDC tests positive for or is otherwise diagnosed with COVID-19.

Dated this 8th day of April, 2020.

JAMES L. ROBART
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CLAUDIA FABIOLA ALMEIDA, Petitioner, v. WILLIAM P. BARR, Respondent.	CASE NO. C20-0490RSM-MLP ORDER DENYING MOTION FOR TEMPORARY RESTRAINING ORDER

I. INTRODUCTION

Before the court is Petitioner Claudia Fabiola Almeida's emergency motion for immediate relief, which the court construes as a motion for a temporary restraining order ("TRO"). (*See* Mot. (Dkt. # 2).) Specifically, Ms. Almeida seeks immediate release from custody in the Tacoma Northwest Detention Center ("the NWDC") due to the COVID-19 pandemic, which she alleges renders detained individuals, like herself, "vulnerable to serious health complications and or [sic] death." (*See id.* at 2.) Ms. Almeida originally filed her motion in the Ninth Circuit Court of Appeals as part of her 8

U.S.C. § 1252(a)(1) petition for review of the Board of Immigration Appeals' ("the Board") final order of removal. *See Almeida v. Barr*, No. 19-72254 (9th Cir.), Dkt. # 20 (filed March 25, 2020). The Ninth Circuit construed Ms. Almeida's emergency motion as a petition for a writ of habeas corpus under 28 U.S.C. § 2241 and transferred her motion to this court for "prompt[]" consideration. *See id.*, Dkt. # 24 (filed March 31, 2020); (*see also* 9th Cir. Transfer Order (Dkt. # 1-1) at 2)). Respondent William P. Barr ("the Attorney General") opposes the motion. (*See* Resp. (Dkt. # 3).) The court has considered the motion, all submissions filed in support of and in opposition to the motion, the relevant portions of the record, and the applicable law. Being fully advised, the court DENIES Ms. Almeida's motion.

II. BACKGROUND

A. Ms. Almeida's Immigration Proceedings and Appeal to the Ninth Circuit

Ms. Almeida is a citizen of Mexico, who became a lawful permanent resident of the United States on January 20, 1990. (Administrative Record ("AR") at 1014.)[1] Subsequently, she was convicted of two forgery offenses and possession of a controlled substance, methamphetamine. (*Id.* at 820, 1014.)

On February 6, 2015, Ms. Almeida sought admission to the United States as lawful permanent resident. (*Id.*) However, at the time of her application for admission,

[1] The court refers to the administrative record on file in the Ninth Circuit. *See Almeida v. Barr*, No. 19-72254 (9th Cir.) Dkt. # 6 (filed Sept. 24, 2019). In transferring Ms. Almeida's motion to this court, the Ninth Circuit neglected to transfer the administrative record to which the briefing on this matter refers. Nevertheless, the court takes judicial notice of the administrative record on file in the Ninth Circuit. *Lee v. City of L.A.*, 250 F.3d 668, 689 (9th Cir. 2001) ("[U]nder Fed. R. Evid. 201, a court may take judicial notice of 'matters of public record.'").

she was found to be in possession of 1.88 kilograms of methamphetamine concealed in her car. (*Id.* at 820, 823, 828-32, 1014.) She was subsequently convicted in United States District Court for smuggling goods in violation of 18 U.S.C. § 545. (*Id.* at 824, 1014.) The court sentenced her to 36 months' imprisonment. (*Id.* at 825.)

Due to her criminal record, the United States Department of Homeland Security ("DHS") initiated removal proceedings against Ms. Almeida and filed a Notice to Appear in Immigration Court. (*Id.* at 1012-14.) The Notice to Appear charged Ms. Almeida with three counts of removability, including (1) as a noncitizen convicted of a crime involving moral turpitude, *see* 8 U.S.C. § 1182(a)(2)(A)(i)(I); (2) as a noncitizen convicted of a controlled substance offense, *see* 8 U.S.C. § 1182(a)(2)(A)(i)(II); and (3) as a noncitizen the Attorney General has reason to believe was involved in the illicit trafficking of a controlled substance, *see* 8 U.S.C. § 1182(a)(2)(C)(i). (AR at 1014.)

On August 8, 2018, Ms. Almeida, through counsel, conceded that she was removable as a noncitizen convicted of a crime involving moral turpitude and a controlled substance offense, but denied that she was removable as an illicit trafficker of a controlled substance. (*Id.* at 141.) However, on November 7, 2018, Ms. Almeida filed a motion to amend her pleadings, arguing that she was no longer removable as a noncitizen convicted of a controlled substance offense based on the Ninth Circuit's initial 2018 decision in *Lorenzo v. Sessions*, 902 F.3d 930, 932 (9th Cir. 2018), *opinion withdrawn on denial of reh'g sub nom. Lorenzo v. Whitaker*, 913 F.3d 930 (9th Cir. 2019) ("*Lorenzo II*"), *and opinion superseded on denial of reh'g sub nom. Lorenzo v. Whitaker*, 752 F. App'x 482 (9th Cir. 2019) ("*Lorenzo III*"). (AR at 942-45.) The immigration

judge denied Ms. Almeida's motion to withdraw her concession. (*Id.* at 175-77.) Ms. Almeida then sought asylum and related relief and protection from removal, as well as cancellation of removal for certain permanent residents. (*Id.* at 142, 166-67, 788-99, 803-04.)

On February 7, 2019, the immigration judge issued a written decision finding Ms. Almeida removable pursuant to all charges of removability and ineligible for relief and protection from removal. (*Id.* at 49-83.) The immigration judge denied Ms. Almeida's request for cancellation of removal as a matter of discretion and found Ms. Almeida statutorily barred from asylum and withholding of removal because her conviction for smuggled goods constitutes a particularly serious crime. (*Id.* at 70-74 (citing 8 U.S.C. §§ 1158(b)(2)(A)(ii), 1231(b)(3)(B)(ii)).) The immigration judge held in the alternative that Ms. Almeida did not establish eligibility for relief and protection from removal on the merits of her claims. (*Id.* at 74-81.) Finally, the immigration judge denied Ms. Almeida's request for a continuance. (*Id.* at 81-82.)

On July 29, 2019, the Board dismissed Ms. Almeida's appeal of the immigration judge's decision. (*Id.* at 3-7.) First, the Board held that it was unnecessary to reach Ms. Almeida's challenge to the controlled substance ground of removability because she conceded removability as a noncitizen who committed a crime involving moral turpitude. (*Id.* at 3.) Further, the Board noted that the Ninth Circuit's decision in *Lorenzo*, on which Ms. Almeida relied to challenge her removability, was withdrawn. (*Id.* at 3-4 (citing *Lorenzo II*, 913 F.3d 930; *Lorenzo III*, 752 F. App'x 482).) Second, the Board agreed with the immigration judge's denial of the cancellation of removal as a matter of

discretion. (*Id.* at 4-5.) Third, the Board upheld the immigration judge's denial of asylum and withholding of removal based on the particularly serious crime bar. (*Id.* at 5-7.) Finally, the Board held that the immigration judge's denial of Ms. Almeida's request for deferral of removal under the Convention Against Torture was not clearly erroneous because Ms. Almeida was never tortured in the past and her fear of harm was speculative. (*Id.* at 7.)

On September 3, 2019, Ms. Almeida filed a petition for review with the Ninth Circuit and a motion for a stay of removal. *See Almeida v. Barr*, No. 19-72254 (9th Cir.) Dkt. # 1 (filed Sept. 3, 2019). The Attorney General opposes Ms. Almeida's petition. *See id.*, Dkt. # 9 (filed Oct. 29, 2019). On November 5, 2019, Ms. Almeida filed a motion to hold her petition in abeyance while she applied for U and T nonimmigrant visas. *See id.*, Dkt. # 11. The Attorney General also opposes the abeyance motion. *See id.*, Dkt. # 12. Ms. Almeida's petition in the Ninth Circuit is presently in the Ninth Circuit's mediation program. (*See* Mot. at 4-5; Resp. at 6.) She is currently in DHS custody and detained at the NWDC pursuant to 8 U.S.C. § 1225(b)(2)(A). She has been detained at the NWDC since August 16, 2018. (Mot. at 4.)

B. Ms. Almeida's Emergency Motion for Immediate Release

On March 23, 2020, Ms. Almeida filed her present emergency motion for release from custody in the Ninth Circuit. (*See* Mot.) The Ninth Circuit panel assigned to Ms.

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Almeida's appeal construed Ms. Almeida's motion as a petition for a writ of habeas corpus under 28 U.S.C. § 2241 and transferred it to this court.[2] (*See* Transfer Order at 2.)

In her present motion, Ms. Almeida, who is 40 years old, asserts that her underlying health conditions, including obesity, unspecified, and impaired glucose tolerance (prediabetes) elevate her risk of becoming severely ill if she contracts COVID-19. (*See* Mot. at 5 (citing Att. E[3]).) She provides her NWDC patient summary as evidence of these underlying health conditions. (*See id.*)

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[2] The United States Supreme Court has not yet resolved the question of whether a conditions of confinement claim, such as Ms. Almeida's claim here, may be brought in the form of a petition for a writ of habeas corpus. *See Bell v. Wolfish*, 441 U.S. 520, 526 n.6 (1979) ("Thus, we leave to another day the question of the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement, as distinct from the fact or length of the confinement itself."). The majority of federal circuit courts allow detainees to challenge their conditions of confinement via a habeas petition. *See Aamer v. Obama*, 742 F.3d 1023, 1036-37 (D.C. Cir. 2014) (citing *United States v. DeLeon*, 444 F.3d 41, 59 (1st Cir. 2006); *Thompson v. Choinski*, 525 F.3d 205, 209 (2d Cir. 2008); *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235, 242 & n.5 (3d Cir. 2005); *McNair v. McCune*, 527 F.2d 874, 875 (4th Cir. 1975); *Adams v. Bradshaw*, 644 F.3d 481, 482 83 (6th Cir. 2011)). The Ninth Circuit has not yet decided the issue. *See Nettles v. Grounds*, 830 F.3d 922, 931 (9th Cir. 2016) (holding that if a state prisoner's claim "would not necessarily spell speedier release," it does not lie at "the core of habeas corpus," and must be brought, if at all, under 42 U.S.C. § 1983; but explicitly stating that the court would not address how this standard "applies to relief sought by prisoners in federal custody").

Nevertheless, the three-judge panel assigned to Ms. Almeida's appeal instructed this court to construe Ms. Almeida's motion, in which she challenges her detention based on alleged conditions at the NWDC that increase the risk of a COVID-19 infection, as a petition for habeas corpus under 28 U.S.C. § 2241. (*See* Transfer Order at 2.) Although the Ninth Circuit's transfer order holding that this district has jurisdiction to hear this motion as a habeas petition is unpublished and therefore does not definitively resolve this unsettled area of law, this court will follow the Ninth Circuit's direction in this case and not consider the issue further.

[3] In transferring this case to the Western District of Washington, the Ninth Circuit neglected to transfer the attachments to Ms. Almeida's motion. (*See* Mot.) However, the court has reviewed the attachments that Ms. Almeida filed with her motion in the Ninth Circuit, *see Almeida v. Barr*, No. 19-72254 (9th Cir.) Dkt. # 20 (filed March 25, 2020), and takes judicial notice of them, *see supra* n.1 (citing *Lee*, 250 F.3d at 689).

To bolster her motion, Ms. Almeida also relies on a letter from two physicians, Dr. Scott A. Allen, MD, FACP, and Dr. Josiah Rich, MS, MPH, who both serve as medical subject matter experts for DHS's Office of Civil Rights and Civil Liberties ("CRCL"), which the physicians sent to the Chairpersons and Ranking Members of the House Committee on Homeland Security, the House Committee on Oversight and Reform, and the Senate Committee on Homeland Security and Governmental Affairs. (*Id.* at 7-8 (citing Att. D[4]).) In their letter, the physicians state that they are "gravely concerned about the need to implement immediate and effective mitigation strategies to slow the spread of the coronavirus and resulting infections of COVID-19." (*Id.*, Att. D at 2.) The physicians note that there have been clusters of COVID-19 identified in "congregant settings" in Chinese and Iranian prisons and that an inmate and officer have reportedly tested positive for the virus at New York's Rikers Island. (*Id.*) They also note recent reporting indicating that immigrant detainees at ICE's Aurora facility are in isolation for possible exposure to coronavirus that a member of ICE's medical staff at a private detention center in New Jersey has tested positive for coronavirus. (*Id.*) The physicians do not provide any statements or information concerning conditions at the NWDC. (*See generally id.*)

C. Conditions at the NWDC & Additional Safety Precautions

In his response to Ms. Almeida's motion, the Attorney General submits the declaration of Drew H. Bostock, who is the Officer in Charge ("OIC") with DHS, ICE,

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[4] *See supra* n.3.

Enforcement and Removal Operations ("ERO") in the Seattle Field Office ("ERO Seattle"). (Bostock Decl. (Dkt. # 3) ¶ 1.)[5] Although Ms. Almeida challenges the sufficiency of measures implemented at the NWDC and described in OIC Bostock's declaration, she does not challenge the accuracy of his declaration. (*See* Reply (Dkt. # 4) at 8-9).) OIC Bostock attests to the following facts concerning the NWDC, its present conditions, and precautions implemented at the facility to prevent an outbreak of COVID-19:

The NWDC[6] is a private detention center run by The GEO Group, Inc. ("GEO"). (Bostock Decl. ¶ 4.) It has the capacity to house 1,575 detainees and historically operates near capacity. (*Id.* ¶ 6.) However, presently, the NWDC has only 838 detainees, which represents only 53.2% of its typical number of detainees. (*Id.*) ICE last transferred detainees from the southern border to the NWDC on March 5, 2020, and does not anticipate any additional transfers from that area in the reasonably foreseeable future. (*Id.* ¶ 7.)

On March 18, 2020, ICE announced that due to the ongoing COVID-19 pandemic, it would adjust enforcement to focus on public safety risks and individuals subject to mandatory detention based on criminal grounds. (*Id.* ¶ 8.) For individuals who do fall within these categories, ICE is currently exercising its discretion to delay enforcement

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[5] The Declaration of Drew H. Bostock is attached to the Attorney General's response to Ms. Almeida's motion. (*See* Resp. (attaching Bostock Decl.).)

[6] The NWDC is also referred to as the Northwest ICE Processing Center ("NWIPC"). (*See* Bostock Decl. ¶ 1.)

actions until after the COVID-19 crisis or to use alternatives to detention, where appropriate. (*Id.*) Due to this change, ICE expects only a limited number of incoming detainees at the NWDC during the COVID-19 crisis—the majority of whom will be aliens who represent public safety risks and are subject to mandatory custody provisions. (*Id.* ¶ 9.)

As a response to the COVID-19 crisis, the ICE Health Services Corps ("IHSC"), which oversees medical care at the NWDC, implemented certain safety protocols. (*Id.* ¶ 11.) On March 26, 2020, IHSC implemented temperature and prescreening checks for all new detainees arriving at the NWDC prior to entrance into the facility. (*Id.*) Regular procedures at the NWDC require that all incoming detainees' personal property and valuable are inventories and stored. (*Id.* ¶ 12.) Further, all incoming detainees are afforded the opportunity to shower and provided with clean clothing, bedding, towels, and personal hygiene items. (*Id.*)

GEO provides all detainees with an instructional flyer outlining proper hand washing hygiene and the importance of covering coughs. (*Id.* ¶ 13.) In response to the COVID-19 pandemic, additional posters in multiple languages concerning hand washing hygiene and covering coughs have been placed in each housing unit at the NWDC. (*Id.*)

As of March 20, 2020, all incoming detainees who do not meet current IHSC protocol requirements for isolation monitoring due to possible COVID-19 symptoms, exposure, or testing, are placed in two separate housing units for 14 days of monitoring for signs or symptoms of COVID-19. (*Id.* ¶ 14.) Detainees in the 14-day observation period are not allowed to commingle with other detainees in common areas during the

14-day period. (*Id.*) Detainees admitted on the same date and who are determined to be at the same risk classification may be housed in the same cell for the 14-day observation period. (*Id.*) Detainees admitted on separate dates and those at different risk classification levels are not housed together. (*Id.*) If the 14-day period passes without any detainees in a cell displaying signs or symptoms of COVID-19, the detainees are released to other housing units in the facility. (*Id.*) A separate remote medical unit has been established to monitor detainees undergoing the 14-day observation. (*Id.*)

In response to COVID-19, GEO has enhanced its cleaning in all units, food preparation and service areas, intake rooms and other work centers with increased emphasis on cleaning contact areas with disinfectant cleaners approved as effective against COVID-19. (*Id.* ¶ 16.) GEO makes soap and cleaning supplies available to detainees in all housing units and work areas at the NWDC and has increased the amount of soap, disinfectant cleaner, and food service sanitizer in every housing unit in response to COVID-19. (*Id.* ¶ 17.) GEO also holds weekly town hall meetings with detainees in every housing unit to educate detainees on hand washing and covering coughs. (*Id.* ¶ 18.) GEO instructs detainees to clean tables and horizontal surfaces before each meal and to disinfect such surfaces after each meal. (*Id.*) GEO also instructs detainees to clean countertops, microwave handles, door handles, exercise equipment, electronic tablets, telephones, and any high-risk contact areas with disinfectant cleaner. (*Id.*)

On March 13, 2020, ICE temporarily suspended social visitation at the NWDC, and other detention facilities, to prevent the spread of COVID-19, and cancelled all tours of the NWDC. (*Id.* ¶¶ 19-20.) GEO screens all contractors, vendors, attorneys, and court

visitors through a questionnaire that covers whether the individual is currently experiencing any possible COVID-19 symptoms and recent travel history and prohibits entry to anyone who positively reports symptoms or possible exposure to COVID-19. (*Id.* ¶ 21.) Visitors are limited to noncontact visits unless a contact visit is absolutely necessary and has been approved by the OIC or Assistant OIC. (*Id.* ¶ 22.) If an attorney's request for a contact visit is approved, the attorney must wear personal protective equipment ("PPE"), including a mask. (*Id.*) In addition, ICE has implemented a daily duty officer to facilitate unmonitored attorney-client phone calls from each housing unit so that detainees do not have to move throughout the facility. (*Id.*)

ICE and GEO are collaborating on a process to implement temperature checks of all employees and staff for GEO, ICE, and Executive Office for Immigration Review ("EOIR") at the NWDC starting on March 27, 2020. (*Id.* ¶ 24.) ICE and GEO employees are instructed to stay home if they are sick, experiencing any possible COVID-19 symptoms, or have been in close contact with someone diagnosed with COVID-19. (*Id.* ¶ 25.) GEO is voluntarily notifying ICE if any of its employees test positive or are diagnosed with COVID-19. (*Id.*) As of March 27, 2020, no ICE or GEO employee or staff at the NWDC had reported testing positive for COVID-19. (*Id.*) In addition, ICE instituted a telework program for its employees at the NWDC to minimize the number of employees present at the facility. (*Id.* ¶ 26.)

Finally, in late March 2020, ERO Tacoma began conducting a discretionary review of certain detainees' cases identified IHSC, based on their medical records, as detainees who meet the current CDC criteria as at-risk due to COVID-19. (*Id.* ¶ 31.) The

review requires that IHSC identify detainees who fall within an at-risk category and who are not subject to various mandatory custody provisions based on their immigration and criminal histories. (*Id.*) If an identified detainee is not subject to mandatory custody, ERO Tacoma determines whether the detainee is otherwise a danger to the public and/or a flight risk such that release is not appropriate. (*Id.*) As a result of this labor-intensive review, by March 27, 2020, ICE had already released six detainees from custody. (*Id.* ¶¶ 31-32.)

III. ANALYSIS

A. Standards for a TRO

The standard for issuing a TRO is the same as the standard for issuing a preliminary injunction. *See New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1347 n.2 (1977). A TRO is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). "The proper legal standard for preliminary injunctive relief requires a party to demonstrate (1) 'that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest.'" *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009) (citing *Winte*r, 555 U.S. at 20).

As an alternative to this test, a preliminary injunction is appropriate if "serious questions going to the merits were raised and the balance of the hardships tips sharply" in the moving party's favor, thereby allowing preservation of the status quo when complex

legal questions require further inspection or deliberation. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011). However, the "serious questions" approach supports a court's entry of a TRO only so long as the moving party also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest. *Id*. at 1135. The moving party bears the burden of persuasion and must make a clear showing that he is entitled to such relief. *Winter*, 555 U.S. at 22.

B. Ms. Almeida's Motion

The court concludes that Ms. Almeida has not made a clear showing that she is entitled to the extraordinary remedy that she requests.

1. Likelihood of Success on the Merits

To obtain a TRO, Ms. Almeida must make a clear showing that she is likely to succeed on the merits or, alternatively, has raised serious questions going to the merits of her habeas petition on Fifth Amendment grounds. To succeed on her habeas petition, Ms. Almeida must show that she is "in custody in violation of the Constitution or laws or treaties of the United States." *See* 28 U.S.C. § 2241. Ms. Almeida argues that her detention violates the Fifth Amendment's Due Process Clause because her detention "gravely heightens her risk of contracting COVID-19 due to the congregate carceral setting," and her "underlying health issues make her particularly vulnerable to severe illness." (Mot. at 5, 8.) For the reasons stated below, the court concludes that Ms. Almeida fails to make a clear showing that she is likely to succeed on the merits of her claim or that she has raised serious questions going to the merits of her claim.

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When the government detains a person pursuant to an immigration violation, the person is a civil detainee. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). To evaluate the constitutionality of civil detention conditions under the Fifth Amendment, a district court must determine whether those conditions "amount to punishment of the detainee." *Bell v. Wolfish*, 441 U.S. 520, 535 (1979); *see also Kingsley v. Hendrickson*, --- U.S. ---, 135 S. Ct. 2466, 2473-74 (2015). Punishment may be shown through an express intent to punish or a condition that is not "reasonably related to a legitimate governmental objective." *Bell*, 441 U.S. at 539; *see also Kingsley*, 135 S. Ct. at 2473-74 (clarifying that "a pretrial detainee can prevail by providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose"). In addition, "when 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).[7] Thus, for example, the government violates the Due Process Clause if it fails to provide civil detainees with "food, clothing, shelter, medical care, and reasonable safety." *Id.* at 200. In the context of a Due Process Clause failure-to-protect claim, the Ninth Circuit declared that "the defendant's conduct must be objectively unreasonable, a test that will necessarily 'turn on the facts and circumstances of each particular case.'"

[7] In *DeShaney*, the Supreme Court analyzed the petitioners' rights under the Fourteenth Amendment. *See* 489 U.S. at 194-95. Fifth Amendment due process claims and Fourteenth Amendment due process claims are analyzed in the same way. *See Paul v. Davis*, 424 U.S. 693, 702 n.3 (1976).

Castro v. Cty. of L.A., 833 F.3d 1060, 1071 (9th Cir. 2016) (quoting *Kingsley*, 135 S. Ct. at 2473) (alterations and internal quotation marks omitted).[8]

Ms. Almeida does not present allegations or evidence to show an "express intent" to punish her. (*See generally* Mot.) Moreover, preventing detained aliens from absconding and ensuring that they appear for removal proceedings is a legitimate governmental objective. *See Jennings v. Rodriguez*, --- U.S. ---, 138 S. Ct. 830, 836 (2018); *Demore v. Kim*, 538 U.S. 510, 520-22 (2003); *Zadvydas*, 533 U.S. at 690-91. Ms. Almeida fails to present evidence establishing that her current confinement is not reasonably related to, or is excessive in relation to, that objective. Therefore, Ms. Almeida may succeed on her Fifth Amendment claim only if she shows that the Attorney General has failed to provide for her reasonable safety. *See DeShaney*, 489 U.S. at 200.

As of the date of this order, there is no evidence of a COVID-19 case among any detainees or staff at the NWDC. Nevertheless, Ms. Almeida contends that her continued detention at NWDC "gravely heightens her risk of contracting COVID-19" due to the nature of the virus at issue, its endemic presence in the surrounding community, and "the congregate carceral" nature of detention itself. (Mot. at 5-6.) She also contends that her "underlying health issues make her particularly vulnerable to severe illness due to COVID-19." (*Id.* at 5.) Yet, Ms. Almeida never addresses the actual conditions at the NWDC or the measures that facility has implemented to provide for detainees' safety

[8] "[T]he Supreme Court has treated medical care claims substantially the same as other conditions of confinement violations including failure-to-protect claims." *Gordon v. Cty. of Orange*, 888 F.3d 1118, 1124 (9th Cir. 2018), *cert. denied sub nom. Cty. of Orange, Cal. v. Gordon*, 139 S. Ct. 794, 202 L. Ed. 2d 571 (2019).

during the present COVID-19 pandemic. Indeed, she submits no evidence or testimony concerning her actual experience at the NWDC and instead relies on generalized statements from Drs. Allen and Rich about the potential risks to immigrant detainees generally due to the COVID-19 pandemic. (*See* Mot. Att. D.) The court does not dismiss these concerns but notes that nothing in Drs. Allen and Rich's letter addresses the actual conditions at the NWDC. (*See generally id.*) Instead, Drs. Allen and Rich point to reported conditions at prisons in China and Iran, the presence of COVID-19 at New York's Rikers Island, the possible presence of COVID-19 among immigrant detainees at ICE's Aurora facility, and a reported positive COVID-19 test for a member of ICE's medical staff at a detention center in New Jersey. (*See id.* at 3.) None of this is relevant to the circumstances before the court, which involve the conditions facing Ms. Almeida at the NWDC.

Under the Fifth Amendment, the Attorney General is not required to eliminate any risk to Ms. Almeida. Instead, the Attorney General is only required to provide for her "reasonable safety." *See DeSahney*, 489 U.S. at 200. First, the court notes that although the NWDC has a capacity to house 1,575 detainees, the detainee population has been reduced to 838 individuals—representing approximately only 53.2% of the number of detainees ordinarily housed there. (Bostock Dec. ¶ 6.) These figures suggest that the NWDC is not currently overcrowded; indeed, they suggest the opposite. Further, there is substantial evidence before the court of robust measures at the NWDC to prevent an outbreak of COVID-19, to contain one should it occur, and generally to provide for the safety of the detainees housed there during the pandemic. As detailed above, those

measures include (1) policies limiting transfers of detainees from the southern border of the United States (*id.* ¶ 7); (2) exercising discretion to delay certain enforcement actions that limit the number of new detainees arriving the NWDC (*id.* ¶¶ 8-9); (3) implementing temperature and prescreening checks on all new detainees prior to their entrance into the NWDC (*id.* ¶ 11); (4) providing additional information in multiple languages and conducting weekly town hall meetings with detainees concerning hand washing hygiene and the importance of covering a cough (*id.* ¶¶ 13, 18); (5) providing for the segregation of incoming detainees for 14 days of monitoring for signs or symptoms of COVID-19 (*id.* ¶ 14); (6) enhanced cleaning measures (*id.* ¶ 16); (7) providing additional soap, hand sanitizer, and cleaning supplies to both detainees and employees (*id.* ¶¶ 17, 23); (8) instituting temperature checks for employees and instructing employees to stay home if they are symptomatic or have been exposed to someone diagnosed with COVID-19 (*id.* ¶¶ 24-25); and (9) implementing a telework program under which only half of ERO employees are present at the NWDC at any given time (*id.* ¶ 26). In addition, the court notes the newly implemented review process under which at-risk detainees are assessed for release and under which six detainees have already been released. (*Id.* ¶¶ 31-32.)

Ms. Almeida argues in her reply memorandum that the measures implemented at the NWDC are insufficient. (*See* Reply at 8-9.) Significantly, however, the measures implemented by the NWDC generally track the recommendations of DHS's medical subject matter experts, Drs. Allen and Rich, upon whom Ms. Almeida relies. (*See* Mot. Att. D at 5 (recommending "[p]rocesses for screening, testing, isolation, and quarantine," "limiting transport and transfer of immigrant detainees" and "implementing alternatives

to detention to facilitate as much social distancing as possible"). Although Drs. Allen and Rich may recommend "releasing all detainees in high risk medical groups" (*id.*), the Attorney General cannot do so without first assessing whether such release is otherwise authorized by law and in the public's interest in any given case. Indeed, the Attorney General is presently engaged in such a case-by-case analysis and has begun to release high-risk detainees on this basis. (*See* Bostock Decl. ¶¶ 31-32.) Given the evidence of the extensive measures that the NWDC has implemented, and the lack of any contrary evidence concerning actual conditions at the facility, the court cannot conclude that Ms. Almeida has made a clear showing that she is likely to prevail on her Fifth Amendment claim or that she has raised serious questions going to the merits of her claim.

Finally, the court understands that several other district courts have granted TROs in favor of immigration detainees on Fifth Amendment grounds due to conditions at those facilities. *See Castillo et al. v. Barr et al.*, --- F. Supp. 3d ----, 2020 WL 1502864, at *6 (C.D. Cal. Mar. 27, 2020); *Basank v. Decker*, No. 20 CIV. 2518 (AT), 2020 WL 1481503, at *7 (S.D.N.Y. Mar. 26, 2020); *Coronel v. Decker*, --- F. Supp. 3d ----, 2020 WL 1487274, at *10 (S.D.N.Y. Mar. 27, 2020). However, the facts in those cases diverge from those before this court in meaningful ways. *See Basank*, 2020 WL 1481503, at *7 ("Each of the jails where a Petitioner is being housed has reported confirmed cases of COVID-19."); *Coronel*, 2020 WL 1487274 at *4 (stating that, unlike in this case, "the record demonstrates that ICE has not taken any action to address the particular risks COVID-19 poses to high-risk individuals"); *Castillo*, 2020 WL 1502864 at *1 (stating that "[o]ver the years, and as recently as 2018, DHS's Office of the

Inspector General had, repeatedly, found that significant and various health and safety risks existed at Adelanto"), at *2 (stating that the plaintiff detainees do not have access to hand sanitizer). It would be improper for this court to rely on conditions at other detention facilities to conclude that the conditions at the NWDC represent a Fifth Amendment violation.

2. Likelihood of Irreparable Harm

The court also concludes that Ms. Almeida has not meet her burden to show that "irreparable injury is likely in the absence of an injunction." *Winter*, 555 U.S. at 22. As discussed above, given the measures the Attorney General is currently taking, the court cannot conclude either that the spread of COVID-19 inside NWDC is inevitable, or that the Attorney General will be unable to contain it if it occurs. No one can entirely guarantee safety in the midst of a global pandemic. However, the standard under which the court evaluates Ms. Almeida's TRO motion is not guaranteed safety—an impossible standard to meet no matter the circumstances—but rather a likelihood of irreparable harm. The evidence before the court does not meet that standard.

Therefore, the court DENIES Ms. Almeida's motion for a TRO.[9]

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[9] Having concluded that Ms. Almeida fails to meet the first two prongs of the TRO standard, the court finds it unnecessary to address the third and fourth prongs at this time.

IV. CONCLUSION

For the foregoing reasons, the court DENIES Ms. Almeida's motion for a TRO (Dkt. # 2).

Dated this 6th day of April, 2020.

RICARDO S. MARTINEZ
CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
VALDOSTA DIVISION

A.S.M., *et al.*,	*	
Petitioners,	*	
vs.	*	CASE NO. 7:20-CV-62 (CDL)
WARDEN MICHAEL DONAHUE, *et al.*,	*	
Respondents.	*	

O R D E R

Petitioners are detainees at the Stewart Detention Center ("Stewart") and Irwin County Detention Center ("Irwin") either awaiting deportation from the United States pursuant to a final order of removal or awaiting resolution of their claim not to be removed. They seek emergency preliminary equitable relief temporarily releasing them from custody. They allege that continued detention at Stewart and Irwin exposes them to the substantial risk of infection with the COVID-19 virus, which given their underlying health conditions seriously endangers their health and safety. They maintain that these conditions violate their constitutional right to substantive due process under the Fifth Amendment and their right to be free from cruel and unusual punishment under the Eighth Amendment.

Petitioners' pending motion seeks a temporary restraining order, which the Court converts to a motion for preliminary

injunction now that Defendants have responded to it. *See Levine v. Comcoa Ltd.*, 70 F.3d 1191, 1193 (11th Cir. 1995). The standard for the two is the same. To obtain such preliminary injunctive relief, Petitioners must establish the following: (1) that they have a substantial likelihood of succeeding on the merits; (2) that they face an imminent and substantial threat of irreparable harm unless relief is granted; (3) that the threatened injury to them outweighs the harm the relief may cause defendants; and (4) the relief is not against the public interest. *Levi Strauss & Co. v. Sunrise Int'l Trading Inc.*, 51 F.3d 982, 985 (11th Cir. 1995).

Before the Court decides whether Petitioners have satisfied the requirements for preliminary injunctive relief, it must determine whether it has jurisdiction to decide the matter. Petitioners maintain that because they seek a writ of habeas corpus releasing them from custody the Court has jurisdiction pursuant to 28 U.S.C. § 2241. Alternatively, they argue that the Court has jurisdiction under 28 U.S.C. § 1331 to determine their implied cause of action for equitable relief to remedy constitutional violations. Although the Eleventh Circuit has not addressed the issue in a published opinion, an unpublished opinion in this Circuit has concluded that a petition for a writ of habeas corpus is not the appropriate mechanism for contesting a prisoner's conditions of confinement. *See Vaz v. Skinner*, 634 F. App'x 778, 781 (11th Cir. 2015) (per curiam) (finding § 2241 is "not the

appropriate vehicle for . . . a claim challeng[ing] the conditions of confinement"). The circuits that have squarely addressed the issue are split on how they resolve it. *See Wilborn v. Mansukhani*, 795 F. App'x 157, 162-64 (4th Cir. 2019) (per curiam) (describing circuit split). The Court is persuaded that the Eleventh Circuit would likely follow the unpublished decision of its fellow colleagues who have decided the issue consistent with a majority of the other circuits. Accordingly, the Court finds that a writ of habeas corpus is not the appropriate mechanism for seeking the relief Petitioners request. And the Court may not exercise jurisdiction pursuant to 28 U.S.C. § 2241. The Court has considered Petitioners' argument that an exception should be made to the general principle that writs of habeas corpus cannot be used to remedy conditions of confinement claims when release from detention is the only meaningful remedy for the constitutional violation. The Court agrees that the general principle eschewing habeas relief as a means for remedying condition of confinement constitutional violations rests upon the assumption that eliminating the contested confinement conditions is possible without releasing the detainee from detention. And if the present record supported Petitioners' contention that they face substantial risk of serious physical harm and/or death from unconstitutional *conditions that cannot be modified to reasonably eliminate those risks*, the Court may find Petitioners' argument

for habeas relief persuasive. But based upon the present record, the Court does not find that the only way to remedy Petitioners' alleged constitutional violations is to release them from custody. Therefore, even if this narrow exception to the "no habeas for constitutional confinement claims" was recognized in this circuit, it does not apply here.

Petitioners have a stronger argument for jurisdiction pursuant to 28 U.S.C. § 1331 arising from their implied cause of action for equitable relief to remedy constitutional violations. *See Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 404 (1971) (Harlan, J., concurring) ("[There is a] presumed availability of federal equitable relief against threatened invasions of constitutional interests."). The remedy for this type of claim, however, is modification of the conditions of confinement to eliminate the constitutional violation. Release from custody is not a remedy for this type of claim. *See Gomez v. United States*, 899 F.2d 1124, 1126 (11th Cir. 1990) ("The appropriate Eleventh Circuit relief from prison conditions that violate the Eighth Amendment during legal incarceration is to require the discontinuance of any improper practices, or to require correction of any condition causing cruel and unusual punishment. . . . [R]elief of an Eighth Amendment violation does not include release from confinement."). Because the only remedy Petitioners seek in their presently pending motion for emergency

preliminary equitable relief is release from detention, this claim does not support granting that relief.

Based on the foregoing, Petitioners' motion for emergency preliminary injunctive relief is denied. The Court emphasizes the narrow scope of today's ruling. Based upon the present record, Petitioners are not entitled to release from custody in the form of preliminary injunctive relief because: (1) the Court has no jurisdiction to decide Petitioners' writ of habeas corpus claim that is based upon allegedly unconstitutional conditions of confinement, and (2) release from custody is not an appropriate remedy for Petitioners' implied equitable relief cause of action to remedy constitutional violations. Petitioners may amend their motion to seek remedies other than release from detention.

IT IS SO ORDERED, this 10th day of April, 2020.

S/Clay D. Land
CLAY D. LAND
CHIEF U.S. DISTRICT COURT JUDGE
MIDDLE DISTRICT OF GEORGIA

IN THE UNITED STATES DISTRICT COURTS

FOR THE EASTERN DISTRICT OF CALIFORNIA

AND THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT COMPOSED OF THREE JUDGES

PURSUANT TO SECTION 2284, TITLE 28 UNITED STATES CODE

RALPH COLEMAN, et al., Plaintiffs, v. GAVIN NEWSOM, et al., Defendants.	Case No. 2:90-cv-0520 KJM DB P **THREE-JUDGE COURT**
MARCIANO PLATA, et al., Plaintiff, v. GAVIN NEWSOM, et al., Defendants.	Case No. 01-cv-01351-JST **THREE-JUDGE COURT** **ORDER DENYING PLAINTIFFS' EMERGENCY MOTION TO MODIFY POPULATION REDUCTION ORDER**

Before: WARDLAW, Circuit Judge, MUELLER, Chief District Judge, and TIGAR, District Judge

We are living in unprecedented times. The spread of COVID-19 is a global crisis, a crisis that is heightened in the most vulnerable groups among us. One such group is before us today. Plaintiffs, two classes of inmates incarcerated in California state prisons, have filed a motion asking us to order the state to release an unspecified, but significant, number of prisoners so that the prison population can be reduced to a level sufficient to allow physical distancing to prevent the spread of COVID-19—which, in Plaintiffs' view, requires that prisoners who live in dorm-style environments be housed six feet apart from one another. ECF No. 3219/6522.[1]

While we cannot know with certainty due to the pathogenesis of the virus, it appears that

[1] All filings in this Three-Judge Court are included in the individual docket sheets of both *Plata v. Newsom*, No. 01-cv-01351-JST (N.D. Cal.), and *Coleman v. Newsom*, No. 2:90-cv-0520 KJM DB P (E.D. Cal.). The Court cites to the docket number of *Plata* first, then *Coleman*.

COVID-19 has not yet surged in California's prisons. Thus far, only thirteen inmates have confirmed cases of the disease. Cal. Dep't of Corr. & Rehab., *Population COVID-19 Tracking*, https://www.cdcr.ca.gov/covid19/population-status-tracking/ (last visited Apr. 4, 2020). And, to their credit, Defendants[2] have already taken steps to combat the virus, including taking measures to reduce the prison population. But given the undisputed risk of further contagion in a carceral environment,[3] Plaintiffs' desire to maximize the reduction in the state's prison population is understandable.

We conclude, however, that under Federal Rule of Civil Procedure 60(b)(5) and the Prison Litigation Reform Act (PLRA), 18 U.S.C. § 3626, Plaintiffs' emergency motion for relief based on COVID-19 is not properly before us. This three-judge court was first convened in 2007 to consider a different issue: whether a release of prisoners was necessary to remedy California's structural failure to provide constitutionally adequate medical and mental health care services to inmates incarcerated in the state's prisons. We are therefore bound to deny Plaintiffs' motion. However, we do so without prejudice to Plaintiffs' seeking relief in a procedurally appropriate forum, including the individual *Coleman* and/or *Plata* courts.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Procedural History

Given the exigency of the circumstances before us, we provide only a brief procedural history here.[4] The proceedings before this three-judge court began long ago as two separate cases: *Coleman*, filed in 1990 in the Eastern District of California, alleged that Defendants were failing to provide constitutionally adequate mental health care services to inmates with serious mental disorders. *Plata*, filed in 2001 in the Northern District of California, alleged that Defendants were

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[2] Defendants are various California state officials, including Governor Gavin Newsom.

[3] *See, e.g.*, *167 Inmates at Cook County Jail Confirmed Positive for COVID-19*, Chi. Sun Times (Apr. 1, 2020), https://chicago.suntimes.com/coronavirus/2020/4/1/21203767/cook-county-jail-coronavirus-positive-covid-19 (reporting that 167 pre-trial detainees housed at the Cook County, Ill. jail tested positive for COVID-19 over a ten-day span).

[4] The history of these proceedings is chronicled more thoroughly in a 2009 order of our court, *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882 (E.D. Cal./N.D. Cal. 2009), and the Supreme Court's decision in *Brown v. Plata*, 563 U.S. 493 (2011).

failing to provide constitutionally adequate medical care.

The individual *Coleman* and *Plata* courts entered numerous remedial orders, including appointing a Special Master to oversee remedial efforts in *Coleman* and a Receiver to take control of the medical care delivery system in *Plata*. These measures failed to cure the constitutional deficiencies, and in 2007, both courts concluded that, absent a reduction in the state prison population—which was then almost double the prison system's design capacity—Defendants would never be able to deliver constitutionally adequate medical and mental health care.

Because they were not individually empowered to order a release of prisoners from California's prisons, the *Plata* and *Coleman* courts granted Plaintiffs' separate motions to convene a three-judge court to consider the issue. *See* 18 U.S.C. § 3626(a)(3)(B) (providing that a prisoner release order can be entered only by a three-judge court). The Chief Judge of the United States Court of Appeals for the Ninth Circuit appointed this three-judge court in both cases to determine whether a release order was appropriate.[5] *See Brown v. Plata*, 563 U.S. 493, 500 (2011) ("Because the two cases are interrelated, their limited consolidation for this purpose has a certain utility in avoiding conflicting decrees and aiding judicial consideration and enforcement.").

After holding a fourteen-day trial, we concluded that a significant reduction in the state prison population was the only way to bring Defendants into compliance with their constitutional obligations to provide adequate medical and mental health care services. *See generally Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882 (E.D. Cal./N.D. Cal. 2009) ("*Coleman I*"). We therefore ordered Defendants to reduce California's prison population to 137.5% design capacity within two years. *Id.* at 970.

Defendants appealed, and the Supreme Court affirmed.[6] *Plata*, 563 U.S. 493. The Court held that the PLRA's requirements for entering a prisoner release order were satisfied, *see* 18

[5] The original members of the three-judge court, the Hon. Stephen Reinhardt, Circuit Judge; the Hon. Lawrence K. Karlton, District Judge; and the Hon. Thelton E. Henderson, District Judge, have since been replaced by its current members: the Hon. Kim McLane Wardlaw, Circuit Judge; the Hon. Kimberly J. Mueller, Chief District Judge; and the Hon. Jon S. Tigar, District Judge.

[6] By statute, a three-judge district court order granting a permanent injunction may be appealed directly to the Supreme Court. 28 U.S.C. § 1253.

U.S.C. § 3626, and that there was ample evidence supporting our conclusion that crowding was the primary cause of the constitutional violations in California's delivery of medical and mental health services in its prison system. *Plata*, 563 U.S. at 517–530. It also concluded that the 137.5% population cap we ordered was "narrowly drawn, extend[ed] no further than necessary to correct the violation of [the] federal right, and [was] the least intrusive means necessary to correct the violation," and that we gave appropriate "substantial weight" to public safety, as the PLRA requires. *Id.* at 530–41; *see* 18 U.S.C. § 3626(a). At the same time, the Supreme Court recognized our ability to modify our remedial order as necessary:

> The three-judge court, however, retains the authority, and the responsibility, to make further amendments to the existing order or any modified decree it may enter as warranted by the exercise of its sound discretion. "The power of a court of equity to modify a decree of injunctive relief is long-established, broad, and flexible." *New York State Assn. for Retarded Children, Inc. v. Carey*, 706 F.2d 956, 967 (C.A.2 1983) (Friendly, J.). A court that invokes equity's power to remedy a constitutional violation by an injunction mandating systemic changes to an institution has the continuing duty and responsibility to assess the efficacy and consequences of its order. *Id.*, at 969–971. Experience may teach the necessity for modification or amendment of an earlier decree. To that end, the three-judge court must remain open to a showing or demonstration by either party that the injunction should be altered to ensure that the rights and interests of the parties are given all due and necessary protection.

Plata, 563 U.S. at 542–43.

Two years after the Supreme Court affirmed our prison population reduction order, Defendants asked us to terminate that order even though they had not yet complied with it. *Coleman v. Brown*, 922 F. Supp. 2d 1004, 1008 (E.D. Cal./N.D. Cal. 2013) ("*Coleman II*"). Plaintiffs filed a cross-motion asking us to impose institution-specific population caps to supplement the system-wide 137.5% cap that we had already ordered. *Id.* We denied both requests. *Id.* We concluded, among other things, that Defendants had failed to demonstrate that they could provide constitutionally adequate medical and mental health care with a prison population that exceeded 137.5% design capacity. *Id.* at 1034–43. At the same time, we concluded that Plaintiffs' request for institution-specific caps was premature because, until Defendants met the systemwide 137.5% cap, it was difficult to determine whether additional relief was necessary. *Id.* at 1048.

In 2015, Defendants succeeded, for the first time, in reducing the statewide prison population to less than 137.5% design capacity. The population has remained below that benchmark ever since.[7] Since that time, we have largely stepped back as the individual *Coleman* and *Plata* courts have continued to work to ensure that California provides constitutionally adequate medical and mental health services to its inmates.

B. Plaintiffs' Emergency Motion Based on COVID-19

On March 25, 2020, Plaintiffs filed the motion currently before us, which they have styled as an "Emergency Motion to Modify Population Reduction Order." ECF No. 3219/6522. The motion asks us to order Defendants to release to parole or post-release community supervision certain categories of inmates, including those who are scheduled to parole within a year and are either (a) low risk, as determined by the California Department of Corrections and Rehabilitation's (CDCR) risk assessment tool or (b) serving time for a non-violent offense. *Id.* at 27. Plaintiffs also ask us to require Defendants to release or relocate inmates who, because of their age or other medical conditions, are at a high risk of developing a severe form of COVID-19. *Id.* at 27–28. While Plaintiffs have not put forth a specific number of inmates that they believe should be released, they argued at the April 2, 2020 telephonic hearing on this motion that Defendants must release as many inmates as would be required to allow all remaining inmates to practice physical distancing, especially those who reside in crowded dorm housing.

Although the current record is unclear as to when Defendants began planning a response to COVID-19, they started implementing preventive measures at least as of March 11, 2020, when normal visiting at CDCR institutions was canceled statewide, fact sheets and posters on the pandemic were delivered to the inmate population, and additional hand-sanitizing dispenser stations were ordered. ECF No. 3241-1/6553-1. CDCR has activated "a centrally-located command center where CDCR and CCHCS [California Correctional Health Care Services] experts monitor information, prepare for known and unknown events, and exchange information centrally

[7] As of the most recent status report filed with us on March 16, 2020, California's prison population is at 134.4% design capacity. ECF No. 3213/6502 at 2.

in order to make decisions and provide guidance quickly." ECF No. 3240/6553-2 ¶ 4 (Gipson Decl.). The center's "goal is to implement measures and strategies to protect inmates and staff during the COVID-19 pandemic and to enhance social distancing and housing options during this time." *Id.*

On March 24, 2020, California Governor Gavin Newsom issued an executive order directing CDCR to suspend admission of inmates to state custody for 30 days, with the possibility that the suspension would be extended for an additional 30 days. ECF No. 3241/6553 ¶ 4 (Diaz Decl.). On March 30, 2020, CDCR Secretary Ralph Diaz announced that release would be accelerated for inmates who have less than sixty days remaining on their sentence, are not serving a term of incarceration for a violent felony or a domestic violence offense, and are not required to register as a sex offender. *Id.* ¶ 5. These last two measures are expected to result in an approximately 6,500-person reduction in the prison population over the coming weeks.[8] *Id.* ¶¶ 4–7.

Defendants oppose Plaintiffs' motion, arguing both that their response to COVID-19 so far has been constitutionally sufficient, and that the motion is not properly before this three-judge court because the relief it seeks is, in substance, a *new* prisoner release order, rather than a modification of our 2009 order imposing the 137.5% population cap. ECF No. 3235/6552.

II. DISCUSSION

Whether Plaintiffs' motion is properly viewed as a modification request is a critical question. For one, it bears on whether the motion is properly before our three-judge court. But even if the motion were properly before us, the PLRA places significant restrictions on a federal court's authority to order the release of prisoners as a remedy for a constitutional violation. *See* 18 U.S.C. § 3626. For example, a prisoner release order may be entered only if "(i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order; and (ii) the defendant has

[8] Defendants have also taken additional steps to combat COVID-19, including but not limited to transferring approximately 500 inmates out of dorm housing, suspending transfers between facilities, and conducting temperature checks and symptom screenings of all individuals entering the prisons. *E.g.*, ECF No. 3240/6553-2 ¶¶ 6–11.

had a reasonable amount of time to comply with the previous court orders." *Id.* § 3626(a)(3)(A)(i)–(ii). Plaintiffs argue that our 2009 order imposing the 137.5% population cap satisfies the PLRA's requirement of a prior order for less intrusive relief. ECF No. 3219/6522 at 31–32. If, however, the relief they seek is not actually a modification of the 2009 order but rather *new* relief based on the *new* threat of harm posed by COVID-19, Plaintiffs likely cannot satisfy the prior order requirement at this point because there have not yet been any orders requiring Defendants to take measures short of release to address the threat of the virus; nor have Defendants had a reasonable time in which to comply.[9]

In arguing that their motion properly seeks to modify our 2009 order imposing the population cap, Plaintiffs rely on Federal Rule of Civil Procedure 60(b)(5), which grants courts authority to "relieve a party . . . from a final judgment" if "applying it prospectively is no longer equitable." We have previously recognized that Rule 60(b)(5) may provide us with authority to modify our 2009 order in appropriate circumstances. *Coleman II*, 922 F. Supp. 2d at 1025–27 (citing *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367 (1992)). But we may only modify the order to the extent necessary to ensure that the remedial structure remains tailored to cure the constitutional violations previously found by the *Coleman* and *Plata* courts. *See id.* at 1048 (refusing to modify the 2009 order because it was not yet clear whether the 137.5% design capacity cap would be sufficient to cure the constitutional defects in Defendants' prison health care system). Rule 60(b)(5) does not provide us with free-standing authority to remedy any harm Defendants may inflict upon Plaintiffs, regardless of whether it is tethered to the previous findings of structural constitutional shortcomings in the delivery of medical and mental health care. *Cf. Parsons v. Ryan*, 912 F.3d 486, 501 (9th Cir. 2018) (explaining that a modification of relief was appropriate because it was not issued "in response to new violations of federal rights").

Plaintiffs argue that the potential harm posed by COVID-19 is attributable to the constitutional violations that have been previously found in these cases because "[p]reventing the spread of a dangerous, contagious illness is plainly a requirement of an adequate medical care

[9] We recognize that what is reasonable in ordinary times may be quite different from what is reasonable in these extraordinary times.

system." ECF No. 3248/6558 at 3–4. As a general matter, we agree that the Eighth Amendment requires Defendants to take adequate steps to curb the spread of disease within the prison system. Indeed, disease control is one of the areas in which the *Plata* court previously concluded that Defendants fell short. *See Coleman I*, 922 F. Supp. 2d at 896. For example, the *Plata* court previously found that the prison intake process, "which was designed to allow medical staff to identify inmates' medical issues, including communicable diseases, . . . was woefully inadequate." *Id.* (describing a finding of the *Plata* court in *Plata v. Schwarzenegger*, No. 01-1351-TEH, 2005 WL 2932254, at *12 (N.D. Cal. Oct. 3, 2005)). It also found that exam tables and counter tops where prisoners with infectious diseases were treated "were not routinely disinfected or sanitized." *See id.* at 896 (quoting *Plata*, 2005 WL 2932253, at *14); *see also Plata*, 563 U.S. at 508 (citing this fact in affirming the population cap order). Still, Defendants' inability to control disease was only one symptom of an overall failure to provide inmates with access to constitutionally adequate health care services.

Here, however, the impetus for the release order Plaintiffs seek is different from the overarching structural violations underlying the 2009 population reduction order. The specific harm Plaintiffs allege is not caused by constitutional shortcomings in Defendants' ability to provide medical and mental health services. Indeed, Plaintiffs' own expert acknowledges that California's inmates would still face a substantial risk of harm from COVID-19 "even if the health care delivery system were constitutionally adequate." ECF No. 3219-4/6524 ¶ 19 (Stern Decl.). That the harm Plaintiffs face is not dependent on the existence of a constitutionally inadequate health care delivery system is strong evidence that it is rooted in a significantly different underlying cause than what was before us in the prior three-judge court proceedings.

While the threat posed by COVID-19 is undoubtedly medical, the particular risks the disease poses to prisoners are primarily a function of the contagiousness of the virus and the nature of incarceration. There is no vaccine for COVID-19. Thus far, the only way to stop its spread is through preventive measures—principal among them maintaining physical distancing sufficient to hinder airborne person-to-person transmission. *See* ECF No. 3221-1/6259-1 at 109 (CDC, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in*

Correctional and Detention Facilities) (describing physical distancing as a "cornerstone" of reducing transmission of COVID-19). Creating physical distancing is uniquely difficult in a congregate environment like a prison.[10] *Id.* But crucially, this is a problem shared by *all* prisons, not just those with foundering health care delivery systems. *See id.* at 107–10.

That is not to say that Defendants have no constitutional obligation to take steps to prevent the spread of COVID-19 within California's prisons. Defendants themselves acknowledge that the virus presents a "substantial risk of serious harm" and that the Eighth Amendment therefore requires them to take reasonable measures to abate that risk. ECF No. 3235/6552 at 17; *see Farmer v. Brennan*, 511 U.S. 825, 847 (1994); *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (noting that prison officials may not "ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year"). But we conclude that any constitutional violation in Defendants' current response to the COVID-19 crisis is different, in both nature and degree, from the violations underlying the 2009 population cap order. That order was never intended to prepare Defendants to confront this unprecedented pandemic. Nor could it have, given that the entire world was unprepared for the onslaught of the COVID-19 virus.

We therefore conclude that to the extent Plaintiffs can establish a constitutional violation based on the threat posed by COVID-19, it must be based on shortcomings in Defendants' response to the virus, not on the longstanding systemic constitutional deficiencies in California's prison health care delivery system. Because Plaintiffs' motion seeks a release order to redress a different constitutional injury than those previously found in the *Coleman* and *Plata* proceedings, that relief cannot be granted through a modification to our prior remedial order.

There is precedent within these proceedings for our conclusion that requests for disease-specific relief generally require a new Eighth Amendment analysis. In 2013, the *Plata* plaintiffs brought a motion asking the court to order the transfer of classes of inmates who were particularly at risk of developing a severe form of Valley Fever—an illness spread by airborne fungal spores—

[10] Because the merits of Plaintiffs' motion are not properly before us, we make no findings as to what level of physical distancing might be constitutionally required in a carceral environment.

out of the prisons where the disease was most prevalent. *Plata v. Brown*, No. 01-cv-1351-TEH, 2013 WL 3200587, at *1 (N.D. Cal. Jun. 24, 2013). The plaintiffs did not bring their motion under Rule 60(b)(5), nor did the *Plata* court treat it as a modification request. Instead, the court analyzed whether Defendants' specific responses to the threats posed by Valley Fever were sufficient to satisfy the Eighth Amendment. *Id.* at *10–12. After concluding that they were not, the *Plata* court granted the plaintiffs' transfer request, tailoring the scope of relief to the contours of the specific Eighth Amendment violation implicated by Defendants' inadequate Valley Fever response. *Id.* at *10–13.

The Supreme Court's discussion of our ability to modify the 2009 population cap order confirms our conclusion that the remedy Plaintiffs now seek goes to a different constitutional injury than what has been litigated previously. In describing the scope of our modification authority, the Court explained that it may be appropriate to grant Defendants more time in which to come into compliance with the 137.5% cap if it were necessary to allow the state to develop systems for identifying inmates whose release was least likely to jeopardize public safety. *Plata*, 563 U.S. at 544. It noted such an extension could be conditioned on Defendants' "ability to meet interim benchmarks for improvement in the provision of medical and mental health care." *Id.* The Court also explained that as Defendants made progress in reducing the prison population, it might become apparent "that further population reductions are not necessary or less urgent than previously believed." *Id.* In those circumstances, it could be appropriate to consider whether to extend or modify the requirements of the population cap order. *Id.*

In short, the Supreme Court contemplated that we could adjust our remedial order to ensure that it remained appropriately tailored to its original goal: reducing the prison population to a level sufficient, but no lower than necessary, to allow Defendants to deliver constitutionally adequate medical and mental health care services.[11] *See id.* at 530 (explaining that prospective relief with respect to prison conditions must be "narrowly drawn" and "extend[] no further than

[11] The Court's modification ruling also encompassed the situation where Defendants reached the 137.5% goal but were still unable to provide constitutionally adequate medical care. *Plata*, 563 U.S. at 543. We have no doubt that under that scenario, we would have the power to reduce the percentage of the design capacity cap further.

necessary to correct the violation"). We do not believe that the Court envisaged us "modifying" our judgment to require an additional reduction in the prison population to respond to a unique threat posed by a specific virus that could not have been foreseen only a few months ago, much less at the time of the 2009 population cap order. Our discretion to modify our prior orders is not boundless.

The cases relied on by Plaintiffs only reinforce our view that the motion before us is not an appropriate modification request. In *Parsons v. Ryan*, the plaintiff class entered into a settlement agreement with prison officials that required them to achieve at least 75 percent compliance with several "health care performance measures," including that they provide inmates with health care services within twenty-four hours after a request was first made. 912 F.3d at 493–94, 499. The prison system's compliance rate with this performance measure was abysmal—as low as 34 percent—and after failed efforts to improve compliance, the district court issued an order requiring the defendants to use community health services (i.e., services outside the prisons) to provide the required care. *Id.* at 499. On appeal, the defendants argued that the PLRA required the district court to "make *new* findings of a constitutional violation" before entering the new remedial order. *Id.* at 501. The Ninth Circuit rejected the argument. It concluded that the district court's order merely implemented a new means of curing the same constitutional violation upon which the original settlement agreement had rested—failure to provide care within a reasonable time period—and that it was therefore a proper modification of the prior remedial order. *Id.*

Similarly, in *Armstrong v. Brown*, 768 F.3d 975 (9th Cir. 2014), the district court entered an injunction that required California prison officials to "track the record of each institution and the conduct of individual staff members" who were not complying with a remedial plan to cure systemic violations of the Americans with Disabilities Act and the Rehabilitation Act. *Id.* at 978. The vague language of the injunction created problems. The defendants contended that it required them to track only substantiated allegations of noncompliance whereas the plaintiffs argued that it required tracking and investigation of *all* alleged violations. *Id.* at 978–79. In response, the district court issued a new injunction that both clarified that the defendants were required to track all allegations—substantiated or not—and added dispute resolution procedures, including a

provision that allowed plaintiffs' counsel to review the state's investigations of allegations of noncompliance. *Id.* at 979. The defendants appealed the modified injunction, and the Ninth Circuit affirmed. While noting that the relief ordered by the district court might have been unduly intrusive had it been implemented as an initial remedy, the Ninth Circuit concluded that "the level of intrusiveness [was] acceptable based on the history and circumstances of the case"—namely that the district court "ha[d] attempted narrower, less intrusive alternatives—and those alternatives ha[d] failed." *Id.* at 986.

Plaintiffs argue that, as in *Parsons* and *Armstrong*, more intrusive measures are necessary here because the 137.5% population cap is insufficient to allow Defendants to implement the physical distancing measures they believe are necessary to prevent the spread of COVID-19. ECF No. 3248/6558 at 4–5. But this argument elides the fact that the population cap order *was never intended* to put Defendants in a position to confront the unique threat posed by this once-in-a-century virus. Thus, this is not a case like *Parsons* and *Armstrong* where a district court implemented progressively more intrusive measures to remedy the same, well-understood constitutional violation that formed the basis for the original remedial order. *See Parsons*, 912 F.3d at 499; *Armstrong*, 768 F.3d at 978–79, 986. Instead, Defendants ask us to alter a decade-old order to address a new alleged constitutional violation—an inadequate response to a specific virus—that our prior order was never designed to address. This request falls outside the scope of our equitable modification authority.

Our order today does not leave Plaintiffs without options for seeking relief. While we must deny their motion as currently procedurally improper, we do so without prejudice to their bringing their request for relief in an appropriate forum. As with the Valley Fever motion in *Plata*, and as was done in the original *Coleman* and *Plata* litigation, Plaintiffs may go before a single judge to press their claim that Defendants' response to the COVID-19 pandemic is constitutionally inadequate. For example, if they believe that the response violates Plaintiffs' right to adequate medical care, they may seek relief before the individual *Plata* court. Likewise, Plaintiffs may seek relief before the individual *Coleman* court if they believe that Defendants' response to COVID-19 is preventing the delivery of adequate mental health care. If a single-judge

court finds a constitutional violation, it may order Defendants to take steps short of release necessary to remedy that violation. And if that less intrusive relief proves inadequate, Plaintiffs may request, or the district court may order sua sponte, the convening of a three-judge court to determine whether a release order is appropriate. *See* 18 U.S.C. § 3626(a)(3).

III. CONCLUSION

We take no satisfaction in turning away Plaintiffs' motion without reaching the important question of whether Defendants have implemented constitutionally adequate measures to protect the inmates of California's prisons from the serious threat posed by this unparalleled pandemic. But we are bound by Federal Rule of Civil Procedure 60(b)(5) and the PLRA to reach this conclusion.

We emphasize that Defendants have broad authority to voluntarily take steps that may prevent the life-threatening spread of COVID-19 within their prisons, and we recognize the deference that is due to prison authorities to determine which additional measures must be taken to avoid catastrophic results. *See Turner v. Safley*, 482 U.S. 78, 84–85 (1987). Defendants have represented to us that they are continuously evaluating what more they can do to protect the inmates within their prisons, and we urge them to leave no stone unturned. It is likely that only through significant effort will California's prisons be able to minimize the spread of COVID-19.

* * *

For the foregoing reasons, Plaintiffs' emergency motion for modification of our 2009 population reduction order is **DENIED** without prejudice to pursuing relief in a procedurally appropriate forum, including in the individual *Coleman* and/or *Plata* courts.

IT IS SO ORDERED.

Dated: April 4, 2020

MUELLER, Chief District Judge, concurring:

I join in the court's conclusion that Plaintiffs have not met their burden of demonstrating they qualify for the relief they seek under Federal Rule of Civil Procedure 60(b)(5), assuming without deciding that as the prevailing party previously they may rely on the rule for affirmative relief. *See, e.g.*, *In re Von Borstel*, No. 01-42235-elp7, 2011 WL 477817, at *4 (Bankr. D. Or. Feb. 3, 2011) ("The rule does not say that 'a losing' party may obtain relief; it says 'a' party." Thus, a prevailing party may use Fed. R. Civ. P. 60(b) to seek to set aside a judgment on the ground that the judgment should have provided additional relief." (citing *United States for Use & Benefit of Familian Nw., Inc. v. RG & B Contractors, Inc.*, 21 F.3d 952 (9th Cir. 1994))); *but see Cano v. Baker*, 435 F.3d 1337, 1340 (11th Cir. 2006) ("The equitable purpose of Rule 60(b) cannot be to 'relieve' a party from her own lawsuit in which she had prevailed three decades earlier." (citation omitted)). The court's conclusion in this respect is sufficient to resolve the motion before us.

I respectfully do not join in the court's analysis or determination that Plaintiffs' motion arises out of an Eighth Amendment claim entirely distinct from the claims over which this court has continuing jurisdiction. This court previously found, after extended evidentiary proceedings, that "crowding generates unsanitary conditions, overwhelms the infrastructure of existing prisons, and increases the risk that infectious diseases will spread." *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882, 931 (E.D. Cal. 2009) ("*Coleman I*") (citing Nov. 9, 2007 Scott Report ¶¶ 17–24, ECF No. 1528/3058). In so finding, this court credited multiple experts who opined that prison crowding was a contributor to great vulnerability in the face of outbreak and spread of infectious disease. *Id*. (referencing opinions that "crowding 'contributes to the difficulties of healthcare delivery by virtue of the fact that it increases the incidence of illnesses, [and] infectious disease'"); *id.* (quoting Rep. Tr. at 257:15–22, ECF No. 1832/3541-2, for opinion of Dr. Jeffrey A. Beard that, while prisons may not always be incubators for disease, "they could be if your population densities get so intense," including "if you have a gymnasium that you triple bunk and put hundreds and hundreds of people in a closed dense area"); *id*. ("Until CDCR reduces its population, it will remain highly vulnerable to outbreaks of communicable diseases, including

staph infections, tuberculosis and influenza." (quoting Nov. 9, 2007 Shansky Report ¶ 135, ECF No. 1527/3057)).

Moreover, this court retained jurisdiction to determine whether the remedy it had ordered proved durable. *See Coleman v. Brown*, 952 F. Supp. 2d 901, 934 (E.D.Cal./N.D.Cal. 2013). Even though the prison population for some time has remained below the cap this court previously set, Defendants have not achieved the durability of remedy required for this court's role to cease. The current circumstances appear to expose, in stark terms, the potential need to revisit the current population cap. Even as I do not believe Plaintiffs' motion grounded in Rule 60(b)(5) can be granted, I am inclined to think this court retains broad equitable powers that might permit some reconsideration of the current cap in light of the unprecedented exigent circumstances here. Those circumstances, as is undisputed, present potentially grave risks to members of the Plaintiff classes, as well as to correctional staff and the communities in which they reside, as a result of the COVID-19 pandemic and its impact on the delivery of medical and mental health care in the state prisons. It is undisputed that the delivery of care, to date, remains below constitutional minima. *See Hutto v. Finney*, 437 U.S. 678, 687 n.9 (1987) ("As we explained in *Milliken v. Bradley*, 433 U.S. 267, 281 [ ], state and local authorities have primary responsibility for curing constitutional violations. If, however [those] authorities fail in their affirmative obligations . . . judicial authority may be invoked. Once invoked, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." (internal quotation marks and citation omitted)).

At the same time, it is clear that a prisoner release order under the PLRA is a remedy of last resort and neither Plaintiff class has formally sought focused relief from their individual courts, a condition precedent to issuance of a prisoner release order. *See* 18 U.S.C. § 3626(a)(3)(A); *see also Coleman I*, 922 F. Supp. 2d at 918. Given the availability of expedited proceedings before those district courts to immediately exhaust the possibility of inmate transfers and relocations to secure facilities to achieve constitutionally acceptable conditions for the Plaintiff classes, those proceedings must be invoked first.

With these observations, I join in the decision to deny Plaintiffs' motion without prejudice.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

JENNER BENAVIDES
DAVID FERNANDEZ
GERARDO ARRIAGA
Folkston ICE Processing Center
P.O. Box 248
Folkston, GA 31537

Petitioners/Plaintiffs,

v.

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

and

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

and

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

and

CHAD WOLF
Acting Secretary
Department of Homeland Security,
3801 Nebraska Avenue, NW
Washington, D.C. 20016;

and

Case No.:

HEARING REQUESTED

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

Respondents/Defendants.

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

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I. INTRODUCTION

1. The COVID-19 pandemic is wreaking havoc throughout the world. The United States has now surpassed every other country in number of confirmed cases, and over 12,000 Americans have died. Experts estimate that the coronavirus will ultimately infect between 160 and 214 million people and taken 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 in stopping its transmission, the President has declared a national emergency; forty-eight U.S. states—including Georgia—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), who 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]

6. In immigration detention facilities—including Folkston ICE Processing Center "Folkston") in Folkston, Georgia, where Plaintiffs-Petitioners ("Petitioners") are imprisoned—social distancing is virtually impossible. In these congregate environments, hundreds or thousands of people live, eat, and sleep together in close quarters, and contact with other detainees and ICE personnel is a fact of life. ICE detention facilities are also notorious for their unsanitary conditions 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 Folkston is located—and face serious illness and death.

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[1] *See, e.g.*, *Xochihua-Jaimes v. Barr*, 2020 WL 1429877 (9th Cir. Mar. 24, 2020); *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).

8. 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 Folkston or living in the surrounding community—from the imminent harm that will result from their continued detention.

II. PARTIES

9. Petitioner Jenner Benavides[2] is a 27-year-old transgender woman and citizen of Mexico who has been detained by ICE at Folkston since May 2019. She entered the U.S. at the age of 10 and later became a DACA recipient. She applied for asylum based on continuous sexual assault and abuse she endured as a child in Mexico, and her gender and sexual identity. She is currently appealing the denial of this relief to the BIA and applying for a U-visa. In 2014 her mother died from stomach cancer, leaving Ms. Benavides as the sole caretaker and custodian of her four minor siblings in Nashville, Tennessee. Ms. Benavides is HIV positive and suffers from bipolar disorder and severe depression and anxiety. As a consequence of her health condition, she is at high risk for severe illness or death if she contracts COVID-19.

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

[2] Petitioner Jenner Benavides, David Fernandez, and Gerardo Arriaga have filed this action using pseudonyms. They seek leave to proceed pseudonymously in a concurrently filed motion.

11. Petitioner Gerardo Arriaga is a 24-year-old citizen of Peru. He is married to a U.S. citizen and was living in Atlanta, Georgia before ICE detained him. He is eligible for adjustment of status. Mr. Arriaga is currently detained at Folkston and has been in ICE custody since March 2020. He suffers from Lupus, an autoimmune disease that causes him to be immunocompromised and causes inflammation and damage to his joints, skin, kidneys, blood, heart, and lungs. As a consequence of his health conditions, he is at high risk for severe illness or death if he contracts COVID-19.

12. Respondent-Defendant ("Respondent") Patrick Gartland is the Warden of Folkston ICE Processing Center. Pursuant to a contract with ICE, Mr. Gartland is responsible for the operation of Folkston, where Petitioners are detained.

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

14. 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.

15. 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.

16. 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

17. 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.

18. The 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).

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

IV. EXHAUSTION OF ADMINISTRATIVE REMEDIES

20. 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 his 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 constitutional] need not be administratively exhausted." *Warsame v. U.S. Attorney Gen.*, 796 Fed. Appx. 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

21. 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.[3]

22. On March 11, 2020, the World Health Organization ("WHO") declared the outbreak a global pandemic,[4] and COVID-19 has now touched nearly every country on the planet.[5] As of April 7, 2020, the number of confirmed cases worldwide has surpassed 1.4 million, including

[3] 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

[4] 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

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

over 394,278 people in the United States. Over 81,858 people have died as a result of COVID-19 worldwide, including at least 12,717 in the United States.[6]

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

24. 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."[10] At the time, there were 64 diagnosed COVID-19 cases spread across 15 counties.[11] As of April 7, 2020, less than a month

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

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

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

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

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

[11] Id.

later, the number of reported cases had jumped to 8,818 with 155 counties now affected.[12] The number of reported deaths from COVID-19 is 329, making Georgia the state with the ninth highest number of COVID-19-related deaths in the United States.[13] Governor Kemp issued a shelter in place order for the state of Georgia on April 3, 2020.[14]

25. 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 strokes in the country, particularly in areas with high poverty rates.[15]

26. Due to the lack of widespread testing available in most countries, including the United States, the number of confirmed cases is likely but a fraction of the true number of COVID-19 cases worldwide. As of April 6, 2020, approximately 1,917,095 tests have been administered in the entire United States; in Georgia, only 40,012.[16] Because of the shortage of tests in the United States—admitted to be a "failing" by top infectious disease expert Dr. Anthony Fauci[17]—the CDC

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

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

[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] 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/

[16] The COVID Tracking Project, Our most up-to date data and annotations (last updated Apr. 6, 2020), https://covidtracking.com/data/

[17] 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

currently recommends prioritizing testing for symptomatic healthcare providers and hospitalized patients[18]—which means that the number of diagnosed COVID-19 cases may be only the tip of a very large iceberg.[19]

i. Transmission of COVID-19

27. 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.[20] The coronavirus can survive up to three hours in the air, four hours on copper, 24 hours on cardboard, and two to three days on plastic and stainless steel.[21]

28. Many people with COVID-19 remain completely asymptomatic and may never realize that they are infected, yet can still spread the disease. Likewise, infected people who may 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.

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[18] 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

[19] 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

[20] Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), *How Coronavirus Spreads* (last reviewed Mar. 4, 2020), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html

[21] Harvard Health Publishing, *As coronavirus spreads, many questions and some answers* Harvard Medical School, Coronavirus Resource Center (last updated Apr. 1, 2020), https://www.health.harvard.edu/diseases-and-conditions/coronavirus-resource-center

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

29. 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, and death.

30. Older individuals and those with certain medical conditions are at particularly high risk for serious illness or death from COVID-19.

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

32. 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.[22]

33. 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.

[22] 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, https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/diagnosed-with-covid-19-what-to-expect

iii. Prevention of COVID-19 Transmission

34. There is currently no vaccine against COVID-19. Nor are there any known prophylactic medications that will prevent or reduce the risk of a COVID-19 infection. Therefore, the only effective way to protect people against the risk of serious illness or death from COVID-19 is to limit their exposure to the virus through social distancing—*i.e.*, physical separation of at least six feet from all others—and vigilant hygiene, including frequent and thorough handwashing with soap and water.[23]

35. 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.

36. 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.

37. 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.[24] Following the lockdown, Wuhan saw a sustained decrease in

[23] Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), *How to Protect Yourself* (last reviewed Apr. 1, 2020), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html

[24] 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/

transmission of COVID-19, and two months later, the daily number of reported cases dropped to zero.[25]

38. 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.[26] Overall, countries encompassing an estimated one third of the world's population have enacted similar restrictions.[27] Across the United States, cities and states are imposing increasingly stringent measures to effectuate social distancing. As of April 2, 2020, at least 38 states, 48 counties, and 14 cities, and had ordered their residents to "shelter in place" or stay at home.[28]

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

39. 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."[29]

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[25] *Id.*

[26] 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

[27] Juliana Kaplan, Lauren Frias, & Morgan McFall-Johnson, *A Third of the Global Population Is On Coronavirus Lockdown*, Business Insider (last updated Apr. 6, 2020) https://www.businessinsider.com/countries-on-lockdown-coronavirus-italy-2020-3

[28] 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. 3, 2020) https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html

[29] Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and*

40. 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.[30]

41. 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.[31] 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."

42. Like these and other experts, [32] 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

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Detention Facilities (last reviewed Mar. 23, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html

[30] 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

[31] Janus Rose, *Thousands of Doctors Deman 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

[32] 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.").

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.

43. 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, and lack of access to adequate medical services. For these same reasons, the outbreak is harder to control.[33] The severe outbreaks of COVID-19 in congregate environments, such as cruise ships and nursing homes, illustrate just how rapidly and widely COVID-19 would rip through an ICE detention facility. On the Diamond Princess cruise ship, for example, approximately 700 passengers and crew on board were infected over the course of three weeks despite the initiation of quarantine protocols.

44. 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.

45. 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.[34] Some detained people have staged public protests, including initiating hunger

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[33] 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

[34] U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement, *ICE Guidance on COVID-19* (last reviewed/updated Apr. 2, 2020), https://www.ice.gov/covid19 (" . . . our law enforcement officers and agents continue daily enforcement operations to make criminal and civil arrests."); *see* Richard Hall, Coronavirus: ICE Crackdown Stokes Fears for Safety of Undocumented Immigrants During Pandemic, Independent (Mar. 15, 2020) (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,

strikes and threatening suicide, to express their outrage at being housed with newly arriving individuals who may have been exposed to COVID-19.[35]

46. 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.

47. ICE's past inept handling of infectious disease outbreaks in detention centers foreshadows the impact once COVID-19 hits Folkston. In 2019, a mumps outbreak across 57 immigration detention facilities throughout the country led to almost 900 cases of mumps contracted inside the facilities[36] before the outbreak spread to surrounding communities.[37] ICE

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

[35] *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

[36] 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/

[37] *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.

and CBP facilities have also been sites of other infectious outbreaks in recent years,[38] as have other prisons and jails.[39]

48. COVID-19 has indeed already started to spread inside U.S. prisons and jails across the United States, including in Georgia [40]and New York City.[41]

49. ICE has publicly reported 13 cases of COVID-19 among its detained population as of April 6, 2020, and identified 56 additional cases among its personnel, including seven employees who work at an ICE detention facility.[42] In addition, according to a leaked internal report, ICE has placed at least nine detainees in medical isolation and is monitoring 24 more in ten different detention facilities—all likely due to suspicion of COVID-19.[43]

[38] Christina Potter, Outbreak Observatory *supra* n. 33, (describing outbreaks of acute respiratory illnesses like influenza, and other diseases like scabies and chickenpox).
[39] 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).
[40] 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/

[41] 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/
[42] *ICE Guidance on COVID-19*, *supra* n. 34

[43] Ken Klippenstein, *Exclusive: ICE Detainees Are Being Quarantined, A leaked document about the Department of Homeland Security's Covid-19 response suggests that the crisis has made its way to border detention facilities*, The Nation (Mar. 24, 2020), https://www.thenation.com/article/society/corona-covid-immigration-detention/

50. Nationally and internationally, governments and jail and prison staff have already recognized the threat posed by COVID-19. Authorities in Iran,[44] Ethiopia,[45] and the state of Texas[46] have all begun to release people to mitigate the harm that the impending spread of COVID-19 will cause. Some jails in Georgia have done the same,[47] including Dougherty County Detention Center in Albany, which is suffering from one of the most severe outbreaks in the state.[48] 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."[49]

51. Still, ICE continues to detain even the most medically vulnerable noncitizens despite the grave risk of serious illness or death.

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[44] 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

[45] 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

[46] 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/

[47] 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/;

[48] 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/

[49] Office of the Attorney General, Washington, DC, Memorandum for Director of Bureau 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

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

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

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

53. Preventing the spread of COVID-19 inside Folkston is impossible. The design of immigration detention facilities generally, and Folkston in particular, 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.

54. Folkston houses people in very close quarters, making social distancing and the recommended hygiene measures effectively impossible. Most people sleep in bunk rooms housing dozens of immigrants—where beds are feet apart from each other—and use shared toilets and showers. Folkston also has some smaller cells housing multiple people with shared bathrooms. People eat together in shared cafeterias and regularly congregate in common areas of their housing units.[50]

55. The conditions at Folkston are also flagrantly unsanitary and dangerous to the health of detained individuals. Private contractors operate Folkston, and the DHS Office of Inspector General has repeatedly concluded that ICE fails to hold detention facility contractors accountable for meeting performance standards required to ensure humane conditions.[51]

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

[51] *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),

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

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

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

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

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

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

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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.

61. Detained individuals with diabetes—a condition that the CDC considers a risk factor for severe COVID-19, "particularly if not well controlled"[52]—have reported diets that are inadequate given their medical needs. Petitioner David Fernandez has received as few as three out of the fourteen insulin injections per week he requires to manage his diabetes, which has left him so weak and tired that he could not stand up.

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

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

64. Preliminary data suggests that a person with COVID-19 is most infectious during the early stage of the disease.[53] Early, proactive action is necessary to prevent the virus's spread. The well-documented failure to provide adequate and timely medical care at Folkston is the mark of a system that cannot possibly cope with the spread of COVID-19.

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

[53] 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/

iii. It Is Only a Matter of Time Before COVID-19 Reaches Folkston Detention Center

65. COVID-19 is bound to reach Folkston if it has not already. In Charlton County, where Folkston is located, there were three confirmed case of COVID-19 as of April 7, 2020[54]—including a woman who lives in Folkston with two family members who work in the local public schools and came into contact with students.[55] Duval County, Florida, includes the city of Jacksonville, which is the closest metro area to Folkston—about 45 miles away. Duval County had 524 confirmed cases as of April 7, 2020.[56]

66. There is great risk that people traveling in and out of Folkston will expose Petitioners to COVID-19.

67. Staff at Folkston arrive and leave on a shift basis, and there is limited ability to adequately screen incoming staff for new, asymptomatic infection.

68. Attorneys continue to visit their detained clients in Folkston because most immigration court hearings are still proceeding and many filing deadlines still apply. Since the pandemic began, ICE has permitted attorneys to enter Folkston without taking adequate precautions to limit exposure in the event that a visiting attorney is a COVID-19 carrier. At Folkston, attorneys were permitted to enter for legal visits in late March without wearing any

[54] *Georgia Department of Public Health COVID-19 Daily Status Report* (Apr. 7, 2020).

[55] Gordon Jackson, *Folkston coronavirus case confirmed*, The Brunswick News (Mar. 17, 2020), https://thebrunswicknews.com/news/local_news/folkston-coronavirus-case-confirmed/article_79dd9c5d-f2dc-554b-8993-1ae66bcd127f.html

[56] Florida Department of Health, Division of Disease Control and Health Protection, Florida's COVID-19 data and Surveillance Dashboard, (last updated April 7, 2020) https://experience.arcgis.com/experience/96dd742462124fa0b38ddedb9b25e429

PPE. They merely had to submit to temperature checks and answer a brief set of questions about whether they had traveled recently or had contact with a confirmed case of COVID-19.

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

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

71. Once the virus appears in Folkston, 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 do contract COVID-19, Petitioners—who are already at particularly high risk of serious illness and death—are unlikely to receive the medical care they need.

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

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

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

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

19 may require supportive care.[57] And those who develop serious complications will need advanced support, including highly specialized equipment that is in limited supply and an entire team of care providers. This level of support is especially difficult to provide to detained individuals because ICE detention facilities lack adequate medical care infrastructure.

75. Folkston is geographically isolated from appropriate levels of medical care to treat COVID-19. The disease requires an intensive care unit with appropriate medical equipment and staff. The closest hospitals to Folkston 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.

76. Critical access hospitals are generally located in rural areas where the access to nearby hospitals is extremely limited. They 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.

77. The nearest hospital to Folkston detention center with ICU capabilities is Southeast Georgia Health System in Camden with only 40 beds, including 5 ICU beds, approximately 26 miles away. Patients would likely require initial transport or transfer to Southeast Georgia Health System – Brunswick with 300 beds, including 24 ICU beds, which is about 45 miles away and serves five different counties in Southeast Georgia.

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[57] 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

78. With the increasing shortage of PPE, healthcare providers, hospital capacity, and ICU resources like ventilators, it is impossible to know when specific hospitals in Georgia will run out of any of these requisite resources. However, predictions suggest that Georgia currently has an ICU bed shortage of 755 beds and 1,075 ventilators and that all state hospital resources will be used by April 22, 2020.

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

79. Respondents' failure to recognize the inevitability of an outbreak at Folkston and to take adequate precautions, including releasing people, demonstrates its complete disregard for the lives of detained immigrant, including Petitioners.

80. Instead of releasing Petitioners and other vulnerable people, ICE has issued guidance reflecting certain changes to its operations. These changes fail to adequately protect those in ICE's custody, especially Petitioners, who are particularly vulnerable to infection and illness. Indeed, given the realities of detention, no conditions of confinement can possibly protect Petitioners from the risk of COVID-19.

81. Moreover, many of the changes ICE claims to have implemented at Folkston are either patently ineffective or contradicted by reports from individuals with first-hand experience in the detention centers.

82. Reports from Petitioners and other detained immigrants belie ICE's assertions that it has implemented "[c]omprehensive protocols" for the protection of staff and patients, including the appropriate use of [PPE]." 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. Due to national shortages, some of the top trauma centers and

hospitals in the state of Georgia have had difficulty obtaining sufficient PPE and other medical supplies, and ICE is presumably dealing with the same issues.

83. Several Petitioners and other detained immigrants at Folkston have indicated that ICE personnel never informed them of COVID-19 or advised them on recommended hygiene or social distancing practices. One detained woman at Folkston reported that when detained people asked for explanations and information around COVID-19, guards and staff responded by threatening to take away their possessions and put them in solitary confinement.

84. Detained immigrants also report a severe lack of access to hygiene supplies. Petitioner Jenner Benavides described only receiving four single-use squares of liquid soap a week, which she needed to use for both hand washing and showers. This would be an unacceptable hygiene practice even before the COVID-19 pandemic; now, it is egregious.[58]

85. Other measures ICE claims to have taken, including temporarily suspending social visitation in detention and screening new detained immigrants and arriving visitors for certain symptoms of COVID-19, are insufficient to curb the risk of infection within the detention centers. Moreover, ICE's screening procedures for visitors, which are limited to temperature checks and a questionnaire, will no doubt fail to identify some infected individuals. Many COVID-19 patients may be asymptomatic or have only mild or less common symptoms that do not include fever or respiratory symptoms. As symptoms of COVID-19 can present anywhere from 2 to 14 days after

[58] Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), *Interim Guidance on management of Coronavirus Disease 2019 (COVID-19) in correctional and Detention Facilities* (Mar. 23, 2020) https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html (about providing soap supply)

exposure, people who pass ICE's screenings can expose detained individuals, as well as detention center staff.

86. The limited options available to ICE to mitigate the risk of COVID-19, like solitary confinement for all medically vulnerable people, are problematic and unsafe. Placing an individual with significant medical needs in solitary confinement not only exacerbates underlying medical conditions, including any mental health issues, but also creates significant, life-threatening risks. This is particularly true given the rapid and severe progression of COVID-19 and the need for responsive medical observation. Folkston does not have the space or staff to safely care for patients for this period of time.

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

88. 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 further harm in detention. ICE's response to COVID-19 has made abundantly clear that they do not plan to establish special protections for high-risk patients, instead waiting for them to become symptomatic. This puts not only Petitioners but ICE's own personnel and the larger community at risk of a preventable disaster.

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

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

90. **Jenner Benavides.** Jenner Benavides is a 27-year-old transgender woman and citizen of Mexico who has been in ICE custody since May 2019. Ms. Benavides is living with HIV and bipolar disorder. She also suffers from depression, anxiety and suicidal ideation exacerbated by her conditions of confinement. At Folkston, she is constantly bullied and harassed by other immigrants detained there. She was recently sexually assaulted more than once by men in her pod unit. When she reported the assault, she was put on suicide watch, and then moved to protective custody, which further worsens her anxiety and depression. She has also experienced delays and inconsistencies in medical services at Folkston, and she is not provided enough soap or toiletries to keep herself clean and protected from illness.

91. Ms. Benavides is critically vulnerable to COVID-19 because of her autoimmune disease and other health problems. Her U.S. citizen friend is waiting to care for her in Nashville once she is released, where her two youngest siblings also eagerly await her return. An immigration attorney submitted a humanitarian parole request on her behalf on April 2, 2020. ICE denied the request on April 5, 2020.

92. **David Fernandez.** Mr. Fernandez is a 45-year-old citizen of Mexico who has been detained at Folkston since December 2019. Mr. Fernandez has diabetes and has suffered from tuberculosis in the past. A doctor has told him that if he does not manage his blood sugar levels, he is at risk of suffering a heart attack. Prior to his detention by ICE, he had his sugar levels under control, and he felt well. However, maintenance of his diabetes requires fourteen injections of insulin per week, and he has not consistently received all of these necessary injections. Some

weeks he receives as few as three. His health has deteriorated, and he sometimes cannot stand up from fatigue. Mr. Fernandez is now suffering flu-like symptoms in a facility where he cannot practice social distancing, he is not provided sufficient soap, testing for COVID-19 is unavailable, and staff are not taking precautions to protect him from infection.

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

94. **Gerardo Arriaga.** Mr. Arriaga is a 24-year-old citizen of Peru who has Lupus, an autoimmune disease that causes him to be immunocompromised and causes inflammation and damage to his joints, skin, kidneys, blood, heart, and lungs. Because of his condition, he is predisposed to infections, and needs medications and topical creams to manage the symptoms. While he has been at Folkston, he has not received these necessary medications. He has also requested medical attention that has been ignored, and staff are not taking precautions to protect him from COVID-19. He has also not been provided any soap by ICE since he has been detained.

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

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

97. 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 conditions including highly effective alternatives to detention

("ATD") such as GPS monitoring and telephone check-ins. *See, e.g.*, 8 U.S.C. § 1182(d)(5)(a); 8 C.F.R. § 212.5(b)(1); 8 C.F.R. § 235.3(b)(1)(iii); 8 C.F.R. § 235.3(b)(4)(ii); 8 C.F.R. § 241.4.

VI. LEGAL FRAMEWORK

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

98. All noncitizens who are in ICE, even those with prior criminal convictions, are civil detainees held pursuant to civil immigration laws. *Zadvydas*, 533 U.S. at 690. Their constitutional protections while in civil custody are thus derived from the due process clause of the Fifth Amendment. *Id.*

99. 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).

100. 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).

101. 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).

102. "[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). 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).

103. 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).

104. 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).

105. The government may violate the Eighth Amendment when it "ignore[s] a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year," including "exposure of inmates to a serious, communicable disease," even when "the complaining inmate shows no serious current symptoms." *Helling*, 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).

106. 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).

107. "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).

B. This Court Has Authority to Order Petitioners' Release to Vindicate Their Fifth Amendment Rights, and Such Relief Is Necessary Here.

108. Courts have broad power to fashion equitable remedies to address constitutional violations in prisons, *Hutto v. Finney*, 437 U.S. 678, 687 n.9 (1978), and "[w]hen 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); *see also 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.")

109. This authority extends to "placing limits on a prison's population" when necessary to ensure compliance with the Constitution. *Brown*, 563 U.S. at 511; *see also Duran v. Elrod*, 713 F.2d 292, 297-98 (7th Cir. 1983), *cert. denied*, 465 U.S. 1108 (1984) (concluding that court did not exceed its authority in directing release of low-bond pretrial detainees as necessary to reach a population cap).

110. The same principle applies here. As the constitutional principles and public health experts make clear, releasing Petitioners is the only viable remedy to ensure their safety from the threat to their health that COVID-19 poses. Petitioners are older adults and/or people with medical conditions who are at particularly grave risk of severe illness or death if they contract COVID-19.

111. In the face of this great threat, social distancing and hygiene measures are Petitioners' only defense against COVID-19. Those protective measures are impossible in the environment of an immigration detention center, where Petitioners sleep in close quarters; share toilets, sinks, and showers; eat in communal spaces, and are regularly in close contact with the many other detained people and officers around them. These conditions pose a particularly high risk of exposure to COVID-19, and as a result, Petitioners face unreasonable harm from continued detention and should be released immediately.

C. Habeas Is a Broad, Flexible Remedy That Authorizes Courts to Order Release from Unlawful Detention Conditions as Law and Equity Requires.

112. Petitioner also seek relief under the federal habeas statute, 28 U.S.C. § 2241, which is itself infused with long-standing common law equitable principles. See 28 U.S.C.§ 2241(c)(3) (the writ extends to those prisoners "in custody in violation of the Constitution or laws or treaties

of the United States"). "Habeas is at its core a remedy for unlawful executive detention." *Munaf v. Geren*, 553 U.S. 674, 693 (2008).

113. Habeas invests in federal courts broad, equitable authority to "dispose of the matter as law and justice require," 28 U.S.C. § 2243, as the "very nature of the writ demands that it be administered with the initiative and flexibility." *Harris v. Nelson*, 394 U.S. 286, 291 (1969); *see Boumediene v. Bush*, 553 U.S. 723, 780 (2008) ("Habeas is not 'a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose.'") (quoting *Jones v. Cunningham*, 371 U.S. 236, 243 (1963)).

114. Accordingly, the illegality of custody under the "Constitution or laws . . . of the United States" may stem from the fact of detention and the duration of detention—what is often referred to as the historical core of habeas—and for unlawful placement or conditions of detention. *See Wilwording v. Swenson*, 404 U.S. 249, 251 (1971) (habeas challenging "living conditions and disciplinary measures" is "cognizable in federal habeas corpus"); *Johnson v. Avery*, 393 U.S. 483 (1969) (permitting federal habeas challenge to legality of prison regulation prohibiting provision of legal assistance to other prisoners). *See also Aamer v. Obama*, 742 F.3d 1023, 1031-38 (D.C. Cir. 2014) (surveying history, purpose and Supreme Court jurisprudence and "the weight of the reasoned precedent in the federal Courts of Appeal" relating to habeas and concluding "habeas corpus tests not only the fact but also the form of detention" (citation omitted)).

115. A court is fully empowered to remediate the particular illegality here—an outbreak of lethal and unavoidable virus that threatens Petitioners and violates their constitutional rights to be free from arbitrary and punitive detention—by ordering their release. Habeas corpus is, "above all, an adaptable remedy," *Boumediene*, 553 U.S. at 779, and 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). That authority includes an order of release, *Boumediene*, 553 U.S. at 779, so as "to insure that miscarriages of justice within [the writ's] reach are surfaced and corrected." *Harris*, 395 U.S. at 291.

VII. CLAIM FOR RELIEF

A. Violation of Fifth Amendment Right to Substantive Due Process (Unlawful Punishment; Freedom from Cruel Treatment and Conditions of Confinement)

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

117. The Fifth Amendment to the U.S. Constitution 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.

118. Respondents' continued detention of Petitioners during the COVID-19 pandemic is excessive in relation to any legitimate governmental purpose. Less harsh measures are available to satisfy any government interest in continuing to detain Plaintiffs, including release with conditions. Under these circumstances, Respondents' detention of Petitioners amount to impermissible punishment.

119. 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.

120. Respondents have subjected Petitioners to conditions of confinement that create a substantial risk of contracting a serious case of COVID-19, for which there is no known vaccine,

treatment, or cure. Respondents know or should be aware of the fact that Petitioners' underlying conditions 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.

121. Respondents' continued detention of Petitioners fails to adequately protect Petitioners from the risks of contracting COVID-19.

122. Petitioners' ongoing confinement lacks a reasonable relationship to any legitimate governmental purpose and is excessive in relation to their purpose.

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

124. Respondents have known of or disregarded the substantial risk of harm to Petitioners' health and safety.

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

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

VIII. PRAYER FOR RELIEF

WHEREFORE Petitioners request that the Court grant the following relief:

a. Issue a Writ of Habeas Corpus on the ground that Respondents' continued detention of Petitioners violates the Due Process Clause and order Petitioners' immediate release, with appropriate precautionary public health measures;

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

c. 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;

d. 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

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

Dated: April 8, 2020

Respectfully submitted,

SOUTHERN POVERTY LAW CENTER

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

Paul R. 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

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

KILPATRICK TOWNSEND & STOCKTON LLP

By: /s/ Mark H. Reeves
Mark H. Reeves (GA Bar #141847)
Enterprise Mill
1450 Greene Street, Ste. 230
Augusta, GA 30901
Tel: (706) 823-4206
Fax: (706) 828-4488
mreeves@kilpatricktownsend.com

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
tcaldas@kilpatricktownsend.com
kisted@kilpatricktownsend.com
abrouillette@kilpatricktownsend.com

ASIAN AMERICANS ADVANCING JUSTICE-ATLANTA

Hillary Li* (GA Bar #898375)
Phi Nguyen* (GA Bar #578019)
5680 Oakbrook Pkwy, Ste. 148
Norcross, GA 30093
Tel: (404) 585-8466
Fax: (404) 890-5690
hli@advancingjustice-atlanta.org
pnguyen@advancingjustice-atlanta.org

**pro hac vice motions forthcoming*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Ángel Alejandro HEREDIA MONS, *et al.,* on behalf of themselves and others similarly situated, *Plaintiffs,* *v.* CHAD WOLF, Acting Secretary of the Dep't of Homeland Security, in his official capacity, *et al.*, *Defendants.*	Civil Action No 19-cv-1593 (JEB)

PLAINTIFFS EMERGENCY MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs, members of the class that this Court certified in *Mons v. McAleenan*, No. CV 19-1593 (JEB), 2019 WL 4225322, (D.D.C. Sept. 5, 2019) (hereinafter "Plaintiffs" or "class members"), move for a second preliminary injunction, as set out in the accompanying Memorandum In Support. In their first motion for declaratory and injunctive relief, Plaintiffs' counsel asserted a claim based on the Administrative Procedures Act (hereinafter "APA"). Plaintiffs asserted that Defendants', including the New Orleans Field Office of Immigration and Customs Enforcement (hereinafter "NOLA ICE"), unlawful failure to follow the Parole Directive of 2009, as well as their unlawful failure to provide individualized determinations of flight risk and danger, violate the APA.

New facts have arisen that coupled with the Defendants' continued non-compliance with the September 5, 2019 injunction, are likely to expose Plaintiffs to even more irreparable harm. The rapid spread of the deadly pandemic COVID-19 virus poses a severe threat to Plaintiffs-class members' physical well-being, leaving Plaintiffs with no other choice than to move for a preliminary injunction, requiring NOLA ICE to immediately conduct individualized (case-by-case) parole assessments for all present and future class members

detained in the NOLA ICE region,[1] pursuant to ICE Directive 11002.1, *Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture* (Dec. 8, 2009)[2], otherwise known as the "Parole Directive."

Plaintiffs further request that, should this Court order Defendants to conduct immediate, individualized assessments of Plaintiffs-class members' parole eligibility due to the threat presented by the COVID-19 pandemic, Defendants should also be required to fully comply with all applicable regulations delineated in the Parole Directive, including those that favor the granting of parole to class members who "have serious medical conditions, where continued detention would not be appropriate," and class members "whose continued detention is not in the public interest." Parole Directive at ¶ 4.3, citing 8 C.F.R. § 212.5(b). As required by the Parole Directive, Defendants should incorporate into their individualized assessment of class members' parole eligibility, the danger that COVID-19 poses to those in detention, especially those with serious medical conditions; and should weigh whether the continued detention of parole-eligible class members is in the public interest, given the danger posed by the COVID-19 outbreak.

In support of this Motion, Plaintiffs rely upon the accompanying Memorandum, declarations, and exhibits. A proposed order is attached for the Court's convenience.

STATEMENT PURSUANT TO LOCAL RULE 7(m)

On March 20, 2020, pursuant to Local Rule 7(m) of the Fed. R. Civ. Pro., Plaintiffs' legal counsel emailed Assistant U.S. Attorney Jeremy Simon, Defendant's legal counsel, to advise of the emergency reasons requiring them to seek this preliminary injunction. In an email

[1] Louisiana, Mississippi, Arkansas, Tennessee, and Alabama comprise the NOLA ICE Region. Most class members are held in detention facilities in Louisiana and Mississippi.
[2] https://www.ice.gov/doclib/dro/pdf/11002.1-hd-arole_of_arriving_aliens_found_credible_fear.pdf.

dated March 20, 2020, Mr. Simon informed Plaintiffs' legal counsel that Defendants would oppose this Motion.

Dated: March 31, 2020

Respectfully submitted:

MELISSA CROW (D.C. Bar #453487)
Senior Supervising Attorney

//s// Luz Virginia López

Luz Virginia López
SOUTHERN POVERTY LAW CENTER
1101 17th St., NW, Suite 750
Washington, DC 20036
Tel: (202) 355-4471
luz.lopez@splcenter.org

Michelle P. Gonzalez
Victoria Mesa-Estrada
SOUTHERN POVERTY LAW CENTER
2 South Biscayne Blvd., 32nd Floor
Miami, FL 33131
Tel: (786) 753-1383
mich.gonzalez@splcenter.org
victoria.mesa@splcenter.org

Bruce Hamilton
AMERICAN CIVIL LIBERTIES UNION OF LOUISIANA FOUNDATION
P.O. Box 56157
New Orleans, LA 70156
Tel: (504) 522-0628
bhamilton@laaclu.org

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that, on March 31, 2020, I electronically filed the attached PLAINTIFFS EMERGENCY MOTION FOR PRELIMINARY INJUNCTION with the Court via the CM/ECF system, which will send a Notice of Electronic Filing to all CM/ECF registrants for this case.

Respectfully submitted:

MELISSA CROW (D.C. Bar #453487)
Senior Supervising Attorney

//s// Luz Virginia López

Luz Virginia López
SOUTHERN POVERTY LAW CENTER
1101 17th St., NW, Suite 750
Washington, DC 20036
Tel: (202) 355-4471
luz.lopez@splcenter.org

Michelle P. Gonzalez
Victoria Mesa-Estrada
SOUTHERN POVERTY LAW CENTER
2 South Biscayne Blvd., 32nd Floor
Miami, FL 33131
Tel: (786) 753-1383
mich.gonzalez@splcenter.org
victoria.mesa@splcenter.org

Bruce Hamilton
AMERICAN CIVIL LIBERTIES UNION OF LOUISIANA FOUNDATION
P.O. Box 56157
New Orleans, LA 70156
Tel: (504) 522-0628
bhamilton@laaclu.org

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Ángel Alejandro Heredia Mons et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civ. No.: 1:19-cv-01593**
	)	
Kevin K. McALEENAN et al.	)	
	)	
Defendants/Respondents.	)	
	)	

MEMORANDUM IN SUPPORT OF PLAINTIFFS'
EMERGENCY MOTION FOR PRELIMINARY INJUNCTION

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Rule 23 1

In accordance with this Court's decisions in *Mons v. McAleenan*, No. CV 19-1593 (JEB), 2019 WL 4225322, (D.D.C. Sept. 5, 2019), and *Damus v. Nielsen,* 313 F. Supp. 3d 317, (D.D.C., 2018), and due to the likelihood of irreparable harm that COVID-19 poses to Plaintiffs-class members' well-being and safety, Plaintiffs move this Court to expeditiously grant their request for a preliminary injunction and order Defendants to act as follows: 1) immediately conduct individualized parole assessments for all present and future members of the provisional class, as defined by this Court in *Mons*[1]; 2) enjoin from denying parole to any provisional class members, absent an individualized determination that such provisional class member presents a flight risk or a danger to the community, as concluded pursuant only to the process[2] and limits on use of discretion provided in Enforcement Directive No. 11002.1 ("Directive"); 3) base individualized determinations of flight risk and danger to the community on the specific facts of each provisional class member's case, not categorical criteria; 4) provide class members with parole determinations that conform to all substantive and procedural requirements of the Directive; 5) given the dangers posed by COVID-19, ensure compliance with parole standards pertaining to individuals with a) serious medical conditions, and/or b) whose continued detention is not in the public interest, pursuant to the Immigration and Nationality Act ("INA") and its implementing regulations.

[1] The Court finds that this proposed class meets the conditions supplied by Rule 23 for substantially the same reasons that the *Damus* plaintiffs satisfied those same requirements. *See Damus*, 313 F. Supp. 3d at 329–35. *Mons v. McAleenan*, 2019 WL 4225322, at *8.

[2] Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture (Dec. 8, 2009).

INTRODUCTION

Plaintiffs' travails are not novel to this Court.[3] Despite this Court's prior Order, over seventy-five percent of Plaintiffs are still denied parole without an individualized assessment.[4] The harrowing COVID-19 pandemic that has ravaged most of the world is sweeping through the United States, presenting a grave threat of irreparable harm to Plaintiffs-class members. Plaintiffs first discuss the nature and scope of this deadly, novel disease, the magnitude of which is unprecedented, and the conditions present in the facilities where Plaintiffs-class members are detained, rendering them vulnerable to imminent risk of irreparable harm and death during the pandemic. Plaintiffs also present evidence supporting their request for immediate, individualized assessments of parole eligibility for all present and future class members; and urge this Court to require NOLA ICE officials to comply with the applicable regulations and parole standards when engaging in these immediate, individualized parole assessments, including standards applicable to class members with serious medical conditions, and whose continued detention is not in the public interest, given the dangers posed by the COVID-19 pandemic.

I. FACTUAL BACKGROUND

A. The Parties

Plaintiffs are all present and future members of the class that this Court has provisionally certified, (Doc. No. 33), i.e., arriving aliens eligible for parole, who are currently detained or will be detained by Defendant NOLA ICE. Plaintiffs are or will be detained at the various detention

[3] *See* Order granting preliminary injunction and provisional class certification, R. Doc. 33.
[4] Since this Court's September 5 Order, Defendants have submitted five reports which Plaintiffs discuss in more detail in Section III(B)(2), *infra*.

facilities that the NOLA ICE region comprises,[5] as they await the final adjudication of their civil immigration removal proceedings.

Many Plaintiffs are older adults or have medical conditions that lead to high risk of serious COVID-19 infection, including diabetes, asthma, hypertension, human immunodeficiency virus (HIV), weakened immune systems from prior treatments for cancer, and psychiatric illness.[6] The State of Louisiana is home to the largest number of immigration detention facilities in the NOLA ICE region, with Mississippi a distant second.

The danger posed by Plaintiffs' detention during the current outbreak of COVID-19 is so grave and imminent that it must be properly weighed by ICE in an immediate assessment of parole for all class members, particularly as it relates to the Directive's express language regarding people who have serious medical conditions, and people whose continued detention is not in the public interest. For these reasons, Plaintiffs request a preliminary injunction requiring Defendants to conduct immediate, individualized parole assessments for all class members presently detained in the NOLA ICE region and for all future class members thereafter.

[5] including but not limited to Adams County Detention Center ("Adams"), Catahoula Correctional Center ("Catahoula"), Pine Prairie ICE Processing Center ("Pine Prairie"), Richwood Correctional Center ("Richwood"), River Correctional Center ("River"), South Louisiana Detention Center ("South Louisiana"), Tallahatchie County Correctional Facility ("Tallahatchie"), LaSalle ICE Processing Center ("LaSalle"), and Winn Correctional Center ("Winn").

[6] "In South Korea, 20% of deaths occurred in what they defined as Psychiatric Illness," Franco-Paredes Exp. Decl. ¶17, Table 1.

B. The COVID-19 Virus

The novel COVID-19 virus has led to a global pandemic. Over the last several months, 634,835 people worldwide have received confirmed diagnoses of COVID-19, and over 29,895 people have died.[7] The United States now leads in the number of confirmed cases globally.[8]

There is no vaccine against COVID-19 and there is no known cure.[9] According to preliminary data from China, South Korea, Italy, Spain, and the United States, 80 percent of confirmed cases tend to occur in persons 30 to 69 years of age regardless of underlying medical conditions, and 20 percent of those individuals develop severe symptoms or become critically ill. Franco-Paredes Exp. Decl. ¶17. COVID-19 is most likely to cause serious illness and elevated risk of death for older adults and those with certain medical conditions or underlying disease. Franco-Paredes Exp. Decl. ¶12. Those particularly vulnerable includes people with weakened immune systems (including due to cancer treatment), chronic lung disease, asthma, serious heart conditions, diabetes, renal failure, liver disease, and possibly pregnancy.[10]

Among those with severe clinical manifestations, regardless of their age or underlying medical conditions, the virus progresses into respiratory failure, septic shock, and multiorgan dysfunction requiring intensive care support including the use of mechanical ventilator support. Franco-Paredes Exp. Decl. ¶17. The only known effective measures to reduce the risk of serious

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[7] World Health Organization, Coronavirus Disease 2019 (COVID-19) Situation Report-69, March 29, 2020, https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200329-sitrep-69-covid-19.pdf?sfvrsn=8d6620fa_4.

[8] "The U.S. Now Leads the World in Confirmed Coronavirus Cases," New York Times, March 26, 2020, https://www.nytimes.com/2020/03/26/health/usa-coronavirus-cases.html.

[9] Expert Declaration of Joshua Sharfstein, ¶ 6, filed in support of Plaintiffs' Motion for Temporary Restraining Order in *Las Americas v. Trump*, available at https://www.splcenter.org/sites/default/files/documents/0029._03-27-2020_emergency_motion_for_tro.pdf. ("Sharfstein Decl."). See also, World Health Organization, Q & A on COVID-19, March 9, 2020, https://www.who.int/news-room/q-a-detail/q-a-coronaviruses.

[10] *Id.*

illness or death caused by COVID-19 are social distancing and improved hygiene, which have led to unprecedented public health measures around the world and in the United States.[11]

Detention of any kind requires large groups of people to be held together in a confined space and creates the worst type of setting for curbing the spread of a highly contagious infection such as COVID-19. Franco-Paredes Exp. Decl. ¶23. People who are confined in detention centers will find it virtually impossible to engage in the necessary social distancing and hygiene required to mitigate the risk of transmission, even with thoughtful guidance and plans in place. Franco-Paredes Exp. Decl. ¶¶11,12. For this reason, several jurisdictions at the urging of public health experts, are ordering the release of people from jails, prisons and detention centers.[12]

Moreover, a release of and moratorium on the detention of future class members allows for greater risk mitigation for all people detained or working in these detention centers. Franco-Paredes Exp. Decl. ¶¶ 22,28. Release of *Mons* class members from custody would also reduce the burden on the region's limited health care infrastructure, as it lessens the likelihood of an overwhelming number of people becoming seriously ill from COVID-19 at the same time. Franco-Paredes Exp. Decl. ¶27. Louisiana Governor John Bel Edwards recently reported that Louisiana has seen the fastest rate of growth of COVID-19 virus in the world.[13] The situation is so dire in

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[11] Expert Declaration of Dr. Robert Greifinger, ¶ 4, available at https://www.aclu.org/legal-document/dawson-v-asher-expert-declaration-dr-robert-greifinger.

[12] Prison Policy Initiative, "Responses to the Covid-19 Pandemic," March 27, 2020, available at https://www.prisonpolicy.org/virus/virusresponse.html. *See also* BBC News, "US jails begin releasing prisoners to stem Covid-19 infections," March 19, 2020 available at https://www.bbc.com/news/world-us-canada-51947802 (noting efforts in the states of Ohio, California, Colorado, New York, Alabama, New Jersey, South Carolina, Florida, Texas, Washington, Utah and Louisiana ordering the release of people from incarceration and detention)

[13] Hollie Silverman, *Louisiana Governor says his state has the fastest growth rate of coronavirus cases in the world*, CNN.COM (March 24, 2020), https://www.cnn.com/2020/03/23/us/louisiana-coronavirus-fastest-growth/index.html (accessed March 26, 2020). *See also,* Louisiana Governor's Office of Homeland Security and Emergency Preparedness, *COVID-19 Louisiana Case Info*, https://gov.louisiana.gov/assets/docs/covid/govCV19Brief-2.pdf (releasing data by a researcher at

Louisiana that on March 22, 2020, Governor Bel Edwards issued a statewide "stay-at-home" order, in an attempt to stem the horrific growth of the COVID-19 virus in the state.[14]

C. COVID-19 Poses a Grave Risk of Harm to Persons in Congregate Unhygienic Environments Such as the Facilities Currently Housing All Class Members.

Immigration detention centers in the United States are tinderboxes for the transmission of highly transmissible infectious pathogens including the SARS-CoV-2, which causes COVID-19. Franco-Paredes Exp. Decl. ¶15. In addition, these detention centers are often unhygienic environments. Scharf Exp. Decl. ¶18 at (a)(i). Once an outbreak is underway inside a detention facility, a person in such a facility is expected to be at a high risk of acquiring the virus and transmitting it to others inside.[15] Infectious diseases that are communicated by air or touch are more likely to spread in these environments. Franco-Paredes Exp. Decl. ¶23. A recent study showed that the virus could survive for up to three hours in the air, four hours on copper, up to twenty-four hours on cardboard, and up to two to three days on plastic and stainless steel.[16] This presents an increased danger for the spread of COVID-19 if and when it is introduced into a detention facility. Franco-Paredes Exp. Decl. ¶¶18,20.

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the University of Louisiana Lafayette found that Louisiana presently has the fastest spread of COVID-19 of any region in the world).

[14] Same Karlin, *John Bel Edwards urges residents to heed stay-at-home order*, THE ADVOCATE (March 23, 2020), https://www.theadvocate.com/baton_rouge/news/coronavirus/article_df60a9ec-6d5c-11ea-ac94-c3207fa0a583.html (accessed March 26, 2020); Office of the Louisiana Governor, https://gov.louisiana.gov/assets/Proclamations/2020/JBE-33-2020.pdf (last accessed March 26, 2020).

[15] Tulane Open Letter, available at https://sph.tulane.edu/open-letter-covid19-jail, last accessed Mar. 26, 2020.

[16] *Novel Coronavirus Can Live on Some Surfaces for Up to 3 Days, New Tests Show.* TIME (https://time.com/5801278/coronavirus-stays-on-surfaces-days-tests/) (last visited March 26, 2020). A new study of an early cluster of COVID-19 cases in Wuhan, China revealed the dangers of indirect transmission resulting from infected people contaminating common surfaces—in the study, it was a communal mall bathroom. Cai J, Sun W, Huang J, Gamber M, Wu J, He G. Indirect virus transmission in cluster of COVID-19 cases, Wenzhou, China, 2020. Emerg Infect Dis. 2020 Jun. (https://doi.org/10.3201/eid2606.200412) (last visited March 26, 2020).

Enclosed group environments, like cruise ships or nursing homes, have become the sites for the most severe outbreaks of COVID-19.[17] Immigration detention facilities have even greater risk of infectious spread because of crowding, the proportion of vulnerable people detained, and often scant medical care resources. Franco-Paredes Exp. Decl. ¶¶12,13. People living in such close quarters cannot achieve the "social distancing" needed to effectively prevent the spread of COVID-19. Franco-Paredes Exp. Decl. ¶12. *See also* Scharf Exp. Decl. ¶¶24,26. In addition, many immigration detention facilities lack adequate medical infrastructure to address the spread of infectious disease and treatment of people most vulnerable to illness in detention. Franco-Paredes Exp. Decl. ¶ 13.

Class members are held in crowded confinement with dangerously unsafe hygienic conditions. At Richwood, for example, some are housed in dorms with as many as 100 men who are forced to share four toilets, four sinks, and five showers in a shared room. O.M.H. Decl. ¶10. At Adams, some are housed in dorms holding as many as 240 men who are forced to share six toilets, 12 sinks, and one shower room with 12 showerheads in close proximity. S.U.R. Decl. ¶13. At South Louisiana, as many as 72 women are housed in a single dorm with beds less than two feet apart from one another and forced to share three toilets, three sinks, and six phones, none of which are properly sanitized. K.S.R. Decl.¶15; L.P.C. Decl. ¶¶14,16. These women also report that they are not provided enough toilet paper and had no toilet paper for nearly a week in March 2020. *Id*. At LaSalle, some class members are housed in dorms with more than 90 men who are forced to share five toilets, eight sinks and one shower room. T.M.F. Decl. ¶14.

[17] Centers for Disease Control and Prevention, https://wwwnc.cdc.gov/travel/notices/warning/coronavirus-cruise-ship; https://www.cdc.gov/coronavirus/2019-ncov/healthcare-facilities/prevent-spread-in-long-term-care-facilities.html, last accessed March 26, 2020.

Class members also report suffering from diarrhea and lack of nutrition due to the poor quality of food they are provided. S.U.R. Decl. ¶13; O.M.H. Decl. ¶10; K.S.R Decl. ¶10; R.P.H. Decl. ¶19; and L.P.C. Decl. ¶23. At most of the facilities, class members report that detention center staff are not taking recommended precautions, are not providing COVID-19 education, are not consistently utilizing masks or gloves, and are not providing hand sanitizer, disinfectant or sufficient soap for detainees to clean themselves. T.M.F. Decl. ¶¶15-16, 19; Y.P.T. Decl. ¶¶15-16, 22-23; R.P.H. Decl. ¶¶19-21; L.P.C. Decl ¶¶15, 22; O.M.H. Decl. ¶ 8; S.U.R. Decl. ¶¶ 14-15; and K.S.R. Decl. ¶¶14,18. Many who are desperate for information related to COVID-19 have been met with force or harm in these facilities.[18] Under these conditions, class members cannot practice proper social distancing or hygiene, the only known methods to stem the rapid spread of COVID-19. Franco-Paredes Exp. Decl. ¶¶11,12; *see also* Scharf Exp. Decl. ¶24.

Moreover, given the high population density of these facilities and the ease of transmission of this viral pathogen, the infection rate will be exponential if even a single person, with or without symptoms, who is shedding the virus enters a facility. Franco-Paredes Exp. Decl. ¶20. Of those infected, about one-fifth will get so ill that they require hospital admission. *Id*. About ten percent will develop severe disease requiring treatment only available in the intensive care unit, at least five percent of whom will likely die from respiratory failure, septic shock and multiorgan failure. *Id*. If those who require it cannot be hospitalized, many more will die in detention without access to necessary medical equipment, such as ventilators. *Id.* at ¶21.

[18] Mother Jones, "ICE Detainees Were Pepper-sprayed During a Briefing on Coronavirus," March 26, 2020, available at https://www.motherjones.com/politics/2020/03/ice-detainees-were-pepper-sprayed-during-a-briefing-on-coronavirus/?fbclid=IwAR0vM4J5UTiubdNO_X-Cc5m2MWYyVf2vU1FFzwjNuU-KTAWGz01nA2Y6V1A. *See also* Mother Jones, "ICE Detainee Reports He was Pepper-Sprayed and Sent to Isolation," March 25, 2020, available at https://www.motherjones.com/politics/2020/03/ice-geo-detention-pine-prairie-pepper-spray-louisiana/.

D. Older Adults and Those with Certain Medical Conditions Are Particularly Vulnerable to the Grave Risk of Harm, Including Serious Illness or Death.

The COVID-19 pandemic is devastating the United States. As of March 29, 2020, there have been 103,321 confirmed cases and 1,668 deaths.[19] Moreover, the transmission of COVID-19 grows exponentially. Franco-Paredes Exp. Decl. ¶20-21. People over the age of 50 and those with certain medical conditions face greater chances of serious illness or death from COVID-19. Certain underlying medical conditions increase the risk of serious COVID-19 disease for people of any age, including lung disease, heart disease, chronic liver or kidney disease (including hepatitis and dialysis patients), diabetes, epilepsy, hypertension, compromised immune systems (such as from cancer, cancer treatment, HIV, or other autoimmune disease), blood disorders (including sickle cell disease), inherited metabolic disorders, stroke, developmental delay, pregnancy and psychiatric illness. Franco-Paredes Exp. Decl. ¶16, Table 1.

In most people, COVID-19 causes fever, cough, and shortness of breath. But for people over fifty or with high-risk medical conditions, the shortness of breath can often be severe.[20] Even in younger and healthier people, infection of this virus requires supplemental oxygen, positive pressure ventilation, and in extreme cases, extracorporeal mechanical oxygenation.[21] Most people in higher risk categories who develop serious disease, however, will need advanced support. Franco-Paredes Exp. Decl. ¶24. This level of support can quickly exceed local health care resources. Franco-Paredes Exp. Decl. ¶26.[22]

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[19] World Health Organization, Coronavirus Disease 2019 (COVID-19) Situation Report-69, March 29, 2020, https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200329-sitrep-69-covid-19.pdf?sfvrsn=8d6620fa_4.

[20] Expert Declaration of Dr. Jonathan Golob ¶5, available at https://www.aclu.org/legal-document/dawson-v-asher-expert-declaration-dr-jonathan-golob?redirect=dawson-v-asher-expert-declaration-dr-jonathan-golob.

[21] *Id.*

[22] According to recent estimates, the fatality rate of people infected with COVID-19 is about *ten times* higher than a severe seasonal influenza, even in advanced countries with highly effective health care

Preliminary data from China showed that twenty percent of people in high-risk categories who have contracted COVID-19 there have died.[23] Social distancing and vigilant hygiene, including washing hands with soap and water, are the only known effective measures for protecting vulnerable people from COVID-19. Scharf Exp. Decl. ¶24. Projections by the Centers for Disease Control and Prevention (CDC) indicate that between 160 million and 214 million people in the United States could be infected with COVID-19 over the course of the epidemic without effective public health intervention, with as many as 1.7 million deaths in the most severe projections.[24] Many Plaintiffs qualify as having high-risk vulnerability to COVID-19. *Infra* Note, Section IV.

E. People Detained in the Region Face an Elevated Risk of COVID-19 Transmission.

The NOLA ICE region comprises five states: Louisiana, Mississippi, Alabama, Arkansas, and Tennessee. The majority of class members are housed in facilities located in Mississippi and Louisiana, with the latter state hosting the largest number of detention facilities, housing as many as 8,000 people[25] at any given time in aggregate.[26]

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systems. For people in the highest risk populations, the fatality rate of COVID-19 infection is about 15 percent. Franco-Paredes Exp. Decl. ¶26

[23] *Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19)*, World Health Organization (Feb. 28, 2020), at 12, https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf (finding fatality rates for patients with COVID-19 and co-morbid conditions to be: "13.2% for those with cardiovascular disease, 9.2% for diabetes, 8.4% for hypertension, 8.0% for chronic respiratory disease, and 7.6% for cancer"); Wei-jie Guan et al., *Comorbidity and its impact on 1,590 patients with COVID-19 in China: A Nationwide Analysis*, medRxiv (Feb. 27, 2020), at 5.

[24] Sheri Fink, *Worst-Case Estimates for U.S. Coronavirus Deaths*, N.Y. TIMES (March 13, 2020), https://www.nytimes.com/2020/03/13/us/coronavirus-deaths-estimate.html (accessed March 26, 2020).

[25] "[W]here the immigrant detainee population has surged in recent months and hit 8,000 earlier this year." PBS News, December 4, 2019, available at https://www.pbs.org/newshour/nation/ice-confirms-officers-in-louisiana-jail-pepper-sprayed-protesting-migrants.

[26] As stated *supra*, Louisiana has seen the fastest rate of growth of COVID-19 infection for the first 13 days of any area in the world, prompting the Governor to issue a "stay-in-place" order to stem the tide of COVID-19's rapid spread. See Office of the Louisiana Governor, https://gov.louisiana.gov/assets/Proclamations/2020/JBE-33-2020.pdf (last accessed March 26, 2020).

As of March 29, 2020, there were 3,540 confirmed cases of COVID-19 and 151 deaths from COVID-19 reported in Louisiana.[27] As of March 29, 2020, there were 847 confirmed cases and 16 deaths from COVID-19 reported in Mississippi.[28] The COVID-19 outbreak in Louisiana has resulted in unprecedented health measures to facilitate and enforce social distancing, as evidenced by the Governor's "stay-in-place" order issued March 22, 2020.[29] While schools, businesses, and government facilities close around the state, a high risk remains that COVID-19 will spread at the numerous immigration detention facilities in the State. Franco-Paredes Exp. Decl. ¶ 15.

Louisiana has the highest per capita rate of COVID-19 incidence in the world. Scharf. Exp. Decl. ¶17 at (h). The areas in which ICE NOLA centers are located are characterized by low medical access and public citizen health illiteracy. *Id* at (i). The managers hired by the region's ICE contractors (namely the GEO Group and LaSalle Corrections) have little training to cope with infectious disease. *Id* at (j).[30] COVID-19 has already begun to spread within Louisiana's carceral system. At the Federal Correctional Center in Oakdale, Louisiana which is located a few feet away from the Oakdale Immigration Court and a mere twenty-minute drive from Pine Prairie, at least sixty inmates are in quarantine and at least one has died due to a COVID-19 outbreak.[31]

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[27] Louisiana Department of Health statistics, updated daily, available at: http://ldh.la.gov/Coronavirus/.

[28] Mississippi Department of Health statistics, updated daily, available at: https://msdh.ms.gov/msdhsite/_static/14,0,420.html.

[29] Office of the Louisiana Governor, https://gov.louisiana.gov/assets/Proclamations/2020/JBE-33-2020.pdf (last accessed March 26, 2020).

[30] *See also* Declaration of Laura G. Rivera, Esq.

[31] Washington Post, "An explosion of coronavirus cases cripples a federal prison in Louisiana," March 29, 2020, available at https://www.washingtonpost.com/national/an-explosion-of-coronavirus-cases-cripples-a-federal-prison-in-louisiana/2020/03/29/75a465c0-71d5-11ea-85cb-8670579b863d_story.html.

F. Many Class Members Present High-Risk Vulnerability to COVID-19.

People who are over fifty or of any age with certain specified medical conditions, "are deemed to be at high risk of developing severe disease and dying from COVID-19." Franco-Paredes Exp. Decl. ¶16. R.P.H. is a 50-year-old Cuban national currently detained at South Louisiana. R.P.H. Decl. ¶1. She has been detained by ICE since July 25, 2019. *Id* at ¶13. R.P.H. is a breast cancer survivor who has undergone multiple rounds of radiation throughout her life and is currently experiencing spinal cord inflammation affecting her nervous system. *Id* at ¶¶4-5,20. She is eligible for parole, but she has been denied four times despite submitting requests supported by evidentiary documents. *Id* at ¶14. R.P.H.'s health is rapidly deteriorating in detention, where she has experienced flu-like symptoms including body pain, sore throat, ear pain, fever, dizziness, nausea, headaches, and loss of vision. *Id* at ¶¶15-18. She is exposed to at least seventy-two other detained women, with many presenting flu-like symptoms and is unable to practice social distancing. *Id* at ¶¶22,25. R.P.H. is critically vulnerable to COVID-19 because of her weakened immune system, history of recurring cancer, and the conditions of confinement at South Louisiana.

O.M.H. is a thirty-two year-old Venezuelan national detained at LaSalle. O.M.H. Decl. ¶1. He has been detained by ICE since May 2019, and was recently transferred from Richwood, where he spent most of his time in detention. *Id* at ¶¶1,4. He is eligible for parole, but his requests for release have not been granted and his last application remains pending. *Id* at ¶¶6,10. O.M.H. is HIV-positive and suffers from Hepatitis C, depression, and anxiety. *Id* at ¶¶1,6. O.M.H. was not provided medication to treat his HIV condition until about January 2020. *Id* at ¶6. Despite the threat of COVID-19 and the overcrowded dorms, ICE continued to transfer new detainees to Richwood as recently as March 23, 2020, without implementing any proper quarantine precautions. *Id* at ¶9. O.M.H. lost a significant amount of weight, necessitating at least two visits

to the nearest hospital. *Id* at ¶¶9,11. O.M.H. is vulnerable to COVID-19 because of his HIV and Hepatitis C diagnoses, as well as his deteriorating health due to his conditions of confinement.

B.A.E. is a Cameroonian national currently detained at LaSalle. B.A.E. Decl. ¶1. He has been detained by ICE since October 2019. *Id* at ¶6. B.A.E. suffers from a chest muscle injury, a recurrent fever, and a wound in his throat. *Id* at ¶ 8-9. He is currently seeing blood in his stool and when he coughs. *Id*. He is eligible for parole and has applied three times, but all his requests were denied. *Id*. Despite his symptoms, LaSalle has not provided him with adequate medical care, refusing to run tests to determine the cause of his ailments. *Id*. B.A.E. is vulnerable to COVID-19 because of his current state of health and due to the conditions of confinement at LaSalle.

Y.P.T. is a thirty-year-old Cuban national detained at Catahoula. Y.P.T. Decl. ¶1. Y.P.T. has been detained by ICE since August 2019, and is eligible for parole. *Id* at ¶¶8,10. Y.P.T. applied for parole three times, but his requests were denied. *Id* at ¶¶10,27. In or about February 2020, he suffered a fall that resulted in a right foot fracture. *Id* at ¶18. He was forced to wait over one week before being taken to a hospital to get a proper diagnosis of his fracture. *Id*. His ankle and foot remain swollen. *Id*. Y.P.T. has been confined to a wheelchair for over one month and is unable to bathe or mobilize without the assistance of other detained men. *Id* at ¶19. During a recent hospital visit, Y.P.T. was openly exposed to at least twelve other individuals without any social distancing measures or other precautions to protect him and others. *Id*. Y.P.T. is vulnerable to COVID-19 due to his weakened health as a result of his immobility and his conditions of confinement.

S.U.R. is a 59-year-old Nicaraguan national detained at Adams. S.U.R. Decl. ¶1. S.U.R. has been detained by ICE for over 13 months *Id*. S.U.R. suffers from hypertension and a systolic heart murmur, requiring medication and medical supervision. *Id*. He is eligible for parole but was denied once without the opportunity to affirmatively apply. *Id* at ¶¶7-9. He filed a redetermination

request but never received a response. *Id*. S.U.R. is held in a dorm with 240 men, some of whom are over the age of fifty-five and others who suffer from illnesses including diabetes, asthma and hypertension. *Id* at ¶¶13,16. S.U.R. is critically vulnerable to COVID-19 because of his age and significant health conditions.

T.M.F. is a 44-year old Cameroonian national detained at LaSalle. T.M.F. Decl. ¶ 1. T.M.F. has been detained by ICE since October 28, 2019. *Id.* at ¶ 7. T.M.F. suffers from depression and chronic injuries due to torture he endured in Cameroon, including to his eyes, back, wrists and knees. *Id* at ¶ 13. He is eligible for parole and has applied twice, but both requests were denied. *Id* at ¶¶ 9-10. An immigration judge granted T.M.F. Withholding of Removal in early March 2020, but ICE refuses to release him from detention. *Id* at ¶¶10-11. Throughout his detention, T.M.F.'s conditions of confinement have been unsanitary and lacking in access to adequate medical care. *Id* at ¶¶12-15. T.M.F. is vulnerable to COVID-19 because of his chronic health issues and due to his conditions of confinement.

K.S.R. is a twenty-seven-year-old Cuban national detained at South Louisiana. K.S.R. Decl. ¶1. She has been detained by ICE since October 2019. *Id* at ¶5. She is parole-eligible but her multiple requests were denied, despite extensive supporting evidence in her applications. *Id*. ¶7. K.S.R. was diagnosed with H1N1 influenza in early March 2020, after she experienced high fever, vomiting, and coughing. *Id*. She continues to have flu-like symptoms with minimal improvement. *Id* at ¶9. K.S.R. was placed in isolation for six days without being provided hygiene products, food, or medical attention. *Id* at ¶¶9-11. K.S.R. shares her dorm with at least fifty-two other women living in close proximity to each other. *Id* at ¶¶8,12-13. Some of K.S.R.'s dormmates are elderly women, cancer survivors, or suffer from chronic illnesses including diabetes, asthma, hypertension, and lupus. *Id* at ¶¶14-15. K.S.R. and the other detainees in her dorm are exposed to

guards who do not exercise safety precautions or provide education to prevent COVID-19 from spreading in the facility. *Id* at ¶¶16-17. K.S.R. is vulnerable to COVID-19 because of her weakened immune system as a result of contracting H1N1 influenza and her conditions of confinement.

G. This Court Should Require NOLA ICE to Immediately Reassess Parole for All of Class Members and Should Prioritize the Cases Most Vulnerable to COVID-19.

As risk mitigation is the only known strategy that can protect people from COVID-19, public health experts with experience in immigration detention and correctional settings have recommended the release of vulnerable detainees from custody. Franco-Paredes Exp. Decl. ¶¶ 27-28. *See also* Scharf Exp. Decl. ¶¶ 18, 34. Dr. Peter Scharf, a correctional health expert, has concluded that "[t]he best epidemiological models available, based on valid scientific research, suggest widespread COVID-19 contagion in this region's ICE facilities, which will lead to broad contagion unless release efforts are initiated in a rapid timeframe." Exp. Decl. ¶ 4. Dr. Scarf added that, "[t]he reality that this region's ICE facilities are located in remote or rural areas with limited resources and that medical resources proximate to the relevant ICE detention facilities leads to the conclusion that, were a COVID-19 infection to occur, widespread, long-term morbidity and mortality are more probable than not." *Id.*

Dr. Carlos Franco-Paredes, an infectious diseases expert, recommends "releasing detain[ed] asylum seekers on parole from these centers" because it "constitutes a high-yield public health intervention that may significantly lessen the impact of this outbreak." Franco-Paredes Exp. Decl. ¶28. He further recommends that ICE should focus on "targeting the release of persons in the age groups at risk of severe disease and death and persons with underlying medical conditions" as it "may lessen the human and financial costs that this outbreak may impose." *Id*.

All class members are vulnerable to serious illness or death if they remain in civil detention in the facilities that NOLA ICE administers. Franco-Paredes Exp. Decl. ¶15. Class members risked

their lives to escape persecution and torture in their home countries for what they believed was a safe haven in the United States. These asylum-seekers now find themselves trapped in a what has essentially become a ticking-timebomb and, for many, a tomb.

II. LEGAL STANDARD

A. Preliminary Issues

1) Jurisdiction.

This Court has jurisdiction to adjudicate Plaintiffs' Emergency Motion for Preliminary Injunction.[32] As a result of the COVID-19 crisis, Plaintiffs seek an injunction requiring that NOLA ICE officials immediately administer to all present and future class members individualized parole assessments, in a method consisted with the applicable regulations and standards of the Directive; they are not seeking to challenge the outcome of the individualized parole assessments itself. *See Abdi v. Duke*, 280 F. Supp. 3d 373, 385 (W.D.N.Y. 2017) (federal district court had jurisdiction beyond the jurisdictional bar of § 1252(a)(2)(B)(ii), where plaintiffs were not asking the court to review the propriety of any given parole decision, but, instead, simply sought compliance with certain minimum procedural safeguards when parole decisions are made); *Zadvydas v. Davis*, 533 U.S. 678 (2001) (holding that §1252(a)(2)(B)(ii) does not entirely strip federal courts of jurisdiction over claims relating to the parole process).

Nor do Plaintiffs seek to violate the INA by enjoining the operation of any detention statute, in violation of *8 U.S.C. § 1252(f)(1)*. Rather, Plaintiffs assert that Defendants continue to defy this Court's injunction, by ignoring the regulations and standards of the Directive, and as a result, have placed current and future class members at risk of irreparable harm from exposure to COVID-19:

[32] *See, Mons* 2019 WL 4225322, at *4 ("the plaintiffs there and here, however, "are not challenging the outcome of ICE's decisionmaking, but the method by which parole is currently being granted (or denied)) (emphasis added); *Damus* 313 F. Supp. 3d at 327

> "[b]ut '[w]here ... a petitioner seeks to enjoin conduct that allegedly is not even authorized[,] ... the court is not enjoining the operation of [the statute], and [INA] – § 1252(f)(1) therefore is not implicated.'" *Mons* 2019 WL 4225322, at *4 (internal quotations and citations omitted).

Therefore, Plaintiffs here challenge "'an overarching agency' action as unlawful – in this case, Defendants' systematic failure to follow the Directive [and this Court's September 5 Order], and to instead impose detention without its safeguards and individualized determinations." *Damus,* 313 F. Supp. 3d at 328. (citing *R.I.L-R. v. Johnson*, 80 F. Supp. 3d 164, 176 (D.D.C. 2015)). In this case, NOLA ICE's disavowal of the Directive will likely result in irreparable harm to the Plaintiffs, as outbreaks of the deadly COVID-19 are likely to sweep through the Louisiana detention facilities housing class members.

2) *Class Certification*

Plaintiffs are part of the class that this Court certified, consisting of:

> "[(1)] [a]ll arriving asylum-seekers (2) who receive positive credible fear determinations; and (3) who are or will be detained by U.S. Immigration and Customs Enforcement; (4) after having been denied parole by the New Orleans ICE Field Office.'"
> *Mons,* 2019 WL 4225322, at *8; *See also*, *Damus* 313 F. Supp. 3d at 329–35.

B. Legal Framework Governing Parole Decisions

1) The INA and Implementing Regulations

The Immigration and Nationality Act (hereinafter "INA"), sets out the process by which noncitizens can apply for asylum. *See* 8 U.S.C. § 1225(b)(1)(A)(ii). Under the INA, if an interviewing immigration officer "determines that an asylum-seeker has a 'credible fear' of persecution in her home country, that person 'shall be detained for further consideration of [her] application.'" *Id*. § 1225(b)(1)(B)(ii); *see also* 8 C.F.R. § 208.30(f) (describing the procedures surrounding a positive finding of credible fear). In addition, the INA allows the Attorney General to temporarily parole detained asylum-seekers who have received a positive credible fear finding:

"permitting these individuals for 'urgent humanitarian reasons or significant public benefit.' *See* 8 U.S.C. § 1182(d)(5)(A).

The INA's implementing regulations further provide that DHS must exercise its parole discretion on a "case-by-case basis" and that it may parole arriving aliens who "present neither a security risk nor a risk of absconding" and "whose continued detention is not in the public interest". 8 C.F.R. § 212.5(b); *Mons,* 2019 WL 4225322, at *1; *see also* 8 C.F.R. § 235.3(c).[33]

2) The Directive

The Directive defines circumstances under which there is a "public interest" in granting parole pursuant to the INA and implementing regulations. It provides that, absent exceptional overriding factors, an asylum-seeker who has established a credible fear of persecution should be granted parole in the "public interest," and released from detention while pursuing an asylum claim, so long as the individual establishes their identity and presents neither a flight risk nor danger to the community. Directive ¶ 6.2. In considering parole applications, the Directive requires that "[e]ach alien's eligibility for parole should be considered and analyzed on its own merits, and based on the facts of the individual alien's case." *Id.*

The Directive also delineates a number of procedural requirements for DHS's adjudication of parole applications. These prescribe that the agency must inform asylum-seekers that they have a right to seek parole in a language they understand," *id.* at ¶ 6.1; conduct a parole interview within "seven days following a finding that an arriving [noncitizen] has a credible fear," *id*. at ¶ 8.2; provide written notification of the parole decision that contains "a brief explanation of the reasons for any decision to deny parole" within seven days of the interview, *id.* at ¶ 6.5-6.6;

[33] "[a]gency regulations provide that the Secretary of Homeland Security may parole asylum-seekers who are 'neither a security risk nor a risk of absconding,' in the service of such 'urgent humanitarian reasons or significant public benefit." 8 C.F.R. § 212.5(b); *Mons,* 2019 WL 4225322, at *1; *see also* 8 C.F.R. § 235.3(c)

notify applicants whose applications are denied that they may request a redetermination, *id.* at § 8.2; and, consider whether setting a reasonable bond and/or" an alternative to detention program would mitigate any flight risk concerns, *id*. at ¶ 8.3.2.c.

Moreover, the Directive's applicable regulations describe five categories of "aliens who may meet the parole standards based on a case-by-case determination, provided they do not present a flight risk or security risk . . ." *Id.* at ¶ 4.3. Among the five categories are: "(1) aliens who have *serious medical conditions*, where continued detention would not be appropriate;" and "(5) aliens whose *continued detention is not in the public interest*." *Id*. (emphasis added).

ICE Field Offices have historically relied on the Directive to grant parole to thousands of asylum-seekers with credible fears of persecution, based on individualized findings that their detention was unnecessary. This is not surprising, as the overwhelming majority of asylum-seekers who establish a credible fear lack any criminal history, pose no threat to public safety, and do not need to be detained to ensure their appearance for court proceedings.[34] Since enacting the Directive, DHS has not revoked or amended it.

This Court has acknowledged that, since approximately 2017, the NOLA ICE Field Office has engaged in a blanket parole-denial policy, making NOLA ICE the region with lowest percentage of parole grants in the United States: "the percentage of asylum-seekers that that Office has released on parole has dramatically declined in recent years. The Office currently retains the lowest release rate of any jurisdiction in the country, having denied 98.5% of release requests in

[34] *See, e.g.*, Mark Noferi, "A Humane Approach Can Work: The Effectiveness of Alternatives to Detention for Asylum Seekers" at 1, 3 (July 2015) (summarizing research showing that asylum seekers are predisposed to comply with legal processes), *available at:* https://www.americanimmigrationcouncil.org/sites/default/files/research/a_humane_approach_can_work_the_effectiveness_of_alternatives_to_detention_for_asylum_seekers.pdf.

2018 and 100% of requests made thus far in 2019 (internal citations omitted)." *Mons*, 2019 WL 4225322, at *2.

Pursuant to the Sept. 5 Order, Defendants have submitted monthly reports detailing the number of parole requests received, and whether the requests were granted or denied. Defendants have thus far submitted five reports, showing that the monthly parole-grant rates are as follows: November 2019 Report: 0.66 percent grant rate for redetermination requests and 1.3 percent grant rate for initial applications; December 2019 Report: 1.16 percent grant rate for redetermination requests and 1.7 percent grant rate for initial applications; January 2020 Report: 1.8 percent grant rate for redetermination requests and 2.59 percent grant rate for initial applications; February 2020 Report: 21 percent grant rate for redetermination requests and 47.6 percent grant rate for initial applications; and March 2020 Report: 27 percent grant rate for redetermination requests and 11 percent grant rate for initial applications.

While the Reports show a modest increase in parole grants, the parole-grant numbers are nowhere near the historical numbers for NOLA ICE region, e.g. the 75 percent parole grant rate reported in 2016, the year before this region saw a precipitous drop to a parole grant rate of 1.8 percent. In addition, Plaintiffs have reason to believe that Defendants continue to circumvent this Court's Order by failing to conduct individualized assessments of parole submissions and re-submissions, as required by the Directive. Moreover, Defendants' reports, (particularly the February 2020 report reflecting only twenty-one initial parole applications), may not accurately reflect the total number of parole requests received by deportation officers across the region's detention facilities.

Unfortunately, class members with serious medical conditions continue to languish in detention facilities in the NOLA ICE region, and with the specter of a COVID-19 outbreak, now

find themselves in conditions that pose an equal or graver threat to their lives, than the ones that forced them to flee their homelands and seek asylum in the United States.

For example, class member O.M.H. was denied parole despite having HIV and Hepatitis C and remains in detention. Decl. ¶1,5. Class member K.S.R. tested positive for H1N1 but was nonetheless denied parole and remains in custody despite a weakened immune system. Decl. ¶9. Class member L.P.C. knows individuals currently in detention without parole who suffer from medical conditions, such as asthma, diabetes, cancer, and lupus, that could result in death, should a COVID-19 outbreak take place. Decl. ¶22. Class member Y.P.T. remains in detention, after NOLA ICE officials denied all four of his parole requests, despite satisfying all parole requirements, providing all necessary evidence, and being confined to a wheelchair. Decl., ¶ 19-26, 28. Class member B.A.E., reports coughing "clots of blood," having "blood in [his] feces, and suffering from continuous fever, but only receives Ibuprofen and remains detained in a crowded bunk. Decl., ¶ 10. Class member R.P.H., who was denied parole despite having been a cancer survivor, was explicitly told she would not receive parole unless her cancer returned. Decl., ¶ 4-5, 15. And class member S.U.R.'s nephew remains detained despite having only one functioning kidney. Decl., ¶ 12.

All Plaintiff-witnesses have applied for release on parole at least once. Most suffer from serious medical problems and are considered part of high-risk populations that are being decimated by COVID-19. There is no public benefit in keeping these asylum-seekers in detention, at the risk of irreparable injury. The experts agree that keeping these vulnerable class members detained during the COVID-19 pandemic will result in risk of irreparable physical injury, and even death.

As the anecdotal evidence from class members shows, NOLA ICE officials continue to defy the Directive, even weeks after the dangers of COVID-19 became a reality. Class members

languish in crowded detention centers, and those who are sick suffer without access to adequate health care. Experts warn that class members face a certainty of irreparable harm and death once these detention centers experience COVID-19 outbreaks, as they are congregate environments that are simply ill equipped to prevent and successfully navigate an outbreak of such unprecedented, deadly proportions. Franco-Paredes Exp. Decl. ¶¶ 12, 13.

C. Legal Requisites for Establishing a Preliminary Injunction

In deciding whether to issue a preliminary injunction, a court must consider "whether (1) the plaintiff has a substantial likelihood of success on the merits; (2) the plaintiff would suffer irreparable injury were an injunction not granted; (3) an injunction would substantially injure other interested parties; and (4) the grant of an injunction would further the public interest." *Sottera, Inc. v. FDA*, 627 F.3d 891, 893 (D.C. Cir. 2010) (internal quotation marks and citations omitted). Plaintiffs meet these requirements.

Plaintiffs bear the burden of showing that they meet all factors: "[t]he movant has the burden to show that all four factors, taken together, weigh in favor of the injunction." *Davis v. Pension Ben. Guar. Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009). "The last two factors 'merge when the Government is the opposing party.'" *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 10 (D.C. Cir. 2019) (quoting *Nken v. Holder*, 556 U.S. 418, 435 (2009)). This Court appeared to merge the last two factors in its analysis granting Plaintiffs' preliminary injunction motion: "these last two prongs pose no serious obstacle to Plaintiffs' request for a preliminary injunction." *Mons* 2019 WL 4225322, at *11.

III. ARGUMENT

A. Likelihood of success on merits

In order to obtain injunctive relief, plaintiffs must demonstrate that they are likely to prevail on the merits of their claims. The determination as to whether a party has successfully demonstrated such likelihood is informed by the circumstances of the particular case and claims being made. *See Hi-Tech Pharmacal Co. v. United States FDA*, 587 F. Supp. 2d 1, 8 (D.D.C. 2008). While the four factors of injunctive relief are not considered in isolation from one another, a strong showing of likely success on the merits may warrant issuance of preliminary injunctive relief, even if the plaintiff makes a less compelling showing on the other factors in injunctive-relief analysis. *Morgan Stanley DW Inc. v. Rothe*, 150 F. Supp. 2d 67, 72 (D.D.C. 2001); *Hi-Tech Pharmacal Co.*, 587 F. Supp. 2d at 7.

Plaintiffs re-assert the first two claims presented in their original complaint to the Court, but now make these assertions as the basis for injunctive relief requested to enjoin Defendants from acting in a manner specifically harmful to Plaintiffs' during the COVID-19 pandemic. Plaintiffs will demonstrate that they are likely to succeed on the merits of these claims, which consist of the following:

1) Defendants' policy and practice of ignoring the Directive is arbitrary, capricious, and contrary to the law in violation of [the APA *See* Compl., ¶ 133.
2) Defendants' "failure to provide individualized determinations of flight risk and danger" violate the INA and implementing regulations and the APA *See* Compl., ¶¶ 133-137.

The INA, codified in Title 8 of the U.S. Code, contains important provisions of U.S. immigration law. For example, the basis for the existing parole system in the U.S. is found in INA

§212(d)(5)(A), which grants the Secretary of DHS authority to make parole determinations pursuant to its provisions. INA §212(d)(5)(A). Furthermore, through the INA, Congress delegated rulemaking power to the Secretary, as it required that they "shall establish such regulations … as he deems necessary for carrying out his authority under the provisions" of the INA. 8 U.S.C. § 1182(d)(5)(A). The Secretary has delegated parole authority to the three immigration agencies which are components of DHS: USCIS, CBP, and ICE.[35]

The authority granted by the Secretary to ICE includes the non-law enforcement functions of parole programs, including the authority to make parole determinations for arriving aliens who have passed credible fear interviews, and are awaiting an asylum hearing. *Id*. In addition to delegating this authority over general parole determination, the Secretary also delegated to ICE the supplemental specific authority to grant parole to arriving aliens due to "urgent humanitarian interest" or "significant public benefit." 8 C.F.R. § 212.5. Groups whose need for parole constitute urgent humanitarian interest or significant public interest include, but are not limited to, individuals who "have serious medical conditions, where detention would not be appropriate," and "whose continued detention is not in the public interest." Directive at ¶ 4.3 (citing 8 C.F.R. § 212.5(b)).

The power of an administrative agency to administer authority granted to it by Congress, such as the INA authority over parole determinations delegated to ICE by the Secretary, "necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) (explaining that rulemaking power was necessary for an agency to carry out the powers delegated to it by the

[35] (Memorandum of Agreement Between USCIS, ICE, and CBP: Coordinating the Concurrent Exercise by USCIS, ICE, and CBP, of the Secretary's Parole Authority Under INA § 212(d)(s)(A); Homeland Security Act, 6 U.S.C. § 251-98 (transferring authorities exercised exclusively by the former Immigration and Naturalization Service to DHS).

Secretary of the Interior under an act of Congress). Agencies are empowered by the delegation of authority to promulgate rules and policies that serve as implementing regulations. *Id*.

1) Plaintiffs' Claims Arise under the APA.

As aforementioned, DHS and ICE (hereinafter "Defendants") presently both possess parole authority under the INA, as of the delegation of such authority by the Secretary of DHS to ICE. As ICE must now implement the INA to exercise the parole determination authority it was granted, it is necessary for ICE to develop rules to fill gaps left by Congress in the INA. For example, while the INA grants the authority to release immigrants in custody on parole, it does not dictate the process that should be followed. For that reason, ICE was compelled to produce the Directive to provide guidance to its officials carrying out determinations, and to prevent those determinations from being made arbitrarily or on an ad hoc basis, in violation of the Administrative Procedures Act ("APA"). *Morton*, 415 U.S. at 232.

The APA, codified under Title Five of the U.S. Code, governs the actions of agencies, as well as the actions of federal executive departments, that delegate rulemaking power to agencies that are components of them. "Agencies," under the APA, are "each authority of the government of the [U.S.], whether or not it is within or subject to review by another agency," except for those expressly excluded in the APA's provisions. 5 U.S.C. § 701. The APA prohibits such acts by agencies from being "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706.

Actions of agencies governed by the APA include the process by which they promulgate rules, after they have been delegated the authority to do so. 5 U.S.C.A. § 553 A "rule" under the APA is defined as "the whole or a part of an agency statement of general or particular

applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency…" 5 U.S.C. § 551.

The Directive satisfies the definition of a rule under the APA. . 5 U.S.C §551(4) *et seq.* (1946). It is a statement applicable to the particular agency action of making parole determinations that was promulgated by the Defendants – an administrative agency (ICE), and the federal executive department which delegated parole determination power to that agency (DHS). Dep't of Homeland Sec. Delegation No. 7030.2, "*Delegation of Authority to the Assistance Secretary for the Bureau of Immigration and Custom Enforcement"* (Nov. 13, 2004); ICE Delegations of Authority to the Directors No. 0001, "*Detention and Removal and Investigations to the Field Office Directors, Special Agents in Charge and Certain Other Officers of the Bureau of Immigration and Customs Enforcement*," (Jun. 6, 2003). The Directive was designed to prescribe policy for the implementation of the INA bysetting forth procedures and practice requirements to provide guidance on the future exercise of discretion by agency officials making parole determinations. 5 U.S.C. §551 et seq. (1946). As the Directive in question is a rule pursuant to the meaning under the APA, claims regarding the agency's actions with respect to the Directive are governed by the APA.

Plaintiffs are likely to succeed on the merits of their claims arising under the APA, as: 1) Plaintiffs validly challenge final agency action, entitling them to judicial review of their claims under the APA; 2) the Directive is a binding agency rule that ICE and DHS are required to adhere to under the *Accardi* doctrine of the Supreme Court; 3) Plaintiffs are likely to successfully demonstrate the Defendants do not adhere to this binding Directive; and 4) Defendants' failure and refusal to adhere to the Directive renders their actions arbitrary, capricious, and contrary to law in violation of the APA.

2) *The Directive is binding o nICE and DHS under the Accardi doctrine.*

The *Accardi* doctrine established that agencies are required to adhere to their own rules, including internal agency policies, such as the Directive. *U.S. ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954); *Morton*, 415 U.S. at 200, 235 (requiring an agency to comply with a directive that provides guidance on internal procedures, and holding that the agency's failure to comply constituted a violation of the APA as "arbitrary" and "capricious"). This remains true, even when procedures set out are potentially more rigorous than required. *Id*. Adherence by an agency to its rules is particularly significant where the rights of individuals are impacted by agency action and rulemaking. *Id.* at 235*; e.g. Aracely v. Nielsen*, 319 F.Supp.3d 110, 149, 157 (D.D.C. 2018) (holding that Defendants must re-evaluate plaintiff's request for parole in strict compliance with the ICE Directive of 2009, as that Directive impacts individual rights); *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363, 38 (1957); *Morton v. Ruiz*, 415 U.S. 199, 235 (1974).

Prior to the filing of this motion, this Court already established that the specific Directive in question in *Mons* and this request is binding written agency policy for the following reasons: a) it impacts individual rights of arriving aliens, b) the boilerplate disclaimer language included in it is not effective, and 3) it imposes constraints on an agency's previously unfettered discretion over parole grants upon taking effect.

a. The Directive is binding because it impacts rights of arriving aliens.

This Court has established that the Directive is binding written agency policy, as it impacts individual rights of arriving aliens, and legal consequences flow from DHS and ICE failure to implement the Directive in making parole determinations. *Bennet v. Spear*, 520 U.S. 154, 177-78 (1997), *Aracely*, 319 F.Supp.3d at 150 (2018); *Damus*, 313 F.Supp.3d at 343. Agency action

impacts individual rights when rights or obligations of plaintiff's are determined by those actions, or legal consequences flow from those actions. 5 U.S.C. § 704.

The Directive sets out the definitions, guidance, internal procedures, and standards used to make a determination of parole, as well as the mitigating factors required to deny individuals parole. Directive ¶ 1-9. Freedom of movement is a fundamental personal liberty under the U.S. Constitution. *Aptheker v. Sec'y of State*, 378 U.S. 500, 505-509 (1964), U.S. Const. amend. V. Thus, the determination of whether Plaintiffs will be granted parole is simultaneously a determination of whether, and to what extent, Plaintiffs will be deprived of a liberty interest prior to their asylum hearings, or if they will instead be able to exercise their right to freedom of movement.

During the COVID-19 virus pandemic, the Directive has even more extensive impact on individual rights of arriving aliens than under circumstances where no public health emergency is present. Until the pandemic is abated, the Directive impacts Plaintiffs' individual rights to bodily integrity and reasonable safety. *See DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189, 199-200 (1989); *see also Youngberg v. Romeo*, 457 U.S. 324, 319 (1982). Additionally, while the Directive requires individualized parole determinations for all arriving aliens found to have a credible fear, it separately emphasizes that, for "urgent humanitarian reasons" or "significant public benefit," such individualized review is made available to individuals who "have serious medical conditions, where continued detention would not be appropriate" and "whose continued detention is not in the public interest." Directive at ¶ 4.3, citing 8 C.F.R. § 212.5(b). Thus, in addition to establishing the right of individualized review of parole eligibility for all arriving aliens with credible fear, the Directive specifically highlights that individuals of vulnerable health also have this right. Since it is established that the Directive is binding, the existence of these rights

persists despite any attempt by Defendants to disclaim the creation of rights using boilerplate language.

Therefore, as this Court has already established, and Plaintiffs further demonstrate, the Directive impacts individual rights and liberties of Plaintiffs, and is thus binding pursuant to the *Accardi* doctrine. *Aracely v. Nielsen*, 319 F.Supp.3d 110, 149, 157 (D.D.C. 2018).

b. The Directive is binding because the boilerplate language it contains is ineffective and does not enable Defendants to evade legal challenges.

Defendants included a disclaimer in the Directive, stating that it "is not intended to, shall not be construed to, may not be relied upon to, and does not create, any rights, privileges, or benefits, substantive or procedural, enforceable by any party against the United States." Directive ¶ 10. In recent prior cases, arriving aliens have argued to this Court that Defendants' purpose in including this language is to attempt to prevent the Directive from becoming binding, in order to avoid APA claims from being brought against them. *See Aracely* 319 F.Supp.3d 110; *see also Damus*, 313 F.Supp.3d at 341–42,.

Nonetheless, this Court has established that an agency cannot use such boilerplate language to evade legal challenges or judicial review under the APA. *Aracely*, 319 F.Supp.3d at 152; *Damus*, 313 F.Supp.3d at 337-38; §706(2); 5 U.S.C. § 551. Such language is ineffective and does not enable Defendants to evade legal challenges. Thus, the Directive does, in fact, impact rights of individuals, and remains binding on the DHS and ICE, despite the use of boiler plate disclaimer language.

i. **The Directive is binding as it imposes constraints on those agencies' previously unfettered discretion over parole grants.**

In its first paragraph, the Directive contains an explanation that describes its purpose, stating it "provides guidance" on agency officials' use of their "discretion to consider the parole

of arriving aliens." Directive ¶ 1. Though an agency's discretion over an issue or process may be subject to no, or fewer, limitations prior to the implementation of a relevant rule, once that agency "announces and follows—by rule or by settled course of adjudication—a general policy by which its exercise of discretion will be governed, an irrational departure from that policy (as opposed to an avowed alteration of it) could constitute action that must be overturned as 'arbitrary, capricious, [or] an abuse of discretion'." *Lopez v. FAA*, 318 F.3d 242, 246–48 (D.D.C. 2003); *Damus v. Nielsen*, 313 F.Supp.3d at 337–38 (D.D.C. 2018). Since departure from any implemented rule limiting agency discretion results in invalidation of that departing action, rules imposing such constraints on agency discretion are binding upon implementation.

The aforementioned statement explaining the Directive's purpose effectively announced, in 2009, that the information contained in the Directive would govern the use of discretion in parole determinations by Defendants. While Defendants may not originally have been bound to perform parole determinations pursuant to factors, considerations, and measures such as those set out in the Directive, their discretion to ignore those measure ceased upon the date which the Directive went into effect. Thus, the Directive is binding on Defendants as of January 4, 2009.

3) Defendants persistently refuse to adhere to the binding directive during the COVID-19 pandemic, despite the issuance of a prior order by this Court granting injunctive relief.

In September 2019, this Court found Plaintiffs provided sufficient evidence to demonstrate that Defendants were not following the binding Directive. (Doc. No. 33) . To make that determination, the Court considered statistics demonstrating the abysmal rates of parole grants. *Id*. These statistics included that in the years immediately following implementation of the Directive, asylum-seekers were granted parole at a rate of ninety percent nationwide, but since 2017 the rates of release on parole dramatically declined, despite confirmation by the DHS and NOLA ICE that

the Directive was being followed. *Id*. NOLA ICE was shown to deny parole requests at a rate of 98.5% in 2018 and 100% in 2019, being the lowest release rate in the country. *Id*.

Additionally, affidavits of arriving aliens supported that numerous individuals who had met all requirements for parole eligibility under the Directive were denied parole, whether they had submitted all required documents or, as occurs many times, had not been given sufficient time to submit documents. Affidavits also evidenced failure to provide parole interviews, failure to provide information regarding rights to and engagement in the parole process, failure to translate or explain the contents of documents or processes to detainees, neglect and inattention to detainees who tried to seek answers, and the regular vocalization of comments assuring that parole would not be granted to detainees in adherence to the Directive.

The Court should again find that Plaintiffs provide sufficient evidence to demonstrate continued failure to follow the binding Directive and provide individualized determinations of flight risk and danger.

a. Parole grant rates continue to be abysmal and a departure from previous application of the Directive, with no rational justification.

Plaintiffs now provide the most recent statistics on the most recent parole grant rates, which still evidence an irrational departure from binding agency policy in the Directive, despite the issuance of the Order providing injunctive relief in September. *INS v. Yang*, 519 U.S. 26 (1996). Plaintiffs remind the Court that, in 2016, about 75% of parole applications were successful. (Scharf Decl., ¶ 14). In 2018, fewer than 2% of parole applications were granted. *Id*. At the present time, in March 2020, data reported by Defendants demonstrate that parole rates are as follows: 12% at Atlanta City Detention Center, 30% at Jackson Parish Correctional Center, 32% at Winn, 35% at Richwood, 19% at Basile Detention Center, 34% percent at River, 41% percent at Pine Prairie,

zero percent at La Salle, zero percent at Catahoula, and zero percent at Allen Parish Correctional Center.

Though rates did appear to begin to grant rise slightly in 2020, statistics demonstrating such increases are missing relevant data. *Id*. Additionally, the rise that has occurred is still an astounding departure from previous grant rates, with no justification for such decline (as discussed below). *Id*.

Furthermore, witnesses continue to provide testimony of continued egregious behavior of Defendants in violation of the Directive, despite the injunctive relief and measures ordered by this Court in September 2019. Witness testimony evidences that determinations over parole persistently fail to be individualized.

b. Defendants often deny parole without arriving aliens ever having applied, indicating that they are not conducting individualized determinations as required by the Directive.

Arriving aliens have been denied parole without ever being given information about parole or the opportunity to apply. B.A.E. Decl., ¶ 8 (stating that a denial was given only three days to apply for parole and was denied without ever applying when was not able to meet the deadline); O.M.H. Decl., ¶ 5 (informing that arriving alien was denied parole without having applied for it); S.U.R. Decl., ¶ 7 (explaining that arriving alien was denied parole about three days after passing credible fear interview, without ever having applied for parole); Y.P.T. Decl., ¶ 12 (informing that arriving alien was denied parole before even being given opportunity to apply). At times, it is upon receipt of their denial notice that they learn about parole. *Id*. Denial has often happened just days after arriving aliens having been found to have credible fear. *Id*. As the Directive requires individualized determinations of flight risk or danger to be made, Defendants have violated the Directive, since it is impossible to make an individualized determination without having an

application informing decisionmakers of the particular circumstances of an individual to be considered. Directive at ¶ 4.3, citing 8 C.F.R. § 212.5(b).

c. Defendants explicitly state that applying for parole is futile, and parole grants will not be issued.

Arriving aliens are often discouraged from applying for parole by officers who make comments explicitly assuring them of the futility of submitting a parole application. B.A.E. Decl., ¶ 9 (revealing that arriving aliens were told by ICE officials at River that ICE "does not grant parole to anyone in Louisiana"); T.R.O. Decl., ¶ 12 (was told by ICE Officer Silva that "parole is not granted in Louisiana."); R.P.H. Decl., ¶ 15 (revealing that declarant has been told by ICE agents, on multiple occasions, that she will not be granted parole unless her cancer returns); T.M.F. Decl., ¶ 9 (revealing that declarant was told by an ICE officer not to place hope in parole). Officers have told arriving aliens that they will not be getting parole. Sometimes, they have stated that denials will be given under all circumstances, and other times, they have stated that grants will only be given to certain persons, such as those who have cancer. R.P.H. Decl., ¶ 15 (revealing that declarant has been told by ICE agents, on multiple occasions, that she will not be granted parole unless her cancer returns). Other times, comments have been made such that parole is not granted to anyone at all in Louisiana. B.A.E. Decl., ¶ 9 (revealing that declarant was told by ICE officials at River that ICE does not grant parole to anyone in Louisiana).

These comments further indicate Defendants' failure to adhere to the Directive, as the only reasons for which a person should be denied parole under the Directives are if, after an individualized review of their request, they are determined to be a flight risk or a danger to the community. § 212.5(b)(5); Directive Par. 6.2, 8.3; *Aracely*, 319 F.Supp.3d 110 (Jul. 3, 2018). Otherwise, parole should be granted as continued detention is not in the public interest. *Id*.

d. Defendants fail to provide a reasonable amount of time for arriving aliens to submit parole applications.

When Defendants do accept parole applications, they do not provide a reasonable amount of time for arriving aliens to submit required documents. B.A.E. Decl., ¶ 8 (explaining that declarant was given only three days to apply for parole and was not able to meet the deadline). In order to apply for parole, an individual must first determine who will serve as their sponsor. S.U.R. Decl., ¶8-9. Then, they must collect several documents to demonstrate their eligibility for parole, and their sponsor's ability to serve as such. *Id*. This involves collecting evidence such as identity documents, often from a country individuals have just fled in fear of persecution, tax documents from sponsors, proof of homeownership, utility bills, and letters of support from the sponsor and any other individuals available to attest to the good character of the applicant. Directive Par. 8.3-8.4; S.U.R. Decl., ¶8-9. In some instances, parole applicants have been given as little as three days to collect these documents and determine where to submit them, with little, if any, guidance from officers. B.A.E. Decl., ¶8 (revealing declarant was given three days to apply for parole and was not able to meet the deadline).

These acts by Defendants confirm they do not have an interest in providing an individualized determination of eligibility for parole. By failing to allow a reasonable amount of time for individuals to submit all required materials, Defendants effectively deprive arriving aliens of the opportunity to sincerely undergo an individualized determination of their eligibility as required by the Directive.

e. Defendants continue to determine flight risk and danger arbitrarily, despite mounting evidence in favor of granting parole.

Denials continue to be issued despite mounting evidence in favor of applicants' eligibility and satisfaction of all requirements for parole. B.A.E. Decl., ¶9; R.P.H. Decl., ¶15. These denials

continue to be categorical, and if any notice of denial is provided, at all such notice does not explain how the applicant falls into the category for which they were denied, usually "flight risk." This action by Defendants indicates that such determinations are made arbitrarily and without reasoning based on particular facts of applicants' circumstances and cases. B.A.E. Decl., ¶9 (informing that the parole applicant was denied parole for alleged "flight risk" despite submitting all required evidence to the contrary and received no further explanation); R.P.H. Decl., ¶15 (explaining that applicant is eligible for parole and has applied four times, but was denied repeatedly, three times for "flight risk" despite having extensive family in Florida to sponsor her, and the last for "lack of additional documents.").

Many denied applicants have sponsors who are U.S. citizens, and who provide all necessary evidence of citizenship, can attest to the arriving alien's good character, and have a close relationship, willingness, and ability to support them. B.A.E. Decl., ¶9 (explaining that arriving alien was denied as a "flight risk" even though her husband, who was released on parole in another region and is making an asylum claim under the same facts as this arriving alien, has same parole sponsor, who is a U.S. citizen cousin who lives in Tampa, Florida, and has presented evidence in support of the arriving alien's request for parole numerous times, including copies of their 2018 tax returns, evidence of U.S. citizenship, copies of bills, additional letters of support, documentation of arriving alien's clean criminal history, and a copy of arriving alien's birth certificate); R.P.H. Decl., ¶15 (stating that although eligible for parole and having applied four times, arriving alien has been denied repeatedly, the first three times for "flight risk" despite having extensive family in Florida to sponsor her, and the final time for "lack of additional documents."); K.S.R. Decl., ¶7 (explaining that their sponsor is a U.S. citizen); O.M.H. Decl., ¶11 (explaining that their sponsor is a U.S. citizen); S.U.R. Decl., ¶8 (explaining that their sponsor is a U.S. citizen);

T.M.F. Decl., ¶23 (explaining that their sponsor is a U.S. citizen); L.P.C. Decl., ¶11 (explaining that their sponsor is a U.S. citizen).

Many others have sponsors who are lawful permanent residents in the U.S., willing to take responsibility for them, but are denied, nonetheless. Y.P.T. Decl., ¶28 (explaining that their sponsor is a lawful permanent resident). While not absolutely dispositive of an arriving alien's merit of release on parole under an individualized review, the fact that grants of parole have been made in different regions for persons whose asylum cases stem from the same set of facts as those in a denied class member's case suggests that individualized review has not occurred before denial. K.S.R. Decl., ¶7 (has same sponsor as husband, and same set of facts leading to her request for asylum yet was denied parole though her husband was granted parole in a different region).

After receiving submissions of parole applications, Defendants sometimes fail to conduct parole interviews. S.U.R. Decl., ¶8-10 (explaining declarant was never provided a parole interview or a response on their application despite having their attorney prepare a parole application on their and their U.S. citizen sponsor's behalves, despite submitting all required documentation). The failure to conduct parole interviews after receiving submissions, while still issuing denials despite having received mounting evidence of eligibility, demonstrates that Defendants decisions to deny are made arbitrarily and irrationally. In the face of mounting evidence of eligibility, it would only be rational for Defendants to seek clarification of any facts that may indicate ineligibility through a parole interview. Thus, failure to conduct such interviews indicate that Defendants are not interested in assessing the particular circumstances of each person's individual case and are predisposed to deny regardless of any evidence provided by arriving aliens.

Often, arriving aliens commonly receive no notice at all informing them why they were denied, let alone the insufficient notice described above. S.U.R. Decl., ¶8-10 (was never provided

a response on their application despite having their attorney prepare a parole application on their behalf, having a U.S. citizen sponsor, and having submitted all required documentation).

Officials at the detention centers have sometimes refused to accept applications requesting parole at all. T.R.O. Decl., ¶11-12 (describing that, despite many attempts to request parole, ICE officers refused to accept parole application, and individual was told that she would have to wait until her court date); O.M.H. Decl., ¶9 (explaining that ICE officers stopped visiting detainees and refused to accept parole requests or provide information despite being asked). Such actions are evidently contrary to the individualized determination requirement in the Directive.

f. Defendants disregard the vulnerability of individuals with medical issues and ignore provisions that parole of such persons is justified.

The Directive contains provisions in favor of granting parole to class members who "have serious medical conditions, where continued detention would not be appropriate," and "whose continued detention is not in the public interest." Directive at ¶4.4 (citing 8 C.F.R. § 212.5(b)). Defendants disregard those provisions by continuously keeping individuals with underlying health conditions in detention, and even more extensively violate those provisions during the COVID-19 pandemic, due to those individuals' particular vulnerability. Numerous individuals with underlying health conditions and serious medical concerns remain in detention and have been denied parole, including those with asthma, diabetes, lupus, H1N1, HIV, hepatitis, cancer and others. K.S.R. Decl., ¶9 (tested positive for H1N1, but denied parole nonetheless); L.P.C. Decl., ¶22 (individuals who she has witnessed remain in detention without parole include those who suffer from asthma, diabetes, cancer, and lupus); Y.P.T. Decl., ¶19-26, 28 (denied four times despite satisfying all requirements, providing all necessary evidence, and now being confined in a wheelchair due to the neglect of the government to an injury he sustained). Such continued detention is in direct violation of the aforementioned provisions of the Directive. O.M.H. Decl.,

¶1,5 (explaining declarant was denied parole without ever having applied, despite being positive for HIV and Hepatitis C).

4) Plaintiffs' claims validly challenge final agency action, entitling them to judicial review of those claims under the APA.

As the claims brought by Plaintiffs' challenge final agency action, Plaintiffs are entitled to judicial review of those claims. 5 U.S.C. § 704. The APA grants the authority to bring legal action, including writs of prohibitory or mandatory injunction, in a court of competent jurisdiction, as the Plaintiffs have done in *Mons*. 5 U.S.C. § 704. Persons suffering legal wrongs because of agency action, or adversely affected or aggrieved by agency action are entitled to judicial review thereof if the actions in question: 1) impact plaintiffs' rights, and 2) are final agency actions. 5 U.S.C. § 704; *See Aracely v. Nielsen*, 319 F.Supp.3d 110, 138-139 (D.D.C. 2018); *see also Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

In order to be reviewable as a final action, the agency action at issue does not need to be in writing. *See Venetian Casino Resort LLC v. EEOC,* 530 F.3d 925, 929 (D.D.C. 2008) (entertaining an APA challenge to the agency's "decision ... to adopt [an unwritten] policy of disclosing confidential information without notice" because such a policy is "surely a consummation of the agency's decision making process" and it impacted the plaintiff's rights); *R.I.L–R v.* , 80 F.Supp.3d 164, 184 (holding that ICE's deterrence policy is a final agency action subject to APA review, despite the lack of a writing memorializing the policy).

This Court has established that routine and systematic failure to adhere to the statutory directives requiring factors to be considered in making custody determinations by agencies such as ICE constitutes final agency action under the APA, and is thus subject to judicial review by a court. *Ramirez v. U.S. Customs & Enf't*, 310 F.Supp.3d 7, 8 (D.D.C. 2018) (holding that ICE's

failure to adhere to directive constituted final agency action subject to judicial review under the APA).

As in *Ramirez*, Plaintiffs challenge the routine and systematic failure of Defendants to adhere to the Directive, which serves to implement parole procedures under the INA. Action being challenged by Plaintiffs also similarly includes Defendants' failure to follow the Directive's instructions to provide individualized review when making custody determinations regarding whether to grant parole, as required by the INA. *See* Compl., ¶133-137. As such actions by agencies like ICE have been established by this Court to constitute final agency action, Plaintiffs validly challenge Defendants' actions under the APA and are entitled to judicial review of their claims.

5) *Defendants' refusal to adhere to the Directive renders their actions arbitrary and capricious under the INA, requiring their actions to be overturned under the APA.*

The APA presents grounds that authorize and require a reviewing court to overturn agency action as being in violation of its provisions. These grounds include agency action being 1) arbitrary and capricious, and 2) contrary to law. 5 USC § 706.

a. Defendants' actions are arbitrary and capricious under the APA.

Agency actions may be arbitrary and capricious under the APA when they do not comply with binding internal policies governing the rights of individuals. 5 U.S.C. § 706(2)(A); *see Morton v. Ruiz*, 415 U.S. 199, 204-06 (1974); *Aracely*, 319 F.Supp.3d at 150. The Supreme Court has established that the APA was adopted to provide, inter alia, that administrative policies affecting individual rights and obligations be promulgated pursuant to ascertained and established procedures, such as the Directive. This requirement set out by the APA serves to ensure agency rules are not applied in an ad hoc manner, as unpublished ad hoc determinations are inherently arbitrary in nature. *Morton*, 415 U.S. at 232.

In *INS v. Yang*, 519 U.S. 26 (1996), the Supreme Court held that an irrational departure from policy (as opposed to an avowed alteration of it) could constitute action that must be overturned as "arbitrary [or] capricious," within the meaning of the APA, 5 U.S.C. § 706(2)(A). In contrast to the behavior of defendants in *Yang*, Defendants in *Mons* are not merely narrowing or expanding a definition, but instead entirely disregarding a binding directive requiring the provision by the agency of an individualized *determination* of eligibility. *Yang*, 519 U.S. at 32 (finding that taking a narrow view of what constitutes a term in a statute where no definition was provided by that statute, while still adhering to the provision containing the term, does not violate the APA).

The issue with Defendants' actions in *Mons* is not whether Defendant agencies can elaborate what constitutes a flight risk or danger where there is no definition provided under the INA. Instead, the issue consists of Defendants' failure to conduct individualized determinations to Plaintiffs as required by the INA, as demonstrated by their failure to provide any reasoning as to why they consistently conclude that each of the individuals, in the vast majority of applicants denied parole by Defendants, present a flight risk or danger.[36]

This Court explained that it found Defendants offered "absolutely no explanation for the precipitous nosedive in the parole-grant rates issued by an Office that has allegedly preserved the same underlying policy for making those decisions all along." *See Mons*, No. 19-1593 JEB, 2019 WL 4225322 at 21. Approximately seven months later, Defendants still have not offered an explanation for continued abysmal parole-grant rates and persistent departure from the Directive.

[36] Class members report that ICE officers merely check a box next to select a category, such as "flight risk" or "danger" and provide no further explanation or rational for how they determined that individuals fall under such categories, based on the facts specific to their situation or application for parole. S.U.R. Decl., ¶ 8-10; R.P.H. Decl., ¶ 15; B.A.E. Decl., ¶ 9.

Nor have Defendants made an avowed alteration of the Directive. As no explanation has been provided, no avowed alteration has occurred, and no lawful or valid explanation is readily apparent, Defendants actions constitute an irrational departure from binding agency policy. Thus, their actions are arbitrary and capricious under the APA.

b. Defendants' actions are contrary to law, as they violate the INA.

As set forth in the INA, parole applications are to be granted on a "case-by-case" basis for "urgent humanitarian reasons or significant public benefit," provided the aliens present neither a security risk nor a risk of absconding. INA § 212(d)(5)(A).

While the act does not provide definitions of "urgent humanitarian reasons" or "significant public interest," it does provide examples of what would be considered to constitute such terms. *Id*. These examples are not an exhaustive list. *Id*. Instead, these are groups of persons highlighted as specifically justifiable. *Id*. The INA further establishes this list as a floor, not a ceiling, as it states that all other arriving aliens may also be granted parole, so long as they meet initial eligibility conditions, are provided with an individualized review, and are not concluded to be risk of flight or danger as a result of that individual review. 8 C.F.R. 212.5(c)-(d).

The practice of providing notice in the form of a "check" indicating a category for denial with no further explanation indicates that individualization on a "case-by-case" of review has not occurred, as required by the INA. 8 C.F.R. § 212.5. Additionally, as discussed earlier in this motion, Defendants persistently engage in other actions that demonstrate failure to provide individualized determinations in violation of the INA, such as denying Parole toarriving aliens who have not applied, explicitly stating that applying for parole is futile as no parole grants will be issued, failing to provide a reasonable amount of time for arriving aliens to submit documents to be evaluated, and failing to conduct parole interviews prior to denial of parole applications.

S.U.R. Decl., ¶7-10; B.A.E. Decl., ¶8-9; T.R.O. Decl., ¶12; R.P.H. Decl., ¶15; O.M.H. Decl., ¶5; Y.P.T. Decl., ¶12. These actions impede the receipt of facts, without which no individualized determination can occur, demonstrating Defendants' lack of intent to consider the individual facts of arriving aliens' cases, in violation of the INA. *Id*; 8 C.F.R. § 212.5.

Furthermore, as the Directive provides binding agency policy on the technical details and implementation of parole, about which Congress provided no guidance, it is the authority for parole procedures, where the INA has not set forth or elaborated on. 5 U.S.C.A. § 553. Thus, since the Directive provides the authority for parole implementation under the INA, Defendants inherently violate the INA when it does not abide by the Directive. *Bennet v. Spear*, 520 U.S. 154, 177-78 (1997), *Aracely*, 319 F.Supp.3d at 150 (2018); *Damus*, 313 F.Supp.3d at 343.

For these reasons, Defendants' actions are likely to be found arbitrary, capricious, and contrary to law under the APA, and Plaintiffs are likely to succeed on the merits of their claims.

B. Plaintiffs Will Suffer Irreparable Harm Absent a Preliminary Injunction.

In order to establish irreparable harm, the moving party must show that the injury is "of such imminence that there is a 'clear and present' need for equitable relief to prevent irreparable harm." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) (quoting *Wisconsin Gas Co. v. Fed. Energy Regulatory Comm'n*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam)). The injury must also be "both certain and great; it must be actual and not theoretical." *Id.* (quoting *Wisconsin Gas*, 758 F.2d at 674). Finally, the injury must be "beyond remediation." *Id.*

In its earlier holding, this Court noted that: "[l]ike the plaintiffs in Damus, Plaintiffs here have established that they will suffer irreparable harm without injunctive relief." As the Court there noted, detention irreparably harms individuals "in myriad ways," and the injuries at stake

there and here are "beyond remediation." 313 F. Supp. 3d at 342. *Mons* 2019 WL 4225322, at *11. The Court recognized that Defendants' non-compliance with the Directive subjected asylum-seekers to prolonged detention and suffering. *Id*. The COVID-19 pandemic is not theoretical; it is a very real, deadly threat to the physical well-being of Plaintiffs. Should COVID-19 strike NOLA ICE's detention facilities, most Plaintiffs will suffer irreparable harm beyond remediation. As Professor Scharf concludes:

> "[d]espite explicit guidelines and standards mandating proactive efforts to reduce disease in the facilities, [] ICE has failed to respond to obvious warnings, risk factors and direct information to reduced the risks of COVID-19 posed to people detained in their custody. The risks of irreparable harm posed to these individuals, including the more probable than not consequence of long-term illness and death, is in my opinion substantial and avoidable if appropriate release mechanisms are adopted in a rapid timeframe."
> Scharf Exp. Decl., Summary Opinion.

1) *Plaintiffs Will Become Infected with COVID-19 if They Remain in Detention.*

Plaintiffs have presented evidence showing that they are suffering or will suffer irreparable harm absent this Court's intervention. They have shown that ICE continues to deprive them of "the protections of the ICE Directive. . . . instead, they are subject to a *de facto* 'no-parole' reality, under which detention has become the default option . . . being deprived of the safeguards of the Directive harms putative class members in a myriad ways." *Damus* at 342. NOLA ICE's reluctance to abide by the principles of the Directive and this Court's Order, demonstrated by the continued paucity of parole grants, has left hundreds of asylum-seeking class members trapped in detention facilities that are simply ill equipped to protect them from the irreparable harm that COVID-19 will wreak upon them.

Without injunctive relief, present and future class members are likely to become infected with COVID-19. Plaintiffs' experts warn that "[i]mmigration detention centers in the United States are tinderboxes for the transmission of highly transmissible infectious pathogens including the

SARS-CoV-2, which causes the Coronavirus Disease (COVID-19).” Franco-Paredes Exp. Decl. ¶15. “Given the large population density of immigration detention centers, and the ease of transmission of this viral pathogen, the attack rate inside these centers may reach exponential proportions consuming significant medical care and financial resources.” *Id*. In addition, these detention centers “are often unhygienic environments” exacerbating the propagation of COVID-19. Scharf Exp. Decl. ¶18 at (a)(i).

Class members relate harrowing conditions that will make the spread of COVID-19 among these detained asylum-seekers inevitable: Plaintiffs are housed in dorms with as many 100 men, forced to share four toilets, four sinks, and five showers in a shared room. O.M.H. Decl. ¶10. At Adams, some are housed in dorms holding up to 240 men , who are forced to share six toilets, twelve sinks, and one shower room with twelve showerheads in close proximity. S.U.R. Decl. ¶13. At South Louisiana, as many as 72 women are housed in a single dorm with beds less than two feet apart from one another, and forced to share three toilets, three sinks, and six phones, none of which are ever properly sanitized. K.S.R. Decl. ¶15; L.P.C. ¶14,16. These women also report that they are not provided sufficient toilet paper and had no toilet paper for nearly a week in March 2020. *Id*. At LaSalle some Plaintiffs’ class members are housed in dorms with more than 90 men, who are forced to share have five toilets, eight sinks and one shower room with five showerheads. T.M.F. Decl. ¶14. In these environments, Plaintiffs’ cannot practice proper social distancing or hygiene, the only known methods to stem the rapid spread of COVID-19. Franco-Paredes Exp. Decl. ¶11,12. *See also* Scharf Exp. Decl. ¶ 24.

The facts are stark and frightening. Given the high population density of these facilities and the ease of transmission of this viral pathogen, the infection rate will be exponential if even a single person, with or without symptoms, that is shedding the virus enters a facility. Franco-

Paredes Exp. Decl. ¶20. Plaintiffs describe residing in a petri dish-like environment. Experts agree that given the poor conditions present in the immigration detention facilities in Louisiana and Mississippi, and high population density (exacerbated by Defendants' refusal to comply with the Directive), the spread of COVID-19 is inevitable.

2) *Plaintiffs Will Likely Become Ill and/or Die from Infection if They Remain in Detention.*

Plaintiffs here have established that they will suffer irreparable harm without injunctive relief. As this Court previously recognized, detention irreparably harms individuals "in myriad ways," and the injuries suffered by asylum-seeking Plaintiffs from prolonged detention are "beyond remediation." *Mons* 2019 WL 4225322, at *11. In requiring Defendants to comply with the Directive, this Court acknowledged the physical and mental harm caused by prolonged detention on Plaintiff's well-being. Plaintiffs now come before this Court again, to ask for their lives. For as long as NOLA ICE officials continue to defy the regulations and procedures of the Directive, many, if not most, asylum-seekers who remain in detention during a COVID-19 outbreak will suffer irreparable harm from this disease, if not death.

The Directive recognizes that "aliens who have serious medical conditions" should be paroled. Directive ¶ 4.3. Many class members suffer from serious medical conditions that render them vulnerable under normal conditions of confinement but will likely result in their death, should they be exposed to COVID-19. According to recent estimates, the fatality rate of people infected with COVID-19 is about *ten times* higher than a severe seasonal influenza, even in advanced countries with highly effective health care systems.[37] For people in the highest risk populations, the fatality rate of COVID-19 infection is about 15 percent. Franco-Paredes Exp. Decl. ¶ 26.

[37] *Id* at ¶ 4.

There is little doubt that, should any of the detention facilities that house Plaintiffs suffer a COVID-19 outbreak, Plaintiffs will suffer irreparable harm. Given the fast spread of this unprecedented disease, Plaintiffs' risk of injury is imminent and certain. As such, the injuries caused by the Defendants' continued non-compliance with the Directive are "of such imminence that there is a 'clear and present' need for equitable relief to prevent irreparable harm." *Chaplaincy*, 454 F.3d at 297 (internal quotation marks and citation omitted).

3) *Current Protocols of ICE to Address COVID-19 Do Not Address, and Instead Worsen and Increase Likelihood of, Infection and/or Death from COVID-19.*

As this Court recognized, Plaintiffs have already experienced unspeakable trauma in their home countries and journies to the United States. Plaintiffs' injuries from a COVID-19 outbreak would sure be "beyond remediation." Plaintiffs do not seek monetary compensation for their injuries. Rather, they seek injunctive and declaratory relief that requires NOLA ICE to immediately provide individualized parole assessment to all present and future class members, and to comply with all of the Directive's regulations and procedures, including those that recognize the need to parole persons with serious medical issues, and those whose release would benefit the public interest.

According to experts, risk mitigation is the only known strategy that can protect vulnerable groups from COVID-19, and release of vulnerable detainees from custody is the best mitigation strategy. Franco-Paredes Exp. Decl. ¶¶ 27-28. *See also* Scharf Exp. Decl. ¶¶ 18, 34. Dr. Peter Scharf has concluded "[t]he reality that this region's ICE facilities are located in remote or rural areas with limited resources and that medical resources proximate to the relevant ICE detention facilities leads to the conclusion that, were a COVID-19 infection to occur, widespread, long-term morbidity and mortality are more probable than not." *Id.* at ¶ 34. Because ICE protocols are insufficient to protect Plaintiffs from the specter of grave illness and death, Plaintiffs urge this

Court to require Defendants to fully comply with the Directive, and immediately give all present and future Plaintiffs fair, individualized parole reviews.

C. The Balance of Harms and the Public Interest Both Favor Injunctive Relief.

In 2018, this Court established that issuance of injunctive relief is in the public interest, when the same Defendants present in *Mons* failed to comply with the same Directive presently at issue. *Aracely v. Nielsen*, 319 F.Supp.3d 110 (Jul. 3, 2018) (holding that granting injunctive relief is in the public interest where the government and its agencies have failed to comply with the Directive).

While the INA issuing the authority to make parole determinations does not elaborate on the meaning of the term "public interest" within its provisions, ICE has permissibly, under the APA, elaborated on its meaning through the promulgation of a guide for implementation of the INA, in order to "fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974); 8 C.F.R. § 212.5.

The Directive mandates that an alien's "continued detention is not in the public interest." Directive ¶ 6.2. It states the public interest is met when an arriving alien is paroled who is found to have a credible fear of persecution, establishes, to the satisfaction of ICE, his or her identity and that he or she presents neither a flight risk nor a danger to the community, and presents no additional factors that weigh against release. § 212.5(b)(5); Directive Par. 6.2, 8.3; *Aracely*, 319 F.Supp.3d 110 (Jul. 3, 2018). In other words, the Directive establishes that, once these requirements are met, an individual should be released on parole "on the basis that his or her continued detention is not in the public interest." *Id*.[38]

[38] This Court has established that, "[t]he public interest is served when administrative agencies comply with their obligations under the APA." R.I.L–R, 80 F.Supp.3d at 191 (citing N. *Mariana*

Defendants consistently disregard the public interest by refusing to apply the binding Directive, pursuant to the APA, as they fail to release individuals who evidently meet the aforementioned requirements, without providing any justification or explanation as to why those individuals fall into categories meriting denial despite their obvious eligibility and satisfaction of all requirements. This action by Defendants results in the "continued detention" the Directive explicitly sets out as not being in the public interest. Directive ¶ 6.2, 8.3; *see Aracely*, 319 F.Supp.3d 110 (Jul. 3, 2018).

Most notably, among those consistently denied in violation of the Directive, and thus in violation of the public interest, are individuals who have serious medical conditions, where continued detention would not be appropriate." Directive at ¶ 4.4 (citing 8 C.F.R. § 212.5(b)). While Defendants' non-compliance violates this particular provision on a regular basis, the extent of Defendants' violation is even greater during the COVID-19 pandemic, as the heightened vulnerability of those individuals makes their continued detention even more inappropriate at this time.

This court has established that the public interest "surely does not cut in favor of permitting an agency to fail to comply with its own binding policies impacting the rights of individuals." *See Jacksonville Port Auth. v. Adams*, 556 F.2d 52, 58–59 (D.C. Cir. 1977) (recognizing that "there is an overriding public interest ... in the general importance of an agency's faithful adherence to its statutory mandate"). Furthermore, Plaintiffs find no harm that could result from this Court requiring Defendants to comport with existing regulations that require an orderly process for granting freedom to asylum-seekers meriting such. Therefore, in order to

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Islands v. United States, 686 F.Supp.2d 7, 21 (D.D.C. 2009)); *Klayman v. Obama*, 957 F.Supp.2d 1, 43 (D.D.C. 2013)); *Damus*, 313 F.Supp.3d at 341–42, 2018 WL 3232515.

serve the public interest, and to prevent this non-compliance that is harmful to and violative of individual rights and the public interest during the COVID-19 pandemic, a grant of the injunctive relief requested is necessary.

CONCLUSION

For the foregoing reasons, Plaintiffs' emergency motion for a preliminary injunction should be GRANTED.

Respectfully submitted:

MELISSA CROW (D.C. Bar #453487)
Senior Supervising Attorney

//s// Luz Virginia López

Luz Virginia López
SOUTHERN POVERTY LAW CENTER
1101 17th St., NW, Suite 750
Washington, DC 20036
Tel: (202) 355-4471
luz.lopez@splcenter.org

Attorneys for Plaintiffs

Michelle P. Gonzalez
Victoria Mesa-Estrada
SOUTHERN POVERTY LAW CENTER
2 South Biscayne Blvd., 32nd Floor
Miami, FL 33131
Tel: (786) 753-1383
mich.gonzalez@splcenter.org
victoria.mesa@splcenter.org

Bruce Hamilton
AMERICAN CIVIL LIBERTIES UNION OF LOUISIANA FOUNDATION
P.O. Box 56157
New Orleans, LA 70156
Tel: (504) 522-0628
bhamilton@laaclu.org

CERTIFICATE OF SERVICE

I hereby certify that, on March 31, 2020, I electronically filed the attached MEMORANDUM IN SUPPORT OF PLAINTIFFS' EMERGENCY MOTION FOR PRELIMINARY INJUNCTION with the Court via the CM/ECF system, which will send a Notice of Electronic Filing to all CM/ECF registrants for this case.

Respectfully submitted:

MELISSA CROW (D.C. Bar #453487)
Senior Supervising Attorney

//s// Luz Virginia López

Luz Virginia López
SOUTHERN POVERTY LAW CENTER
1101 17th St., NW, Suite 750
Washington, DC 20036
Tel: (202) 355-4471
luz.lopez@splcenter.org

Michelle P. Gonzalez
Victoria Mesa-Estrada
SOUTHERN POVERTY LAW CENTER
2 South Biscayne Blvd., 32nd Floor
Miami, FL 33131
Tel: (786) 753-1383
mich.gonzalez@splcenter.org
victoria.mesa@splcenter.org

Bruce Hamilton
AMERICAN CIVIL LIBERTIES UNION OF LOUISIANA FOUNDATION
P.O. Box 56157
New Orleans, LA 70156
Tel: (504) 522-0628
bhamilton@laaclu.org

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Ángel Alejandro HEREDIA MONS, *et al.*, on behalf of themselves and others similarly situated, *Plaintiffs,* *v.* CHAD WOLF, Acting Secretary of the Dep't of Homeland Security, in his official capacity, *et al.*, *Defendants.*	Civil Action No 19-cv-1593 (JEB)

[PROPOSED] ORDER

For the reasons set forth in the accompanying Memorandum Opinion, the Court ORDERS that:

1. Plaintiffs' Motion for a Preliminary Injunction is GRANTED;

2. Due to the likelihood of irreparable harm to Plaintiffs' well-being and safety presented by the COVID-19 virus, Defendants are hereby ORDERED to immediately conduct individualized parole assessments for all present and future members of the provisional class, as defined by this Court in Mons v. McAleenan, No. CV 19-1593 (JEB), 2019 WL 4225322 (D.D.C. Sept. 5, 2019).

3. Defendants are hereby ENJOINED from denying parole to any provisional class members absent an individualized determination that such provisional class member presents a flight risk or a danger to the community, as concluded pursuant only tothe parole process and limits on use of discretion provided in Enforcement, Directive No. 11002.1, Parole of Arriving Aliens

Found to Have a Credible Fear of Persecution or Torture (Dec. 8, 2009) (hereinafter "Parole Directive");

4. The individualized determinations of flight risk and danger to the community referenced above shall be based on the specific facts of each provisional class member's case, and shall not be based on categorical criteria applicable to all provisional class members;

5. Defendants shall provide provisional class members with parole determinations that conform to all substantive and procedural requirements of the Parole Directive.

6. Given the dangers posed by the COVID-19 pandemic, Defendants shall also particularly ensure compliance with the parole standards pertaining to class members who 1) have serious medical conditions, and 2) whose continued detention is not in the public interest, pursuant to the INA and its implementing regulations.

7. Defendants shall commence the individualized parole assessments of all class members as soon as possible, but not more than five days from the issuance of this Order.

8. Defendants shall complete all individualized assessments of parole eligibility for class members not later than fourteen days after issuance of this Order;

9. Defendants shall provide individualized assessments of parole eligibility to future class members, upon first arrival to any of the detention facilities in the NOLA ICE region;

10. Defendants shall inform Plaintiffs', through written notice, of the reasons for any resulting denial of parole after determination made pursuant to the Parole Directive;

11. From the issuance of this Order, notice provided to any provisional class member informing of reasons for denial shall contain, in writing, explanations with specificity to the particular facts of the provisional class member's case;

12. Such notice shall additionally include a fact specific explanation of the reasoning by which individualized assessment of provisional class member's case pursuant to the Parole Directive led to the conclusion that the individual did not merit a grant, despite the dangers presented by COVID-19;

13. No provision of this order shall be construed or implemented in a manner that would cause delay of provisional class members' grant and release on parole; such implementation or construction will not justify delay.

14. Defendants shall provide a status report to the Court and Plaintiffs that is similar in content to the monthly reports Defendants file with the Court.

IT IS SO ORDERED

_____
JAMES E. BOASBERG
United States District Judge

Date:

EXHIBIT

1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Ángel Alejandro Heredia Mons et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civ. No.: 1:19-cv-01593**
	)	
Kevin K. McALEENAN et al.	)	
	)	
Defendants/Respondents.	)	
	)	

DECLARATION OF B.A.E.

I, B.A.E., declare under penalty of perjury that the following is true and correct to the best of my knowledge:

1. My initials are B.A.E. and I am a Cameroonian national detained at the LaSalle Detention Facility ("LaSalle") in Jena, Louisiana. I speak English fluently.

Synopsis of Past Persecution

2. I am fleeing death and torture in Cameroon as a wanted man due to false accusations of being a member of a separatist group against the current regime.
3. I was the victim of several physical assaults at the hands of Cameroonian force officers of the current regime between 2017 and 2018. I was later imprisoned, tortured, and starved for five months in late 2018, until I was released in or about January 2019.
4. Due to my prolonged incarceration and mistreatment in Cameroon, I was in need of medical attention, but was only able to access traditional healers in nearby villages. Meanwhile, the government once again ordered my immediate arrest on suspicion of being a separatist. Since I fled the country, I have been accused of having escaped prison as a

fugitive, when in fact I was released with the consent of the Attorney General after having paid a bond. At this point, I knew that any person accused of being separatist would be tortured or killed in detention or transferred to Yaounde for assassination at the maximum-security prison. These instructions were clear from the president and were covered by media internationally.

Journey to the United States

5. On or about May 29, 2019, I escaped Cameroon to save my life and flew to Quito, Ecuador. I left my fiancée in Cameroon, who due to all the distress, went into labor early and gave birth to our son prematurely. I was unable to get any help in Ecuador and decided to travel to the United States (US) to request asylum. I travelled through Colombia, and central America until finally arriving to Tapachula, Mexico several weeks later. This included a terrifying trek through the Darien Gap jungle, where I saw corpses of other asylum seekers including minors and feared for my life.
6. In Tapachula, I was transferred to a detention center in Tuxpan by Mexican authorities. After my release on or about October 3, 2019, I made my way to the US-Mexico border.

Frustration of Access to Parole

7. On or about November 1, 2019, I was processed by border authorities at a port of entry in Texas where I formally requested asylum. I was soon transferred to the custody of Immigration and Customs Enforcement (ICE) at the Rio Grande Detention Center in Laredo, Texas. I was then transferred to the Tallahatchie County Correctional Facility (Tallahatchie) in Mississippi.
8. While detained at Tallahatchie, I had my credible fear interview and was shortly given a positive credible fear finding. I was only given three days to apply for parole and was not

able to meet this deadline. ICE gave me a parole denial letter before I submitted any application for parole. The letter checked off a box indicating that I was denied because ICE determined I was a flight risk. It did not offer any analysis or explanation as to how ICE came to this conclusion.

9. I was then transferred to the River Correctional Facility in Ferriday, Louisiana in or about November 2019. I applied for parole, but quickly realized that ICE does not grant parole in Louisiana. There officers directly told me that they do not grant parole to anyone. Nevertheless, I applied. An attorney helped me put together a strong request packet, including evidence that my US-citizen cousin living in Maryland is willing to serve as my sponsor and support me upon my release, but my application was refused. I was then transferred to LaSalle on or about the January 27, 2020 where I filed another request for parole. My application was promptly denied, once again checking off the "flight risk" box, despite all the evidence I submitted to the contrary. No explanation was provided.

Conditions of Confinement

10. During the long transportation from Laredo, Texas to Tallahatchie in Mississippi, we were handcuffed and shackled by our legs and waist. This was painful. When I arrived to Tallahatchie, I was shocked to realize that it is a criminal prison. There are US citizens incarcerated on one side and immigrants on another side.
11. A few weeks ago, I got sick. I asked to be tested for coronavirus, but they told me they can only test for fever. I have a muscle injury in my chest, and I have a wound in my throat and irritation. I see clots of blood when I cough. I see blood in my feces. I was told that it was not the flu. I do not know if it is due to coronavirus and ICE refuses to test me even though I have a constant fever. The doctors told me that everything was fine and did not perform

any tests. They gave me syrup and salt and ibuprofen. It hasn't helped. Despite my symptoms, I was sent back to my crowded dorm.

12. In recent days, ICE came to talk to our dorm after people panicked over coronavirus. I asked them if they will continue to transfer more people to this facility despite the risk it poses to our health and they said, "Of course, we will. We will receive more people and court is still happening." They did not come with a medical practitioner and they did not provide us education or talk to us about precautions. There is no toilet paper in my dorm currently and there has been a quarantine of one of the other dorms.
13. Recently, in Owl Charlie dorm, there were some asylum seekers who refused food in protest of these conditions and the looming threat of coronavirus. The officers entered the dorm in riot gear and sprayed tear gas at them. As a result, someone fainted and was taken to the hospital.
14. When I saw the medical staff at LaSalle recently, a man told me that he has never seen anyone leave this place. I am deeply worried and afraid because I hear on the news that Louisiana is the place where coronavirus is the fastest growing in the world. I am very disturbed by the fact that ICE refuses to take any precautionary measures to protect us from the spread of the coronavirus.

Plans if Released on Parole

15. As soon as I am released, I plan to self-quarantine in my cousin's home in Maryland. He is a financially secure U.S. citizen and he is more than willing to help seek out medical care and legal representation so that I can continue fighting my asylum case before the non-detained court. He will also ensure that I am able to attend all my future court hearings. I am desperate to leave this place, where I am afraid that I will be left to die.

VERIFICATION

I, B [redacted] A [redacted] E [redacted] am the individual referred to as B.A.E. in the attached declaration. I declare under penalty of perjury that the foregoing is true and correct.

I have authorized my legal counsel in the *Heredia Mons* litigation to sign on my behalf given the difficulty of arranging visitation and travel in light of the current COVID-19 pandemic. I am also foregoing the option to sign documents sent by mail due to the urgency of the COVID-19 situation and due to reasonable fear of destruction of mail or retaliation by officials at this facility. If required to do so, I will provide a signature when I am able.

Victoria Mesa-Estrada

Victoria Mesa-Estrada, Esq.
On behalf of witness Benedict Agborotoh Eyong

Date: March 28, 2020

EXHIBIT

2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Ángel Alejandro Heredia Mons et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civ. No.: 1:19-cv-01593**
	)	
Kevin K. McALEENAN et al.	)	
	)	
Defendants/Respondents.	)	
	)	

DECLARATION OF K.S.R.

I, K.S.R., declare under penalty of perjury that the following is true and correct to the best of my knowledge:

1. I was born in Holguin, Cuba. I am a 27-year-old asylum seeker detained at the South Louisiana Correctional Facility in Basile, Louisiana ("S. Louisiana"). I am a native Spanish speaker and I do not speak English.

Synopsis of Past Persecution

2. In Cuba my husband ran a secret internet computer service. He provided access to United States (US) television programs and news sources against the Cuban dictatorship to local community members. He was found out, arrested and abused by Cuban police. He fled Cuba as soon as he was released and able to leave. Not long after he left, I was forcibly dragged by authorities to jail in Cuba, where I was also mistreated.
3. Other than this politically motivated arrest, I have no criminal history or record. As soon as I was released, I fled the island and sought to reunify with my husband so that we could

seek asylum in the US as political dissidents because we feared for our lives and safety. I flew to Uruguay in or about July 2018. My husband and I were reunified.

Journey to the United States

4. The journey from Uruguay to Mexico was long and treacherous, including paths through a deadly jungle across several countries. We finally made it to the US - Mexico border in or about July 2019. I was informed by Mexican authorities that we would be assigned numbers by US authorities and forced to wait in Mexico until our numbers were called.
5. After months of waiting and scraping by in Mexico, my husband and I were processed through a port of entry on or about October 1, 2019. US border authorities took us into custody and immediately separated us. I was then transferred to the custody of Immigration and Customs Enforcement ("ICE"). ICE has in its possession my original government-issued photo-identity documents from Cuba.

Frustration of Access to Parole

6. On or about October 11, 2019, I was provided a credible fear interview. On or about November 3, 2019, I was transferred to S. Louisiana. On or about December 3, 2019, I received my positive credible fear finding. Meanwhile, on or about November 27, 2019, my husband was granted parole from a facility in a different region. He was released to live in Tampa, FL, where he continues to reside with our sponsor.
7. On or about December 3, 2019, an ICE officer gave me the parole advisal in English and told me that I had until December 7, 2019 to turn in all my evidence in support of a parole application. I immediately requested two additional days to present all evidence as I knew I would not receive all my supporting documents on time. I turned my parole application in on or about December 9, 2019. I was not provided an interview. On or about December

17, 209, I was provided a parole denial letter in English with a box checked off indicating I was a flight risk. I was given no other information. I noticed that the denial letter was marked as denied on December 3, 2019, the same day I was given the parole advisal.

8. Since then, I have applied for a redetermination of my parole request approximately three times, each time providing additional evidence. All my efforts have failed. My proposed sponsor is the same person who served as my husband's sponsor. He is my US citizen cousin who lives in Tampa, FL. I have presented to ICE the following evidence: of my cousin's 2018 tax returns, evidence of his US citizenship, copies of his bills, additional letters of support from family and friends residing lawfully in the US, documentation of my clean criminal history, and a copy of my birth certificate. However, ICE refuses to release me, continuing to provide denial letters checking off the "flight risk" rationale without further explanation. I have been separated from my husband for about five months.
9. Here, Deportation Officers (DOs) provide us misinformation or conflicting information when they visit the dorms. Sometimes they tell us no one will be granted parole. Sometimes they tell us our requests will be denied if the sponsor is not an immediate relative. Other times they tell us the requests will be denied if the proposed sponsor does not make more than seventy-thousand dollars ($70,000) annually.

Conditions of Confinement

10. The conditions in this facility are terrible. Water constantly drips from the walls in my dorm and my bed sheets always wet. The food we are provided is often frozen and always undercooked. It is also lacking in nutrition and frequently gives us all diarrhea. We are mistreated by GEO officers, humiliated and yelled at like we are violent prisoners.

11. On or about March 3, 2020 I grew very ill. I had a high fever, vomiting, and coughing. I was taken to the medical unit and tested for influenza. I tested positive for H1N1. I was placed in isolation, in a small room within the medical unit. I was then left in that room for approximately eight hours without any medicine to reduce my high fever, from about 1PM to about 9PM, at which time they gave me Tylenol.

12. The staff did not tell me how long I would be kept in isolation. The six days I spent in that room were some of the worst of my life. I struggled with suicidal ideation. The door to the room was largely a clear glass window. The shower in the room directly faced the window and there was no curtain. Staff and officers saw me naked when I attempted to bathe. I was not provided any soap or shampoo to clean myself. I was not provided clean clothes.

13. I was suffering cold sweats from the fever. I was very cold all the time, especially at night. I begged for another sheet to cover myself. They refused to bring me one. I did not receive medical attention in that room. The only medicine I was given was Tylenol to reduce fever and this did not happen regularly or even daily. There were times they forgot to feed me. I would get so hungry that I would wait hours in front of the glass door trying to get someone's attention and plead with them to notify the officers that I had not been fed.

14. After six days of isolation, I was transferred to a dorm with five other women who had also tested positive for H1N1 influenza. On the thirteenth day, they transferred me to a regular dorm with about fifty-one (51) other women. Here in the dorm we do not have disinfectant, bleach or sanitizer. They barely provide us soap. The only soap we are given is four-ounce (4 oz) bottles of liquid, all-purpose soap. They are supposed to give us two bottles each about every eight (8) days. Often many more days pass before we are provided more. This is all we are given to wash our hands, bodies and hair.

15. Our beds are approximately sixty (60) centimeters apart and it is impossible to practice social distancing. We all use the same three (3) tablets and six (6) phones to communicate with our loved ones within the dorm. We are forced to share three (3) toilets and (2) sinks. There are three sinks, but one is broken and the remaining two are clogged, often accumulating still, dirty water. The showers do not have curtains and are in close proximity to one another. The toilet paper we are given is of poor quality and does not last. We went approximately six days this month without any toilet paper. Those who can, supplement toiletries and food by purchasing items at the commissary.
16. We are terrified of a COVID-19 outbreak, especially after seeing how they handled the H1N1 influenza situation. In this dorm we have people who are vulnerable to coronavirus. There are elderly women detained here, some as old as seventy (70). Other women have diabetes, heart problems or are survivors of cancer.
17. Not long ago, a woman in her fifties suffered an attack. The medical staff came to the dorm, but they did not know what to do. The woman was on the floor suffering seizure-like convulsions. We all watched as they just looked at her writhing on the floor. This lasted for about fifteen (15) minutes. At that point she passed out and they took her away in a wheelchair. The very next day she was brought back to the dorm.
18. The officers and staff do not appear to be taking any precautions to keep us safe from coronavirus. They sometimes come to work sick. I have witnessed officers coughing in our eating areas. They do not wear gloves. They do not wear masks. I heard some of them have quit because they see there are no precautions being taken here.
19. We are not being provided any COVID-19 information or education. We beg them for information daily. There are already three dorms under quarantine due to influenza. We

noticed, however, that one dorm's quarantine is being taken much more seriously. Officers do not enter that dorm. They feed the women through a slot. This is the Alpha Bravo dorm, which we suspect had a confirmed case of COVID-19.

20. We know from the limited news we are able to watch and from our loved ones on the outside with whom we communicate, that this virus will spread very quickly under these conditions. Some of the women detained here are doctors in their home countries and they try to educate us as well. We are afraid we will be left to die in this place. It is a heartbreaking irony, after so many of us fled to the US for fear of death in our home countries.

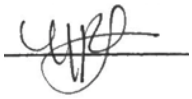
Plans if Released on Parole

21. If I am released on parole, I plan to reunite with my husband who lives with my cousin and our designated sponsor in Tampa, FL. I plan to self-quarantine to keep us safe from COVID-19 infection and to keep fighting my asylum case with the help of my family outside of this facility.

VERIFICATION

I, K[redacted] S[redacted] R[redacted] am the individual referred to as K.S.R. in the attached declaration. I declare under penalty of perjury that the foregoing is true and correct.

I have authorized my legal counsel in the *Heredia Mons* litigation to sign on my behalf given the difficulty of arranging visitation and travel in light of the current COVID-19 pandemic. I am also foregoing the option to sign documents sent by mail due to the urgency of the COVID-19 situation and due to reasonable fear of destruction of mail or retaliation by officials at this facility. If required to do so, I will provide a signature when I am able.



Date: March 23, 2020

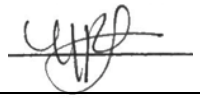
Michelle P. Gonzalez, Esq.
On behalf of witness Karina Serrano Rodriguez

CERTIFICATION

I, Michelle P. Gonzalez, declare that I am proficient in the English and Spanish languages. On March 23, 2020, I read the foregoing declaration and orally translated it faithfully and accurately into Spanish over a telephonic call with the declarant. After I completed translating the declaration, the declarant verified that the contents of the foregoing declaration are true and accurate.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 23, 2020



Signature

EXHIBIT

3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Ángel Alejandro Heredia Mons et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civ. No.: 1:19-cv-01593**
	)	
Kevin K. McALEENAN et al.	)	
	)	
Defendants/Respondents.	)	
	)	

DECLARATION OF L.P.C.

I, L.P.C., declare under penalty of perjury that the following is true and correct to the best of my knowledge:

1. I am a 26-year-old Cuban asylum seeker detained at the South Louisiana Correctional Center ("S. Louisiana") in Basile, Louisiana. I am a native Spanish speaker. I do not speak any other languages.

Synopsis of Past Persecution

2. In Cuba I studied pharmacology. I completed my degree in or about July 2016. I was instructed that I was obligated to sign up for government service by September of that year. However, I was strongly against the Cuban government's use of medical workers as pawns for their corrupt agenda. When the time came, I did not want to present myself.
3. I began receiving threats from the supervisor of the relevant sector and from the president of the designated municipality where I was assigned to serve. The police do the government's bidding. They came to my zone and beat me in front of my family. My

mother was particularly affected by witnessing this brutality because she is older and suffers from hypertension. I have scars on my knee from this assault.

4. After beating me, they dragged me by force and detained me for over twenty-four (24) hours with no food and no water. They left me in a cell with another woman who was violent. She beat me and humiliated me in that cell, and they did nothing to stop her. Eventually my mother decided I needed to leave the island in order to stay safe. I fled Cuba at the age of twenty-two (22) on or about December 23, 2016.

Journey to the United States

5. In order to leave Cuba, I boarded the soonest flight to Guyana. From there I crossed the border to Brazil, where I worked as the caretaker for a family's infant. I soon realized I would have no path to asylum or legal status in Brazil. So, I began my journey to the US in order to formally request asylum. From Brazil I crossed through Peru, Ecuador, Colombia, Panama, Costa Rica, Nicaragua, Honduras, and Guatemala, before finally crossing into Mexico on or about April 10, 2019. This journey was difficult, but I met other asylum seekers that helped me along the way.
6. In Mexico, things grew more dangerous for me. I attempted to board a bus heading to the US border, but I was detained by Mexican authorities. They arrested many of us and detained us in an immigrant jail with terrible conditions. The Mexican officials took all of our belongings, kept our money for themselves, and piled the rest together in a separate cell. Soon, the people detained there grew desperate and a riot ensued.
7. The riot occurred in or about May 2019. The rioters set fire to our pile of belongings. All of my official documents and clothes were destroyed in that fire. I left that detention facility with only the clothing and shoes I had on. Not long after this terrifying experience, I

became infected with the dengue virus. I suffered a fever and was bed ridden for several days in Tapachula, Mexico. When I recovered, I made my way to Chiapas and from there to Oaxaca. I was told that I would need to take a special route in order to avoid getting rearrested by corrupt Mexican authorities.

8. I spent over eleven (11) hours on a raft on the ocean headed to Veracruz, Mexico. There were moments that I thought I would die on that raft. Despite taking this perilous route, when we arrived in Veracruz, Mexican authorities detained me once again. I spent forty (40) days in another detention center there. My family hired a Mexican lawyer who secured my release and helped me get on a flight to Chihuahua, Mexico. From Chihuahua, I took a bus to Ojinaga where I presented myself at the US border.
9. I arrived at the port of entry near Presidio, Texas on or about August 5, 2019. There I was told that I would not be processed. I was assigned a number and forced to wait until that number was called. During the following two months I worked several small jobs in order to survive. There are cartels that control that region and I was living in fear. I was finally allowed to request asylum in the US after I was processed by border authorities at the Presidio, Texas port of entry on or about October 15, 2019. Soon after, I was detained under the custody of Immigration and Customs Enforcement ("ICE").

Frustration of Access to Parole

10. After crossing into the US, I was immediately detained at the West Texas Detention Facility in Sierra Blanca, Texas. Shortly after, I received a credible fear interview (CFI). In or around early November 2019, I was transported from Sierra Blanca to S. Louisiana.
11. Upon receiving my positive CFI results, my US citizen cousins and my US citizen aunt quickly sent me documents, including a sponsor affidavit, letters of support, copies of bills,

copies of tax returns (evidencing an annual income of over $100,000), proof of their identity, proof of their US citizenship, a copy of my Cuban national photo-identification card, and a copy of my clean criminal record. As soon as the documents arrived, I attempted to submit them to my assigned DO, Officer Silva in support of my parole request.

12. Officer Silva refused to accept my documents and told me I would just have to wait until my court date. He said that parole is simply not granted in Louisiana. Over the last four months, I have made several attempts to request parole. All of my efforts have failed. The denial letters are all the same, checking off a box indicating that ICE has determined me a flight risk, without further explanation.

Conditions of Confinement

13. In March 2020, at least two of the dorms in this facility were placed under quarantine, including my dorm. We were expressly told this was due to an outbreak of H1N1 influenza. We are all terrified of a COVID-19 outbreak in this facility.
14. In my dorm there are seventy-two (72) women sharing close quarters and contained air. Our beds are about half a meter apart. We are forced to share three (3) toilets and three (3) sinks. We are not provided hand soap or hand sanitizer. For six (6) days in March, we were not taken to the yard for fresh air. Despite the quarantine, they continue to bring newly detained women to this dorm, putting them at risk for H1N1 and putting all of us at risk for COVID-19.
15. They give each woman here two four-ounce (4 oz) bottles of soap to last us a week or longer. It is like a liquid shampoo and it is all they give us to clean our hands, bodies and hair. It does not contain disinfectant. Many times, they do not have enough to go around.

16. On or about March 19, 2020 for example, it was time for them to replenish our toilet paper and four-ounce bottles. However, they told us they did not have any to provide due to coronavirus. The toilet paper they do provide does not last us for the week and it is very poor quality. During the month of March 2020, we went about five (5) days without any toilet paper.

17. Most of us in this dorm have been experiencing flu-like symptoms including diarrhea and sore throat. If we complain or consistently ask for medical attention, we are provided one or two ibuprofen tablets. I suffered from flu-like symptoms including diarrhea, fever, and pain in my veins. They tested me for influenza and I tested negative, so they returned me to the dorm. They did not test me for COVID-19.

18. We have to purchase the limited medicine available in the commissary to help control our symptoms. For example, you can buy approximately 30 pills of ibuprofen for three US dollars ($3.00). Vitamin C and other preventative vitamins or medicine are simply not available.

19. In or about the month of March 2020, we witnessed another scary incident of neglect in this dorm. One woman was running a very high fever. She was sweating and she could not stop shaking. We were all concerned she would have seizures or die. We continuously asked the officers supervising our dorm to take her to medical. They ignored our requests for hours. We continued to beg them to get her help.

20. After five hours of asking the officers to please take her to get medical attention, a few women placed a piece of bread in one of the microwaves in our dorm. They turned the microwave on for several minutes. They were hoping to set off an alarm to force the

officers to enter our dorm and help her. The bread started to burn, and the smoke detectors went off as planned.

21. They entered our dorm and took her to the medical unit. One officer told us that the microwave was more valuable than any of us. Since then, she was diagnosed with H1N1 and is in isolation. The only other measure they have taken is that they visit our dorm twice a day to take our temperature.

22. We have been under limited quarantine for about a month, with the same set of gloves and the same limited masks. When we ask for replacement gloves and masks, they tell us they do not have any new ones to provide us. All the workers here are coming back inside after contact from the outside world. They do not wear masks and they do not use gloves. A group of us communicated with a man we believe to be a GEO director. He told us he cannot require staff to wear these items because it is not the law.

23. In this dorm, there are at least ten (10) women who are older than fifty (50) and some who are as old as seventy-one (71). There are also women who suffer from asthma and diabetes, as well as a few survivors of cancer and at least one woman living with lupus. To make matters worse, the food we are provided is of poor quality and has no nutritional value. It often makes us sick.

24. All the measures we are taking to protect ourselves in this dorm are based on news we watch on television or from speaking with our loved ones on the outside. The staff and guards here have not provided us any education on COVID-19 measures or precautions. We are all upset because it is impossible to exercise effective social distancing under these conditions.

25. The medical unit here is not staffed with doctors or nurse practitioners. Even when they have taken women into isolation in the medical unit, they are not provided adequate care. For example, a woman in our dorm tested positive for H1N1. They took her to an isolation room in the medical unit. When she was cleared and finally returned, she told us how she was treated.

26. She told us she was unable to bathe or change clothes for three days. She said she tried asking for soap and toothpaste and clean clothes, but no one helped her. She said she was not given any medicine other than ibuprofen. She said she was left unattended for long periods of time. She said she lost all sense of time in that room, vomiting and running a high fever. She said sometimes they forgot to feed her, and she would have to try to get someone's attention through a glass window to remind them to bring her food.

Plans if Granted Release on Parole

27. If I am released on parole, I plan to live with my aunt and cousins in Florida, all of whom are US citizens. I plan to self-quarantine in their home and to continue fighting my case before the non-detained court. I hope to be released to my family soon. They will help me recover from all I have suffered to secure a free and safe life here in the US.

VERIFICATION

I, L[redacted] P[redacted] C[redacted], am the individual referred to as L.P.C. in the attached declaration. I declare under penalty of perjury that the foregoing is true and correct.

I have authorized my legal counsel in the *Heredia Mons* litigation to sign on my behalf given the difficulty of arranging visitation and travel in light of the current COVID-19 pandemic. I am also foregoing the option to sign documents sent by mail due to the urgency of the COVID-19 situation and due to reasonable fear of destruction of mail or retaliation by officials at this facility. If required to do so, I will provide a signature when I am able.

Michelle P. Gonzalez, Esq.
On behalf of witness Laura Perez Carranza

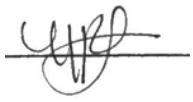
Date: March 25, 2020

CERTIFICATION

I, Michelle P. Gonzalez, declare that I am proficient in the English and Spanish languages. On March 25, 2020, I read the foregoing declaration and orally translated it faithfully and accurately into Spanish over a telephonic call with the declarant. After I completed translating the declaration, the declarant verified that the contents of the foregoing declaration are true and accurate.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 25, 2020



Signature

EXHIBIT

4

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Ángel Alejandro Heredia Mons et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civ. No.: 1:19-cv-01593**
	)	
Kevin K. McALEENAN et al.	)	
	)	
Defendants/Respondents.	)	
	)	

DECLARATION OF O.M.H.

I, O.M.H., declare under penalty of perjury that the following is true and correct to the best of my knowledge:

1. I am a 32-year-old asylum seeker and political dissident from Venezuela. I am HIV-positive and suffer from Hepatitis C. I am currently detained at the LaSalle Detention Facility in Jena, Louisiana. I was transferred here yesterday from Richwood Correctional Center ("Richwood") in Monroe, LA where I was detained since July 2019. I am a native Spanish speaker.

Synopsis of Past Persecution

2. In Venezuela I worked for the government. I was threatened by paramilitary officers known as *colectivos* because I refused to comply with government orders that were against my moral compass and political opinion. They wanted me to report against a small town for establishing their own rations, sharing food and other necessities, outside of the government's parameters. I refused.

3. In or about November 2018, five (5) armed *colectivos* came to my home and threatened my life in front of my family. They pointed guns at me in front of my mother and told me if I did not follow their orders, they would kill me. The very next day I fled to Colombia.

Journey to the United States

4. Life was difficult in Colombia as I endured a lot of xenophobia and had no path to status. I decided to seek asylum in the United States ("US"). I arrived in Reynosa, Mexico in or about May 2019. I presented myself at the Hidalgo, Texas port of entry and informed US border authorities I was requesting asylum. They took my Venezuelan passport and national photo-identity card and placed me in the custody of Immigration and Customs Enforcement ("ICE").

Time in ICE Custody

5. I was first detained in the El Valle Detention Facility in Raymondville, Texas. I was held there for about eight (8) days until I was transferred to the Tallahatchie County Correctional Facility ("Tallahatchie") in Mississippi. I was held in Tallahatchie for about twenty-six (26) days. In Tallahatchie I was provided a credible fear interview and quickly informed of the positive determination. Soon thereafter I was denied release on parole without having applied for it. On or about July 3, 2019 I was transferred to Richwood.

6. My time in ICE custody has been very difficult to endure, particularly given my medical conditions. I was not provided medication to treat my illnesses until about January 2020. I have many visits with psychologists because of insomnia and depression as a result of my heightened anxiety regarding my health under these prolonged conditions of confinement. If anyone gets sick around me, I could die. I am living in fear.

7. In Richwood, my dorm held one hundred (100) men at any given time. We were forced to share four (4) toilets, four (4) sinks, and five (5) showers. The food was awful and made me sick. A crucial part of staying healthy while living with HIV is eating plenty of healthy food to keep my immune system as strong as possible. This has been impossible. I have suffered from stomach ailments throughout my ICE incarceration.
8. During the months of November 2019, December 2019 and January 2020, I suffered serious illness. During this time, I had to be taken to the nearest hospital on two occasions. I lost a lot of weight very quickly and had flu-like symptoms, including fever. In Richwood, the medical unit does not have major medical equipment or beds for patients. The only thing that staff in the medical unit do for you is give you pills. They do not properly conduct check-ups, such as tracking my vital signs and taking blood samples. To my knowledge, it is not staffed with any doctors and it is generally not staffed overnight.
9. Despite the threat of coronavirus, the overcrowded dorms and the poor conditions, ICE was transferring more and more men to Richwood. Additionally, ICE officers simply stopped visiting us at all. They would not accept our parole requests and they would not provide us information. At least half of the population at Richwood engaged in protest in the form of hunger strikes due to these issues. In or about December 2019, officers stormed two of the dorms at Richwood in riot gear. They sprayed tear gas and shot rubber bullets at the men as retaliation against their peaceful strikes.
10. My immigration attorney filed an extensive parole request on my behalf on or about March 26, 2020. The next day I was transferred to LaSalle with no explanation. Neither here nor at Richwood are precautions being taken in light of coronavirus. The officers do not provide us any education or information related to COVID-19. Despite the governor of

Louisiana declaring a state of emergency, they do not wear masks or gloves. They do not provide disinfectant.

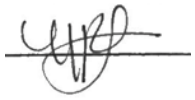
Plans if Granted Release on Parole

11. As my attorney included in my parole request, my sponsor is a long-time friend and US citizen residing in Texas. Should I be released from detention, I plan to live in his home and self-quarantine in order to protect my life and health. The parole request packet my attorney submitted was approximately one hundred (100) pages in length, including evidence of my clean criminal record, additional letters of support, evidence of my sponsor's US citizenship, his tax returns, bills and housing information. She also included evidence that my brother, who is pursuing asylum in the non-detained setting, is paying taxes. I hope that I am released before the situation in Louisiana presents an acute threat to my life, safety and well-being.

VERIFICATION

I, O[redacted] M[redacted] H[redacted] am the individual referred to as O.M.H. in the attached declaration. I declare under penalty of perjury that the foregoing is true and correct.

I have authorized my legal counsel in the *Heredia Mons* litigation to sign on my behalf given the difficulty of arranging visitation and travel in light of the current COVID-19 pandemic. I am also foregoing the option to sign documents sent by mail due to the urgency of the COVID-19 situation and due to reasonable fear of destruction of mail or retaliation by officials at this facility. If required to do so, I will provide a signature when I am able.



Date: March 28, 2020

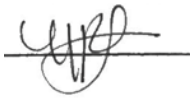
Michelle P. Gonzalez, Esq.
On behalf of witness Otto Jesus Matos Hernandez

CERTIFICATION

I, Michelle P. Gonzalez, declare that I am proficient in the English and Spanish languages. On March 28, 2020, I read the foregoing declaration and orally translated it faithfully and accurately into Spanish over a telephonic call with the declarant. After I completed translating the declaration, the declarant verified that the contents of the foregoing declaration are true and accurate.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 28, 2020



Signature

EXHIBIT

5

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Ángel Alejandro Heredia Mons et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civ. No.: 1:19-cv-01593**
	)	
Kevin K. McALEENAN et al.	)	
	)	
Defendants/Respondents.	)	
	)	

DECLARATION OF R.P.H.

I, R.P.H., declare under penalty of perjury that the following is true and correct to the best of my knowledge:

1. My name initials are R.P.H. and I am a Cuban national detained at the South Louisiana Correctional Center ("South Louisiana") in Basile, Louisiana. I am fifty (50) years old, and I am a breast cancer survivor.
2. I am a native Spanish speaker. I do not speak any other languages.

Relevant Medical History

3. When I was fifteen years old, doctors in Cuba discovered that I had benign nodules in my breasts. They removed the nodules and told me that I would not be able to have children for fifteen years.
4. I gave birth to my daughter in 1999, when I was thirty years old. She was born two months premature, and as a result, she has a mental disability. During my pregnancy, doctors found a malignant tumor in my right breast. They performed a surgery to remove my right breast entirely, as well as a part of my left breast. During that time, I went through six cycles of

radiation. After my mastectomy, doctors conducted an operation to try to reconstruct my breasts using skin from my stomach, but the operation did not work well.

5. When I was forty-two years old, the skin from my breasts began to rot and die as a result of more malignant cells. I had another operation in 2012 to completely remove my breasts and clean out the entire area. This time, I underwent sixteen cycles of radiation. I was unable to do anything for seven months, during which time I felt constantly weak and was in and out of the hospital. I lost fifty pounds during this treatment, my hair fell out, and the radiation left permanent physical damage to my body.

Synopsis of Past Persecution

6. I am fleeing violence and imprisonment at the hands of the Cuban government. When I graduated from university to become a chemical industrial engineer in Cuba in 1993, the Cuban government began pressuring me to participate in its political party. I have never wanted to participate in a group in which I don't believe. I would regularly speak about my political opinion and participated in numerous protests. Due to these actions, police began coming regularly to my house, threatening me and searching my home for evidence to prove I was against the government. They ordered me to participate in political events and marches, but I refused.

7. When the Cuban police learned that I was speaking out against the Cuban government at my workplace, I was fired from my job in or about September of 2016. After Fidel Castro died in November 2016, the country went into a period of mourning, but since my family believes that the Castro regime is a dictatorship, we were not sad. On the one-year anniversary of Castro's death, my family was over at my house, having a get together. We were not mourning. The police chief came to my home and stopped the music we were

playing. He insulted me, arrested me in front of my family, and took me to the police station where I was interrogated, intimidated, and threatened for two hours.

8. On or about May 10, 2018, I was denied entrance to my daughter's school because school officials said I was a "counter-revolutionary." The police arrived and pushed me around. They detained me, putting me in handcuffs in front of my daughter, who has a mental disability. She was terrified and humiliated. She didn't understand what was happening. Police again took me to the police station, where they threatened me and verbally abused me for six hours. That same day, they issued me a letter threatening to take me to jail if I said or did anything else viewed as "counter-revolutionary."
9. I knew from neighbors that had spent time in Cuban jails that people starve to death and die in those places. I knew of people who were "disappeared" by the government, and their families never heard from them again. I knew at this time that I had no choice but to leave the country.

Journey to the United States

10. I left Cuba on or about May 24, 2018. I took a plane from Cuba to Guyana, and from there, I crossed the jungles of Guyana and Brazil, to the border with Uruguay by bus and on foot. With my health problems, I was lucky to survive the journey.
11. I arrived in Uruguay on or around May 29, 2018. It was very dangerous in Uruguay, and I knew it was not safe for me to stay there. I was able to find work at a wine factory. For about ten and a half months I stayed working in Uruguay until I was able to save money to come to the United States (U.S.) to request asylum.
12. From Uruguay, I flew to Nicaragua, and from Nicaragua, I made my way north by bus through Honduras, Guatemala, and Mexico. On or around May 28, 2019, I arrived at the

U.S.-Mexico border. I was issued a number and forced to wait for two months until it was my turn to present myself at the port of entry in Hidalgo, Texas. On or about July 25, 2019, I was crossed through the port of entry, where I identified myself as a survivor of political persecution in Cuba and asked for asylum. I was detained by border authorities and quickly transferred to the custody of Immigration and Customs Enforcement ("ICE"). ICE has in its possession my original Cuban photo-identity documents.

Frustration of Access to Parole

13. From Hidalgo, I was transferred to a detention center in Texas for about four days. I was then transferred to South Louisiana, which is where I remain detained today. I had my credible fear interview on or about September 4, 2019 and was determined credible soon thereafter.

14. I am eligible for parole and I have applied four times. All my requests have been denied. Each denial letter checks off a box indicating that ICE determined I was a "flight risk" with no further explanation. However, I have extensive family living in Florida, all of whom are U.S. citizens who are prepared to support me and ensure I attend my future court hearings. I provided extensive evidence of this in my applications. I have been told by ICE agents on multiple occasions that I will not be granted parole unless my cancer returns.

Conditions of Confinement

15. Being in detention the last eight months has been a very traumatizing and hopeless experience for me. The stress from being confined in such a small space, forced to endure verbal and psychological abuse by guards, and repeatedly denied access to relief is causing me to deteriorate physically and mentally. Despite my medical history, I arrived at South Louisiana strong and in good health. I feel I have aged dramatically. I have been sick more

times than I can keep track of in this facility. I first got sick around the end of August or beginning of September. My throat was very sore, my ear hurt, and I had a fever. I was administered a round of antibiotics. About fifteen days later, in September, I got a bad cold. This cycle of sickness continued.

16. When I get sick here, I have to fill out a request to be sent to the medical unit. However, officers refuse to take me to medical the day I make the request. Sometimes, if I am lucky, I get to go the following day. Other times, I am made to wait days before being seen. At times, I have had to cry and beg to be taken to medical, because we are not taken to medical unless they perceive a sickness to be life-threatening.

17. In or about October 2019, I was experiencing intense back, leg, and arm pain. I also began fainting. I lost consciousness various times. I was experiencing nausea, headaches, dizziness, and loss of vision. One day I passed out in the bathroom and was taken to the hospital. The doctor there told me he was very scared for me. He believed that I might have a tumor in my head. They conducted various tests, which came up negative for cancer. But the doctor revealed at this time that my spinal discs were compromising my nervous system, in particular, my sciatic nerve, which was leading to the pain in my spine, left leg, and right arm.

18. Through January 2020, the pain worsened significantly, and my left ankle has swollen. When the pain is particularly bad, I cannot get out of bed or walk around for several days at a time. Often, I cannot sit because I am in too much pain. The doctor told me that my pain has become chronic and that I really need physical therapy, but I am not provided with any physical therapy here. The doctor also recommended I take vitamins, but South Louisiana does not provide me with the vitamins I need. Taking vitamins was an important

part of my daily regimen in Cuba alongside a balanced diet, frequent exercise, and regular check-ups. I was also taking medication that helped me manage the symptoms from the surgeries and radiation. Despite having low immunity, I took good care of my health in Cuba, so I did not get sick very often. It was not until I came to South Louisiana that my health, since being in remission, took a deep dive.

19. Here, the diet is hardly balanced and rarely nutritious. Fresh fruit is rare, and so much of the food we are provided is made from flour and full of margarine. The food is also very spicy. The only water we have access to here is from the faucet, and it tastes like bleach. Due to the poor nutrition, my blood pressure—which was always healthy in Cuba—has gone up. Additionally, due to the poor diet and medications I am on here, I have gained about thirty-five pounds, which I believe has exacerbated my body pain.

20. Sanitation here is also horrendous. ICE and detention center officials are actively putting our lives at risk by denying us even the most basic hygiene and sanitation supplies. While in detention, I have never had access to hand sanitizer, anti-bacterial wipes, gloves, or masks. The only thing we receive about twice a month are small bottles of shampoo and a small roll of toilet paper, which only lasts about nine days. Even after my dorm was placed under quarantine around the end of February or beginning of March (for what we were told was an outbreak of the flu), no additional cleaning or hygiene supplies were provided. I have never seen officers using any sanitation supplies to clean the facility.

21. Additionally, they have laundered the blankets only once during the eight months I have been detained here. Officers at South Louisiana also do not clean the phones. The women detained here try as best as we can to clean them with what we have. The sanitation of the dorms is also left to us, but we do not have access to adequate cleaning products to properly

sanitize the dorm. Now that coronavirus is a looming threat, the only thing that has changed is that we have finally been provided with four small hand soaps, which will not last long in our dorm. Before about mid-March, I never had access to hand-soap.

22. Currently the majority of us in my dorm, Echo-Charlie, feel ill. There are women coughing and sneezing all around me. Even in such a state, women continue to be transferred to South Louisiana from other centers. In my dorm, there is only about half a meter between each of us at any given time. Echo-Charlie dorm was in quarantine for fourteen days around early March. Now, the Fox Bravo and Alpha Bravo dorms are under quarantine.

23. Some of the regular practices of the medical staff here have become especially worrisome given the threat of coronavirus. Sometimes the nurses come to the dormitory to check on some of us, and they use the same set of gloves to examine all of us. I have also noticed when I go to the medical unit, the nurses never change their gloves in between tending to different patients.

24. On or around March 21, 2020, five deportation officers came to our dorm. They told us that four of the deportation officers were quitting their jobs because of coronavirus. When asked for more information, one of them said, “We are leaving because they are doing a bad job here.” One of the officers that left was my assigned deportation officer, Jason Brownsfield. Now only two ICE officers remain, tending to the over-400 women detained here at South Louisiana.

25. On the evening of March 27, 2020, GEO Group officers came into our dorm and told us that due to staffing shortages, they would be combining two dorms. They combined my dorm with the dorm of women under H1N1 quarantine. Now there are seventy-two (72) of us in the same dorm, and all the women from the other dorm are sick. There is even less

space between us now. We asked the officers for disinfectant, but they denied our request. The officers are not disinfecting the dorm and they are not using gloves. I have also witnessed officers working extra shifts because so many staff have quit.

26. Women who joined us from the quarantined dorm have been telling us about how they were treated. Some placed in isolation said they were not provided the opportunity to bathe for three consecutive days, they were sometimes denied water, and they were not provided food consistently. The women also confirmed that their sheets and clothes were not washed during the quarantine, and they were not allowed to wear their undergarments. They also said doctors never came to check on them while under quarantine, and not once did any officers come to clean the dorm during the quarantine. They look so sickly.

Plans if Granted Release on Parole

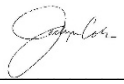
27. It has now been about ten (10) months since I first arrived at the U.S. border, and I am still awaiting my next master hearing, which is not until May 2020. I do not understand why ICE continues to hold me here in unsanitary and life-threatening conditions, when they have full authority to release me to the care of my family sponsors, and when I have demonstrated my commitment to following all legal procedures requested of me. I do not know how much longer I will survive the conditions of my confinement.

28. If I am released, I plan to live with my U.S.-citizen family members in Florida and self-quarantine in their home to protect myself from serious risk of illness and death due to COVID-19. I plan to rely on their financial and emotional support to begin recovering from the physical and mental deterioration I have endured seeking safety in the U.S. I plan to find legal representation and to continue fighting my asylum case before the non-detained court. I hope I live to see that day.

VERIFICATION

I, R[redacted] P[redacted] H[redacted], am the individual referred to as R.P.H. in the attached declaration. I declare under penalty of perjury that the foregoing is true and correct.

I have authorized my legal counsel in the *Heredia Mons* litigation to sign on my behalf given the difficulty of arranging visitation and travel in light of the current COVID-19 pandemic. I am also foregoing the option to sign documents sent by mail due to the urgency of the COVID-19 situation and due to reasonable fear of destruction of mail or retaliation by officials at this facility. If required to do so, I will provide a signature when I am able.



Jaclyn Cole
On behalf of witness Rosa Pino Hidalgo

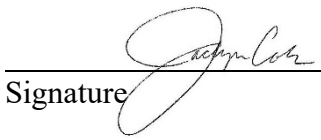
Date: March 26, 2020

CERTIFICATION

I, Jaclyn Cole, declare that I am proficient in the English and Spanish languages. On March 26, 2020, I read the foregoing declaration and orally translated it faithfully and accurately into Spanish over a telephonic call with the declarant. After I completed translating the declaration, the declarant verified that the contents of the foregoing declaration are true and accurate.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 26, 2020



Signature

EXHIBIT

6

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Ángel Alejandro Heredia Mons et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civ. No.: 1:19-cv-01593**
	)	
Kevin K. McALEENAN et al.	)	
	)	
Defendants/Respondents.	)	
	)	

DECLARATION OF S.U.R.

I, S.U.R., declare under penalty of perjury that the following is true and correct to the best of my knowledge:

1. I am a Nicaraguan asylum seeker detained at the Adams County Correctional Center ("Adams") in Natchez, Mississippi. I am native Spanish Speaker and I speak no other languages. I turn sixty (60) years old next week. I suffer from hypertension and a systolic heart murmur. I have been detained under the custody of Immigration and Customs Enforcement ("ICE") for thirteen (13) months.

Synopsis of Past Persecution

2. I am fleeing violent persecution in Nicaragua due to my political opinion against Daniel Ortega, whom I consider to be a fascist communist dictator akin to Fidel Castro. On or about April 23, 2018 I participated in peaceful demonstrations against the Ortega regime in Managua, Nicaragua. That day, I was beaten by Nicaraguan paramilitary officers. They also shot me twice resulting in injuries to my left arm and my genitals.

3. Thereafter, I was hospitalized. When I recovered, I went into hiding, moving from place to place. Conditions in the country grew worse as Ortega made every effort to destroy media, journalism and human rights organizations in our country. My nephew suffered similar mistreatment due to his political opinion and participation in peaceful protests. Afraid we would be tracked down and killed, we decided to leave and seek safe safety in the United States ("US"). We left Nicaragua together on or about September 24, 2018.

Journey to the United States

4. We traveled through Honduras and Guatemala until we reached the Mexican border. It was difficult to obtain permission to travel through Mexico. After crossing over, armed criminal factions kidnapped us and held us for ransom. However, our families had no money to pay these men. I was sure we would be killed. They finally dumped us naked and deprived of our belongings, leaving us for dead in the mountains.
5. Eventually we made our way to the US - Mexico border at El Chaparral in Tijuana. We had no money and had to work various small jobs to survive. We sought help from volunteers at an organization called Al Otro Lado. We were told that we would have to wait in line to seek asylum in the US. We were assigned numbers to wait on or about January 23, 2019. We crossed into the US at the San Ysidro port of entry on or about February 25, 2019.

Frustration of Access to Parole

6. After being processed at the border, we were kept in temporary holding cells known as *hieleras* for about eight (8) days. On or about March 3, 2019 we were transferred to the San Luis Regional Detention Center in Arizona. On or about March 11, 2019 we were

transferred to the to the Tallahatchie County Correctional Facility ("Tallahatchie") in Mississippi.

7. While detained in Tallahatchie, I was provided a credible fear interview. About two weeks later, I was given the positive determination results along with documents informing me of my right to apply for parole. However, three or four days later, I was given a letter in English denying me parole without my having applied for it. The English language denial letter checked off a box indicating that ICE had determined I was a "flight risk," without offering any explanation as to how they made this determination.

8. On or about April 11, 2019 we were transferred to the River Correctional Facility in Ferriday, Louisiana. By this time, I was able to get more help from my primary sponsor, a US citizen woman named Suzi residing in Spokane, Washington with her US citizen husband. My nephew and I met Suzi while she was volunteering in Tijuana with Al Otro Lado. She took a great interest in helping us after learning of our story.

9. With Suzi's help, I secured an attorney to represent me in my asylum claim and to request release through parole. Suzi provided a sponsor affidavit, a letter from her husband, evidence of their US citizenship, copies of their tax returns showing their significant wealth, documentation of the housing they offered to me and my nephew and copies of my identity documents. In addition, we gathered letters of support from our cousins living in New York and Miami. However, I was never provided a parole interview nor any decision on the request.

10. On or about November 11, 2019, we were transferred to Adams. My sponsor and attorneys had no luck in pursuing my parole request. We focused our efforts on my asylum case. Despite my testimony, medical records evidencing my serious injuries, and corroborating

letters, the judge denied my case. With the help of my lawyers, I field an appeal and it is currently pending before the Board of Immigration Appeals.

Conditions of Confinement

11. I cannot describe the pain I felt the day the judge denied my case. He said he did not believe me that I was shot, despite the medical records I presented and the visible scar on my arm. While I broke down in tears, he stated that the scar on my left arm appeared, in his opinion, to be from a cigar burn and not a bullet wound.
12. About twenty-four days ago, they transferred my nephew to the LaSalle Detention Center. This has caused me great despair. He was in an accident as a child and as a result only has one functioning kidney. I am terrified that they will deport him, and he will be killed in Nicaragua or that he will contract COVID-19 and die in that jail. I am also scared for my life and well-being in this facility.
13. My dorm alone holds two-hundred and forty (240) men. We all breathe the same contained air. Our beds are less than a meter apart. We are forced to share six (6) toilets, twelve (12) sinks, twelve (12) showerheads, all in close proximity. To make matters worse, the quality of the food here is terrible. Anyone who does not have money to buy more food in commissary is very sick or malnourished. Most of the men here have diarrhea. The bathrooms are always occupied. We have to stand in line to use the toilet.
14. We are each provided one small square of soap about every eight (8) days. The square of soap cannot weigh more than two (2) ounces. In order to stay clean, you have to buy your own soap in the commissary. One bar of soap costs about one dollar and fifty cents ($1.50). Many do not have the money to purchase items and remain dirty. Our clothes are all comingled and washed together.

15. We are also provided a very small, travel-size, tube of toothpaste about every eight (8) days. Sometimes the soap and toothpaste are not available for several days longer. It is not sufficient and, people supplement by buying toothpaste from the commissary, if they can afford it. The guards and officers here do not wear gloves or masks. We are not being provided any health information or explained precautionary measures that should be taken in light of the COVID-19 pandemic.

16. There are many men at high risk in my dorm. At least a dozen men in my dorm are over the age of fifty-five (55). There are men with diabetes, asthma and hypertension like me. My friend, a Venezuelan asylum seeker in my dorm, is sixty-three (63) years old and suffers from both diabetes and hypertension.

17. Worse still, rumors are growing that there are already a few cases of COVID-19 and that those men are supposedly in isolation. People are growing desperate to be released to avoid getting very sick or dying in here. The officers here do not care about our safety or health. They yell at us for everything. If we ask questions or plead for help, they yell and reprimand us. If we engage in peaceful protest of any kind, they punish us. I have already endured so much to escape death in my country. I pray I will not meet death in this jail.

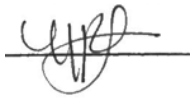
Plans if Granted Release on Parole

18. Suzi has promised to continue helping me financially once I am released. I will also rely on my family in the US for emotional and financial support. If I am granted release on parole, I will live in the housing that Suzi offered and continue to fight my appeal. I will self-quarantine in that home to avoid infection from coronavirus and I will seek help to secure my nephew's release so he may do the same.

VERIFICATION

I, S[redacted] J[redacted] U[redacted] Rojas, am the individual referred to as S.U.R. in the attached declaration. I declare under penalty of perjury that the foregoing is true and correct.

I have authorized my legal counsel in the *Heredia Mons* litigation to sign on my behalf given the difficulty of arranging visitation and travel in light of the current COVID-19 pandemic. I am also foregoing the option to sign documents sent by mail due to the urgency of the COVID-19 situation and due to reasonable fear of destruction of mail or retaliation by officials at this facility. If required to do so, I will provide a signature when I am able.



Date: March 24, 2020

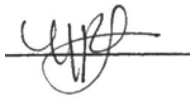
Michelle P. Gonzalez, Esq.
On behalf of witness Silvio Urbino Rojas

CERTIFICATION

I, Michelle P. Gonzalez, declare that I am proficient in the English and Spanish languages. On March 24, 2020, I read the foregoing declaration and orally translated it faithfully and accurately into Spanish over a telephonic call with the declarant. After I completed translating the declaration, the declarant verified that the contents of the foregoing declaration are true and accurate.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 24, 2020



Signature

EXHIBIT

7

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Ángel Alejandro Heredia Mons et al.	
Plaintiffs,	
v.	**Civ. No.: 1:19-cv-01593**
Kevin K. McALEENAN et al.	
Defendants/Respondents.	

DECLARATION OF T.M.F.

I, T.M.F., declare under penalty of perjury that the following is true and correct to the best of my knowledge:

1. My initials are T.M.F. and I am a 44-year-old Cameroonian national detained at the LaSalle Detention Facility ("LaSalle") in Jena, Louisiana.

Synopsis of Past Persecution

2. I am fleeing torture and death in Cameroon as a member of the English-speaking minority and due to my imputed political opinion as a separatist against the current regime. I also speak an indigenous language called Baforchu. In Cameroon I provided for my wife and children working in food provision out of a small warehouse.

3. Beginning in or about late May 2018, I was targeted by the Cameroonian military. They wrongfully suspected me of belonging to an armed separatist group because they were shown photos of me with members. However, these photos were taken while these separatists were extorting me at gunpoint. They wrongfully detained and tortured me on two separate occasions, for several days on end. They set fire to my warehouse and all the

goods contained therein. They also cut off half of my youngest son's finger. He was less than two years old at the time.

4. The acts of torture I suffered at the hands of military officers included stripping me naked, beating me mercilessly all over my body and face until I bled from my nose and mouth, hitting me with the dull side of a machete, using electric jumper cables to shock my penis, raping me with a baton, hitting my left knee with the butt of a long rifle which broke my skin open and exposed my kneecap, carving into my right knee with a knife, forcing the barrel of a gun into my mouth, and subjecting me to a water pressure hose that caused an infection in my eyes, the side effects of which persist to this day.

Journey to the United States

5. When I was able to escape my tormentors, I fled to Nigeria in or about June 2019. I was told that I could not stay safely in Nigeria because the Cameroonian military would quickly find me again and surely kill me for daring to escape them a second time. I decided I would travel to seek asylum in the United States (US) where I have family members who could help me recover from all the violence and trauma I endured.

6. On or about June 10, 2019 I flew on Turkish Airways from Abuja, Nigeria, to Quito, Ecuador. En route to Ecuador we stopped briefly in Bogota, Colombia, and Panama for connecting flights. I arrived in Quito on or about June 12, 2019. From there I had a long and difficult journey by bus and by foot through Colombia and Central America until I reached Mexico on or about July 28, 2019. This travel included eight terrifying, life-threatening days through the Darien Gap jungle.

7. Once I was in Mexico, I traveled to the US border in Nuevo Laredo. There, I was told I could not directly enter the US to seek asylum. I was assigned a number and forced to wait

in Mexico until that number was called. After struggling to survive for months in Latin America, where very few people spoke English, I was allowed to enter the US to request asylum. I crossed the bridge port of entry in Laredo, Texas on or about October 28, 2019. I was detained by border authorities and transferred to the custody of Immigration and Customs Enforcement ("ICE"). ICE has in its possession my original Cameroonian passport and my original national photo-identity document.

Frustration of Access to Parole

8. From Laredo, I was transferred to the Rio Grande Detention Center in Texas, where I was held for about two weeks. I was then transferred to the Tallahatchie County Correctional Facility ("Tallahatchie") in Mississippi. While detained at Tallahatchie, I was provided a credible fear interview on or about November 29, 2019. Soon thereafter, I was provided a positive credibility finding and related paperwork.
9. While detained at Tallahatchie, I was able to seek out limited legal assistance from the Mid-South Immigration Advocates non-profit. With their help, I was able to apply for parole. They worked with my family to collect all necessary evidence in support of my parole request. However, their efforts proved in vein as I have been denied parole several times now. Each denial letter checks off a box indicating that ICE determined me to be a flight risk as the only rationale for the denial. No further explanation is provided. At least two officers told me that parole is not granted in Louisiana. One Deportation Officer told me to not place my hope in parole and focus on my case.
10. My last request for parole included the following supporting evidence: an affidavit from my proposed sponsor, my cousin who lives in Massachusetts; evidence of his US citizenship; copies of his tax returns for the past two years; a letter of support from another

US citizen cousin living in Massachusetts; and a letter of support from my niece, who is a Lawful Permanent Resident, also residing in Massachusetts. I also included information about the fact that I am on medication for depression and that I have serious chronic injuries from the brutal attacks I suffered in Cameroon, including to my eyes, back, wrist and knees.

11. On or about December 10, 2019, I was transferred to the River Correctional Facility ("River") in Ferriday, Louisiana. On or about January 6, 2020, I was transferred to LaSalle. Here, no one gave us any helpful information about parole, which fueled my anxiety and despair. For weeks, I pleaded with the officers to tell me the name and contact information for my designated deportation officer ("DO"). They finally told me my assigned officer is DO Feiek. When I asked for his contact information, they provided me the address for the River facility in Ferriday, Louisiana. My family and I have had no luck in communicating with him.

12. I had my final hearing before the Immigration Judge ("IJ") on March 10, 2020. The IJs in this region are inhumane and not impartial from all I have witnessed over the past five months. However, because of the strength of my case, the severity of my past persecution and my ability to present my facts fluently in English, I was thankfully granted Withholding of Removal due to my fear of return to Cameroon on that day.

13. Despite winning my case, ICE is refusing to release me. They told me that I will have to wait thirty (30) days before they will even consider freeing me from this place. I am terrified they will use COVID-19 as an excuse to keep me here indefinitely. This is frustrating and makes no sense, because most of us have family and sponsor homes where we can live to properly self-quarantine or practice social distancing in order to prevent the spread of this terrible virus.

Conditions of Confinement

14. More than ninety (90) men are in my dorm alone. ICE continues to bring in more men into this facility everyday despite the COVID-19 pandemic. In my dorm we only have five (5) toilets that we must all share. We have one large showering room with only five (5) showerheads for us all to use for bathing. There are no curtains separating the space between showerheads within the shared room. Additionally, the shower room has only two (2) soap dispensers that release foam.

15. We share eight (8) sinks. Next to the sinks are two (2) more soap foam dispensers. All four soap dispensers frequently run out of soap. We are not provided additional soap or shampoo. We are often left with nothing to clean our hands, hair and bodies. We have to buy our own soap from the commissary if we wish to clean ourselves properly. One bar of soap costs about three US dollars ($3). I had to buy my toothpaste at the commissary because the quality of the toothpaste they provide us is very poor. We are given toilet paper, but it is also very poor quality.

16. The other day, one man in my dorm put his mouth directly on the jug of water from which we all pour our drinking water. We grew very upset and immediately notified the guards, asking for help. They told us to shut up and stay quiet in our dorm. We explained what happened and our reasonable fear of contamination, but they refused to replace the jug of water.

17. Additionally, there is no substantive medical care here. We do not have doctors attending to our medical issues and they rarely provide us medicine. If you complain of any illness, you are lucky if they give you ibuprofen. Throughout my time at this facility, I have endured severe pain from my chronic injuries, but they refused to take me to a real hospital.

The most they would do is provide me a small amount of ibuprofen, which did nothing to ease my pain.

18. One man in my dorm has a painful hernia in his genital region. We cannot sleep because every night he is crying and shouting out in pain. All they do is give him ibuprofen. We have several men in this dorm with high blood pressure and mental health problems. Two men suffer from diabetes and are injected twice daily with needles. There are several men well over fifty years old in my dorm, as well.

19. The men at this facility are growing more desperate as we learn news of the COVID-19 pandemic and its serious risk to all of our lives and well-being. We learn this through our limited access to news sources or from our loved ones on the outside. The officials here do not orient us, provide education or even talk to us about COVID-19. We beg them for information. They are not taking any preventative precautions. Sometimes when we return from the yard, they tell us to wash our hands, but that is it.

20. Many officers are not coming to their post because of this fear. Several wear gloves, but none wear masks. No hand sanitizer or other form of disinfectant is available in the facility. Some officers are rumored to have quit. Now, only one officer is supervising two of our large dorms. She sits outside of our dorms to surveil the two dorms. This is a very dangerous situation, and I am worried what will happen as the men here continue to grow more desperate and fearful for their lives.

21. Recently, I learned that some of the asylum seekers planned a hunger strike to take place throughout the facility. They asked us all to stop eating. They asked people who work in units like the kitchen and laundry to stop working. They are asking people who are taken

to the yard for recreation to refuse to return to the jail. They want ICE to take their requests for release seriously because we are all scared and eligible for release.

22. Today the formal strike began after it was rumored that there were two confirmed COVID-19 cases in one of the dorms at this facility. In retaliation of the protest, officers in riot gear came to intervene. They entered our dorm and sprayed tear gas. I fell and was unable to exert control over my body and limbs.

23. A female officer came to help me up. She had to press on my back before I was able to regain some control. At this point I was taken for a medical check-up. When I returned to my dorm, I realized that some of my items were missing, including a book where I keep important phone numbers and addresses. I only have one family member's phone number memorized, so I was very upset.

24. In my dorm, several of the African asylum seekers are planning to write a letter about our situation, these dangerous conditions, and our increasing panic related to COVID-19. They are planning to put everyone's name and A number to sign the letter. After all we have suffered and endured to seek safe haven in the US, we cannot believe we may be left to die here in these detention centers.

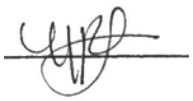
Plans if Released

25. If I am released, I plan to self-quarantine in my cousin's home to protect myself from COVID-19. I also plan to rely on the financial and emotional support of my family living in Massachusetts to physical and psychological therapy. I hope I am released to my family soon, so I can begin to heal from the extensive trauma I have suffered.

VERIFICATION

I, T[redacted] M[redacted] F[redacted] am the individual referred to as T.M.F. in the attached declaration. I declare under penalty of perjury that the foregoing is true and correct.

I have authorized my legal counsel in the *Heredia Mons* litigation to sign on my behalf given the difficulty of arranging visitation and travel in light of the current COVID-19 pandemic. I am also foregoing the option to sign documents sent by mail due to the urgency of the COVID-19 situation and due to reasonable fear of destruction of mail or retaliation by officials at this facility. If required to do so, I will provide a signature when I am able.



Michelle P. Gonzalez, Esq.
On behalf of witness Thaddeus Mokom Fon

Date: March 23, 2020

EXHIBIT

8

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Ángel Alejandro Heredia Mons et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civ. No.: 1:19-cv-01593**
	)	
Kevin K. McALEENAN et al.	)	
	)	
Defendants/Respondents.	)	
	)	

DECLARATION OF Y.P.T.

I, Y.P.T., declare under penalty of perjury that the following is true and correct to the best of my knowledge:

1. My initials are Y.P.T., and I am a 30-year-old Cuban national detained at the Catahoula Correctional Center ("Catahoula") in Harrisonburg, Louisiana. I am a native Spanish speaker. I do not speak English.

Synopsis of Past Persecution

2. I was forced to flee Cuba due to political persecution at the hands of the Cuban government. On or about May 1, 2018, the police arrived at my house around 8:00 am. That day was a commemorative holiday with official events that all are expected to participate in. The officers demanded that I leave my house, and they interrogated me about my failure to participate. I responded that I had no interest because I do not believe in politics. In front of my mother, my wife, and my five-year-old daughter, the police began to beat me until my face was bloodied. They handcuffed me and then took me to the police station.

3. I was put in a cell, where they continued to brutalize me with a police baton. They hit my body, my stomach, my arms, my feet, and my face. They called me a counter-revolutionary and threatened to disappear me. I was half-conscious when they threw me to the ground, and one police officer proceeded to sexually assault me. They left me on the floor for an hour, traumatized and half-conscious. They kept me detained without medical attention for twenty-five days, until the bruises and cuts had nearly disappeared.
4. Shortly thereafter, my family accompanied me to the police station, and we formally accused the police of mistreatment. However, the corruption in Cuba is pervasive, and because I had no visible cuts or bruises anymore, they said it was just my word against theirs. They refused to look into the incident.
5. After receiving multiple official citations and continued threats of imprisonment and disappearance, I was detained again on or about July 26, 2018, again for failure to participate in political events. Upon my release, three days later, I decided to flee and seek asylum in the United States (U.S.).

Journey to the United States

6. On or about October 16, 2018, I took a flight from Cuba to Guyana. The journey from Guyana to the U.S. was extremely difficult. I traveled by bus and on foot. I experienced physical and sexual abuse on my journey. I passed through nine countries in my search for safety.
7. I first traveled from Guyana to Brazil, and then to Uruguay, where I requested asylum. I was denied asylum, and so I made my way back through Brazil, then to Peru, Colombia, and Panama. I was robbed various times in Peru and Colombia. While traveling through the jungles of Colombia and Panama, I saw the bodies of immigrants that had died on the

perilous journey. From Panama, I continued on to Costa Rica, Nicaragua, Honduras, Guatemala, and Mexico.

8. On or around May 10, 2019, I arrived to Ciudad Acuña, Coahuila in Mexico at the border with the U. S. I was assigned a number and forced to wait in a makeshift encampment for over three months until it was my turn to present myself at the port of entry. It was very unsanitary and dangerous in the encampment, and I depended on the donations of churches to survive. On or about August, 22, 2019, I was finally processed at the Del Rio, Texas port of entry, where I asked for asylum. I was immediately detained by border officials and transferred to the custody of Immigration and Customs Enforcement ("ICE"). ICE has in its possession my original photo-identity documents from Cuba.

Frustration of Access to Parole

9. After being detained, I was taken to a very cold cell known as a *hielera*. I was then transferred to a detention center in Texas. About six days later, I was transferred to the Tallahatchie County Correctional Facility ("Tallahatchie") in Tutwiler, Mississippi. About a week after arriving to Tallahatchie, I was provided a credible fear interview ("CFI"). About a week after the interview, I was provided a positive determination of my CFI and related paperwork. Soon thereafter, I was provided an English language parole denial letter, before being given the opportunity to submit documents in support of a parole request. The stated reason for the denial was that ICE considered me a flight risk.

10. Since then, I have applied for parole three times at three different ICE detention centers, and all of my requests have been denied. Every denial letter checks off the same "flight risk" box as the stated reason for my denial, without offering any rationale or additional information about how ICE made this determination. My requests included extensive

evidence from my sponsor, letters of support from community members residing lawfully in the US, and evidence my good moral character. My cousin, who I have been close with my whole life, eagerly agreed to serve as my sponsor and to support me financially once released from detention. Alongside my cousin, I also have lawful permanent resident friends who have agreed to support me as I try to heal and fight my immigration case.

Conditions of Confinement

11. While detained at Tallahatchie, I began experiencing a lot of anxiety and depression as a result of my confinement, poor conditions, and flashbacks to the abuse I experienced in Cuba. At Tallahatchie, I was never provided any medication for my depression or anxiety. I also regularly experienced nausea and claustrophobia, due to poor nutrition and close confinement with other detained immigrants.
12. In or about September 2019, I was transferred to Bossier Medium Security Facility ("Bossier") in Plain Dealing, Louisiana. Bossier was a living hell. There, I experienced psychological and physical mistreatment. At Bossier, they would keep us indoors without access to the yard for months at a time, and we were not provided adequate nutrition. I was able to speak with a psychologist at Bossier, and they provided me with sleeping medication. However, the medication didn't help due to the constant abuse by guards like the slamming of doors all night long and waking us up daily at 4:00 am.
13. When we requested medical treatment, we were told to drink water. When we got sick, often ibuprofen was the only medication provided to us. Those who were able to afford it would purchase ibuprofen at the commissary when refused medication. Officials withheld information about our cases, they yelled at us, and they put us in solitary confinement without just cause. Before I arrived at Bossier, some of my bunkmates had been sprayed

with tear gas and put in solitary confinement for requesting information about parole and refusing to eat their food. I met immigrants in Bossier who arrived healthy and left Bossier with serious mental health problems.

14. When I first arrived at Bossier, I was provided a small tube of toothpaste and soap that lasted me all of three days. After that, no more soap or toothpaste was provided. Those of us who have family in the U.S. to deposit money into our commissary accounts were able to purchase soap for about two U.S. dollars ($2) at commissary and toothpaste for approximately three U.S. dollars and eighty-five cents ($3.85). For those without money in their commissary account, they had no access to such necessities.

15. At mealtimes, the state and local inmates with whom we were incarcerated at Bossier served us meals, and they never used gloves to serve the food. The temperature at Bossier was also kept very low. At night especially, it was very cold, and sometimes the officers took away our blankets arbitrarily. Once, I was put in solitary confinement at Bossier because I complained that the food was too spicy and that the temperature was too cold in my dorm. In total, I was placed in solitary confinement four times without just cause while detained at Bossier.

16. I never had access to hand sanitizer at Bossier, even when people in the dorm were sick. In the bathrooms, there were no shower curtains. Officers and other detained men could watch me bathe. Weekly, we were each provided with a small roll of toilet paper, which would often not last the week.

17. In or about January 2020, I was transferred to River Correctional Center (“River”), in Ferriday, Louisiana. While detained at River, I had my final asylum hearing on or about January 10, 2020. I cannot afford legal representation, so I presented my case alone. I was

denied asylum. I decided to appeal the decision because the decision was not just, and I cannot return to Cuba. The appeal is currently pending. At River, conditions were unsanitary much like at Bossier. Detainees were responsible for cleaning the bathrooms, but we were never provided with adequate cleaning supplies or gloves.

18. In or about February 2020, I was transferred to Catahoula Correctional Center ("Catahoula") in Harrisonburg, Louisiana. Shortly after arriving at Catahoula, while I was walking back to the dorm from the yard, I fell because the ground was wet from the rain. I fractured my right foot. My foot was very inflamed and in a lot of pain. I requested various times to be taken to the hospital. I was not taken to the hospital until about a week later.

19. When I was transported to the hospital, officers placed metal cuffs on my swollen foot and ankle. Since the hospitalization, I continue to suffer from severe pain. I request pain medication, but I am only provided ibuprofen. I am provided five to six pills of ibuprofen that are supposed to last me two to three days. This is not a sufficient amount to help ease the pain. I have been confined to a wheelchair for over a month. It is very hard for me to bathe, and I have to depend on the kindness of fellow detained men to take me to the dining hall to eat.

20. In recent weeks, my fear for my life has increased with the threat of coronavirus. Especially with my injury, I feel so weak and I worry I will be vulnerable once the virus enters the detention center. Already, someone in Catahoula Parish, where I am detained, has been confirmed to have died from the virus.

21. On the morning of March 24, 2020, officers told me they were taking me to the hospital for a routine check-up on my foot. They did not provide me with a mask, gloves, or any hand sanitizing wipes. I begged them not to take me out of the center without hygienic

protection because I am very afraid of being exposed to coronavirus. But they ignored my pleas.

22. During the ride to the hospital, the two officials transporting me were smoking cigarettes. Neither wore gloves or masks. One of the officers was coughing. They were both talking about the coronavirus on the drive. When I arrived at the hospital, I had to wait in a waiting room with ten to twelve patients, many of them coughing. I had a brief visit with the doctor and then was returned to Catahoula in the early afternoon. I am very scared thinking about all the people I was exposed to without any mask or other hygienic protection throughout the day, including officers, doctors, nurses, and sick patients. Such negligence worries me as it poses a great risk to my own health and the health of all of us at Catahoula, including staff.

23. Despite the threat coronavirus poses, ICE continues to transfer people in and out of Catahoula, and right now the dorms are completely full. In my dorm there are over one hundred (100) people, and there is less than a meter (3 feet) of space between each of us at any given time. We all breathe the same air. There are many people here who feel sick, who are coughing, and who have fevers. We are not provided the most basic sanitary supplies to keep ourselves safe. No hand sanitizer, masks, or gloves are provided to us.

24. I am in Dorm I. Everyone here fears that coronavirus has already entered the facility. On my way to the dining area, I have to pass Dorm B, which is under quarantine. Dorm B is not far from the solitary confinement cells. In those cells, we can see people are wearing masks. From Dorm B and from solitary, people yell to us that they are infected with coronavirus. The officers do not provide us information to quell our fears. They also do not provide us education related to coronavirus.

25. We are afraid to request medical care, because we are threatened with time in solitary confinement when we request to go to the medical unit. This happened to me about a month ago when I had a sore throat and fever. I requested to go to medical unit, and, as a remedy, I was told to gargle saltwater and provided ibuprofen. Afterwards, officers tried to take me to a solitary confinement cell, but I begged them not to because of my deteriorated mental state. I was allowed to return to the dorm.

26. I cannot remain detained here. As a survivor of sexual and physical abuse in a Cuban jail, being incarcerated in these neglectful facilities across the south has been very traumatic for me. Claustrophobia, flashbacks, depression, anxiety, and insomnia are now all regular parts of my daily life. I have to take daily medication to treat these issues. I live in constant fear of being returned to solitary confinement or deported to Cuba. Each passing day I am more terrified of being infected with coronavirus.

Plans if Granted Release on Parole

27. The most painful part of all of this is that I am aware of my eligibility for parole under ICE's own directive. It causes me mental anguish to know that ICE has full authority to release me to the care of my proposed sponsor, my cousin who is a lawful permanent resident living in Florida.

28. If released, I plan to live with her and her husband in their home near Tampa, Florida. Upon my release, I plan to self-quarantine in their home to protect myself from COVID-19. I also plan to rely on their financial and emotional support. They plan to help me obtain the medical care I need to heal my fractured foot and to retain legal representation to continue fighting my case before the non-detained court. I am desperate to be released to my family and extended community.

VERIFICATION

I, Y[redacted] P[redacted] T[redacted] am the individual referred to as Y.P.T. in the attached declaration. I declare under penalty of perjury that the foregoing is true and correct.

I have authorized my legal counsel in the *Heredia Mons* litigation to sign on my behalf given the difficulty of arranging visitation and travel in light of the current COVID-19 pandemic. I am also foregoing the option to sign documents sent by mail due to the urgency of the COVID-19 situation and due to reasonable fear of destruction of mail or retaliation by officials at this facility. If required to do so, I will provide a signature when I am able.

Jaclyn Cole
On behalf of witness Yudanys Perez Treto

Date: March 26, 2020

CERTIFICATION

I, Jaclyn Cole, declare that I am proficient in the English and Spanish languages. On March 26, 2020, I read the foregoing declaration and orally translated it faithfully and accurately into Spanish over a telephonic call with the declarant. After I completed translating the declaration, the declarant verified that the contents of the foregoing declaration are true and accurate.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 26, 2020

Signature

EXHIBIT

9

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Ángel Alejandro Heredia Mons et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civ. No.: 1:19-cv-01593**
	)	
Kevin K. McALEENAN et al.	)	
	)	
Defendants/Respondents.	)	
	)	

DECLARATION OF LAURA G. RIVERA, ESQ.

I, Laura G. Rivera, Esq., make this declaration on my personal knowledge and if called to testify, I could and would do so competently as follows:

1. I serve as the Director of the Southeast Immigrant Freedom Initiative of the Southern Poverty Law Center ("SIFI"). SIFI provides pro bono representation to detained immigrants in proceedings before the Executive Office for Immigration Review ("EOIR") and U.S. Immigration and Customs and Enforcement ("ICE"). SIFI, established in 2017, has represented hundreds of individuals confined under the jurisdiction of the New Orleans ICE Field Office. Most SIFI cases focus on decarceration.

2. Most of the clients SIFI represents under the jurisdiction of the New Orleans ICE Field Office are confined inside the LaSalle Detention Center ("LaSalle") in Jena, Louisiana, and Pine Prairie ICE Processing Center ("Pine Prairie") in Pine Prairie, Louisiana. SIFI has also represented clients at the Adams County Correctional Center in Natchez, Mississippi, the River Correctional Center in Monroe, Louisiana, and the Winn Correctional Center in Winnfield, Louisiana.

3. Since the outbreak of the novel coronavirus, SIFI staff have visited individuals inside Pine Prairie and LaSalle and spoken by phone to individuals at both detention centers. What SIFI staff have personally witnessed and learned in conversation with people inside these facilities reveals a grossly deficient response by the New Orleans ICE Field Office and private contractors to stem the spread of the virus. ICE has failed to give people inside LaSalle and Pine Prairie adequate information about how to protect themselves from contracting COVID-19. It has stymied their ability to practice social distancing by continuing to confine individuals in groups of dozens or larger. It has failed to increase their access to soap and fresh air. And when detained individuals express collective fear and concern, the New Orleans ICE Field Office and private contractors have responded with force and punishment.

4. The New Orleans ICE Field Office has the power and the duty to make determinations about whether to release non-citizens on parole on a case-by-case basis. 8 U.S.C. § 1182(d)(5)(A); 8 C.F.R. § 212.5. ICE has various other mechanisms to release people from its custody, including release on recognizance, conditional release on bond, and release on an order of supervision. These tools are available to ICE during its initial custody determinations or its redeterminations. Over the past two years, however, ICE has detained and denied release to thousands more people than it ever did before. This drastic turn is due to ICE having manipulated an algorithm in a computer risk assessment tool that it uses to generate recommendations about custody determinations.[1] The result was the tool *always* recommended confinement. And while ICE agents may manually override the recommendation, advocates allege in a recent suit that ICE in New York accepted the recommendations more than 99 percent of the time.[2]

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[1] Compl. at 2, *Velesaca v. Decker*, Case No. 1:20-cv-01803 (S.D.N.Y. Feb. 28, 2020).
[2] "[T]he full ramifications of the change to the algorithm are likely even broader: It is used nationally, but the FOIA suit only revealed data from New York." Hannah Bloch-Wehba, "A

5. Not even the COVID-19 pandemic and the attendant danger it poses inside congregates spaces has dampened the New Orleans ICE Field Office's ironclad commitment to incarceration over sound alternatives to detention. It continues to deny humanitarian parole even to those in its custody who suffer from serious medical conditions.

6. Amid this crisis, ICE has failed to provide adequate legal access for people in its custody, whether in-person, by video teleconference ("VTC"), or by phone. SIFI's primary mode of contact with confined individuals is through a free and confidential hotline through which they may reach us. Due to technology and staffing restrictions caused by the coronavirus, the hotline is now staffed Mondays and Thursdays instead of Monday through Thursday. It conducts the rest of its communications through a combination of in-person visitation, VTC, and other legal phone calls.

7. ICE's COVID-19-related restrictions on in-person visitation have made it virtually impossible to conduct in-person visitation at Pine Prairie, where contact visitation is the only option. In "guidance" published on its website on March 23 and March 24, 2020, ICE offered conflicting messages on the type of personal protective equipment legal workers would have to bring for in-person visitation. On March 23, 2020, two subsections presented different requirements. One subsection stated: "non-contact legal visitation…will continue to be permitted. In order to safeguard visitors, detainees, and ICE and facility staff, official visitors may be subject to special screening and procedures. ICE may impose additional requirements, such as mandating that visitors wear protective equipment." Another subsection stated that "all legal visitors" must "provide and wear personal protective equipment," including "disposable vinyl gloves, N-95 or surgical masks, and eye protection[] while visiting any detention facility."

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lawsuit against ICE reveals the danger of government-by-algorithm," The Washington Post (Mar. 5, 2020), available at: https://www.washingtonpost.com/outlook/2020/03/05/lawsuit-against-ice-reveals-danger-government-by-algorithm/

8. Up until then, I had provided SIFI staff with gloves, disinfectant wipes, and hand sanitizer, but not masks or eye protection. Not knowing which of the two statements would prevail, and out of an abundance of caution, that same day I mailed by overnight delivery several packages containing surgical masks to five SIFI staff members. The masks were not N-95 masks. Despite trying to procure them locally, I had been unable to, given the national shortage of those masks. Even if I had been able to procure them, SIFI's use of N-95 masks would have taken those masks out of circulation for use by frontline health care providers, in contravention of the priorities urged by public health experts.

9. The next day, on March 24, 2020, ICE issued updated guidance:

> Detainee access to legal counsel remains a paramount requirement and will be accommodated to the maximum extent practicable. Unless and until it is determined to pose a risk to the safety andsecurity of the facility, legal visitation will continue; but ICE is encouraging all legal representatives to contact the facility at which they must visit their clients in-person to determine current policies and procedures regarding legal visits. Non-contactlegal visitation (e.g., Skype or teleconference) should be offered first, if available, to limit exposure to ICE detainees; but if the attorney believes the legal visit requires contact, the facility should permit the visit with the appropriate guidelinesit has established.
>
> For in-person, contact (without any physical barriers) visits to occur, the attorney must undergo screening using the same procedures as staff. ICE will require all legal visitors to provideand wear PPE (e.g., gloves, N-95 masks, and eye protection) while visiting with any client at any facility . Legal representatives may also be required to go through similar testing as employees of the detention facility, as determined by the individual facility.The overall authority to approve legal visits lies with the Warden or Facility Administrator; however, the facilities have been asked to notify its local Field Office Director as soon as possible of any denied legal visits.
>
> For attorneys appearing in-person for court at ICE facilities, they are encouraged to contact the Executive Office for Immigration Review for any additional requirements.

10. In essence, then, ICE maintains that contact visitation is not allowed unless legal workers procure and use N-95 masks. Given that SIFI Pine Prairie legal teams or any other SIFI legal representatives cannot obtain N-95 masks for use due to the critical shortage of N-95 masks across the country, this new N-95 mask standard virtually ensures that no legal visitation will occur at Pine Prairie.

LaSalle Detention Center, Jena, LA

11. On March 20, 2020, the New Orleans ICE Field Office denied release on parole to two SIFI clients with medical complications who are confined inside LaSalle. The clients, asylum seekers, have both engaged in a hunger strike for about 140 days. Their strike is rooted in their

frustration with the way the immigration courts have treated their pleas for asylum, and, as the duration of their confinement lengthens, their desperation at being locked up, separated from family. Before the novel coronavirus was declared a pandemic, SIFI filed initial parole requests. They contained evidence from a leading medical expert in detainee health attesting that they are medically vulnerable, and documents showing they pose no risk to public safety and no flight risk, having sponsors willing to host them upon release. ICE denied their parole requests.

12. After the outbreak, SIFI renewed these requests, citing to the COVID-19 pandemic as a changed circumstance, and adding new supporting evidence. Yet, again, ICE denied release. ICE has since begin to force feed them via nasogastric tubes. Given the available data on the high rates of transmission of the novel coronavirus and the most likely method of transmission through droplets entering the mucosa, force feeding medically fragile individuals inside likely contaminated detention center medical wings may compound their risk of infection.

13. Over the past week, SIFI staff have learned that ICE and facility staff have used force to respond to confined individuals' clamor for their own health and safety. On March 26, 2020, a woman inside LaSalle called SIFI's hotline and spoke with a SIFI helpline specialist. The day prior, she said, officials used tear gas against people in a different housing unit who protested after hearing rumors that someone was diagnosed with coronavirus. Due to the fumes, those individuals, the caller, and the nearly 80 others in her housing unit had to be evacuated. ICE since acknowledged the use of force incident, but said pepper spray and not tear gas was deployed.[3]

14. The March 26 caller also reported woefully deficient conditions. Though guards did tell her and others about the coronavirus, they did not provide materials for her and others to disinfect

[3] Noah Lanard, "ICE Detainee Were Pepper-Sprayed During a Briefing on Coronavirus," Mother Jones (Mar. 26, 2020), available at: https://www.motherjones.com/politics/2020/03/ice-detainees-were-pepper-sprayed-during-a-briefing-on-coronavirus/.

or clean their area. All but one toilet is broken, meaning close to 80 people must share one toilet. Staff told them they were out of toilet paper. When soap runs out, she said, it is not replaced until the next day. She also stated that she doubts the staff will tell persons detained if someone at the detention center has been diagnosed with coronavirus because it would be inconvenient for them.

15. The March 26 caller is herself suffering from a serious medical condition. She reported suffering from blood clots in her brain which cause significant pain. Though she requested medical attention about two weeks ago, she still has not been given medication.

16. Another caller from LaSalle reported symptoms consistent with COVID-19. He called on March 19, 2020, and complained of having a fever, chest pain, difficulty breathing while trying to sleep, and of coughing blood. He reported having been tested for the flu and having returned a negative result; however, to his knowledge, he had not been tested for coronavirus. The only treatment he reported receiving inside LaSalle was ibuprofen, syrup, and salt, which had not helped. He reported sharing a unit, HD, with others who had symptoms of coughing, fever, or shortness of breath. None had been removed from the unit. New people were being brought into the unit. Facility staff were not routinely using gloves. He reported that a different housing unit, OD, had been quarantined earlier for two to three weeks. His understanding was that some individuals inside that unit had been infected with the common flu.

Pine Prairie Detention Center, Pine Prairie, LA

17. ICE and its private contractors have also used force in the past week against individuals confined inside Pine Prairie. An SPLC legal worker received a call from a man inside the facility on March 24, 2020 as the incident unfolded. He told her that he could see some eight guards

wearing riot gear, and also the assistant warden. As at LaSalle, ICE confirmed the incident in a published report and explained ICE or its agents used pepper spray against those in its custody.[4]

18. The escalating dangers to people in ICE custody make it all the more important for SIFI staff to maintain contact with clients and potential clients in confinement. A SIFI legal worker conducted in-person visitation with several individuals at Pine Prairie on March 16 and March 20, 2020. She wore a mask and gloves both times. The first time, she observed that none of the facility staff or detained people wore masks or gloves. That day, she met with five individuals, seated a table about six feet from those she visited. The five individuals she visited independently gave her a consistent message: none had received any information about the coronavirus. They also mentioned lacking access to hand soap. When she asked them whether facility staff had changed any protocols in response to the pandemic, they said their conditions had not changed in any noticeable way. The five individuals had engaged in a hunger strike and had been subjected to solitary confinement. Three of them independently told her that while segregated inside one- or two-person cells, they were not given water to drink for almost a week, and they were forced to drink water from the toilet.

19. Her second visit, on March 20, 2020, was with five individuals confined inside a quarantined unit, Charlie Alpha. That time, some staff wore masks; others did not. As before, she sat at a six-foot table in the visitation area. Because the table is located in a common area, the visits were not private or confidential. The five men from the quarantine unit wore masks but no gloves. As they waited in the common area, they sat alongside other detained people awaiting visitation

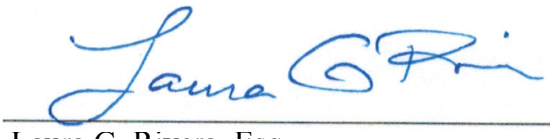
[4] Ben Fox, Philip Marcelo, and Nomaan Merchant, "Trump administration urged to free migrants as virus surges," Associated Press (March. 25, 2020), available at: http://www.wboc.com/story/41938213/trump-administration-urged-to-free-migrants-as-virus-surges.

who did not have masks or gloves. They told her that they were only given masks when they left the dorm, not while they were inside of it. They also told her that detained individuals are still cleaning the dorms, and they are given neither masks nor gloves. Guards and ICE agents sometimes wear masks and gloves when they enter Charlie Alpha and sometimes do not. Several of them also reported to her that ICE continues to bring new people into confinement at Pine Prairie, putting those new people into the Charlie Alpha unit, a known high-risk unit.

20. The same legal worker had a VTC call with someone inside Pine Prairie on March 18, 2020. The man was wearing a mask and gloves. He told her that he and roughly sixty others inside his housing unit, Charlie Alpha, were under quarantine. Guards had told those in Charlie Alpha that someone inside that unit was suspected of having COVID-19. The suspected COVID-19 carrier had been removed from the Charlie Alpha unit. Everyone else remained inside Charlie Alpha. He told her that detained people inside Charlie Alpha were responsible for cleaning their own unit. They had access to some chemicals to clean with. However, they had no access to hand soap or hand sanitizer, only the limited soap given to them for showers. The guards had not taken any measures to space people out inside the unit.

21. Since the onset of this pandemic, SIFI and partner organizations have to date submitted three letters to ICE and facility administrators requesting information about their response plans and urged them to release people from custody. As of now, SIFI has received no response.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on March 29, 2020 in Decatur, Georgia.



Laura G. Rivera, Esq.

EXHIBIT

10

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Ángel Alejandro HEREDIA MONS et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civ. No.: 1:19-cv-01593**
	)	
Kevin K. McALEENAN et al.	)	
	)	
Defendants/Respondents.	)	
	)	

DECLARATION OF CARLOS FRANCO-PAREDES, M.D., M.P.H.

I, Carlos Franco-Paredes, M.D., M.P.H., declare under penalty of perjury under the laws of the United States as follows:

I. Overview of Background and Specializations.

1. My name is Dr. Carlos Franco-Paredes and I am an Associate Professor of Medicine at the University of Colorado in the Department of Medicine, Division of Infectious Diseases. I completed my internal medicine residency and infectious diseases fellowship at Emory University School of Medicine.
2. In addition, I hold a public health degree in global health from the Rollins School of Public Health at Emory University with a concentration on the dynamics of infectious disease epidemics and pandemics. I also have twenty years of relevant clinical experience. I participated in developing international guidelines for pandemic influenza preparedness and response as well as a global health action plan with the World Health Organization.
3. As an infectious diseases clinician, I have experience providing care to individuals in a civil detention centers in the United States (US) and have performed medical forensic

examinations and medical second opinion evaluations for patients in the custody of the Department of Homeland Security, Immigration and Customs Enforcement (ICE). I have also provided direct care for many patients in ICE custody or incarcerated settings living with HIV-infection at my current academic institution.

4. I present my Curriculum Vitae attached as Exhibit A. I have written and published extensively on the topics of infectious diseases pandemics and epidemics, particularly in influenza. I have 196 scientific publications in peer-reviewed scientific journals. I teach a class at the school of medicine on caring for underserved populations including immigrants and incarcerated populations.

II. Overview of Documents Reviewed in Preparation of this Declaration.

5. In preparation for this declaration, I reviewed the following scientific references, relevant medical documents and public health websites:

   a. Johns Hopkins University. Coronavirus Resource Center Available at: https://coronavirus.jhu.edu/map.html. Accessed: March 21, 2020.

   b. CDC-Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19) Available at: https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html). Accessed: March 21, 2020.

   c. CDC COVID 19 Response Team. Severe outcomes among patients with coronavirus disease 2019 (COVID-19) – United States, February 12-March 16, 2020. Available at: https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e2.htm. Accessed: March 21, 2020.

   d. Rodriguez-Morales AJ, Cardona-Ospina JA, Gutiérrez-Ocampo E, Villamizar-Peña R, Holguin-Rivera Y, Escalera-Antezana JP, Alvarado-Arnez LE, Bonilla-Aldana DK, Franco-Paredes C, Henao-Martinez AF, Paniz-Mondolfi A, Lagos-Grisales GJ, Ramírez-Vallejo E, Suárez JA, Zambrano LI, Villamil-Gómez WE, Balbin-Ramon GJ, Rabaan AA, Harapan H, Dhama K, Nishiura H, Kataoka H, Ahmad T, Sah R; Latin American Network of Coronavirus Disease 2019-COVID-19 Research (LANCOVID-19). Electronic address: https://www.lancovid.org. Clinical, laboratory and imaging features of COVID-19: A systematic review and meta-analysis. Travel Med Infect Dis. 2020 Mar 13:101623. doi: 10.1016/j.tmaid.2020.101623. [Epub ahead of print].

e. Foppian Palacios C, Opensahw JJ, Travassos MA. Influenza in US detention centers- the desperate need for immunization. N Engl J Med 2020; 382(9): 789-792.

f. Novel Coronavirus Pneumonia Emergency Response Epidemiology Team. [The Epidemiological Characteristics of an Outbreak of 2019 Novel Coronavirus Diseases (COVID-19) in China]. Zhonghua Liu Xing Bing Xue Za Zhi. 2020;41(2):145–151. DOI:10.3760/cma.j.issn.0254-6450.2020.02.003.

g. Mart M, Ware LB. The long-lasting effects of the acute respiratory distress syndrome. Expert Rev Respir Dis 2020; https://doi.org/10.1080/17476348.2020.1743182.

h. Wu C, Chen X, Cai Y, Xia J, Zhou X, Xu S, Huang H, Zhang L, Zhou X, Du C, Zhang Y, Song J, Wang S, Chao Y, Yang Z, Xu J, Zhou X, Chen D, Xiong W, Xu L, Zhou F, Jiang J, Bai C, Zheng J, Song Y. JAMA Intern Med. 2020 Mar 13. doi: 10.1001/jamainternmed.2020.0994. [Epub ahead of print].

i. Koh GC, Hoenig H. How should the rehabilitation community prepare for 2019-nCOV? Arch Phys Med Rehabil 2020 Mar 16. Pii: S0003-9993(20)30153-2. Doi: 10.1016/j.apmr.2020.03.003. (Epub ahead of print].

j. Chen C, Zhou Y, Wen WD. SARS-CoV-2: a potential novel etiology of fulminant myocarditis. Herz 2020; March 5. https://doiorg/10.1007/s00059-020-04909-z.

k. Hu H, Ma F, Wei X, Fang Y. Coronavirus fulminant myocarditis saved with glucocorticoid and human immunoglobulin. Eur Heat J 2020; Mar 16. [Epub ahead of print].

l. Li R, Pei S, Chen B, Song , Zhang T, Shaman J. Substantial undocumented infection facilitates the rapid dissemination of novel coronavirus (SARS-CoV2). Science 10.1126/scienceabb3221 (2020).

m. Russell CD, Millar JE, Baillie JK. Clinical evidence does not support corticosteroid treatment for 2019-nCoV lung injury. Lancet Infect Dis 2020; 395: 474-475.

n. Hoffmann M, Kleine-Weber H, Schroeder S, Krüger N, Herrler T, Erichsen S, Schiergens TS, Herrler G, Wu NH, Nitsche A, Müller MA, Drosten C, Pöhlmann S. SARS-CoV-2 Cell Entry Depends on ACE2 and TMPRSS2 and Is Blocked by a Clinically Proven Protease Inhibitor. Cell. 2020 Mar 4. pii: S0092-8674(20)30229-4. doi: 10.1016/j.cell.2020.02.052. [Epub ahead of print]

o. Tian S, Hu W, Niu L, Liu H, Su H, Xiao SY. Pulmonary pathology of early phase 2019 novel coronavirus (COVID-19) pneumonia in patients with lung cancer. J Thorac Oncol 2020; https://doi.org/10.1016;j.tho.2020.02.010.

p. Lauer SA, Grantz KH, Bi Q, Jones FK, Zheng Q, Meredith HR, Azman AS, Reich NG, Lessler J.The incubation period of coronavirus disease 2019 (COVID-19) from publicly reported confirmed cases: estimation and

application. Ann Intern Med 2020; March 10, doi: https://doi/org/107326/M20-0504.

q. Korean Society of Infectious Diseases; Korean Society of Pediatric Infectious Diseases; Korean Society of Epidemiology; Korean Society for Antimicrobial Therapy; Korean Society for Healthcare-associated Infection Control and Prevention; Korea Centers for Disease Control and Prevention. Report on the Epidemiological Features of Coronavirus Disease 2019 (COVID-19) Outbreak in the Republic of Korea from January 19 to March 2, 2020. J Korean Med Sci. 2020 Mar 16; 35(10):e112. doi: 10.3346/jkms.2020.35.e112.

6. I also reviewed the following legal documents:

a. Declaration of S.U.R., Nicaraguan national detained at the Adams County Correctional Center;
b. Declaration of T.M.F., Cameroonian national detained at the LaSalle Detention Facility;
c. Southern Poverty Law Center webpage related to the instant litigation, available at: https://www.splcenter.org/seeking-justice/case-docket/heredia-mons-et-al-v-mcaleenan-et-al;
d. ICE COVID-19 guidance available at: https://www.ice.gov/covid19;
e. CDC guidance for correctional-detention facilities available at: https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html#For_cases; and
f. ICE – Detention Management guidance available at: https://www.ice.gov/detention-management.

III. Formal Analysis.

A. Global and US-Specific Status of the SARS-CoV-2 (COVID-19) Pandemic.

7. The Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2) is a newly emerging zoonotic agent initially identified in December 2019 that as of the date of this writing, has spread to 173 countries, causing 487,648 confirmed cases and 20,000 deaths. This viral pathogen causes the Coronavirus Disease 2019 (COVID-19). Infection with COVID-19 is associated with significant morbidity and mortality, especially in patients above 50 years of age and those with chronic medical conditions.

8. As of March 26, 2020, there have been 69,246 confirmed cases of COVID-19 with 1,046 deaths reported in the US. There has been reports of confirmed cases in all US states and most states have already reported deaths. The epicenters in the US territory began in the Pacific Northwestern states and then to California and the Northeast, particularly New York City and New Jersey.

9. However, there is an increasing number of cases and deaths reported in the South. For example, as of March 26, 2020, the Louisiana Department of Health reports 2,305 confirmed cases and 83 deaths. (http://ldh.la.gov/Coronavirus/). The Mississippi State Department of Health reports 485 confirmed cases and 6 deaths. (https://msdh.ms.gov/msdhsite/_static/14,0,420.html#Mississippi).

10. Many ICE detention centers are located in the South and the rapid spread of this viral infection among these states is a concern that we need to monitor closely from an epidemiological perspective. Recent reports by the CDC show that 31% of COVID-19 cases, 45% of hospitalizations, and 80% of deaths occurred among adults over 65 years of age. Case-fatality in persons aged over 85 ranged from 10-27%, followed by 3-11% among persons aged 65 to 84, 1% among persons aged 55 to 64, and less than 1% among persons aged 20 to 54.

B. Risk of Immigration Detention Centers Fueling the COVID-19 Pandemic.

11. I reviewed COVID-19 guidance by ICE and CDC recommendations for carceral settings. ICE's proposed plans and interventions to halt the spread of COVID-19 are well delineated and useful. The CDC recommendations provide some guidance that is general and may take into account the realities of some of these detention centers.

12. Both sets of guidance address social distancing in these centers, which appears to be difficult, if not impossible, in settings where many individuals are living in close quarters with a large number of beds per room or dorm. However, these recommendations and guidance are likely insufficient in case of a large outbreak due to this highly transmissible virus.

13. I have experience providing care to individuals in civil detention centers and I have performed medical forensic examinations and medical second opinion evaluations for patients in the custody of the Department of Homeland Security. Based on my conversations with patients, my own observations, and information that exists regarding the resources available within immigration detention facilities as detailed by the ICE Health Services Corps, it is my professional opinion that the medical care available in immigration detention centers cannot properly accommodate the needs of patients should there be an outbreak of COVID-19 in these facilities. Immigration detention centers are often poorly equipped to diagnose and manage infectious disease outbreaks. Many of these centers lack onsite medical facilities or 24-hour medical care.

14. In summary, I am concerned about the treatment of immigrants inside detention centers, which could make the current COVID-19 epidemic worse in the US by contributing to a high fatality rate among detained individuals and potentially spreading the outbreak into the larger community.

15. Immigration detention centers in the US are tinderboxes for the transmission of highly transmissible infectious pathogens including the SARS-CoV-2, which causes the Coronavirus Disease (COVID-19). Given the large population density of immigration detention centers, and the ease of transmission of this viral pathogen, the attack rate

inside these centers may reach exponential proportions consuming significant medical care and financial resources.

C. Populations at Risk of Severe Disease and Death Due to SARS-CoV-2 Infection under ICE Custody.

16. According to the CDC, groups deemed to be at high risk of developing severe disease and dying from COVID-19 include those above 50 years of age and those with underlying medical conditions (regardless of their age). (See Table 1 below). These cases are also amplifiers or hyper-spreaders of the infection since they tend to have high viral concentrations in their respiratory secretions.

17. The clinical experience in China, South Korea, Italy, and Spain; and within the US has shown that 80% of confirmed cases tend to occur in persons 30 to 69 years of age regardless of whether they had underlying medical conditions. Of these, 20% develop severe clinical manifestations or become critically ill. Among those with severe clinical manifestations, regardless of their age or underlying medical conditions, the virus progresses into respiratory failure, septic shock, and multiorgan dysfunction requiring intensive care support including the use of mechanical ventilator support. The overall case fatality rate is 10-14% of those who develop severe disease. In China, 80% of deaths occurred among adults 60 years of age or older.

Table 1. Risk factors for developing severe disease and death

Age groups at high risk of developing severe disease and dying without underlying medical conditions	≥50 years (1% CFR)* 60-69 years (3.6% CFR) 70-79 years (8% CFR)
Groups with underlying medical conditions at high risk of dying regardless of their age	-Cardiovascular Disease (congestive heart failure, history of myocardial infarction, history of cardiac surgery)

	-Systemic Arterial Hypertension (high blood pressure) -Chronic Respiratory Disease (asthma, chronic obstructive pulmonary disease including chronic bronchitis or emphysema, or other pulmonary diseases) -Diabetes Mellitus -Cancer -Chronic Liver Disease -Chronic Kidney Disease -Autoimmune Diseases -Severe Psychiatric Illness ** -History of Transplantation -HIV/AIDS

*CFR= Case Fatality Rate. This is an indicator of lethality used during outbreaks to identify the number of individuals who succumb out of those infected.
** In South Korea, 20% of deaths occurred in what they defined as Psychiatric Illness (J Korean Med Sci 2020; 35(10): e112).

D. Potential Impact of the COVID-19 Behind the Walls of Immigration Detention Centers in the US.

18. There is a growing number of confirmed cases in the US, increasing numbers of hospitalizations and admissions to intensive care units, and many deaths. In this wave of the pandemic or in subsequent ones, it is likely the number of infected individuals will continue to augment. In the closed settings of immigration detention centers, where there is overcrowding and confinement of a large number of persons, networks of transmission become highly conducive to spread rapidly.

19. There is evidence of substantial undocumented infection facilitating the rapid dissemination of novel coronavirus SARS-CoV-2 which is responsible for 79% of documented cases of COVID-19 in China. Once an individual is exposed to this virus from either a symptomatic individual (21% of cases) or from asymptomatic individuals (79% of cases), the shortest incubation period is 3 days with a median incubation period of 5.1 (95% CI 4.5 to 5.8 days). Overall, 97.5% of persons who develop symptoms do so within 11.5 days of the initial exposure. Most persons with COVID-19 who develop severe disease do so immediately after admission or within 3-5 days from their initial presentation and represent 53% of those requiring intensive care unit admissions and advanced supportive care. At my current institution, the two confirmed deaths occurred within 48 hours of admission to the hospital.

20. Given the high population density of jails, prisons, and juvenile detention centers, and the ease of transmission of this viral pathogen, the infection rate will be exponential if even a single person, with or without symptoms, that is shedding the virus enters a facility. For every person with the virus, they will infect more than 2 other people – whether they be incarcerated individuals or staff. Of those infected, one-fifth will get so ill that they require hospital admission, and about 10% will develop severe disease requiring treatment only available in the intensive care unit.

21. To illustrate the magnitude of this threat, a jail or prison that holds 1500 individuals can anticipate that 500-650 individuals may acquire the infection. Of these, 100 to 150 individuals may develop symptoms and may progress to develop severe disease requiring admission to the hospital, potentially to an intensive care unit. Of these, 5-10 individuals may die from respiratory failure, septic shock and multiorgan failure. If the

approximately 150 individuals are not hospitalized, they will all be at high risk of death without access to proper equipment, such as ventilators.

22. Reducing the number of incarcerated individuals is necessary for effective infection control and sanitization practices that could dramatically reduce the burden COVID-19 will inevitably place on our health system. Urgent action is needed given the predicted shortage of medical supplies such as personal protective equipment, shortage of staff as medical personnel become ill themselves, and limited life-saving resources such as ventilators.

E. A COVID-19 Outbreak in a Detention Center Will Likely Overwhelm Local Healthcare Systems

23. Detention of any kind requires large groups of people to be held together in a confined space and creates the worst type of setting for curbing the spread of a highly contagious infection such as COVID-19. To contain the spread of the disease, infection prevention protocols must be meticulously followed.

24. The number of private rooms in a typical detention facility is insufficient to comply with the recommended airborne/droplet isolation guidelines. Another important consideration that complicates disinfection and decontamination practices is the ability of this novel coronavirus to survive for extended periods of time on materials that are highly prevalent in secure settings, such as metals and other non-porous surfaces. Current outbreak protocols require frequent disinfection and decontamination of all surfaces of the facility, which is exceedingly difficult given the large number of

incarcerated individuals, frequent interactions between incarcerated individuals and staff, and regularity with which staff move in and out of each facility.

25. Responding to an outbreak requires significant improvements in staffing, upgrading medical equipment, substantial supplies including antibiotics, intravenous infusions, cardiac and respiratory monitors, devices for oxygen supply, and personal protection supplies among persons at high risk of severe COVID-19 disease. Additionally, this outbreak calls for highly trained staff to correctly institute, enforce isolation, quarantine procedures, and have training on the appropriate utilization of personal protective equipment. It is essential that nursing and medical staff be trained in infection control prevention practices, implementing triage protocols, and the medical management of suspected, probable and confirmed cases of coronavirus infection.

26. These same personnel would have to initiate the management of those with severe disease. Since these are closed facilities, the number of exposed, infected, and ill individuals may rapidly overwhelm staff and resources. This is particularly important in rural and semirural settings where many immigration detention centers are located, particularly in Southern States and where they may have contact with a limited number of surrounding medical centers. As a result, many patients would need transfer to hospitals near these facilities, likely overwhelming the surrounding healthcare systems, which are already functioning at full capacity caring for the general non-incarcerated community.

27. A large outbreak of COVID-19 in an immigration detention facility would put a tremendous strain on the medical system to the detriment of patients in the communities

surrounding these centers. It is reasonable to anticipate that there will be the loss of additional lives that could have otherwise been saved.

IV. Expert Opinion.

28. There is an urgent need to consider alternative strategies to dilute the community-based impact of an outbreak inside immigration detention centers. Therefore, it is my professional view, that releasing detainees/asylum seekers on parole from these centers constitutes a high-yield public health intervention that may significantly lessen the impact of this outbreak. In particular, targeting the release of persons in the age groups at risk of severe disease and death; and persons with underlying medical conditions, may lessen the human and financial costs that this outbreak may impose on ICE detention facilities nationwide.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 26th day of March 2020 at 12631 E 17th Ave, Aurora, CO 80045, United States.

Carlos Franco Paredes, M.D., M.P.H.
Associate Professor of Medicine
Division of Infectious Diseases
Department of Medicine
Division of infectious Diseases
Program Director Infectious Disease Fellowship
Training Program, University of Colorado

Exhibit A. Curriculum Vitae – Carlos Franco-Paredes MD, MPH

PERSONAL INFORMATION

Carlos Franco-Paredes, M.D., M.P.H.
Carlos.franco-paredes@cuanschutz.edu
carlos.franco.paredes@gmail.com
US Citizen

CURRENT PROFESSIONAL POSITION AND ACTIVITIES:

- Associate Professor of Medicine, Division of Infectious Diseases, University of Colorado Denver School of Medicine, Anschutz Medical Campus and Infectious Diseases (July 2018 - ongoing).
- Fellowship Program Director, Division of Infectious Diseases, University of Colorado Denver School of Medicine, Anschutz Medical Campus (March 2019- ongoing).

EDUCATION

1989 -1995	M.D. - La Salle University School of Medicine, Mexico City, Mexico
1996-1999	Internship and Residency in Internal Medicine, Emory University School of Medicine Affiliated Hospitals, Atlanta, GA
1999-2002	Fellowship in Infectious Diseases, Emory University School of Medicine Affiliated Hospitals, Atlanta, GA
1999-2002	Fellow in AIDS International Training and Research Program, NIH Fogarty Institute, Rollins School of Public Health, Emory University, Atlanta, GA
1999 - 2002	Masters Degree in Public Health (M.P.H.) Rollins School of Public Health, Emory University, Atlanta, GA, Global Health Track
2001-2002	Chief Medical Resident, Grady Memorial Hospital, Emory University School of Medicine, Atlanta, GA
2006	Diploma Course in Tropical Medicine, Gorgas. University of Alabama, Birmingham and Universidad Cayetano Heredia, Lima Peru

CERTIFICATIONS

1999-Present	Diplomat in Internal Medicine American Board of Internal Medicine (Recertification 11/2010-11/2020)
2001-present	Diplomat in Infectious Diseases, American Board of Internal Medicine, Infectious Diseases Subspecialty (Recertification 04/2011-04/2021)
2005-present	Travel Medicine Certification by the International Society of Travel Medicine
2007-present	Tropical Medicine Certification by the American Society of Tropical Medicine – Diploma in Tropical Medicine and Hygiene (DTMH - Gorgas)

EMPLOYMENT HISTORY:

- 2002 - 2004 - Advisor to the Director of the National Center for Child and

Adolescent Health and of the National Immunization Council (NIP), Ministry of Health Mexico; my activities included critical review of current national health plans on vaccination, infectious diseases, soil-transmitted helminthic control programs; meningococcal disease outbreaks in the jail system, an outbreak of imported measles in 2003-2004 and bioterrorism and influenza pandemic preparedness. I represented the NIP at meetings of the Global Health Security Action Group preparation of National preparedness and response plans for Mexico

- 2005 – 2011- Co-Director Travel Well Clinic, Emory University
  Emory Midtown Hospital
- 2004- 8/2009 -Assistant Professor of Medicine
  Department of Medicine, Division of Infectious Diseases
  Emory University School of Medicine, Atlanta GA
- 3/2008-10/2009 Consultant WHO, HQ, Geneva, Influenza Vaccine
- 9/2009- 3/2011 Associate Professor of Medicine
  Department of Medicine, Division of Infectious Diseases
  Emory University School of Medicine, Atlanta GA
- 1/2007 – 3/2011 Assistant Professor of Public Health
  Hubert Department of Global Health
  Rollins School of Public Health, Emory University, Atlanta GA
- 4/2011 –5/2013 - Associate Professor of Public Health in Global Health
  Hubert Department of Global Health
  Rollins School of Public Health, Emory University, Atlanta GA
- 2010 - WHO HQ Consultant for a 4-month-period on the Deployment of H1N1 influenza vaccine in the African Region, Jan to March 2010, Switzerland Geneva, WHO HQ 2010 sponsored by John Snow Inc. USAID, Washington, D.C.
- 2014-2015 - Consultant International Association of Immunization Managers, Regional Meeting of the Middle Eastern and North African Countries and Sub Saharan Africa, held in Durban South Africa, Sept 2014; and as rapporteur of the Inaugural Conference, 3-4 March 2015, Istanbul, Turkey.
- 3/2011- 5/2017 - Phoebe Physician Group –Infectious Diseases Clinician Phoebe Putney Memorial Hospital, Albany, GA.
- 5/2015 - 9/2015 - Consultant Surveillance of Enteric Fever in Asia (Pakistan, Indonesia, Bangladesh, Nepal, India) March 2015-October 2015.
- June 19, 2017-June 31, 2018–Visiting Associate Professor of Medicine, Division of Infectious Diseases, University of Colorado Denver, Anschutz Medical Campus
- June 2004- present - Adjunct Professor of Pediatrics, Division of Clinical Research, Hospital Infantil de México, Federico Gómez, México City, México. Investigador Nacional Nivel II, Sistema Nacional de Investigadores (12/2019); SNI III Sistema Nacional de Investigadores (1/2020-); Investigador Clínico Nivel E, Sistema Nacional de Hospitales

HONORS AND AWARDS

1995 Top Graduating Student, La Salle School of Medicine

1997 Award for Academic Excellence in Internal Medicine, EUSM
1999 Alpha Omega Alpha (AOA) House staff Officer, EUSM
2002 Pillar of Excellence Award. Fulton County Department of Health and Wellness Communicable Disease Prevention Branch, Atlanta GA
2002 Emory University Humanitarian Award for extraordinary service in Leadership Betterment of the Human Condition the Emory University Rollins School of Public Health
2002 Winner of the Essay Contest on the Health of Developing Countries: Causes and Effects in Relation to Economics or Law, sponsored by the Center for International Development at Harvard University and the World Health Organization Commission on Macroeconomics Health with the essay "*Infectious Diseases, Non-zero Sum Thinking and the Developing World"*
2002 *"James W. Alley"* Award for Outstanding Service to Disadvantaged Populations, Rollins School of Public Health of Emory University May 2002. Received during Commencement Ceremony Graduation to obtain the Degree of Masters in Public Health
2006 Golden Apple Award for Excellence in Teaching, Emory University, School of Med
2006 Best Conference Award Conference, "*Juha Kokko*" Best Conference Department of Medicine, EUSM
2007 "*Jack Shulman*" Award Infectious Disease fellowship, Excellence in Teaching Award, Division of Infectious Diseases, EUSM
2007 Emerging Threats in Public Health: Pandemic Influenza CD-ROM, APHA's Public Health Education and Health Promotion Section, Annual Public Health Materials Contest award
2009 National Center for Preparedness, Detection, and Control of Infectious Diseases. Honor Award Certificate for an exemplary partnership in clinical and epidemiologic monitoring of illness related to international travel. NCPDCID Recognition Awards Ceremony, April 2009. CDC, Atlanta, GA
2012 The ISTM Awards Committee, directed by Prof. Herbert DuPont, selected the article "Rethinking typhoid fever vaccines" in the Journal of Travel Medicine (Best Review Article)
2012 Best Clinical Teacher. Albany Family Medicine Residency Program
2018 Outstanding Educator Award – Infectious Diseases Fellowship, Division of Infectious Diseases, University of Colorado, Anschutz Medical Center, Aurora Colorado

EDITORSHIP AND EDITORIAL BOARDS

2007-Present Deputy/Associate Editor PLoS Neglected Tropical Disease
Public Library of Science

2017-2018 Deputy Editor, Annals of Clinical Microbiology and Antimicrobials BMC
2007-2019 Core Faculty International AIDS Society-USA -Travel and Tropical Medicine/HIV/AIDS

INTERNATIONAL COMMITTEES

2018- Member of the Examination Committee of the International Society of Travel Medicine. Developing Examination Questions and Proctoring the Certificate in Traveler's Health Examination

Proctor Certificate of Traveler's Health Examination (CTH) as part of the International Society of Travel Medicine– 12th Asia-Pacific Travel Health Conference, Thailand 21-24, March 2019
Proctor Certificate of Traveler's Health Examination (CTH), Atlanta, GA, September, 2019

PRESENTATIONS AT NATIONAL/INTERNATIONAL MEETINGS

2017- Meeting of the Colombian Society of Infectious Diseases, August 2017:
Discussion of Clinical Cases Session, Influenza, MERS-Coronavirus, Leprosy, Enteric Fever
2018 – Cutaneous Mycobacterial Diseases, Universidad Cayetano Heredia,
Lima, Peru, Mayo 2018
2018 – Scientific Writing Seminar, ACIN, Pereira, Colombia, August 2-4, 2018
2019 – First International Congress of Tropical Diseases ACINTROP 2019. March 21, 2019, Monteria, Colombia, Topic: Leishmaniasis
2019 – One Health Symposium of Zoonoses, Pereira Colombia, August 16-17, 2019, Topic: Zoonotic Leprosy
2019 – Congress Colombian Association of Infectious Diseases (ACIN), Topic: Leprosy in Latin America, Cartagena, Colombia, August 21-24, 2019
2019 – World Society Pediatric Infectious Diseases, Manila Philippines, November 7-9, 2019 - Tropical Medicine Symposium: Diagnosis, Treatment, and Prevention of Leprosy.
2019 – FLAP. Federacion Latino Americana de Parasitologia, Panama, Panama, November 26, 2019, Oral Transmission of Leprosy Symposium
2019 – FLAP. Federacion Latino Americana de Parasitologia, Panama, Panama, November 27, 2019, Leprosy Situation in the Americas.

PUBLICATIONS

BOOKS

Franco-Paredes C, Santos-Preciado JI. Neglected Tropical Diseases in Latin America and the Caribbean, Springer-Verlag, 2015. ISBN-13: 978-3709114216 ISBN-10: 3709114217
Franco-Paredes C. Core Concepts in Clinical Infectious Diseases, Academic Press, Elsevier, March 2016. ISBN: 978-0-12-804423-0

RESEARCH ORIGINAL ARTICLES (clinical, basic science, other) in refereed journals:

1. Del Rio C, **Franco-Paredes C**, Duffus W, Barragan M, Hicks G. Routinely Recommending HIV Testing at a Large Urban Urgent-Care Clinic – Atlanta, GA. *MMWR Morbid Mortal Wkly Rep* 2001; 50:538-541.

2. Del Rio C, Barragán M, **Franco-Paredes C**. *Pneumocystis carinii* Pneumonia. *N Engl J Med* 2004; 351:1262-1263.
3. Barragan M, Hicks G, Williams M, **Franco-Paredes C**, Duffus W, Del Rio C. Health Literacy is Associated with HIV Test Acceptance. *J Gen Intern Med* 2005; 20:422-425.
4. Rodriguez-Morales A, Arria M, Rojas-Mirabal J, Borges E, Benitez J, Herrera M, Villalobos C, Maldonado A, Rubio N, **Franco-Paredes C**. Lepidopterism Due to the Exposure of the Moth *Hylesia metabus* in Northeastern Venezuela. *Am J Trop Med Hyg* 2005; 73:991-993.
5. Rodriguez-Morales A, Sánchez E, Arria M, Vargas M, Piccolo C, Colina R, **Franco-Paredes C**. White Blood Cell Counts in *Plasmodium vivax*. *J Infect Dis* 2005; 192:1675-1676.
6. **Franco-Paredes C**, Nicolls D, Dismukes R, Kozarsky P. Persistent Tropical Infectious Diseases among Sudanese Refugees Living in the US. *Am J Trop Med Hyg* 2005; 73: 1.
7. Osorio-Pinzon J, Moncada L, **Franco-Paredes C**. Role of Ivermectin in the Treatment of Severe Orbital Myiasis Due to *Cochliomyia hominivorax*. *Clin Infect Dis* 2006; 3: e57-9.
8. Rodriguez-Morales A, **Franco-Paredes C**. Impact of *Plasmodium vivax* Malaria during Pregnancy in Northeastern Venezuela. *Am J Trop Med Hyg* 2006; 74:273-277.
9. Rodriguez-Morales A, Nestor P, Arria M, **Franco-Paredes C**. Impact of Imported Malaria on the Burden of Malaria in Northeastern Venezuela. *J Travel Med* 2006; 13:15-20.
10. Rodríguez-Morales A, Sánchez E, Vargas M, Piccolo C, Colina R, Arria M, **Franco-Paredes C.** Is anemia in *Plasmodium vivax* More Severe and More Frequent than in *Plasmodium falciparum? Am J Med* 2006; 119:e9-10.
11. Hicks G, Barragan M, **Franco-Paredes C**, Williams MV, del Rio C. Health Literacy is a Predictor of HIV Knowledge. *Fam Med J* 2006; 10:717-723.
12. Cardenas R, Sandoval C, Rodriguez-Morales A, **Franco-Paredes C**. Impact of Climate Variability in the Occurrence of Leishmaniasis in Northeastern Colombia. *Am J Trop Med Hyg* 2006; 75:273-7.
13. **Franco-Paredes C**, Nicolls D, Dismukes R, Wilson M, Jones D, Workowski K, Kozarsky P. Persistent and Untreated Tropical Infectious Diseases among Sudanese Refugees in the US. *Am J Trop Med Hyg* 2007; 77:633-635.
14. Rodríguez-Morales AJ, Sanchez E, Arria M, Vargas M, Piccolo C, Colina R, **Franco-Paredes C**. Hemoglobin and haematocrit: The Threefold Conversion is also Non Valid for Assessing Anaemia in *Plasmodium vivax* Malaria-endemic Settings. *Malaria J* 2007; 6:166.
15. **Franco-Paredes C**, Jones D, Rodriguez-Morales AJ, Santos-Preciado JI. Improving the Health of Neglected Populations in Latin America. *BMC Public Health* 2007; 7.
16. Kelly C, Hernández I, **Franco-Paredes C**, Del Rio C. The Clinical and Epidemiologic Characteristics of Foreign-born Latinos with HIV/AIDS at an Urban HIV Clinic. *AIDS Reader* 2007; 17:73-88.
17. Hotez PJ, Bottazzi ME, **Franco-Paredes C**, Ault SK, Roses-Periago M. The Neglected Tropical Diseases of Latin America and the Caribbean: Estimated Disease Burden and Distribution and a Roadmap for Control and Elimination. *PLoS Negl Trop Dis* 2008; 2:e300.
18. Tellez I, Barragan M, Nelson K, Del Rio C, **Franco-Paredes C**. *Pneumocystis jiroveci* (PCP) in the Inner City: A Persistent and Deadly Pathogen. *Am J Med Sci* 2008; 335:192-197.
19. Rodriguez-Morales AJ, Olinda, **Franco-Paredes C**. Cutaneous Leishmaniasis Imported from Colombia to Northcentral Venezuela: Implications for Travel Advice. *Trav Med Infect Dis* 2008; 6(6): 376-9.

20. Jacob J, Kozarsky P, Dismukes R, Bynoe V, Margoles L, Leonard M, Tellez I, **Franco-Paredes C**. Five-Year Experience with Type 1 and Type 2 Reactions in Hansen's Disease at a US Travel Clinic. *Am J Trop Med Hygiene* 2008; 79:452-454.
21. Delgado O, Silva S, Coraspe V, Ribas MA, Rodriguez-Morales AJ, Navarro P, **Franco-Paredes C**. Epidemiology of Cutaneous Leishmaniasis in Children and Adolescents in Venezuela. *Trop Biomed.* 2008; 25(3):178-83.
22. **Franco-Paredes C**, Lammoglia L, Hernandez I, Santos-Preciado JI. Epidemiology and Outcomes of Bacterial Meningitis in Mexican Children: 10-Years' Experience (1993-2003). *Int J Infect Dis* 2008; 12:380-386.
23. Pedroza A, Huerta GJ, Garcia ML, Rojas A, Lopez I, Peñagos M, **Franco-Paredes C**, Deroche C, Mascareñas C. The Safety and Immunogenicity of Influenza Vaccine in Children with Asthma in Mexico. *Int J Infect Dis* 2009; 13(4): 469-75.
24. Museru O, **Franco-Paredes C**. Epidemiology and Outcomes of Hepatitis B Virus Infection among Refugees Seen at US Travel Medicine Clinic: 2005-2008. *Travel Med Infect Dis* 2009; 7: 171-179.
25. Rodriguez-Morales AJ, Olinda M, **Franco-Paredes C**. Imported Cases of Malaria Admitted to Two Hospitals of Margarita Island, Venezuela: 1998-2005. *Travel Med Infect Dis* 2009: (1): 48-45.
26. Kelley CF, Checkley W, Mannino DM, **Franco-Paredes C**, Del Rio C, Holguin F. Trends in Hospitalizations for AIDS-associated *Pneumocystis jiroveci* Pneumonia in the United States (1986-2005). *Chest* 2009; 136(1): 190-7.
27. Carranza M, Newton O, **Franco-Paredes C**, Villasenor A. Clinical Outcomes of Mexican Children with Febrile Acute Upper Respiratory Infection: No Impact of Antibiotic Therapy. *Int J Infect Dis* 2010; 14(9): e759-63.
28. Museru O, Vargas M, Kinyua M, Alexander KT, **Franco-Paredes C,** Oladele A. Hepatitis B Virus Infection among Refugees Resettled in the US: High Prevalence and Challenges in Access to Health Care. *J Immigrant Minor Health* 2010;
29. Moro P, Thompson B, Santos-Preciado JI, Weniger B, Chen R, **Franco-Paredes C.** Needlestick injuries in Mexico City sanitation workers. *Revista Panamericana de Salud Pública/Pan American Journal of Public Health* 2010; 27 (6): 467-8.
30. Barragan M, Holtz M, **Franco-Paredes C**, Leonard M. The Untimely Misfortune of Tuberculosis Diagnosis at time of Death. *Infect Dis Clin Pract* 2010; 18(6):1-7.
31. Hochberg N, Armstrong W, Wang W, Sheth A, Moro R, Montgomery S, Steuer F, Lennox J, **Franco-Paredes C**. High Prevalence of Persistent Parasitic Infections in Foreign-born HIV-infected Persons in the United States. *PLoS Neglect Dis* 2011; 5(4): e1034.
32. Larocque RC, Rao SR, Lee J, Ansdell V, Yates JA, Schwartz BS, Knouse M, Cahill J, Hagmann S, Vinetz J, Connor BA, Goad JA, Oladele A, Alvarez S, Stauffer W, Walker P, Kozarsky P, **Franco-Paredes C**, Dismukes R, Rosen J, Hynes NA, Jacquerioz F, McLellan S, Hale D, Sofarelli T, Schoenfeld D, Marano N, Brunette G, Jentes ES, Yanni E, Sotir MJ, Ryan ET; the Global TravEpiNet Consortium. Global TravEpiNet: A National Consortium of Clinics Providing Care to International Travelers--Analysis of Demographic Characteristics, Travel Destinations, and Pretravel Healthcare of High-Risk US International Travelers, 2009-2011. *Clin Infect Dis*. 2012; 54(4):455-462.
33. Espinosa-Padilla SE, Murata C, Estrada-Parra S, Santos-Argumendo L, Mascarenas C, **Franco-Paredes C**, Espinosa-Rosales FJ. Immunogenicity of a 23-valent pneumococcal polysaccharide vaccine among Mexican children. *Arch Med Res* 2012;

34. Harris JR, Lockhart SR, Sondermeyer G, Vugia DJ, Crist MB, D'Angelo MT, Sellers B, **Franco-Paredes C**, Makvandi M, Smelser C, Greene J, Stanek D, Signs K, Nett RJ, Chiller T, Park BJ. *Cryptococcus gattii* infections in multiple states outside the US Pacific Northwest. *Emerg Infect Dis*. 2013; 19 (10):1620-6.
35. **Franco-Paredes C**. Aerobic actinomycetes that masquerade as pulmonary tuberculosis. Bol Med Hosp Infant Mex 2014; 71(1): 36-40.
36. Chastain DB, Ngando I, Bland CM, **Franco-Paredes C**, and Hawkins WA. Effect of the 2014 Clinical and Laboratory Standard Institute urine-specific breakpoints on cefazolin susceptibility rates at a community teaching hospital. *Ann Clin Microbiol Antimicrob* 2017; 16(1): 43.
37. Kashef Hamadani BH, **Franco-Paredes C**, MCollister B, Shapiro L, Beckham JD, Henao-Martinez AF. Cryptococcosis and cryptococcal meningitis- new predictors and clinical outcomes at a United States Academic Medical Center. *Mycoses* 2017; doi: 10.1111/myc.12742.
38. Chastain DB, **Franco-Paredes C**, Wheeler SE, Olubajo B, Hawkins A. Evaluating Guideline Adherence regarding Empirical Vancomycin use in patients with neutropenic fever. *Int J Infect Dis* 2018; Feb 22. pii: S1201-9712(18)30052-3. doi: 10.1016/j.ijid.2018.02.016. PMID: 29477362
39. Parra-Henao G, Amioka E, **Franco-Paredes C**, Colborn KL, Henao-Martinez AF. Heart failure symptoms and ecological factors as predictors of Chagas disease among indigenous communities in the Sierra Nevada de Santa Marta, Colombia. *J Card Fail* 2018; Mar 26. pii: S1071-9164(18)30119-2. doi: 10.1016/j.cardfail.2018.03.007.
40. Vela Duarte D, Henao-Martinez AF, Nyberg E, Castellanos P, **Franco-Paredes C**, Chastain DB, Lacunar Stroke in Cryptococcal Meningitis: Clinical and Radiographic Features. *J Stroke and Cerebrovascular Disease* 2019;
41. Chastain DB, Henao-Martinez AF, **Franco-Paredes C**. A clinical pharmacist survey of prophylactic strategies used to prevent adverse events of lipid-associated formulations of amphotericin B. *Infect Dis* 2019;
42. Henao-Martínez AF, Chadalawada S, Villamil-Gomez WE, DeSanto K, Rassi A Jr, **Franco-Paredes C**. Duration and determinants of Chagas latency: an etiology and risk systematic review protocol. *JBI Database System Rev Implement Rep*. 2019 Jul 22. doi: 10.11124/JBISRIR-D-18-00018.

RESEARCH ORIGINAL ARTICLES AS COLLABORATOR (clinical, basic science, other) in refereed journals:

43. Benator D, Bhattacharya M, Bozeman L, Burman W, Cantazaro A, Chaisson R, Gordin F, Horsburgh CR, Horton J, Khan A, Lahart C, Metchock B, Pachucki C, Stanton L, Vernon A, Villarino ME, Wang YC, Weiner M, Weis S; **Tuberculosis Trials Consortium**. Rifapentine and Isoniazid Once a Week versus Rifampicin and Isoniazid twice a week for Treatment of Drug-susceptible Pulmonary Tuberculosis in HIV-Negative Patients: a Randomised Clinical Trial. *Lancet* 2002; 360:528-34.
44. Weiner M, Burman W, Vernon A, Benator D, Peloquin CA, Khan A, Weis S, King B, Shah N, Hodge T; **Tuberculosis Trials Consortium**. Low INH Concentrations and Outcome of Tuberculosis Treatment with Once-weekly INH and Rifapentine. *Am J Rev Crit Care Med* 2003; 167:1341-1347.

45. Jasmer RM, Bozeman L, Schwartzman K, Cave MD, Saukkonen JJ, Metchock B, Khan A, Burman WJ; **Tuberculosis Trials Consortium**. **Recurrent Tuberculosis in the United States and Canada: Relapse or Reinfection?** *Am J Respir Crit Care Med* 2004; **170:1360**-1366.
Mendelson M, Davis XM, Jensenius M, Keystone JS, von Sonnenburg F, Hale DC, Burchard GD, Field V, Vincent P, Freedman DO; **GeoSentinel Surveillance Network**. Health risks in travelers to South Africa: the GeoSentinel experience and implications for the 2010 FIFA World Cup. *Am J Trop Med Hyg*. 2010; 82(6): 991-5.
46. Hagmann S, Neugebauer R, Schwartz E, Perret C, Castelli F, Barnett ED, Stauffer WM; GeoSentinel Surveillance Network. Illness in children after international travel: analysis from the **GeoSentinel Surveillance Network**. *Pediatrics.* 2010; 1 25(5): e1072-80.
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FORMAL TEACHING

Medical Student Teaching

2001 - 2002	Clinical Methods, Emory University School of Medicine
2001 - 2002	Clinical Instructor Harvey Cardiology Course, Emory University School of Medicine
2001 - 2002	Problem-Based Learning for Second year Medical Students, EUSM
2005 - 2011	Clinical Methods Preceptor, ECLH
2006 - 2008	Medical Spanish - Instructor for M2, EUSM
2006 - 2007	Directed Study on Social Determinants of Infectious Diseases for M2 students (Lindsay Margolis and Jean Bendik), EUSM
2007 - 2011	Instructor - Global Health for M2 Students, EUSM
2007 - 2008	Presentation-Case Discussion – Social Determinants of Diseases – Coordinated by Dr. Bill Eley – Emory School of Medicine New Curriculum.
2018-	Small Group: Parasitic Diseases, Microbiology Course for First Year Medical Students, University of Colorado, Anschutz Medical Center.
2019-	MS-2 Small group discussion Microbiology, University of Colorado, Anschutz Medical Center: Parasitic Diseases, CNS Infections, Septic Arthritis-Cat Bite
2019-	Class Global Health and Underserved Populations of the New SOM CU Curriculum. Course Co-Director. Pilot Class (Jan 6-Jan 17, 2020).
2020-	MS-2 Small group discussion Microbiology, University of Colorado, Anschutz Medical Center: Parasitic Diseases, CNS Infections, Septic Arthritis-Cat Bite

Graduate Program:

Training programs

2006-2011	Professor - GH511 (Global Health 511) International Infectious Diseases Prevention and Control, Rollins School of Public Health
2009-2011	Professor – GH500 D – Key Issues in Global Health, Career MPH Program
2006-2011	Thesis Advisor to students Global Health Track – Hubert Department of Global Health, Rollins School of Public Health of Emory University
2008-2011	Coordinator International Exchange between Rollins School of Public Health and National Institute of Public Health, Cuernavaca, Mexico – Supported by the Global Health Institute of Emory University

Residency and Fellowship Program:

2004-2011	Resident Report – Noon Conferences Emory Crawford Long Hospital and Grady Memorial Hospital
2004-2011	Didactic Lectures on Parasitic Diseases and Non-tuberculous mycobacterial diseases for Internal Medicine Residents and Infectious Disease Fellows
2005-2008	Coordinator Journal Club Infectious Disease Division
2005-2011	Travel Medicine Elective, Internal Medicine Residents (2 internal residents per month)
2005	Grand Rounds – EUH - Department of Medicine: “Travel Medicine”
2006	Grand Rounds – ECLH – Department of Medicine: “Malaria”
2008	Grand Rounds - ECLH – Department of Medicine: “Leprosy”
2008-2011	Journal Club Coordinator, Internal Medicine Residency Program – ECLH

2009	Grand Rounds - EUH – Department of Medicine: "Leprosy a Modern Perspective of an Ancient Disease"
2009	Grand Rounds – Pulmonary and Critical Care Division – Neglected Tropical Diseases of the Respiratory Tract, June 16, 2009
2017	Grand Rounds – Leprosy, University of Colorado, Anschutz Medical Center, Division of Infectious Diseases, December 2017
2017	Grand Rounds – Infections associated with Secondary Antiphospholid Syndrome, University of Colorado, Anschutz Medical Center, Division of Rheumatology,
2018	Didactic Session – Travel Medicine (Pretravel and Postravel) Infectious Diseases Fellowship Anschutz Medical Center, Division of Infectious Diseases
2017	Infectious Diseases Fellows Clinic, University of Colorado, Anschutz Medical Center, IDPG.
2019	Invited Speaker: Travel Medicine, Pretravel/Postravel Care, Physician Assistant Program, September 12, 2019, University of Colorado, Anschutz Medical Center

Other categories:

2000-2002	Physician Assistant Supervision during Fellowship/Junior Faculty, Emory University
2004-2007	Mentoring of four College Students to enter into Medical School (Emory, Southern University, and Dartmouth): Lindsay Margolis 2004-Emory University Michael Woodworth 2005 – Emory University Peter Manyang 2007 – Southern University Padraic Chisholm 2007 – Southern University/Emory University
2009-2011	Project Leader. Partnership – Emory Global Health Institute – University-wide - Emory Travel Well Clinic and is titled Hansen's disease in the state of Georgia: A Modern Reassessment of an Ancient Disease". http://www.globalhealth.emory.edu/fundingOpportunities/projectideas.php. Students: 5 MPH students (RN/MPH, MD/MPH)
2017-	Infectious Diseases Fellowship Program, University of Colorado, Anschutz Medical Center. Teaching activities, Inpatient and outpatient (ID Fellows Weekly Clinic)
2019-	Infectious Diseases Fellowship Program Director, University of Colorado, Aurora Colorado

Supervisory Teaching:

Ph.D. students directly supervised:

Global Health, Rollins School of Public Health - PhD Task Force Member – 2007-2009

Residency Program:

Emory University: Internal Medicine Residents and Infectious Disease Fellows Supervision – Inpatient Months – 3-4 months per year on Grady Wards. I participated in the presentation and discussion of clinical cases, and discussion of peer-reviewed journal with medical students, residents, and fellows. Overall evaluations: Outstanding Teacher. (Anna Von 2005-2006; Seth Cohen 2008, Susana Castrejon 2007; Lindsay Margoles 2007-2008; Jean Bendik 2006-2008; Meredith Holtz 2007-2008)

University of Colorado, Anschutz Medical Center (since June 2017- present). Case discussion in infectious diseases during clinical rounds inpatient services (ID Gold, ID Blue, ID Orthopedics).

2004-2009 Thesis advisor – MPH Students – Hubert Department of Global Health – Concentration Infectious Diseases: Brenda Thompson 2004; Katrina Hancy 2004; Trina Smith 2006; Melissa Furtado 2007-2008; Oidda Museru 2008-2009; Hema Datwani 2010; Ruth Moro 2010; Talia Quandelacy 2010
2015 – Class GH511, Topic: "Leprosy" as part of the International Infectious Diseases, Global Health Track, Rollins Schoolf of Public Health, Emory University, Atlanta GA
2017 – Class GH511, Topic: "Leprosy" as part of the International Infectious Diseases, Global Health Track, Rollins School of Public Health, Emory University, Atlanta GA
2019 - Project Mentorship – Diffuse lepromatous leprosy. Undergraduate Student, University of Colorado, Boulder. Mikali Ogbasselassie. Project was carried out in Collaboration with the Dermatology Center of the Hospital General de Mexico.
Poster presentation by Mikali Ogbasselassie September 22, 2019, UMBC, Baltimore, Maryland.

EXHIBIT

11

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Ángel Alejandro HEREDIA MONS et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civ. No.: 1:19-cv-01593**
	)	
Kevin K. McALEENAN et al.	)	
	)	
Defendants/Respondents.	)	
	)	

DECLARATION OF DR. PETER SCHARF

I, Dr. Peter Scharf, declare under penalty of perjury under the laws of the United States as follows:

I. Overview

1. The instant expert declaration,[1] executed after reviewing evidence-based materials regarding infectious disease contagion in correctional and detention facilities, concludes that the risks of COVID-19 infection are so substantial in facilities where *Heredia Mons* class members are detained, (particularly Louisiana centers), that release is required to ensure their protection from infection by the COVID-19 virus and its grave aftermaths.

II. Professional background

2. My name is Dr. Peter Scharf. I am currently employed at the LSU School of Public Health as Professor of Public Health.[2] I received my doctorate in l973 from Harvard University. Since then, I have pursued a career in criminal justice research, practice, and teaching at the University of California, Seattle University, American University, the University of

[1] The contributions of Elizabeth Kitty and Carolyn Lilly are gratefully acknowledged.
[2] Curriculum Vitae of Dr. Peter Scharf attached as Appendix A.

New Orleans, Texas State University, Tulane University School of Public Health and Tropical Medicine, and currently, at the Louisiana State University School of Public Health.

3. I have experience working with (and publishing results about) several nationally visible cases including the Chicago Police Department Burge Case and the Crown Heights Civil Disorder Report, which directly involved the use of foreseeable risk concepts and ideas. Additionally, I have written about policing ethical standards and have authored a book on the use of deadly force, "The Badge and the Bullet," which has been regarded by reviewers as a standard in the field, as well as seven other books and dozens of book chapters and journal articles.

4. At the National Police Foundation in Washington, D.C., I supervised the development of a police foreseeable risk management and prediction system (RAMS); supervised a national community policing project; initiated a project that integrated correctional and police policies; and helped assess the Crown Heights Civil Disorders. I founded the *Center for Society, Law and Justice* ("CSLJ") at the University of New Orleans in l995. CSLJ evolved into a nationally prominent, criminal justice, technical-assistance provider supported by eight different cooperative agreements related to cyber-crime, ethics, correctional policies, technology integration, assessment of new technologies, performance metrics, and criminal justice integrity policies.

5. I was employed at Tulane University School of Public Health and Tropical Medicine as a Research Professor of Public Health and Tropical Medicine in the Global Systems and Development Department from June 2008 to August 2014. I conducted research on issues related to juvenile correctional reform (TYC), prison rape (PREA), homicide trends, and

assessments of efforts to avert violent crime trends through prevention and early intervention. I was named the Undergraduate Public Health Teacher of the Year in 2012 and 2013. Previously I was the *Foundations of Excellence* Award Winner at Texas State University (2008).

6. I am currently (since August 2014) a Professor of Public Health at the LSU School of Public Health. I have received funding from the United States Department of Justice for three major correctional initiatives working in cooperation with the Louisiana Department of Public Safety and Corrections regarding high-risk offenders in New Orleans, co-occurring disorders (project was winner of ACA innovation award) and a statewide recidivism study. I was the keynote speaker at the Educational Testing Service Conference in December 2016 in San Francisco regarding Education and Corrections. I teach courses at LSU School of Public Health related to public health perspectives related to Ethics, Violence, Foundations of Public Health, and a Doctoral Public Health Research seminar.
7. I serve as facilitator and analyst for the public safety team of New Orleans Mayor LaToya Cantrell's public safety working group. I conduct research and facilitate meetings with criminal justice leaders chosen by then Mayor Elect LaToya Cantrell, and I co-authored much of the final recommendations regarding the status of the New Orleans Police Department ("NOPD"), facilitated meetings with experts on the sub-committee team, and helped develop NOPD leadership key performance indicators.
8. I testified before the U.S. House Judiciary Crime Subcommittee on four occasions (2007, 2012, 2014, and 2015) regarding violent-crime prevention. I have had expert testimony accepted in U.S. District Court in three l983 (42) cases and have written expert reports related to the issue of foreseeability and crime in three recent cases (Hunter, Stuart,

Williams and Grant County jail). I have been qualified to present testimony in three 42 U.S.C. Section 1983 cases.

9. I authored a report which contributed to a favorable opinion by Seventh Circuit Judge Richard Posner in a case (*Wittmer vs. Peters*) regarding correctional officer hiring policies. I have testified or provided information, depositions, or reports on more than a dozen legal cases regarding correctional policies. I have worked for the Louisiana Department of Public Safety & Corrections regarding the assessment of five different cooperative agreements regarding recidivism reduction, co-occurring disorders, and statewide correctional policy.

III. Case Issues

10. The present case involves a question as to whether the New Orleans Immigration and Customs Enforcement ("ICE") Field Office should use its authority and discretion to release detained asylum-seekers in order to protect them from health risks caused by potential and actual exposure to the novel Coronavirus (COVID-19).

11. In preparing this declaration, I reviewed witness declarations, ICE procedures regarding parole, ICE COVID-19 guidance, evidence-based research regarding infections in corrections, and statistics related to parole out of the New Orleans ICE Field Office.

IV. Factual and Evidentiary Basis for Expert Declaration

12. Under the authority of the New Orleans ICE Field Office, approximately 8,000 (8066) immigrants are detained in often former or newly constructed correctional facilities and managed by private correctional contractors, including GEO, CoreCivic, and La Salle

Corrections:[3] Below is a list of facilities where detained immigrants are held under the custody of the New Orleans ICE Field Office along with an estimate of their available capacity.

a. Adams County Detention Center Natchez, MS – 2,232;

b. Allen Parish Detention – 200;

c. Bossier Parish Medium Security Facility – 240;

d. Catahoula Correctional Center – 835;

e. Etowah County Detention Center – 360;

f. Jackson Parish Correctional Center – 1,000;

g. LaSalle ICE Processing Center –1,200;

h. Natchitoches Parish Detention Center – 563;

i. Pine Prairie ICE Processing Center – 1,094;

j. Richwood Correctional Center – 1,000;

k. River Correctional Center – 500;

l. South Louisiana ICE Processing Center – 1,000;

m. Tallahatchie County Correctional Facility – 575; and

n. Winn Correctional Center – 1,500.

[3] *Hannah Gaber, Under Trump, private prisons are cashing in on ICE detainees*, USA TODAY (Dec. 20, 2019), available at: https://www.usatoday.com/in-depth/news/nation/2019/12/19/ice-detention-private-prisons-expands-under-trump-administration/4393366002/ (accessed March 29, 2020).

13. Parole probabilities are widely variable in the New Orleans ICE Field Office centers as suggested by the government's data from Defendants' March 2020 report[4] below:

Facility	**Grant/Total**	**(Grant Rate %)**
• ACDC	7/55	(12%)
• JACKSON	4/47	(30%)
• WINN	47/145	(32%)
• RICHWOOD	14/40	(35%)
• BASILE	14/75	(19%)
• RIVER	13/38	(34%)
• PINE PRAIRIE	5/12	(41%)
• LA SALLE	0/4	(0%)
• CATAHOULA	0/3	(0%)
• ALLEN PARISH	0/1	(0%)

14. It should be noted that in 2016 about 75 percent of parole applications were successful. In 2018, fewer than 2 percent were granted. In 2020, successful applications began to rise as indicated above.[5] It should be noted that there is missing data in explaining differences in ICE detention parole outcomes, particularly in describing regional and detention center patterns of ICE risk assessment data.
15. The private corrections ICE contract detention vendors who manage ICE detention centers in the region work on contracts that retain them at fixed rates-approximately $50.00 per day per detainee (more than twice the reimbursement rate paid to Louisiana parishes to house Louisiana Department of Public Safety & Corrections inmates). The facilities are crowded and staffed by employees who are paid from about $11.00 to $18.00 per hour. Many of the facilities are located in Central and Western Louisiana and are characterized by limited vocational, educational, and healthcare resources.

[4] Data received from SPLC counsel on March 27, 2020, taken from Defendants' most recent report.
[5] Data estimates from CBS News, Plaintiffs' Complaint and as provided by SPLC counsel.

16. The research related to infectious disease and correctional facilities has built an evidence base regarding the epidemiological risks of allowing infectious disease processes to spread in the confined space of detention centers.

17. Research based upon the experience of correctional facilities faced with a range of infections suggests:

    a. The physical plant of most correctional facilities, including detention facilities is conducive to the spread of infectious disease.[6]

    b. Forced correctional "*sociation*" (eating, counts, recreation, searches, holding cells, etc.) are often mechanisms of contagion[7] along with risks of violence and disorder.

    c. Correctional Officers, staff, and visitors present inadvertent risks of infection to inmates.[8]

    d. Commonly used mechanisms to control infection are difficult to implement given the constraints of almost all correctional facilities.[9]

    e. Residents of correctional and detention centers have been found to present pre-conditions for prolonged and severe COVID-19 illness or death compared with other populations.[10]

    f. Research using proven scientific methods related to detention centers has identified several documented underlying conditions among detained persons, and these comorbidities make detention center detainees especially vulnerable to severe COVID-19 disease and death.

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[6] Lauren-Brooke Eisen, How Coronavirus Could Affect U.S. Jails and Prisons, Brennan Center For Justice (March 13, 2020), available at: https://www.brennancenter.org/our-work/analysis-opinion/how-coronavirus-could-affect-us-jails-and-prisons (accessed March 29, 2020).

[7] Scharf P. and Holt, N., "*Empty Bars*" Prison Journal, 1983.

[8] American Correctional Association, http://www.aca.org/ACA_Prod_IMIS/ACA_Member/Healthcare_Professional_Interest_Section/Copy_of_Coronavirus_COVID.aspx (accessed March 29, 2020).

[9] *See* https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html (accessed March 29, 2020).

[10] Lea Skene and Matt Sledge, *Visits suspended at Louisiana prisons as advocates warn of spreading virus behind bars*, THE ADVOCATE (March 13, 2020), available at: https://www.theadvocate.com/baton_rouge/news/coronavirus/article_fbdc7af8-64a4-11ea-bb78-0b1346e36acc.html (accessed March 29, 2020).

g. Epidemiological research suggests the potential for increased mortality and prolonged mortality in correctional facilities compared with less dense and controlled environments.[11]

h. Louisiana has the highest per capita rate of COVID-19 incidence in the world.[12]

i. The areas in which the Louisiana ICE Detention Centers are located are characterized by low medical access and public citizen health literacy.[13]

j. The managers hired by the region's ICE contractors (The GEO Group and LaSalle Corrections) have little training to cope with infectious disease.[14]

18. Several recognized health authorities have initiated "warnings" to correctional and detention managers related to the health risks in correctional and detention facilities.

a. The Brennan Center on March 13, 2020 outlined[15] from the point of view of correctional research that the risks of widespread risks of COVID-19 infection in correctional and detention centers were substantial:

i. Prisons and Detention Centers are often unhygienic environments.

ii. Special populations (e.g. older inmates) within detection center and correctional environments have unique risks to avoid risks of infection and severe medical aftermaths following COVID-19 infection.

iii. Separation of correctional and State healthcare systems pose unique risks to inmates and detainees.

iv. Action strategies to reduce COVID-19 risks to inmates and detainees include release of individuals who are at risk.

v. Comprehensive agency planning to reduce risks.

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[11] *See* footnote 5, *supra*.

[12] *See* Andrew Capps, *Louisiana experiences fastest COVID-19 case increase in the world in first few weeks*, LAFAYETTE DAILY ADVERTISER (March 24, 2020), available at: https://www.theadvertiser.com/story/news/local/2020/03/24/covid-19-cases-louisiana-coronavirus-spreading-faster-than-anywhere-world/2907504001/ (accessed March 29, 2020). *See also* Louisiana Governor's Office of Homeland Security and Emergency Preparedness, *COVID-19 Louisiana Case Info*, https://gov.louisiana.gov/assets/docs/covid/govCV19Brief-2.pdf..

[13] Louisiana Public Health Briefing, 2019.

[14] Site Visit with Geo regarding program effectiveness, October 2016.

[15] *See* footnote 5, *supra*.

b. The Centers for Disease Control and Prevention (CDC) on March 23, 2020, initiated a Guidance statement[16] to Correctional and Detention facilities regarding the risks of COVID-19 infection in these settings suggesting:

i. Residents live in settings where people are forced to eat, sleep, and have recreation in common areas.

ii. Infection risks for COVID-19 infection include unmonitored staff entrance, visitors, health worker contact, etc.

iii. Detention Centers with populations from all over the world present unique risks of COVID-19 infection.

iv. There are limited opportunities for COVID-19 infection in many correctional facilities.

v. Many residents in detention and correctional facilities have existing conditions that may exacerbate infections that occur.

19. ICE guidance defines standards for healthcare and wellness, applicable to contract detention centers, which offer some protections.[17] However, the health services described fall short of needs anticipated in the advent of a COVID-19 infection affecting ICE contract detention centers in the New Orleans ICE Field Office region, particularly Louisiana.

V. Expert Opinions

A. First Opinion: There is an obvious, foreseeable risk of COVID-19 and the health threats it poses to people detained in these ICE facilities.

20. The current widespread outbreak of COVID-19 in the region, particularly Louisiana, combined with the unsanitary conditions in ICE detention centers, may result in a threat of irreparable harm, such as serious, prolonged illness and death, to the health and safety of detained individuals.

[16] *See* footnote 8, *supra*.
[17] https://www.ice.gov/doclib/detention-standards/2011/4-3.pdf

21. The first U.S. case of COVID-19 was reported on January 20, 2020 in Washington State, which provided New Orleans ICE authorities with more than five weeks to put into place a prevention and control plan for COVID-19.[18]

22. In addition, past influenza outbreaks within the U.S. and other countries showcase the vulnerability of prison populations to disease and virus outbreaks. Thus, demonstrating a well-established and commonly known need for detention centers to take extra precautions to protect detained persons from disease.[19]

B. Second Opinion: The characteristics of the detention centers present a risk of serious illness and death from the contraction and transmission of COVID-19, including the fact that Louisiana has the highest rate per capita of infections, and that the populations inside these facilities have a heightened risk due to the density of population, heavy use, and unsanitary conditions. In addition, staff and in some situations, newly detained persons, who have been outside of the detention center, may serve as vectors for spreading the virus to the existing detained population who have limited ability to take necessary precautions.

23. Louisiana reported its first case of COVID-19 on March 9, 2020. Since then, the State has experienced among the worst outbreaks in the country and, as of March 27, 2020, Louisiana had 2,746 cases of novel coronavirus statewide including 119 deaths, with a corresponding case fatality rate of 4.3 percent.[20] Per capita, this is one of the highest COVID-19 incidence rates in the U.S., a fact which further emphasizes the significant threat of serious illness or death that the disease poses to the public, and especially to vulnerable populations such as people who are held in detainment facilities.

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[18] Michelle Holshue, Michelle, *First case of 2019 Novel Coronavirus in the United States*, N. ENGL. J. MED.. (2020).

[19] Stuart Kinner, *Prisons and custodial settings are part of comprehensive response to COVID 19*, The Lancet (March 17, 2020)

[20] https://wgno.com/news/health/coronavirus/louisiana-covid-19-cases-jump-to-2746-119-deaths/

24. Government-advised precautionary steps from the CDC to prevent the spread of COVID-19 including "know how it spreads," "avoid being exposed to this virus," and "clean your hands often" are impossible for detained persons to follow within a carceral setting. There is little evidence that detention center management identified and implemented effective strategies to implement these precautionary steps.[21]

25. The ubiquitous warnings about COVID-19 infections and the tragic aftermaths that are foreseeable in confined environments with limited healthcare resources and public health training, should have raised concerns among DHS and ICE leaders and contract detection center managers.

26. Confined settings may have a higher reproduction number for the coronavirus. Detention centers, like early outbreaks in nursing homes and on cruise ships, are characterized by significant numbers of people in small, confined spaces. Early studies suggest[22] that the reproduction numbers of COVID-19 in confined settings are significantly higher than community-level transmission, thus suggesting detention centers need to take extra precautions to ensure the safety of the detained population, staff and visitors.

C. Third Opinion: Contract detention center management and ICE-run detention facilities do not have the adequate medical care and cannot ensure reasonable safety, to the detained population, resulting in an increased vulnerability to COVID-19 impacts. In addition, detained persons with underlying chronic conditions who experience an even greater risk of the consequences of COVID-19 are not segmented from the rest of the detained population.

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[21] *See* footnote 8, *supra*.

[22] Kenji Mizumoto at al., *Estimating the asymptomatic proportion of coronavirus disease 2019 (COVID-19) cases on board the Diamond Cruise ship, Yokahama, Japan* (2020), available at: https://www.eurosurveillance.org/content/10.2807/1560-7917.ES.2020.25.10.2000180

27. The 2011 Operations Manual ICE Performance-Based National Detention Standards (PBNDS) and the 2019 National Detention Standards Update (NDS)[23] define the standards for ICE detention centers. In both, standards detail the need for an emergency protocol, including a process for preventing infectious diseases and providing necessary medical care for detainees that are tailored to the detainees' underlying medical conditions. Thus, not developing and enacting an emergency plan embodies a failure to fulfill the standards set forth by ICE for its detention centers.[24]

28. According to PBDNS, within two weeks of arrival at a detention center, all detainees should receive a comprehensive health assessment. This assessment identifies underlying risks, including chronic health challenges both physical and mental. Thus, the medical staff at ICE detention centers would be able to identify detainees who are more vulnerable to COVID-19 and more at risk of death.

29. There are existing standards and precedents for how detention centers decrease the negative impacts within detention centers of diseases like tuberculosis that have a high transmission rate. For example, under PBDNS standards, Tuberculosis (TB) Management includes working with state and local health departments and keeping detainees with suspected TB in isolated rooms with negative pressure ventilation. This suggests that detention centers are already familiar with a protocol that could have been enacted for COVID-19.[25]

30. From the information and documents that I have reviewed, the New Orleans Field Office does not appear to have implemented a protocol to deal with the COVID-19 pandemic.

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[23] See https://www.ice.gov/detention-standards/2011 and https://www.ice.gov/detention-standards/2019#wcm-survey-target-id

[24] *Id*.

[25] Assumes tier with Randomized Controlled Trial procedures as described in www.CrimeSolutions.Gov.

D. Fourth Opinion: There are foreseeable risks in terms of further outbreak and negative health impacts of COVID-19 on the detained population, unless efforts to release people are immediately undertaken.

31. The best epidemiological models available, based on valid scientific research, suggest widespread COVID-19 contagion in this region's ICE facilities, which will lead to broad contagion unless release efforts are initiated in a rapid timeframe.

32. Regional practices involving the outsourcing of detention and jail services to contractors provide disincentives to release detainees even in the face of imminent and documented medical risks to people held in the custody of ICE subcontractors in the New Orleans ICE Field Office region.

33. The risks of this practice of outsourcing are widely known and should have been known by DHS and ICE leaders who had a duty to supervise sub-contractors in terms of their management of health risks and healthcare response duties.

34. The local community benefits of contract ICE detention centers, in this region with few resources, appear to result in political dynamics, along with national political sentiment, that likely contributed to low rates of ICE parole grants.

35. The reality that this region's ICE facilities are located in remote or rural areas with limited resources and that medical resources proximate to the relevant ICE detention facilities leads to the conclusion that, were a COVID-19 infection to occur, widespread, long-term morbidity and mortality are more probable than not people detained by the New Orleans ICE Field Office.

E. Summary Opinion: Despite explicit guidelines and standards mandating proactive efforts to reduce disease in the facilities, the ICE has failed to respond to obvious warnings, risk factors and direct information to reduce the risks COVID-19 posed to people detained in their custody. The risks of irreparable harm posed to these individuals, including the more probable than not consequence of long-term illness

and death, is in my opinion substantial and avoidable if appropriate release mechanisms are adopted in a rapid timeframe.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 29th day of March at New Orleans, Louisiana, United States.

Dr. Peter Scharf
Louisiana State University Health Sciences Center
2020 Gravier Street, 3rd Floor
New Orleans, Louisiana
pschar@lsuhsc.edu
(504) 509-9800

Appendix A – Curriculum Vitae of Dr. Peter Scharf

Profile

- Nationally recognized leader in corrections, criminal justice research, field assessments, performance metrics, police deadly force training, and public health aspects of crime
- Founding Director of the *Center for Society, Law and Justice*
- Noted media interviewee on topics ranging from education for at risk youth, ethics and integrity, law enforcement and forensics, use of force, criminal violence and criminal justice technologies
- Certified as an expert witness in U.S. District Court in the police use of force
- Demonstrated success in multi-million-dollar grant funding and execution
- Worked with White House (Stuart Baker) assessment of Hurricane Katrina criminal justice aftermath
- Testified before House Judiciary Crime Sub-Committee Four times(2007; 2012; 2013; 2015)
- *Foundations of Excellence* Award Winner at Texas State University (2008)
- Named President N.O. Schweitzer Fellowship Board of Directors
- Winner of Tulane Public Health Outstanding Teaching Award (2012 and 2013)
- Serve as facilitator and analyst for the Public Safety Transition team of New Orleans Mayor LaToya Cantrell.
- Helped Organized and facilitated a national Opioid Conference in New Orleans (2019)
- Presented a series of lecture on violent crime at the University of Alabama Medical School

Dr. Peter Scharf
Institute of Public Health and Justice
LSU School of Public Health
504-509-9800 (cell)
504-568-5703(office)
Pschar@lsuhsc.edu

Career Overview

Dr. Peter Scharf is a nationally recognized leader in public health-focused criminology with a specialized focus upon violent gun crimes. He was an invited speaker to the Nobel Public Service Seminar in Stockholm, Sweden. He has innovated new undergraduate course offerings related to public health perspectives related to violence and change processes related to public health. Multiple national media have interviewed him about his expertise related to violent crime.

From 1992-95, Dr. Scharf served as Director of Training and Technical Assistance for the Police Foundation in Washington, DC. He assumed responsibility for the funding and management of a celebrated risk management technology and led a training and technical assistance unit that was dedicated to improving law enforcement practices in civil disorders, diversity training, ethics, the use of force, community policing and effective management practices. He participated in two major investigations: the Chicago Police Department Burge Torture Case, and the New York City Crown Heights Disorder Investigation.

He was the founder of the Center for Society, Law and Justice (CSLJ) at the University of New Orleans. He led the creation of one of the highest quality criminal justice technology training, research, and implementation entities in the United States. Additionally, Dr. Scharf played an integral role in attracting several multi-million-dollar grants to CSLJ and its partner, the University of New Orleans. The Center for Society, Law and Justice won national recognition for its innovative programs supporting law enforcement and correctional professionals. From 1998-2008, the Center managed a $2.8 million-dollar national Bureau of Justice (DOJ)

Assistance Cooperative Agreement to assist national law enforcement in implementing computer technologies. CSLJ completed several major cooperative agreements with DOJ/ODP including a national "*Managing Law Enforcement Integrity*" project, the "*Art of Performance Measures*", a multi-million-dollar project related to Forensic Digital investigations, and a PSN project, which focused upon research related to the targeting of guns in high crime neighborhoods.

While at Texas State University and later Tulane University, he managed a PREA risk management project designed to identify and manage the risk of rape in prisons. He was the 2008 *Foundations of Excellence* Award Winner at Texas State University. While at Tulane University, Dr. Scharf was the named the Outstanding Public Health Teacher in both 2012 and 2013.

Dr. Scharf testified four times before the House Judiciary Committee regarding murder trends and worked with Stuart Baker of the White House on an assessment of the federal Response to Hurricane Katrina.

He is the author of several books, including *Readings in Moral Education* (1978), *Growing Up Moral* (1979), *Towards a Just Correctional System* (1980), *Badge and the Bullet* (1983), *A Guide to Computer-Age Parenting (1984), Understanding the Computer-Age* (1988), *Law Enforcement Integrity: The state of the art (2006), and the Justice Information Sharing Performance Measures Guide* (2008), each of which has had a strong impact on educational, public health and criminal justice practice.

He has appeared in a number of national media entities in the past five years including NPR (6), *NBC Evening News* (3), PBS (3), *Nightline*, BBC (2) and CNN (3) and has been interviewed by the New York Times (4), Washington Post (2), and Wall Street Journal, Houston Chronicle (2), USA Today (6) and other national news entities. He was both treasurer and secretary of the FBI Citizen's Academy Alumni Association since 2004. He was asked to testify four times before the House of Representatives (5/10/07; 6/24/12, 1/23/13 and 7/22/15.)

He recently was named a facilitator and analyst for the Public Safety (N.O.P.D. sub-committee) developing policies for Mayor Latoya Cantrell. Dr. Scharf Facilitates meetings with City Leaders charged with formulating law enforcement policy. He recently helped organized and helped facilitate a national Opioid Crisis conference in New Orleans (October 31, 2019) and will be presenting a series of lectures at the University of Alabama Medical School in November 2019.

Professional Experience:

University Employment

- 1992-1995: *Police Foundation, Washington, D.C.*: Director of Technology and Technical Assistance: Managed and developed major service lines for leading police identified nonprofit organization in US. Directed community-based police training programs. Organized contacts with funding and other governmental agencies. Directed national technology, technical assistance, and training programs.

- 1995-2006: *University of New Orleans*, New Orleans, LA: Director, Center for Society, Law and Justice: Directed funding, training, and research efforts of consortium working with major New Orleans and national law enforcement and correctional entities.

- 2006-2008: *Texas State University, Research Professor Department of Criminal Justice*: Executive Director, Center for Society, Law and Justice at Texas State: Directed all operations of the Center, working with Texas State Criminal Justice faculty and U.S. Department of Justice.

- 2008-2014 *Tulane University Research Professor of Public Health and Tropical Medicine*, Global Health Systems Department: Conducted research related to correctional reentry and public health, homicide trends and assessments of efforts to avert violent crime trends through prevention and early intervention.

- 2014-Current: Professor of Public Health, Institute of Public Health and Justice, LSU School of Public Health: Conduct research regarding nationally-funded projects regarding jail reduction (MacArthur), status of

  17-year-old offenders, co-occurring disorders, and evidence-based reentry.

Consulting:

- *1970* to 1979: *Harvard University*: Co-Project Director, Just Community Prison Project. Managed innovative correctional rehabilitation program.

- 1973-1976: Biological Sciences Curriculum Study, Policy Board, Human Sciences, Author, Rules (Human Sciences Curriculum).

- 1976-1980: *CBS Publishing:* Acquisitions Editor, Trade and Education Titles: Acquired human development, criminal, education justice and trade book manuscripts.

- 1979-1982: *Public Policy Research Organization:* Director, Police Uses of Deadly Force Project. Directed use of deadly force research program.

- 1980-1986: *Mc Graw Hill Book Company*: Senior Acquisitions Editor for Computer-Based Educational and Training Programs. Acquired and developed major computer-based training projects.

- 1986-*1988: Institute for Scientific Information*: Project Director. Director and author of major tool-based middle school curriculum: Micro Works.

- 1989-1991: *Wasatch Education Systems*: National Manager for Criminal Justice Technical Products. Managed market and product efforts for highly profitable computer market segment.

- 1994-Present: *Civigenics*: Founding Partner. Wrote Venture Plan document and developed drug treatment mode for company with more than $80 million dollars in annual recurring revenue and sites in 30 states.

- 1996-1999: *Simon and Schuster/Viacom-Invest*: Consultant. Facilitated development of web and criminal justice technologies and marketing of adult education materials.

- 1997-Present: *Digital Concepts, Inc.* (DCI): Partner. Wrote venture plan in a high-tech company in late venture stage.

- 1999-2000: *Institute for Forensics* (Seattle, WA): Consultant. Helped design new web-based technology to analyze homicide cases.

- *2001*: *California Peace Officers and Standards*: Consultant related to values and policing.

- 2002-2003: *State of Washington*: Design of new parole risk assessment technology.

- 2003-2005: *Sierra Systems*: Consultant for Criminal Justice Programs.

- 2003: *FBI Citizen's Academy Alumni Association*: Secretary, Treasurer, Board Member.

- 2004: *Achieve3000*: Curriculum Subject Matter Expert for on-line moral curriculum development.

- 2004-2007: *International Association of Chiefs of Police Community Policing* Consultant: SMART Program-Juvenile Services Program.

- 2005-2006: *White House (Stuart Baker):* Assessment of federal response to Hurricane Katrina.

- 2007-2012: *International Association of Chiefs of Police Corrections*:
  Consultant on Law Enforcement Information Sharing.

- 2007-2008: *Eckerd Youth Services:* Consultant on Performance Measures Implementation.

- 2007: Developed Testimony for House Judiciary Committee-Crime Subcommittee-Bobby Scott, Chair.

- 2008-2010: *Texas Youth Commission* Consultant on the evaluation of innovative programming.

- 2010: Named to New Orleans Mayor Landrieu's Criminal Justice Transition Team.

- 2011- 2012: Consultant to AMI kids (Tampa FLA).

- 2012-2013: Consultant to Hilliard Heintze (Chicago, Ill.)

- 2012-4- Consultant to SAFY of America, (Delphos, Ohio)

- 2015-Developed testimony for Youth Violence Congressional Briefing

- 2016-17-Educational Testing Service Developed assessment strategy for longitudinal HiSet prison research.

- 2019-Named National Communications Director for the National Prevention Science Collaborative

2017-19: Facilitator and analyst for the Public Transition team/Working Group of New Orleans Mayor LaToya Cantrell. I conduct research and facilitate meetings with criminal justice leaders chosen by the Mayor Elect La Toya Cantrell and was named at prime facilitator for the NOPD sub-committee.

Consultant for the following Educational Police and Criminal Justice Agencies: *White House Homeland Security Council*, *Seattle Police Department*, *FBI Academy*, *Mason County Sheriffs*, *King County Police*, *New York State Criminal Justice*, *Delaware River*, *Oregon State Police*, *AF*, *Austin Police*, *Gretna Police Department*, *Detroit Police Department*, *and IACP*, *CAL POST*, *LAPD, JPSO, Recovery School District, among others.*

Education	
1963 to 1967	***University of Rochester*** **A.B. (Honors)** English
1970 to 1973	***Harvard University*** **Ed. D**. Learning Environments(Human Development and Sociology) **Dissertation Advisor**: Lawrence Kohlberg **Dissertation**: "Moral Atmosphere of the Prison"

Academic Appointments:

1973 to 1981	**University of California at Irvine** Assistant Professor of Social Ecology
1982 to 1986	**Seattle University** Associate Professor of Sociology
1986 to 1988	**University of Pennsylvania** Faculty Member in Computer Education/Criminal Justice
1989 to 1992	**City University** Faculty Member in Education, Business and Criminal Justice
1994-1995	**American University**, Society And Justice Program Adjunct Professor Law and Justice Program
1995-2007	**University of New Orleans** Associate Professor, Director CSLJ Department of Sociology
2006-2008	**Texas State University**, Research Professor, Criminal Justice, Foundations of Excellence Award
2008-2014	**Tulane University**

School of Public Health and Tropical Medicine, Global Health Systems and Development Department
Research Professor of Public Health,

Secretary to Faculty Senate (2010-2011)

Outstanding Undergraduate Teacher (2012 and 2013))

2014-current **LSU School of Public Health**
Professor of Public Health (Adjunct)
Teach doctoral seminar, Ethics and Public Health, Violence, Doctoral Research Coordination, Grant Development, Research

Selected Books

Scharf, Peter, Readings in Moral Education, Minneapolis, Minnesota; Winston Press, 1978.

Scharf, Peter and William McCoy, Growing Up Moral, Minneapolis, Minnesota:

Winston Press, 1979.

Hickey, Joseph, and Peter Scharf, Towards a Just Correctional System, San Francisco, California: Jossey-Bass, 1980.

Scharf Peter and Arnold Binder, Badge and the Bullet, New York, New York:

Praeger Books, 1983.

Scharf, Peter, a Guide to Computer-Age Parenting, New York, New York: Mc Graw Hill, 1984.

Scharf, Peter, Understanding the Computer-Age, New York, New York: Macmillan, 1990.

Scharf, Peter: Law Enforcement Integrity: the state of the art. Washington, DC: Bureau of Justice Assistance, 2006.

Scharf, Peter, Geerken, Michael, et. al. Guide to Justice Information Systems Performance Measures Washington, DC: Bureau of Justice Assistance, 2008.

Selected Journal Titles
Scharf, P. "Inmates Conception of Legal Justice," *Journal of Criminal Justice and Behavior*, 1976, 3, 101-123. Scharf, P. "Scoring Moral Reasoning," *Journal of Contemporary Psychology*, 1981, 26, 1, 23-26. Binder, A. and P. Scharf, "Police-Citizen Violent Encounters," Annals of the *American Academy of Political and Social Sciences*, 1981 (2) 82-103. Scharf, P. "Prison Violence" *Prison Journal*, 1983, 51(2). Binder, A., and P. Scharf, "Deadly Force in Law Enforcement," *Crime and Delinquency*, 1982 (1) 1-18. Scharf, P. "Keeping Faith: Counseling in Correctional Settings," *Counseling Psychologist*, 1983, (9) 83-94. Scharf, Peter. "Kohlberg's Development as the Aim of Education, "*Current Contents*, 1987, 22, 31, 4. Scharf, Peter and Stone, William." Examining the Correctional Technology
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Selected Published Chapters

Scharf, P. "Police Officer Decision-Maker." In Baker, F. Ed. Determinants of Law Enforcement Policies, Lexington, Mass, Lexington Books, 1980.

Scharf, P. "Violence and Moral Values." In Hays, Solway and Roberts, Eds.

Violence and Society, Garden City, NY: Spectrum Press, 198.5.

Scharf, P. "Moral Education of the Juvenile Delinquent." In Manly-Casmir and Cochrane, Eds. Moral Education: The Practical-Domain, New York, NY: Praeger Books, 1986.

Scharf, P. "Law and the Child's Legal Conscience." In Sprague, Ed. Advances in Law and Child Development, Greenwich, Connecticut: JAI Press, 1986.

Scharf, P. "Justice and the Criminal Offender's Moral Claim to Justice," L. Morain Correctional Education, Ottawa, NJ: Canada Press, 1992.

Scharf, P. Foreword, in Osofsky, J. Children and Violence, Princeton, NJ: Alblex, 1997; 2003.

Scharf, P. Foreword to Unter, K. Melding Police and Policy to Dramatically Reduce Crime in the City of New Orleans: A Study of the New Orleans Police Department, 2009.

Technical Reports, Published Presentations, Training Research, Policy Publications

Rules: Interdisciplinary module Biological Sciences Curriculum Study (1982). *Police Use of Deadly Force-UC Irvine* (1982).
"Shoot/Don't Shoot" HBO Video-DBA (1984).

Creating a Correctional Just Community-Harvard U (1985).
Micro Works: Tools for Learning-Institute for Scientific Information (1990).

At Risk Life skills: Computer Based Module-Wasatch Educational Systems (1992).
Burge Torture Case Analysis- Police Foundation-Chicago PD.

Report to the Governor Regarding the Crown Heights Civil Disorder-NY State (1993). *
US Customs Cultural Diversity Curriculum- Police Foundation (1994). *Ethics and Oregon State Police*-Police Foundation (1995). *
Risk Assessment Management System-Police Foundation (1995). *
Framework for Community Policing-BJA (1995). * *BJA Goals and Directions*-BJA (1997). * *Managing the Use of Force*-LA P.O.S.T (1997).
Community Policing Training-CSLJ (1996).
Police Leadership and Management-CSLJ (1997).
Managing Criminal Justice Technologies Training Curriculum-Bureau of Justice Assistance (l999; 2003). *
Technical Assistance for Integrating Criminal Justice Technologies-Bureau of Justice Assistance (1999).
Technical Assistance Needs for Homicide Investigators-Institute for Forensics with Robert Keppel Bureau of Justice Assistance (2000).
Power Users Criminal Justice Training Curriculum-Bureau of Justice Assistance (l999). *
Crack Pipe Study-New Orleans Police Foundation (2001). *

Bail Study-New Orleans Police Foundation (2002). *

Privacy and Criminal Justice Databases Bureau of Justice Assistance (2002). * *Assessing Integrated Criminal Justice Systems*-Bureau of Justice Assistance (2003). *

Technology in Small Agencies –Bureau of Justice Assistance (2003).

Forensic Digital First Responders-National Institute of Justice (2004). *

Assessment of Austin SECURES® Implementation National Institute of Justice (2004). *
SECURES Training Guide, National Institute of Justice (2004). *

N.O.P.D. Retention Study, CSLJ-Police Foundation (2004). *

Consequences of Partially Integrated Information Systems, Bureau of Justice Assistance (2004). *

Performance Measure in Information Technology, Bureau of Justice Assistance (2005). *
Assessment of EDLA PSN Project, PSN (2005). *
The Art of IT Performance Measures, Bureau of Justice Assistance (2006). *

Managing Law Enforcement Integrity, Bureau of Justice Assistance (2006). *

Business Process Re-Engineering, Bureau of Justice Assistance-White Paper

(2006). *

Crime and Education, Project Inkwell (2007). *

Assessment of Hampton and Newport News SECURES® Implementation, National Institute of Justice (2007). *

Technology and Murder: U.S. DOJ Global IJIS Institute, George Washington

University (2007). *

PREA Final Report, Bureau of Justice Assistance (2008).

Assessing the Potential of Correctional Technologies, Moelis and Company (2009).
Between Corrections and Law Enforcement: The International Association of Chiefs of Police (2010).

Youth Focused Policing: The *International* Association of Chiefs of Police (2011) *Assessment of the Circle of Courage Mentoring Program*: Tulane University School of Public Health and Tropical Medicine (2010).

At Risk Youth Strategic Plan for the NO (LA) Recovery School District: Tulane University School of Public Health and Tropical Medicine (2011).

An Analysis of N.O.P.D. Police Attitudes and Values: Tulane University School of Public Health and Tropical Medicine (2012).

Assessment of the CPI Project- LSU School of Public Health (2014)

Study of Correctional Population Trends in St. Tammany Parish LSU School of Public Health (2014).
Performance Measures for Child Welfare Services: Tulane University School of Public Health and Tropical Medicine (2012).

Predicting Murder Trends: US House Judiciary Committee: (2012). *

After New Town Presentation to House Crime Sub-committee (2013). * *Incarceration Rates in St. Tammany Parish* (Presented to the St. Tammany Leadership Council (2014).

School Mass Shootings: Presented to the National Associates of School Safety Executives (2014). *

The Social Ecology of Youth Violence: US House Judiciary Committee: 2015*

NO Macarthur Jail Reduction Manuscript (2015) LSU School of Public Health (2015). *

Raise the Age: a report to the LA Legislature with Dr. Stephen Philippi, et. al. (2016), *

Education and Violent Crime, Educational Testing Service (2017). *

Briefings to Mayor Elect Cantrell Transition Team, (2018). *Facilitation of City in Crisis Opioid Forum* LSUHSC (2019)

The Costs and Consequences of Gun Violence, University of Alabama Medical School (2019)

*Available through www.cslj.net; www.nicic.org www.ojp.org or through Google

Recent Selected Expert Witness Activity

Cleary vs. Smith (1986) - constitutional rights of offenders (consent decree in effect)

Davis vs. Mason County (1991) - use of force (reviewed by Supreme Court): qualified in US District Court

Wittmer vs. Peters (1996) - race and correctional hiring policies: opinion commended by Louis Posner 7th Circuit Appeals

Waldron vs. Mc Millan (1996) – injury in pursuit of subject

Riley vs. New Castle (1996) - false imprisonment and technology

Brooks vs. Pryor Creek (1996) - use of force

Terel vs. Fort Worth (1997) - use of force

Benton vs. Woodward (1998) – US District Court (Section: 1983-42)

Evivie vs. Landreneau (1999) - police use of force-qualified in US District Court (Section: 1983-42)

Castillo vs. Round Rock (2000) – Texas positional asphyxia and wrongful death (under review US Supreme Court)

Jones vs. Grand Prairie (2001) - Texas-investigative procedures in child rape

Marshall vs. Wal-Mart (2002) – alleged "4473" negligence of retailer in Fort Worth gun sale

People vs. Wright (2004) - capital murder of a police officer

St. Clair vs. WA DOC (2006) – use of force/ correctional officer-retention

State (TX) vs. Michael Scott (2008-2009) –murder of four teen-age girls (ICBY Murder case, Austin Texas)

Burley vs. Harvey (2008)-defamation re allegations of criminal activity and racketeering

State vs. Spearman (2010)-Frye qualification of gunshot detection technology

USA vs. Italiano (2011)-civil rights trial re actions following Hurricane Katrina

Brandt vs. CSX Rail (2012)-liability related to murder of a train conductor

Ryan vs. Southwest Labs (2014)-Testing error by drug identification lab

State of La vs. Brian Smith- Capital Punishment in death of patrol Deputies

Preston Hunter vs. Wind Run Apartments(2017)- liability for gun assault in an Apartment Complex in New Orleans East

Breon Stewart vs. Wind Run Apartments (2018)-liability for murder in an Apartment Complex

Schiro v. Walgreen's- Liability(2019) for kidnapping robbery in a drug store
Roslynn Bienemy et. Al vs. Chateau D Orleans Apartments (2019) Liability of an Apartment Complex for Foreseeable Murder of a resident.
Zena Nelson, et.al vs. Allen Borne et. al. (2019) *Liability for shooting of four young men at social event*
Gwendolyn Williams vs. Carrolton Trace Apartment (2019) Liability of an Apartment Complex for Foreseeable Murder of a resident.

Selected Invitational Presentations (past 20 years)

Louisiana Association of Computer-Using Educators "Computer Instruction for

High-Risk Youth," New Orleans LA. (1992)

International Association of Chiefs of Police "Community Policing," St. Louis, MO (1993)

National Organization of Black Law Enforcement Officers "Use of Deadly Force

Revisited-Debate with Johnny Cochrane," Richmond, VA (1994)

National Institute of Corrections "Corrections and Law Enforcement," Washington, DC (1995)

Alaska Alternative Education Conference" Crime and Learning" Wasilla, AK (1996)

National Firearms Meeting "Computer-Based Firearms Control," Washington, DC (1997)

Southern Policing Institute" Law Enforcement Ethics," Gretna, LA (1998) National Sheriff's Association "Law Enforcement Technologies," Columbus, OH (1999)

Mapping Law Enforcement Technologies," Portland, ME, Miami (FLA). Palm

Springs, CA, Cleveland, OH (2000)

Correctional Technology Association (NIC)," Mega trends in Correctional Technologies" Raleigh, NC (2001)

Bureau of Justice Assistance ("Criminal Justice Data Bases, Privacy and Ethics") New Orleans (2001)

Correctional Technology Association," Technology Innovation in Correctional Technologies" New Orleans, LA (2002)

National Governor's Association," "Performance Measures" Washington, DC (2003

National Association for Justice Integration Systems "Solving Serial Crime through Technology" Fort Worth, Texas (2003)

National Institute of Justice "Gunshot Detection" Washington DC (2004)

National Association for Justice Integration Systems "Business Process Change" Boston, MA (2004)

IJIS Institute "Technology and Organizational Change" Dulles, VA (2005)

NCJA "Performance Based Criminal Justice", Dana Point, CA (2005)

SEARCH "Organizational Perspectives and Accountability, Washington, DC (2006)

NCJA/IJIS Institute "Performance Measures, Baltimore, MD (2006)

NAIJS "Change and Performance Measures" Boca Raton FLA (2006)

ACA-NJ "Evacuation of Orleans Parish Prison during Hurricane Katrina" Atlantic City, NJ (2006)

Project Inkwell "Education and Crime" Seattle, WA (2006)

George Washington University" Technology and Murder" Ashburn, VA (2007)

IJIS Institute/NCJA "Murder Trends" Phoenix, AZ (2007)

IIJIS "Performance Metrics and Violent Crime" Springfield, Ill. (2007) US House of Representatives Judiciary Committee "Early Interventions re: managing violent crime risks" NOLA (2007)

US House of Representatives Judiciary Committee "What Works/What Does Not?

Re: control of violent crime" Washington, DC (2007)

Alliance for Good Government "Murder in New Orleans" New Orleans, LA (2007)

IACP "Murder and the Media, New Orleans, LA (2007)

BJA "Information Sharing Summit" Washington, DC (2008)

Nobel Public Service Presentation "Crime and the Knowledge Economy" Stockholm Sweden (2008)

Corrections Technology Association (Keynote) "Can Correctional Technology

Save Costs?" Albany, NY (2009)

American Public Health Association" Performance Measure for Public Health

Technologies" Philadelphia PA (2009)

American Public Health Association" Mentoring to Reduce Violent Crime Risks" Philadelphia PA (2009)

National at-Risk Youth Conference" Violent Crime prevention" Joliet, Ill. 2010

Correctional Technology Association (Roundtable facilitator), Daytona Beach, FLA (2011)

LA Probation and Parole" Can we Afford Prisons-Now What? New Iberia, LA

(2011)

Correctional Technology Association (Roundtable facilitator and Major Session re:

Correctional Reentry), Daytona Beach, FLA (2012)

US House Crime Sub-Committee: "Gun Violence after Newtown," Congressional Violence Summit Washington DC (2013)

New Orleans Roundtable Club, “Murder in New Orleans,” New Orleans, LA (2013)

Louisiana State University Medical School” Murder viewed from public health perspective” (2013)

Bureau of Justice Assistance Second Chance National Conference” Reducing

Recidivism Risks, National Harbor, MD (2014)

National Association of School Safety and Law Enforcement Officers, New Orleans (2014)

Educational Testing Service HI SET Conference-Between Education Crime

Prevention”-Keynote, New Orleans, LA (2015)

US House Congressional Briefing, Social Ecology of Youth Violence,

Washington, DC (2015)

Educational Testing Service HI SET National Conference, -Between Education, Vocations and Crime Control”-Keynote, San Francisco, CA (2016)

Tulane School of Medicine Gun Violence in New Orleans, (2017)

Tulane School of Medicine Gun Violence and Medical Interventions: Tulane School of Medicine (2018)

Louisiana State University Health Science Center a City in Crisis- Opioid Epidemic Facilitation (2019)

University of Alabama Medical School, the Costs and Consequences of Gun Violence Control (2019)

Media Interviews & Grant Funding

Dr. Scharf has received broad media exposure as an expert in the field of criminal justice and has demonstrated strong success in obtaining criminal justice funding. National Media interviews/presentations 2010-2019

- Washington POST
- USA Today
- New York Times
- CBS TV
- NBC Evening News-Lester Holt

- Fox TV
- ABC Nightline
- Clear Channel Radio
- Associated Press
- PBS
- NPR
- CNN
- Le Figaro
- BBC
- NY Times
- Associated Press
- Christian Science Monitor
- Reuters
- WWL Radio
- NBC News

Federal Department of Justice/DHS Cooperative Agreements/Grants

- Bureau of Justice Assistance "Performance Measures for IT Systems" – $150,000.00 (2002)
- National Institute of Justice/ FBI "Gulf Coast Computer Forensics Lab - $1,200,000 (2002)
- Bureau of Justice Assistance "Executive Technical Briefings for Information Technologies"-$220,000.00 (2002)
- Bureau of Justice Assistance "Managing Criminal Justice Technologies"- $650,000.00 (2003)
- Bureau of Justice Assistance "Managing Law Enforcement Integrity", $349,000.00 (2003)
- BJA "Project Safe Neighborhood" - $150 00 (2002-2006)
- National Institute of Justice "Secures® Assessment-Gunshot Detection"- $400,000 (2001-6)

- Bureau of Justice Assistance, "Art of IT Performance Measures" $150,000 (2006-8)
- Office of Domestic Preparedness USAA-NIMS/WMD Training "$600,000.00 (2005-10)
- Bureau of Justice Assistance PREA "Risk Assessment"-

  $527,000.00 (2006-7)
- Bureau of Justice Assistance PREA "Change Experiment"-

  $950,000.00(2007-9)
- Bureau of Justice Assistance-Assessment of Pegasus Local to

  Local Sharing Initiative -$3,500,000.00 (total) with Pegasus

  Research Foundation, Phase 1 and 2 :(2009-11)
- Recovery School District, Designing an Alternative School for High Risk Students (2012-3)
- Bureau of Justice Assistance-Assessment of BJA Co-Occurring Disorder Initiative with LA DOC-$640,000- 2011-2014
- Bureau of Justice Assistance-Statewide Recidivism Reduction- With LA DOC, $ 982,000.00-2012-14
- Bureau of Justice Assistance-Statewide Re-Entry Implementation- With LA DOC, $ 700,000.00-2015-17
- Bureau of Justice Assistance- Phase II Assessment of BJA Co-Occurring Disorder Initiative with LA DOC-$640,000- 2014-2017 Winner of ACA innovation award (2017)
- Mac Arthur Foundation-Assessment of Jail Reduction Initiative $43,000.00 (2016-8)
- Gretna Police Department-Race Relations and Social Media (2019)

Personal:

Father of Adria, Sage, Razi and Tessa.

Grandfather of Sahara, Owen, Levi, Sedona, Deni, Hannah Cora, and Melia.