IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

VERNON JONES, MARCKINDAL JULES, LYXON CHERY, ALDWIN JUNIOR BRATHWAITE, PATRICK MADUABUCHI NWANKWO, DWEEN ALFAREL BLACKMAN, RICARDO QUINTANILLA-MEJIA, BRIGHT IDADA FALODUN, PHILIP DONGA, GAMDUR NARAIN, ERIC C. COMMISSIONG, MD. ABU MUSA BHUYAN, IBRAHIMA SORY SOW, JUBRIL ADELAKOUN, JUAN CARLOS LAINEZ MEJIA, CROSWELL WILSON, JONATHAN ESPINAL-POLANCO, MARVENS THOMAS, SHANTADEWIE RAHMEE, DANILO CONCEPCION, OSCAR SALCEDO, CURRY WENDELL FORBES, and NECATI HARSIT;

Petitioners,

v.

CHAD WOLF,
in his official capacity as Acting Secretary, U.S. Department of Homeland Security;

THOMAS E. FEELEY,
in his official capacity as Field Office Director, Buffalo Field Office, U.S. Immigration & Customs Enforcement; and

JEFFREY SEARLS
in his official capacity as Administrator, Buffalo Federal Detention Facility.

Respondents.

Civil Action No. 1:20-CV-0361

MEMORANDUM OF LAW

Oral Argument Requested

PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR A TEMPORARY RESTRAINING ORDER

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INTRODUCTION

The novel coronavirus, COVID-19, has created a pandemic and disrupted daily functioning around the world. In only a few months, 458,927 people worldwide have been diagnosed with COVID-19 and 20,806 people have died from the virus.[1] In New York State, the epicenter of the virus in the United States,[2] 30,811 people have been diagnosed with and 285 people have died from, COVID-19.[3] The Centers for Disease Control and Prevention ("CDC") warns that "[o]lder adults and people of any age who have serious underlying medical conditions may be at a higher risk for more serious complications from COVID-19."[4] Underlying medical conditions giving rise to higher risks of severe illness or death from COVID-19 include lung disease, moderate to severe asthma; heart disease; immunodeficiency, including cancer; diabetes; and severe obesity.[5] Complications, meanwhile, include pneumonia in both lungs, organ failure, and death.[6] The CDC reports that approximately 20-30% of hospitalized patients of COVID-19 require intensive care

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1 Numbers current as of March 25, 2020 at 3:26 p.m. EST. *See* Johns Hopkins U. of Med., *Coronavirus Resource Center*, https://coronavirus.jhu.edu/ (last accessed Mar. 25, 2020).

2 *See* Jesse McKinley, *Coronavirus in N.Y.C.: Region is Now an Epicenter of the Pandemic*, N.Y. TIMES, https://www.nytimes.com/2020/03/22/nyregion/Coronavirus-new-York-epicenter.html.

3 Numbers current as of March 25, 2020 at 3:38 p.m. EST. COVID Tracking Proj., *Most Recent Data*, https://covidtracking.com/data/ (last accessed Mar. 25, 2020).

4 CTRS. FOR DISEASE CONTROL AND PREVENTION ("CDC"), *People Who Are At Higher Risk for Severe Illness*, https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/people-at-higher-risk.html (last accessed Mar. 23, 2020); *see also* CDC, *Severe Outcomes Among Patients with Coronavirus Disease 2019 (COVID-19) – United States, February 12-March 16, 2020* (Mar. 18, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e2.htm (indicating an exponential increase in fatality rates for older patients of COVID-19).

5 *See Id*.

6 MAYO CLINIC, *Coronavirus Disease 2019 (COVID-19)*, https://www.mayoclinic.org/diseases-conditions/coronavirus/symptoms-causes/syc-20479963 (last accessed Mar. 22, 2020).

for respiratory support.[7] Critically ill patients have required high-flow oxygen therapy, mechanical ventilation, and advanced organ support, among other intensive medical care procedures.[8] A viable vaccine for COVID-19 remains up to eighteen months away and the pandemic "will probably have peaked and declined before a vaccine is available."[9]

Congregate settings – like the Buffalo Federal Detention Facility ("the BFDF" or "Batavia") – are environments where people live, eat, and sleep in close proximity with one another. Such environments produce heightened risks for the spread of COVID-19 because inmates and detainees cannot achieve the social distancing needed to prevent the spread of COVID-19. *See* Declaration of Dr. Marc Stern, M.D. [hereinafter, "Stern Decl."]. Dr. Robert B. Greifinger, an independent consultant on health care within prisons and detention centers, stresses that "[m]any . . . detention facilities lack adequate medical care infrastructure to address the spread of infectious disease and treatment of high-risk people in detention" and that "[t]he release of high-risk individuals is a key part of a [public] risk mitigation strategy." Declaration of Robert B. Greifinger, MD ¶¶ 19, 22 [hereinafter, "Greifinger Decl."].

It is only a matter of time before this global pandemic reaches inside the walls of the BFDF. Fearing the implications if COVID-19 were to infect a civil detention facility, some Courts have already begun ordering the release of noncitizens in civil detention, *see e.g.*, *Xochihua-Jaimes v. Barr*, No. 18-71460 (9th Cir. Mar. 23, 2020), in which the Ninth Circuit took an extraordinary step

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7 CDC, *Clinical Care*, https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html#foot09 (last accessed Mar. 22, 2020).

8 *See Id*.

9 Laura Spinney, *When Will a Coronavirus Vaccine be Ready*, THE GUARDIAN (Mar. 20, 2020), https://www.theguardian.com/world/2020/mar/20/when-will-a-coronavirus-vaccine-be-ready (quoting professor of infectious diseases, Annelies Wilder-Smith).

of *sua sponte* ordering the release of a detainee. The Court cited as its justification the "rapidly escalating public health crisis, which public health authorities predict will especially impact immigration detention centers." *Id*. Similarly, the United Kingdom recently released nearly three hundred immigration detainees[10] while New Jersey has faced fears of similarly grave consequences in its jails and adopted the recommendation of public health officials to release nearly 1,000 inmates in county jails. *See In re Request to Commute or Suspend County Jail Sentences*, No. 084230 (N.J. March 22, 2020) [annexed as Exh. B to Motion]; *see* Tracey Tully, *1000 Inmates Will Be Released From N.J. Jails to Curb Coronavirus Risk*, N.Y. TIMES (March 23, 2020).[11]

Against the backdrop of so monumental a crisis stand Petitioners, whose age and underlying health conditions make them particularly susceptible to both contract and develop complications from COVID-19. In the case before the Court, Petitioners are all individuals held in civil immigration detention at Batavia who face extraordinary risk of serious health complications or death if they contract COVID-19, which they are likely to do if they remain detained. Like the populations identified by the N.Y.C. Board of Correction for immediate release from Rikers Island jail, Petitioners are either over the age of fifty or have an underlying medical condition(s) making them more susceptible to the risks of contracting and succumbing to COVID-19.

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[10] *See* Diane Taylor, *Home Office Releases 300 From Detention Centres Amid Covid-19 Pandemic*, THE GUARDIAN (Mar. 21, 2020), https://www.theguardian.com/uk-news/2020/mar/21/home-office-releases-300-from-detention-centres-amid-covid-19-pandemic.

[11] https://www.nytimes.com/2020/03/23/nyregion/coronavirus-nj-inmates-release.html.

Petitioners seek the extraordinary remedy of a temporary restraining order demanding their immediate release because time is absolutely of the essence. Genesee County already has two positive diagnoses of COVID-19 and has declared a state of emergency,[12] while the Wende Correctional Facility in Alden, New York – through which the New York Department of Corrections ("DOCCS") regularly transfers inmates moving between DOCCS and ICE custody – has confirmed at least two positive cases.[13] The virus is rapidly getting closer to the BFDF by the minute, and once it reaches the facility, Petitioners will be in grave danger.

Medical experts agree it is not a case of *if*, but rather *when* Batavia will be hit by this pandemic. They also agree that traditional measures to protect Petitioners from this contagion are likely to fail in a detention setting. Consequently, the dangers posed to Petitioners if they remain in detention at the BFDF amidst the outbreak are "so grave that it violates contemporary standards of decency" to expose them to such a risk. *Helling v. McKinney*, 509 U.S. 25, 36 (1993). The severity of the outbreak and potential harm to Petitioners dictate that continued civil detention no longer comports with the narrow and non-punitive circumstances that permit civil immigration detention, and rise to the level of a substantive due process violation that this Court must remedy. *See e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Accordingly, for the reasons discussed below, Petitioners move for a temporary restraining order demanding their immediate release from detention under appropriate public health measures and conditions of release.

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[12] Harold McNeil, *First COVID-19 Case Confirmed in Genesee County*, BUFFALO NEWS (Mar. 17, 2020), https://buffalonews.com/2020/03/17/first-covid-19-case-confirmed-in-genesee-county/.

[13] *See* Joe Mahoney, *At New York Prison, Harvey Weinstein Put in Isolation After Contracting Virus*, NIAGARA GAZETTE (Mar. 22, 2020), https://www.niagara-gazette.com/covid-19/at-new-york-prison-harvey-weinstein-put-in-isolation-after/article_26e38374-6c7d-11ea-9f8a-3b2c09e7817d.html.

NOTICE TO RESPONDENTS

Undersigned counsel Joseph Moravec first contacted the U.S. Attorney's Office for the Western District of New York by email on March 22, 2020 and by phone on March 23, 2020 to advise that office of the present conditions being observed at the Buffalo Federal Detention Facility, the dangers posed by the COVID-19 virus, and the need for immediate action to protect particularly vulnerable detainees. On March 25, 2020, Mr. Moravec spoke with Assistant United States Attorneys Daniel Moar, Adam Khalil, and David Coriell to explain the emergency reasons requiring Petitioners to seek a temporary restraining order and to give notice that it would be filed later in the day or overnight. In addition, on the morning of March 26, 2020, Mr. Moravec emailed a copy of the Petition seeking a Writ of Habeas Corpus and Complaint for Injunctive Relief and this Motion for a Temporary Restraining Order, along with all supporting papers, exhibits, and declarations, to Assistant United States Attorneys Daniel Moar, Adam Khalil, and David Coriell. Thus, Respondents' counsel have been notified under Local Rule 65(b)(2).

FACTUAL BACKGROUND

I. COVID-19 POSES GRAVE RISKS OF HARM, INCLUDING SERIOUS ILLNESS OR DEATH, TO OLDER PEOPLE AND THOSE WITH UNDERLYING MEDICAL CONDITIONS.

COVID-19 is a respiratory illness that mainly spreads through person-to-person contact and contact with surfaces or objects that have the virus on it.[14] As of March 25, 2020, 458,927 people worldwide have been diagnosed with COVID-19 and 20,806 have died from COVID-19

[14] *See* CDC, *What You Need to Know About Coronavirus Disease 2019 (COVID-19* 1 (2020), *available at*, https://www.cdc.gov/coronavirus/2019-ncov/downloads/2019-ncov-factsheet.pdf.

related complications.[15] Public health experts predict COVID-19 cases to rise exponentially in the coming months and conditions to worsen as healthcare infrastructure and medical resources are strained by growing needs for treatment.[16]

The risks of developing serious complications from a COVID-19 infection are heightened for people older than the age of fifty and people of any age who have underlying medical conditions, including lung disease; heart disease; chronic liver or kidney diseases, including hepatitis and dialysis patients; diabetes; epilepsy; hypertension; compromised immune systems, such as from cancer, HIV, or autoimmune disease; blood disorders, including sickle cell disease; inherited metabolic disorders; stroke; developmental delay; and pregnancy. *See* Declaration of Dr. Jonathan Louis Golob [hereinafter, "Golob Decl."]. Signs and symptoms of COVID-19 may appear from two to fourteen days after exposure. *See* Declaration of Joe Goldenson, MD at ¶ 8 [hereinafter, "Goldenson Decl."]. Common symptoms include fever, cough, and shortness of breath or difficulty of breathing. *Id*. In more serious cases, however, COVID-19 attacks an infected person's respiratory system and can result in life-threatening pneumonia, marked by a filling of the lungs with inflammatory material and an inability to circulate enough oxygen into the bloodstream.[17] Following development of viral pneumonia, a patient is exposed to the risks of

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15 *Coronavirus Resource Center*, *supra* note 1.

16 *See* James Glanz et al., *Coronavirus Could Overwhelm U.S. Without Urgent Action, Estimates Say*, N.Y. TIMES (Mar. 20, 2020), https://www.nytimes.com/interactive/2020/03/20/us/coronavirus-model-us-outbreak.html.

17 *See* Graham Readfearn, *Coronavirus: What Happens to People's Lungs if They Get Covid-19?*, THE GUARDIAN (Mar. 22, 2020), https://www.theguardian.com/world/2020/mar/22/coronavirus-what-happens-to-peoples-lungs-when-they-get-covid-19.

secondary infections.[18] The virus can further cause severe damage to lung tissue, which requires an extensive period of rehabilitation and, in some cases, can cause a permanent loss of respiratory capacity. *See* Golob Decl. at ¶ 7.

COVID-19 may also target a patient's heart muscle and cause myocarditis, an inflammation of the heart. *Id*. Myocarditis can reduce a heart's ability to pump, leading to rapid or abnormal heart rhythms in the short term, and heart failure that limits exercise tolerance and regular functioning in the long term. *Id*. Emerging research on the virus suggests that COVID-19 may also trigger an over-response by an infected person's immune system, known as cytokine release syndrome, which can cause widespread and permanent damage to the patient's other organs or cause neurologic injury. *Id*.

Most people who fall into the higher risk categories for COVID-19 are likely to require advanced support, including positive pressure ventilation, and in extreme cases, extracorporeal mechanical oxygenation. *Id*. at ¶ 6. These procedures require highly specialized equipment that are in limited supply and sizable teams of nurses, respiratory therapists, and intensive care physicians. *Id*. Local and rural hospital systems are susceptible to being overwhelmed by a cluster of incoming patients who all require ventilation resources at the same time.[19] Due to the trajectory of COVID-19's spread and the limitations of the existing medical care infrastructure, public health experts have emphasized that social distancing is the only viable option for mitigating the virus's damage.[20] Projections published by researchers from the Imperial College London show that even

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[18] *See What Happens to People's Lungs*, *supra* note 17.

[19] *See* Katelyn Newman, *Flattening the Coronavirus Curve and the Importance of Social Distancing*, U.S. NEWS (Mar. 18, 2020), https://www.usnews.com/news/healthiest-communities/articles/2020-03-18/coronavirus-how-social-distancing-can-flatten-the-curve.

[20] *See Id*.

with the implementation of stringent mitigation strategies, such as orders for nationwide social distancing, home isolation, and continued school and university closures, the death toll in the United States could reach 1.1 million people.[21] Without such actions, the death toll could reach upwards of 2.2 million people.[22]

II. NEW YORK STATE IS THE MOST HIGHLY IMPACTED STATE IN THE COUNTRY AND HAS BEGUN TO TAKE EXTRAORDINARY MEASURES TO CURTAIL COVID-19'S SPREAD.

As of March 25, 2020, New York State has reported 30,811 confirmed cases of COVID-19 and 285 deaths, representing the nation's most-impacted state.[23] The continuing and rapid spread of COVID-19 throughout New York led Governor Cuomo to impose a ten-part plan heavily restricting residents' movements and curtailing social activities.[24] In response, sweeping measures are being taken to fifty-six detainees from Rikers Island due to COVID-19.[25] On March 22, Mayor de Blasio announced that twenty-three more detainees were set to be released and the city is reviewing two hundred additional inmates for possible release.[26] Officials' decision to release vulnerable detainees from Rikers Island jail and, possibly, the New York State prisons. In looking

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21 William Wan et al., *Coronavirus Will Radically Alter the U.S.*, WASHINGTON POST (Mar. 19, 2020), https://www.washingtonpost.com/health/2020/03/19/coronavirus-projections-us/.

22 *Id.*

23 *Most Recent Data*, *supra* note 3.

24 N.Y. OFF. OF THE GOVERNOR, *Governor Cuomo Signs the 'New York State on PAUSE' Executive Order*, (Mar. 20, 2020), https://www.governor.ny.gov/news/governor-cuomo-signs-new-york-state-pause-executive-order.

25 *See* Priscilla DeGregory & Vincent Barone, *Officials Approve Release of More Than 50 Rikers Inmates Over Coronavirus Fears*, N.Y. POST (Mar. 21, 2020), https://nypost.com/2020/03/21/officials-approve-release-of-more-than-50-rikers-inmates-over-coronavirus-fears/.

26 Michael Rezendes & Robin McDowell, *38 Positive for Coronavirus in NYC Jails, Including Rikers*, ASSOCIATED PRESS (Mar. 22, 2020), https://apnews.com/54dbc9d47f62cf0c0240314310cfe909.

closely at Rikers Island, Dr. Rachael Bedard, a geriatrician who works at the Rikers Island jail, concludes that social distancing efforts within the facility would not stem the spreading of the virus and that "[t]he only meaningful public health intervention here is to depopulate the jails dramatically."[27] In assessing a jail setting, she notes:

> It has just been incredibly clear to us—as it always is—that the jails are not a closed system. They are vulnerable to whatever is happening in the city. . . . When [detainees] are moved from one location to another, a person has to take them there. That person has to open the door for them, and they have to be let through and be walked down the hallway. When they are moved from one facility to another, somebody has to touch them and put cuffs on them. When we bring them their food, workers go from housing area to housing area with trays that have to be distributed. When we give them their medication, that has to be done for them. They can't do it for themselves. And so, if you think about how many excess human contacts that is, even compared to something like a shelter setting, you can imagine why viral spread in this environment is extra dangerous.[28]

Dr. Bedard concluded that "a jail is a perfect setup for an outbreak"[29] and the BFDF is in essentially the same posture as Rikers. It houses more than 600 civil immigration detainees every day while security officers, medical and administrative staff, attorneys, family, and all the personnel from the Batavia Immigration Court come in and out of the facility. Thus, as the number of infected in the surrounding community grows, it is only a matter of time before the BFDF faces the same reality as Rikers. But in the case of Batavia, there is even less optimism that the crisis will be averted. *See* Sepúlveda & Weprin Letter, Dkt. No. 2 at Exh. D (Opining that "[a]nyone

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[27] Jan Ransom & Alan Feuer, *'A Storm is Coming': Fears of an Inmate Epidemic as the Virus Spreads in the Jails*, N.Y. TIMES (Mar. 20, 2020), https://www.nytimes.com/2020/03/20/nyregion/nyc-coronavirus-rikers-island.html.

[28] *Id.*

[29] *Id.*

who can be safely sent out to the community and who has a family or a stable living situation to go to should be immediately considered for release regardless of the length of his or her remaining sentence" [but] the Governor should *not* to release "those individuals who will be sent to ICE detention" because "ICE has yet to issue guidance on what safety measures, if any, have been implemented in its detention facilities in response to the COVID-19 outbreak."). Specifically Senator Sepúlveda and Assemblyman Weprin voiced their concerns that the BFDF "has so far implemented minimal safety precautions to safeguard the health of ICE detainees, staff, and visitors there[,]" *id*., necessitating the release of state inmates rather than risk transferring them to ICE custody in Batavia.[30]

III. PETITIONERS FACE AN ELEVATED RISK OF CONTRACTING COVID-19 AND DEVELOPING SEVERE MEDICAL COMPLICATIONS AT THE BFDF.

Immigration detention facilities generally "have . . . greater risk of infectious spread because of conditions of crowding, the proportion of vulnerable people detained, and often scant medical care resources." Greifinger Decl. at ¶ 11. Absent a vaccine, which will not be available for a significant time,[31] public health officials identify social distancing as the only viable option to mitigate the spread of the virus and reduce the risk of contracting COVID-19.[32]

Here, Petitioners live in a congregate environment – living, sleeping, and eating in close proximity with one another 100% of the time. They share toilets, sinks, and showers, usually without disinfection between use. Greifinger Decl. at ¶ 11. Food preparation and food service is similarly communal with little opportunities for surface disinfection. *Id*. As a result, Petitioners

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30 *See also* Ransom & Feuer, *supra* note 27 (quoting chief physician of the Rikers Island jail complex, Ross MacDonald).

31 *See* Spinney, *supra* note 9.

32 *See* Newman, *supra* note 19.

face particularly acute risks of contracting COVID-19 because it is impossible for them to adopt the safety and containment recommendations of public health officials. Stern Decl. at ¶ 7. Some experts even retort that social distancing "is an oxymoron in congregate settings" because Petitioners have so severely limited options when trying to create distance between each other. Exh. B, Allen & Rich Letter at 4.

In their letter to congressional leaders, Drs. Allen and Rich further explained that the extensive transfer of individuals throughout the immigration detention network could cause COVID-19 to disseminate rapidly throughout the entire system and cause devastating consequences to public health. *Id.* at 3; *see e.g.*, Petition, Dkt. No. 1 at ¶ 44 (noting that Petitioner Juan Carlos Lainez Mejia was recently transferred from a different immigration detention facility that now has positive cases). In these settings, the risk is not only limited to occupants of the detention facility but also to the surrounding communities because "[detainees] who contract COVID-19 with symptoms that require medical intervention will need to be treated at local hospitals, thus increasing the risk of infection to the public at large . . . ." Exh. B, Allen & Rich Letter at 3. The potential result of a cluster of COVID-19 cases can quickly overwhelm the capacity and resources of a local hospital:

> [A] detention center with a rapid outbreak could result in multiple detainees—five, ten or more—being sent to the local community hospital where there may only be six or eight ventilators over a very short period. As they fill up and overwhelm the ventilator resources, those ventilators are unavailable when the infection inevitably is carried by staff to the community and are also unavailable for all the usual critical illnesses (heart attacks, trauma, etc.).

Id.

Social distancing through the release of detainees who face higher risks of developing serious complications from COVID-19 contractions is a necessary step towards negating the

potentiality of these individuals needing scarce local medical care resources. "Reassessing the security and public health risks [of detainees] . . . will save lives of not only those detained, but also detention staff and their families, and the community-at-large." Exh. B, Allen & Rich Letter at 6.

In addition to the overwhelming risk they face just by occupying congregant spaces, Petitioners detained at the BFDF are subjected to additional and specific risks due to the continued flow of people into and out of the facility. The Batavia Immigration Court, which is housed within the BFDF, continues to operate on a regular basis, leading to the daily entry and exit of immigration judges, court personnel, facility personnel, attorneys, and other required visitors.[33] While Immigration and Customs Enforcement ("ICE") has issued new screening procedures for visitors, *see ICE Guidance on COVID-19*, Dkt. No. 2, Exh. J, the continued operation of the Batavia Immigration Court necessarily compromises the prevailing recommendations from public health officials and Governor Cuomo's executive order to reduce travel and practice social distancing. ICE's directive, as Dr. Goldenson attests, critically fails to "address important public health issues such as social distancing, hand washing, testing, or precautions for high risk individuals." Goldenson Decl. at ¶ 12.

Petitioners at BFDF further face the risk of transmission from an incoming detainee to the facility. The BFDF regularly receives immigrant transfers from the Wende Correctional Facility – for transfers between DOCCS and ICE custody – and the Clinton County Jail, as well as from facilities throughout the United States. As of the time of filing, Clinton County has confirmed ten

[33] *See* Dara Lind, *Immigration Courts are Telling Employees to Come to Work – Ignoring Health Risks and Local Shelter-in-Place Orders*, PROPUBLICA (Mar. 20, 2020), https://www.propublica.org/article/immigration-courts-are-telling-employees-to-come-to-work-ignoring-health-risks-and-local-shelter-in-place-orders.

positive diagnoses for COVID-19.[34] The confirmation of positive COVID-19 cases at Wende Correctional Facility further elevates the chances of a COVID-19 transmission to a detained individual at the BFDF and a subsequent outbreak. So long as transfers of custody continue between DOCCS and ICE, Petitioners will continue to be subjected new exposure risks from people outside of the current detained population at Batavia.

IV. PETITIONERS ARE VULNERABLE TO SERIOUS COMPLICATIONS OR DEATH IF INFECTED BY COVID-19 AND SHOULD BE RELEASED FROM CUSTODY.

All Petitioners face significantly higher risks of developing serious medical complications or dying from a COVID-19 infection than the general population. They are either older than fifty years old and/or have underlying medical conditions or a history of illness that would exacerbate the impact of a COVID-19 infection. They are all detained at the BFDF as they await adjudications of their civil immigration cases.[35]

Vernon Jones is a 39-year-old native and citizen of Jamaica. Mr. Jones has been detained at the BFDF since September 2019. Mr. Jones has struggled with epilepsy and seizures since 2006. Mr. Jones is critically vulnerable to COVID-19 because of his chronic epilepsy.

Marckindal Jules is a 46-year-old native and citizen of Haiti. Mr. Jules has been detained by ICE at the BFDF since March 2019. Mr. Jules is pre-diabetic and tests of his liver function have returned abnormal results. Mr. Jules also lives with an unspecified mental illness for which

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[34] Numbers current as of March 25, 2020 at 1:46 p.m. EST. *See* N.Y. DEP'T OF HEALTH, *County by County Breakdown of Positive Cases*, https://coronavirus.health.ny.gov/county-county-breakdown-positive-cases (last accessed Mar. 25, 2020).

[35] Petitioner Dween Blackman has been ordered removed from the United States and is no longer challenging his removal. However, Respondents have so far been unable to secure travel documents to remove him to his native country. Petitioner Marvens Thomas won termination of his removal case on March 25, 2020, but the Department of Homeland Security reserved appeal and he remains in custody.

he takes medication. Mr. Jules is critically vulnerable to COVID-19 because of his pre-diabetic condition.

Lyxon Chery is a 60-year-old native and citizen of Haiti. He has been detained by ICE at the BFDF since December 2017. Mr. Chery has been diagnosed with moderate to severe Post-Traumatic Stress Disorder and Major Depressive Disorder stemming from past trauma he suffered in Haiti. Mr. Chery also struggles with high blood pressure. He takes daily medication for both his mental and physical health. Mr. Chery is critically vulnerable to COVID-19 because of his age and medical conditions.

Aldwin Brathwaite is a 58-year-old native and citizen of Trinidad and Tobago. Mr. Brathwaite has been detained by ICE at the BFDF since January 2019. Mr. Brathwaite has recently been diagnosed with prostate cancer and was in the process of obtaining a treatment plan. Mr. Brathwaite is critically vulnerable to COVID-19 because of his age and his significant health issues.

Patrick Maduabuchi Nwanwko is a 53-year old native and citizen of Nigeria. Mr. Nwankwo has been detained by ICE since June 2018. Mr. Nwankwo is pre-diabetic and takes medication for high blood pressure. Mr. Nwankwo is critically vulnerable to COVID-19 because of his age and his medical conditions.

Dween Afarel Blackman is a 26-year old native of Suriname and citizen of Guyana. Mr. Blackman has been detained by ICE since December 2019. Mr. Blackman suffers from asthma, ulcerative colitis, and an undiagnosed gastrointestinal illness, and because of his respiratory illness and gastrointestinal complications, he has a weakened immune system. Mr. Blackman is critically vulnerable to COVID-19 because of his medical conditions.

Ricardo Quintanilla-Mejia is a 42-year old native and citizen of El Salvador. Mr. Quintanilla-Mejia has been detained by ICE since October 2016. Mr. Quintanilla-Mejia is diabetic, and also suffers from post-traumatic stress disorder, chronic pancreatitis, metabolic syndrome, blood abnormalities, chronic abdominal pain an musculoskeletal pain resulting from injuries sustained while in custody. Mr. Quintanilla-Mejia takes medications to treat some of these conditions in addition to medication for insomnia and PTSD. Mr. Quintanilla-Mejia is critically vulnerable to COVID-19 because of his medical conditions.

Bright Idada Falodun is a 38-year old native of Nigeria.[36] Mr. Falodun has been detained by ICE at Batavia since August 2015. Mr. Falodun has a history of schizophrenia, depression, rhabdomyolysis, acute kidney injury/acute tubular necrosis, hyperkalemia, metabolic acidosis, and transaminitis. Mr. Falodun is critically vulnerable to COVID-19 because of his medical conditions.

Philip Donga is a 31-year old native and citizen of Sudan. Mr. Donga has been detained at Batavia since December 2018. Mr. Donga has a history of traumatic subdural hematoma as well as seizure disorder, vertigo, and dizziness. He has a long history of tobacco use. He was also identified as at increased risk for cardiovascular disease and is monitored for hyperlipidemia. Mr. Donga has a history of surgery related to his traumatic brain injury and separately for gun-shot wounds sustained in his home country. Mr. Donga is critically vulnerable to COVID-19 because of his medical conditions, history of smoking, and heightened risk of cardiovascular disease.

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[36] Mr. Falodun has been ordered removed to Nigeria, but is challenging his order of removal before the Second Circuit Court of Appeals, arguing that he is a citizen of the United States. *See Falodun v. Barr*, 17-1813 (2d Cir.) (pending).

Gamdur Narain is a 59-year old native and citizen of India. Mr. Narain has been detained by ICE in excess of two years. Mr. Narain is critically vulnerable to COVID-19 because of his age.

Eric C. Commissiong is a 58-year old native and citizen of Trinidad and Tobago. Mr. Commissiong suffers from high blood pressure. Mr. Commissiong is critically vulnerable to COVID-19 because of his age and high blood pressure.

Md. Abu Musa Bhuyan is a 56-year old native and citizen of Bangladesh. He suffers from a tumor on his head. Mr. Musa Bhuyan is critically vulnerable to COVID-19 because of his age and medical conditions.

Ibrahima Sory Sow is a 53-year old native and citizen of Guinea. Mr. Sow suffers from an immune deficiency that makes him especially vulnerable to COVID-19. Therefore, Mr. Sow is critically vulnerable to COVID-19 because of his age and medical conditions.

Jubril Adelakoun is a 43-year old native and citizen of Nigeria. Mr. Adelakoun has been detained by ICE since March 2018. He is pre-diabetic and suffers from hypertension. Mr. Adelakoun is critically vulnerable to COVID-19 because of his medical conditions.

Juan Carlos Lainez Mejia is a 38-year-old native and citizen of Honduras. He has been detained by ICE since December 2017, but was recently moved to Batavia from Bergen County Detention Center in New Jersey. Mr. Lainez Meija is HIV-positive. As of December 2019, his HIV status was only partially controlled by anti-retroviral medication, leaving his immune system compromised. Mr. Lainez Mejia is critically vulnerable to COVID-19 because of his medical conditions.

Croswell Wilson is a 51-year old native and citizen of Jamaica. Mr. Wilson has been detained at BFDF since March 2019. Mr. Wilson has a history of smoking. Mr. Wilson is critically vulnerable to COVID-19 because of his medical history and history of smoking.

Jonathan Espinal-Polanco is a 37-year-old native and citizen of the Domincan Republic. Mr. Espinal-Polanco has been detained by ICE at Batavia since November 2019. Mr. Espinal-Polanco struggles with asthma, schizophrenia, morbid obesity, and hyperlipidemia. As a consequence of his asthma and other conditions, Mr. Espinal-Polanco is critically vulnerable to COVID-19 because of his medical conditions.

Marvens Thomas is a 27-year old native and citizen of Haiti. Mr. Thomas has been detained by ICE at Batavia since July 2019. Mr. Thomas has a history of schizophrenia, high blood pressure, and seizures. Mr. Thomas is critically vulnerable to COVID-19 because of his medical conditions.

Shantadewie Rahmee is a 48-year-old native and citizen of Surimame. Ms. Rahmee has been detained by ICE at Batavia since October 2019. Ms. Rahmee struggles with asthma and has her whole adult life. Ms. Rahmee is critically vulnerable to COVID-19 because of her respiratory condition.

Danilo Concepcion is a 42- year-old native and citizen of the Dominican Republic. Mr. Concepcion has been detained by ICE at Batavia since approximately April 2019. Mr. Concepcion is a Type I diabetic. Mr. Concepcion is critically vulnerable to COVID-19 because of his diabetes.

Oscar Salcedo is a 57-year old native and citizen of the Dominican Republic. He has lived in the United States for 52 years since he was 5 years old. Mr. Salcedo is critically vulnerable to COVID-19 because of his age.

Curry Wendell Forbes is a 42-year old native and citizen of Turks and Caicos and has lived in the United States since he was less than a year old. Mr. Forbes suffers from schizophrenia, diabetes, hypertension, and hypothyroidism. Mr. Forbes is critically vulnerable to COVID-19 because of his medical conditions.

Necati Harsit is a 58-year-old native and citizen of Turkey. Mr. Harsit has been detained by ICE at Batavia since November 2019. He struggles with schizophrenia, diabetes, and had a heart attack and an asthma attack in 2016. Mr. Harsit is critically vulnerable to COVID-19 because of his age and medical conditions.

Collectively, in addition to several at risk due to their age, Petitioners suffer from a broad range of serious medical conditions that make them susceptible to both serious complications or death if any one of them were to contract COVID-19. For example, Petitioners Vernon Jones, Marvens Thomas, and Philip Donga suffer from epilepsy or seizures, which places them at greater "risk of developing more severe illness if they are exposed to COVID-19" according to the Epilepsy Foundation.[37] Petitioners Dween Blackman, Jonathan Espinal-Planco, and Shantadewie Rahmee have asthma and Petitioners Croswell Wilson and Philip Donga have a history of smoking, which the the CDC reports places them at "higher risk of getting *very sick* from COVID-19 [because] COVID-19 can affect [the] respiratory tract (nose, throat, lungs), cause an asthma attack, and possibly lead to pneumonia and acute respiratory disease."[38] Eight petitioners suffer from diabetes, prediabetes, or other renal complications, and the National Kidney Foundation reports

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[37] EPILEPSY FOUNDATION, *Concerns About COVID-19 (Coronavirus) and Epilepsy* (March 23, 2020), https://www.epilepsy.com/article/2020/3/concerns-about-covid-19-coronavirus-and-epilepsy.

[38] CDC, *People with Asthma and COVID-19*, (last accessed March 25, 2020) https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/asthma.html.

that "[o]lder adults and people with kidney disease or other severe chronic medical conditions seem to be at higher risk for more serious Coronavirus illness."[39] Petitioners Lyxon Chery, Eric Commissiong, and Marvens Thomas all suffer from high blood pressure and Petitioners Aldwin Brathwaite and Md. Abu Musa Bhuyan have cancer. The American Heart Association reports that "older adults with heart disease appear to be at a higher risk of getting COVID-19" and "people of any age with serious underlying medical condictions – such as diabetes, cancer, or kidney failure – may face a higher risk of complications if they do get infected."[40] Together, Petitioners all fall into one or several high risk categories, and if forced to remain detained at the Buffalo Federal Detention Facility, are likely to face grave consequences when exposed to the COVID-19 virus.

LEGAL STANDARD

A party seeking a temporary restraining order may do so in two separate ways. *See Rush v. Hillside Buffalo, LLC*, 314 F. Supp. 3d 477, 484 (W.D.N.Y. 2018) ("[I]n the Second Circuit, the standard for a temporary restraining order is the same for a preliminary injunction.") (internal quotation marks and citations omitted). First, the party may "establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of the preliminary relief, that the balance of equities tip in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Second, the party may "show irreparable harm and either a likelihood of success on the merits or 'sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward

[39] NATIONAL KIDNEY FOUNDATION, *Be Prepared: Kidney Patient Prep for Coronavirus* (accessed March 19, 2020), https://www.kidney.org/contents/be-prepared-kidney-patient-prep-coronavirus.

[40] AMERICAN HEART ASSOCIATION, *Coronavirus Questions* (last accessed March 25, 2020), https://www.heart.org/en/coronavirus/coronavirus-questions.

the party requesting the preliminary relief." *ACLU v. Clapper*, 785 F.3d 787, 825 (2d Cir. 2015) (internal quotation marks and citation omitted).

Under the four-factor test, "[a] showing of irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction." *Faiveley Transport Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (internal quotation marks and citation omitted). An alleged constitutional violation constitutes *per se* irreparable harm. *See e.g.*, *Connecticut Dep't of Envtl. Prot. v. O.S.H.A.*, 356 F.3d 226, 231 (2d Cir. 2004) ("[W]e have held that the alleged violation of a constitutional right triggers a finding of irreparable injury.") (internal quotation marks and citations omitted); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) ("[An] *alleged* violation of a constitutional right . . . triggers a finding of irreparable harm.") (emphasis in original).

ARGUMENT

I. PETITIONERS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR WRITS OF HABEAS CORPUS

a. PETITIONERS' CONTINUED DETENTION VIOLATES THEIR FIFTH AMENDMENT RIGHTS TO REASONABLE SAFETY WHILE IN CIVIL IMMIGRATION DETENTION.

The government has an affirmative duty to provide conditions of reasonable health and safety to the people it holds in its custody. In *Deshaney v. Winnebago County Department of Social Services*, the Supreme Court articulated:

> [W]hen the State takes a person into its custody and holds them there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being . . . . The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, *and medical care*—it transgresses the substantive limits on state action set by the Eighth Amendment . . . .

Deshaney v. Winnebago County Department of Social Services, 489 U.S. 189, 199-200 (1989) (emphasis added).

The Eighth Amendment's prohibition against cruel and unusual punishment applies to both existing and impending conditions of harm. *See Helling*, 509 U.S. at 33. "The [Eighth] Amendment . . . requires that inmates be furnished with the basic human needs, one of which is 'reasonable safety.'" *Id*. Exposure to "toxic or similar substances" constitutes one such circumstance where "the Amendment's protection would be available even if the effects of exposure might not be manifested for some time." *Id*. at 34.

The Court also recognized that an injunction to correct a violation of Petitioners' rights to reasonable safety might be appropriate even when no injury has yet occurred. *Helling*, 509 U.S. at 33 ("It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition . . . on the ground that nothing yet has happened to them."). As medical experts are reasonably certain an outbreak at Batavia is imminent, Petitioners should not be required to wait until they have the virus to bring this action.

Specifically in *Helling*, the Supreme Court provided an Eighth Amendment remedy to prisoners who faced a risk of contracting a communicable disease. The Court stated that the risk of infectious maladies and venereal disease within a crowded detained setting were enough to substantiate a claim for Eighth Amendment protection even if it is not proven or alleged that "the likely harm would occur immediately and even though the possible infection might not affect all of those exposed." *Id*. at 33. The Court further emphasized:

> [T]here may be situations in which exposure to toxic or similar substances would present a risk of sufficient likelihood or magnitude—and in which there is a sufficiently broad consensus that exposure of *anyone* to the substance should therefore be prevented—that the Amendment's protection would be available

> even if the effects of exposure might not be manifested for some time.

Helling, 509 U.S. at 34 (internal quotation and citation omitted) (*citing Hutto v. Finney*, 437 U.S. 678 (1978).

In this case, Petitioners are at a serious risk of severe illness or death from COVID-19 because of their age or their underlying medical conditions. As the Court recognized in *Helling*, the Eighth Amendment requires that Petitioners be provided the guarantee of "reasonable safety" while they are held in government custody. If the government cannot adequately provide Petitioners with assurances of "reasonable safety" under detention, then the appropriate remedy would be to release Petitioners from detention where they could obtain such assurances.

b. AS CIVIL DETAINEES, PETITIONERS ARE ENTITLED TO CONDITIONS SUPERIOR TO THOSE OF CRIMINAL DETAINEES AND NEED ONLY SHOW THAT OFFICIALS KNEW OR SHOULD HAVE KNOWN THAT OMITTED MEDICAL TREATMENTS WOULD POSE A SUBSTANTIAL RISK TO THE DETAINEES' HEALTH.

Noncitizen detainees like Petitioners, even those with prior criminal convictions, are civil detainees held pursuant to the country's civil immigration laws. *See Zadvydas*, 533 U.S. at 690. Civil detention, as opposed to criminal incarceration, invokes constitutional protections derived from the Due Process Clause of the Fifth Amendment rather than the Eighth Amendment. Thus, civil detention prohibits the use of punitive measures in any form (apart from the detention itself). *See id.* ("[G]overnment detention violates [the Due Process] Clause unless the detention is ordered in *criminal* proceeding[s] with adequate procedural protections . . . or, in certain special and 'narrow' nonpunitive 'circumstances' . . . .") (emphasis in original); *see also Darnell v. Pineiro*, 849 F.3d 17, 29 (2d Cir. 2017) (stating that civil detainees "may not be punished in any manner – neither cruelly and unusually nor otherwise.") (internal quotation marks and citations omitted). In

Youngberg v. Romeo, the Supreme Court clarified that civil detainees are entitled to "more considerate treatment" than criminal detainees. 457 U.S. 307, 321-22 (1982).

Likewise in *Charles v. Orange County*, the Second Circuit affirmed that individuals in civil detention are "afforded a right to be free from deliberate indifference to their serious medical needs." 925 F.3d 73, 85 (2d Cir. 2019). Deliberate indifference "can be shown by something akin to recklessness, and does not require proof of a malicious or callous state of mind." *Id*. at 86. It is established either when "the defendants *knew* that failing to provide . . . medical treatment would pose a substantial risk to [the detainee]. . . or that the defendants *should have known* that failing to provide the omitted medical treatment would pose a substantial risk to the detainee's health." *Id*. at 87.

Here, Petitioners' due process rights require that they be afforded adequate medical care during their detention. Respondents have or should be expected to have knowledge over the acute risks that COVID-19 poses for older individuals and individuals with underlying medical conditions. Respondents also have knowledge over Petitioners' ages and underlying medical conditions, as ICE routinely keeps medical records and maintains a small medical staff at Batavia.

However, in light of present circumstances, Respondents' decision to continue detaining Petitioners evidences deliberate indifference. Since nearly all medical experts agree that social distancing is the only viable option to reduce the spread of COVID-19, and because social distancing is effectively impossible within a crowded detention facility or dorm, Respondents violate Petitioners' due process rights by continuing to hold them in detention knowing that they cannot do anything to prevent an outbreak.

Furthermore, as noted above, if Petitioners do contract this virus, they are most certainly going to receive substandard care, as the Buffalo Federal Detention Facility is likely to be rapidly

overrun with cases and far beyond the capacity to treat Petitioners adequately. Likewise, reliance on the surrounding regional healthcare infrastructure is insufficient to protect Petitioners. The hospital in Batavia – United Memorial Medical Center – has a total of 133 beds relative to a town of approximately 14,500 residents, in addition to the approximately 650 detainees at the Buffalo Federal Detention Facility. Should the virus hit the area in anything close to an outbreak, the hospital is likely to be quickly overwhelmed and priority on assistance given to citizen residents rather than detainees.

c. COVID-19's Threat Imposes a Potential Harm that Exceeds Respondents' Interest in Detaining Petitioners.

The risk of serious illness or death confronting Petitioners should they contract COVID-19 significantly exceeds Respondents' interest in continuing their detention. In *Zadvydas*, the Supreme Court emphasized that the government's two interests in detaining noncitizens within immigration detention facilities are to "ensure[] the appearance of aliens at future immigration proceedings" and "prevent[] danger to the community." 533 U.S. at 690 (internal quotation marks and citation omitted). The government's twin interests must always be weighed against an individual's compelling liberty interest to be free of physical restraint. The *Zadvydas* Court clarified that the distinction is not between imprisonment and noncitizens "living at large" but rather between imprisonment and "supervision under release conditions . . . ." *Id*. at 696. The Supreme Court concluded that "an alien's liberty interest is, at the least, strong enough to raise a serious question as to whether . . . the Constitution permits detention that is indefinite and potentially permanent." *Id*. Here, the government's interest in continuing to hold Petitioners cannot justify the serious medical harm or death – tantamount to indefinite detention or even torture – that is likely to be faced by Petitioners if they remain.

This is also not the first instance in which this Court has been tasked with considering a habeas action from a Batavia detainee based at least in part on the health consequences in detention. While not directly on point, the case can serve as a guide. In *D'Alessandro v. Mukasey*, this Court granted habeas relief to a petitioner in poor physical health being detained at the BFDF and ordered ICE to immediately release him. 628 F.Supp.2d 368 (W.D.N.Y. 2009). The Court noted that petitioner, a fifty-year-old man, suffered from a "constellation of serious, debilitating, and progressive health problems" that were not likely to improve while detained in ICE custody. *Id*. at 399. Among several factors, the Court evaluated D'Alessandro's poor health in determining that detention was no longer justified. *D'Alessandro*, 628 F.Supp.2d. at 399. The Court ultimately concluded, in addition to his disciplinary record, rehabilitation, and community support, that D'Alessandro's health conditions weighed in favor of establishing that he was "not likely to violate [any] conditions of release" imposed on him, thus justifying his immediate release. *Id*. at 400.

Like the petitioner in *D'Alessandro*, the Petitioners' liberty interests here are elevated because of their heightened susceptibility to contracting COVID-19 and the inevitability of developing serious health complications in the event they contract the virus. Petitioners are all either over the age of fifty or have underlying medical conditions that make their continued detention at the BFDF physically unsafe. *See supra*. Furthermore, Respondents' interest in "preventing danger to the community" in the current case is diminished by the exceptional circumstances produced by the COVID-19 outbreak. *See Zadyvdas*, 533 U.S. at 690. As numerous public health experts have warned, it is *more* dangerous to the community for Respondents to continue detaining Petitioners because of the significant amount of medical resources that local hospitals might be required to treat Petitioners when they develop serious complications from COVID-19.

To address this new reality, extraordinary measures are necessary to protect Petitioners' lives. *See* Exh. B, Allen & Rich Letter at 5 ("to implement immediate social distancing to reduce the likelihood of exposure to . . . the general public, it is essential to consider releasing all detainees who do not pose an immediate risk to public safety."). Sobering as it is, as outlined below, the only reasonable way – i.e. the consensus of expert medical opinion – to protect Petitioners lives is to order they be released immediately before the virus hits.

II. PETITIONERS ARE LIKELY TO SUFFER IRREPARABLE HARM ABSENT THE TEMPORARY RESTRAINING ORDER.

The rapid spread of COVID-19 and the severe harm that it may bring to Petitioners constitute irreparable harm that justifies granting the temporary restraining order. *See Faiveley Transp. Malmo AB*, 559 F.3d at 118 ("A showing of irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction.") (internal quotation marks and citation omitted). Temporary restraining orders are warranted when Petitioners demonstrate that "they will suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm." *See id*. (internal citation omitted). Relevant here, in considering a case that only looked at the "risk of harm to [] *future* health", the Supreme Court stated precisely in *Helling* that:

> It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition . . . on the ground that nothing yet has happened to them. The Courts of Appeals have plainly recognized that a remedy for unsafe conditions need not await a tragic event. . . We thus reject petitioners' central thesis that only deliberate indifference to current serious health problems of inmates is actionable under the Eighth Amendment.

Helling, 509 U.S. at 33; *see also Campbell v. Beto*, 460 F.2d 765, 768 (5th Cir. 1972) ("[I]t is apparent that the courts cannot close their judicial eyes to prison conditions which present a grave

and immediate threat to health or physical well being."); *Ramos v. Lamm*, 639 F.2d 559, 572 (10th Cir. 1980) ("[An inmate] does not need to wait until he is actually assaulted before obtaining relief."); *Woodhous v. Commonwealth of Virginia*, 487 F.2d 889, 890 (4th Cir. 1973) (same). On point to the present case, the Second Circuit has also recognized that "prison officials may not ignore medical conditions that are very likely to cause serious illness and needless suffering in the future even if the prisoner has no serious current symptoms." *Smith v. Carpenter*, 316 F.3d 178, 188 (2d Cir. 2003) (internal quotation omitted).

The fast-changing nature of the COVID-19 outbreak dictates that Petitioners should be released from detention while they await adjudication of their underlying habeas petition. First, constitutional violations are *per se* irreparable harms that justify swift and impactful redress. *See Connecticut Dep't of Envtl. Prot.*, 356 F.3d at 231 ("[W]e have held that the alleged violation of a constitutional right triggers a finding of irreparable injury.") (internal quotation marks and citations omitted). Here, Petitioners have asserted credible violations of their Fifth Amendment right to reasonable safety while being detained by the government, inherently an irreparable injury.

Second, as discussed at length above, Petitioners are individuals who are highly vulnerable to serious harm, potentially leading to their deaths, should they contract COVID-19 while detained at Batavia. *See supra*, Factual Background, §§ I, III, IV; Petition and Complaint, Dkt. No. 1 at . Moreover, the injury that they would suffer is neither remote nor speculative given COVID-19's high rates of transmission and severe impact on vulnerable populations. The imminent risk that Petitioners face is exacerbated by confirmed cases of COVID-19 in Genesee County, the county in which the BFDF sits, as well confirmed cases at the Wende Correctional Facility, through which

DOCCS regularly transfers inmates moving between DOCCS and ICE custody.[41] ¶ 52-57 (noting the specific harm to each petitioner based on individual medical conditions). Finally, the continued operation of the Batavia Immigration Court, which necessitates the daily in and outflow of a large number of people, further elevates Petitioners' risks. As the overwhelming consensus of public health experts indicates, transmission of COVID-19 into an immigration detention facilities likethe BFDF appears to be imminent. *See* Allen & Rich Letter, Dkt. No. 2, Exh. D at 5 ("In the current scenario, with widespread reporting about the lack of available tests for COVID-19 and challenges for screening given the late-onset display of symptoms for what is now a community-spread illness, detention facilities, like the rest of [the] country, are already behind the curve for this stage of mitigation."); *Helling*, 509 U.S. at 34 ("the Eighth Amendment protects against sufficiently imminent dangers.").

III. THE PUBLIC INTEREST AND BALANCE OF EQUITIES WEIGH HEAVILY IN PETITIONERS' FAVOR.

Both the public interest and balance of equities heavily favor the Petitioners. The Second Circuit has articulated that "where a Petitioner alleges constitutional violations, the balance of hardships tips decidedly in the Petitioner's favor despite arguments that granting a preliminary injunction would cause financial or administrative burdens on the Government." *Sajous v. Decker*, No. 18-CV-2447 (AJN), 2018 WL 2357266, at *13 (S.D.N.Y. May 23, 2018), *appeal withdrawn*, No. 18-2591, 2019 WL 4137822 (2d Cir. May 7, 2019) (citing *Mitchell v. Cuomo*, 748 F.2d 804, 808 (2d Cir. 1984)); *see also Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("It is always in the public interest to prevent the violation of a party's constitutional rights.").

[41] *See* Mahoney, *supra* note 13.

Here, Respondents face minimal financial or administrative burdens to release Petitioners from custody. Instead, releasing Petitioners from custody would alleviate the costs required for Respondents to keep Petitioners in custody, as well as the potentially high cost to Respondents should they be required to treat Petitioners when a COVID-19 outbreak occurs. This would include not only the high cost of Petitioners' significant medical treatment, but also possibly the cost of their deaths. Respondents' capacity to release Petitioners under appropriate conditions of supervision also assures Petitioners return for any future immigration proceedings. *See Zadvydas*, 533 U.S. at 690 (noting that one of the Government's two goals is to "ensure[] the appearance of aliens at future immigration proceedings.").

Immediately releasing Petitioners from detention serves both Respondents' specific interests and the more generalized public interest because it benefits the public health. *See e.g.*, *Grand River Enterprises Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 169 (2d Cir. 2005) (identifying "public health" as a "significant public interest."). The release of people most vulnerable to COVID-19 reduces the overall health risk for detainees, facility staff, and regular visitors alike at the BFDF, and protects the surrounding public community. Stern Decl. at ¶ 9. Reducing the spread of an infection in detention centers "slows, if not reduces, the number of people who will become ill enough to require hospitalization, which in turn reduces the health and economic burden to the local community at large." *Id*. at ¶ 10.

IV. RESPONDENTS HAVE THE AUTHORITY TO RELEASE DETAINED PEOPLE IN ITS CUSTODY AND REGULARLY EXERCISES THIS AUTHORITY DUE TO MEDICAL REASONS.

ICE both has the authority to release individuals from custody and routinely exercises this discretion to release particularly vulnerable detainees like Petitioners. *See* 8 U.S.C. §§ 1182(d)(5), 1226(a), 1231(a)(3); 8 C.F.R. §§ 212.5(b)(1), 236.1(c)(8). Regulations governing ICE's release

authority explicitly state that serious medical conditions are a reason to parole an individual, as "continued detention would not be appropriate." 8 C.F.R. § 212.5(b)(1). As former Deputy Assistant Director for Custody Programs in ICE Enforcement and Removal Operations Lorenzen-Strait states, "ICE has exercised and still exercises discretion for purposes of releasing individuals with serious medical conditions from detention" and "exercises humanitarian parole authority all the time for serious medical reasons." Declaration of Andrew Lorenzen-Strait at ¶ 3.

ICE's release policy comes from a long line of agency directives explicitly instructing officers to exercise favorable discretion in cases involving severe medical concerns and to limit the detention of noncitizens with special vulnerabilities. *Id*. at ¶¶ 4 n. 1, 12. This group traditionally includes "individuals who are known to be suffering from serious physical or mental illness, who have disabilities, who are elderly, pregnant, or nursing, . . . or whose detention as otherwise not in the public interest." *Id*. at ¶ 4.

Importantly, this release policy applies regardless of the statutory basis for the noncitizen's detention. *Id*. at ¶ 10. Even individuals held under mandatory detention pursuant to 8 U.S.C. § 1226(c) are eligible for release, "particularly where the nature of their illness could impose substantial health care costs or the humanitarian equities mitigating against detention are particularly compelling." *Id*.

Petitioners, who are all at a high risk from suffering serious complications and/or death from COVID-19, all fit squarely within ICE's definition of vulnerable populations. *See supra*, Factual Background §§ III-IV; Petition, Dkt. No. 1 at ¶ 52-57. Considering ICE's well-established authority and practice of exercising discretion in these circumstances, along with the substantial medical and health care costs that ICE would otherwise bear from a COVID-19 outbreak within the BFDF, Petitioners' immediate release serves the interests of all detainees and the agency.

V. THE COURT HAS AUTHORITY TO ORDER PETITIONERS' RELEASE AS THE SOLE EFFECTIVE REMEDY FOR THE CONSTITUTIONAL VIOLATION.

This Court has "broad discretion in fashioning equitable remedies for . . . constitutional violations." *Ass'n of Surrogates & Supreme Court Reporters Within City of New York v. State of N.Y.*, 966 F.2d 75, 79 (2d Cir. 1992), *opinion modified on reh'g*, 969 F.2d 1416 (2d Cir. 1992). In *Brown v. Plata*, the Supreme Court held that "[w]hen necessary to ensure compliance with a constitutional mandate, courts may enter orders placing limits on a prison's population." 563 U.S. 493, 511 (2011). In cases involving prisons and jails, federal courts have repeatedly ordered the release of detained persons when necessary to remedy constitutional violations caused by overcrowding. *See, e.g.*, *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); *Mobile Cty. Jail Inmates v. Purvis*, 581 F. Supp. 222, 224-25 (S.D. Ala. 1984) (concluding that district court properly exercised remedial powers to order a prison's population reduced to alleviate unconstitutional conditions); *Brenneman v. Madigan*, 343 F. Supp. 128, 139 (N.D. Cal. 1972) ("If the state cannot obtain the resources to detain persons . . . in accordance with minimum constitutional standards, then the state simply will not be permitted to detain such persons."); *Hechavarria v. Whitaker*, 358 F.Supp.3d 227, 234 (W.D.N.Y. Jan. 16, 2019) ("Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him." (*quoting Fay v. Noia*, 372 U.S. 391, 430-31 (1963)).

In this case, the release of Petitioners from detention is the only effective remedy for the constitutional violation they face – namely that they are likely suffer severe harm and possibly die if they remain in detention. Preventive measures that may be effective in the community, such as

maintaining a distance of six feet from other persons and frequent disinfection, are downright impossible for Petitioners while at Batavia. *See supra*, Factual Background §§ I-III. As Dr. Greifinger explains, "[t]he only viable public health strategy available is risk mitigation. Even with the best-laid plans to address the spread of COVID-19 in detention facilities, the release of high-risk individuals is a key part of a risk mitigation strategy." Greifinger Decl. at ¶ 13. And because those measures are not possible to protect Petitioners, regardless of Respondents' best efforts, Petitioners' right to reasonable safety is to be imminently violated by their continued detention.

VI. THE COURT SHOULD NOT REQUIRE PETITIONERS TO PROVIDE SECURITY PRIOR TO ISSUING A TEMPORARY RESTRAINING ORDER.

Federal Rule of Civil Procedure 65(c) provides that, "[t]he court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." However, under Rule 65, "the amount of any bond to be given upon the issuance of a preliminary injunction rests within the sound discretion of the trial court" and "the district court may dispense with the filing of a bond." *Clarkson Co. v. Shaheen*, 544 F.2d 624, 632 (2d Cir. 1976) (internal citations omitted). Since the case here involves the violation of Petitioners' constitutional rights, because Petitioners comprise indigent individuals, and because Respondents – collectively the federal government – would not be financially harmed by a grant of the temporary restraining order, the Court should exercise its discretion and waive the requirement of a security.

CONCLUSION

For the foregoing reasons, Petitioners respectfully move this Court to issue a temporary restraining order against Respondents over their continued detention and order Petitioners' immediate release under appropriate public health measures and conditions of supervision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2020, I filed this Motion for Temporary Restraining Order with all supporting papers to the Clerk of the U.S. District Court for the Western District of New York using its CM/ECF system. The Clerk of the Court electronically served the CM/ECF participants on this case:

- Chad Wolf, Acting Secretary of the U.S. Department of Homeland Security;
- Thomas E. Feeley, Field Office Director, Buffalo Field Office Enforcement and Removal Operations, U.S. Immigration and Customs Enforcement; and
- Jeffrey Searls, Acting Assistant Field Office Director and Administrator, Buffalo Federal Detention Facility

And, I hereby certify that I have sent copies of this filing by electronic mail to the following participants on this case:

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Respectfully submitted,

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EXHIBIT A

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March 19, 2020

The Honorable Bennie Thompson
Chairman
House Committee on Homeland Security
310 Cannon House Office Building
Washington, D.C. 20515

The Honorable Ron Johnson
Chairman
Senate Committee on Homeland Security
and Governmental Affairs
340 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Mike Rogers
Ranking Member
House Committee on Homeland Security
310 Cannon House Office Building
Washington, D.C. 20515

The Honorable Gary Peters
Ranking Member
Senate Committee on Homeland Security
and Governmental Affairs
340 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Carolyn Maloney
Chairwoman
House Committee on Oversight and Reform
2157 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Jim Jordan
Ranking Member
House Committee on Oversight and Reform
2157 Rayburn House Office Building
Washington, D.C. 20515

Dear Committee Chairpersons and Ranking Members:

We are physicians—an internist and an infectious disease specialist—with unique expertise in medical care in detention settings.[1] We currently serve as medical subject matter experts for the

[1] I, Dr. Scott Allen, MD, FACP, am a Professor Emeritus of Medicine, a former Associate Dean of Academic Affairs and former Chair of the Department of Internal Medicine at the University of California Riverside School of Medicine. From 1997 to 2004, I was a full-time correctional physician for the Rhode Island Department of Corrections; for the final three years, I served as the State Medical Program. I have published over 25 peer-reviewed papers in academic journals related to prison health care and am a former Associate Editor of the International Journal of Prisoner Health Care. I am the court appointed monitor for the consent decree in litigation involving

Department of Homeland Security's Office of Civil Rights and Civil Liberties (CRCL). One of us (Dr. Allen) has conducted numerous investigations of immigration detention facilities on CRCL's behalf over the past five years. We both are clinicians and continue to see patients, with one of us (Dr. Rich) currently providing care to coronavirus infected patients in an ICU setting.

As experts in the field of detention health, infectious disease, and public health, we 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. In recent weeks, attention has rightly turned to the public health response in congregate settings such as nursing homes, college campuses, jails, prisons and immigration detention facilities (clusters have already been identified in Chinese and Iranian prisons according to news reports[2] and an inmate and an officer have reportedly just tested positive at New York's Rikers Island).[3] Reporting in recent days reveals that immigrant detainees at ICE's Aurora facility are in isolation for possible exposure to coronavirus.[4] And a member of ICE's medical staff at a private detention center in New Jersey has now been reported to have tested positive for coronavirus.[5]

We have shared our concerns about the serious medical risks from specific public health and safety threats associated with immigration detention with CRCL's Officer Cameron Quinn in an initial letter dated February 25, 2020, and a subsequent letter of March 13, 2020. We offered to

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medical care at Riverside County Jails. I have consulted on detention health issues both domestically and internationally for the Open Society Institute and the International Committee of the Red Cross, among others. I have worked with the Institute of Medicine on several workshops related to detainee healthcare and serve as a medical advisor to Physicians for Human Rights. I am the co-founder and co-director of the Center for Prisoner Health and Human Rights at Brown University (www.prisonerhealth.org), and a former Co-Investigator of the University of California Criminal Justice and Health Consortium. I am also the founder and medical director of the Access Clinic, a primary care medical home to adults with developmental disabilities.

I, Dr. Josiah (Jody) Rich, MD, MPH, am a Professor of Medicine and Epidemiology at The Warren Alpert Medical School of Brown University, and a practicing Infectious Disease Specialist since 1994 at The Miriam Hospital Immunology Center providing clinical care for over 22 years, and at the Rhode Island Department of Corrections caring for prisoners with HIV infection and working in the correctional setting doing research. I have published close to 190 peer-reviewed publications, predominantly in the overlap between infectious diseases, addictions and incarceration. I am the Director and Co-founder of The Center for Prisoner Health and Human Rights at The Miriam Hospital (www.prisonerhealth.org), and a Co-Founder of the nationwide Centers for AIDS Research (CFAR) collaboration in HIV in corrections (CFAR/CHIC) initiative. I am Principal Investigator of three R01 grants and a K24 grant all focused on incarcerated populations. My primary field and area of specialization and expertise is in the overlap between infectious diseases and illicit substance use, the treatment and prevention of HIV infection, and the care and prevention of disease in addicted and incarcerated individuals. I have served as an expert for the National Academy of Sciences, the Institute of Medicine and others.

[2] Erin Mendel, "Coronavirus Outbreaks at China Prisons Spark Worries About Unknown Clusters," *Wall Street Journal*, February 21, 2020, available at: https://www.wsj.com/articles/coronavirus-outbreaks-at-china-prisons-spark-worries-about-unknown-clusters-11582286150; Center for Human Rights in Iran, "Grave Concerns for Prisoners in Iran Amid Coronavirus Outbreak," February 28, 2020, available at https://iranhumanrights.org/2020/02/grave-concerns-for-prisoners-in-iran-amid-coronavirus-outbreak/.

[3] Joseph Konig and Ben Feuerherd, "First Rikers Inmate Tests Positive for Coronavirus" New York Post. March 18, 2020, available at: https://nypost.com/2020/03/18/first-rikers-island-inmate-tests-positive-for-coronavirus/

[4] Sam Tabachnik, "Ten detainees at Aurora's ICE detention facility isolated for possible exposure to coronavirus," *The Denver Post*, March 17, 2020, available at https://www.denverpost.com/2020/03/17/coronavirus-ice-detention-geo-group-aurora-colorado/.

[5] Emily Kassie, "First ICE Employees Test Positive for Coronavirus," *The Marshall Project*, March 19, 2020, available at https://www.themarshallproject.org/2020/03/19/first-ice-employees-test-positive-for-coronavirus

work with DHS in light of our shared obligation to protect the health, safety, and civil rights of detainees under DHS's care. Additionally, on March 17, 2020 we published an opinion piece in the *Washington Post* warning of the need to act immediately to stem the spread of the coronavirus in jails and prisons in order to protect not only the health of prisoners and corrections workers, but the public at large.[6]

In the piece we noted the parallel risks in immigration detention. We are writing now to formally share our concerns about the imminent risk to the health and safety of immigrant detainees, as well as to the public at large, that is a direct consequence of detaining populations in congregate settings. We also offer to Congress, as we have to CRCL, our support and assistance in addressing the public health challenges that must be confronted as proactively as possible to mitigate the spread of the coronavirus both in, and through, immigration detention and congregate settings.

Nature of the Risk in Immigration Detention and Congregate Settings

One of the risks of detention of immigrants in congregant settings is the rapid spread of infectious diseases. Although much is still unknown, the case-fatality rate (number of infected patients who will die from the disease) and rate of spread for COVID-19 appears to be as high or higher than that for influenza or varicella (chicken pox).

In addition to spread within detention facilities, the **extensive transfer of individuals** (who are often without symptoms) throughout the detention system, which occurs with great frequency in the immigration context, could rapidly disseminate the virus throughout the entire system with devastating consequences to public health.[7]

Anyone can get a coronavirus infection. While healthy children appear to suffer mildly if they contract COVID-19, they still pose risk as carriers of infection, particularly so because they may not display symptoms of illness.[8] Family detention continues to struggle with managing outbreaks of influenza and varicella.[9] Notably, seven children who have died in and around

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[6] Josiah Rich, Scott Allen, and Mavis Nimoh, "We must release prisoners to lessen the spread of coronavirus," *Washington Post*, March 17, 2020, available at https://www.washingtonpost.com/opinions/2020/03/17/we-must-release-prisoners-lessen-spread-coronavirus/.

[7] See Hamed Aleaziz, "A Local Sheriff Said No To More Immigrant Detainees Because of Coronavirus Fears. So ICE Transferred Them All To New Facilities," *BuzzFeed News*, March 18, 2020 (ICE recently transferred170 immigrant detainees from Wisconsin to facilities in Texas and Illinois. "'In order to accommodate various operational demands, ICE routinely transfers detainees within its detention network based on available resources and the needs of the agency…' an ICE official said in a statement."), available at https://www.buzzfeednews.com/article/hamedaleaziz/wisconsin-sheriff-ice-detainees-coronavirus

[8] Interview with Jay C. Butler, MD, Deputy Director for Infectious Diseases, Centers for Disease Control and Prevention, "Coronovirus (COVID-19) Testing," *JAMA Network*, March 16, 2020, available at https://youtu.be/oGiOi7eV05g (min 19:00).

[9] Indeed, I (Dr. Allen) raised concerns to CRCL, the DHS Office of Inspector General, and to Congress in July 2018, along with my colleague Dr. Pamela McPherson, about the risks if harm to immigrant children in family detention centers because of specific systemic weaknesses at those facilities in their ability to provide for the medical and mental health needs of children in detention. *See*, e.g., July 17, 2018 Letter to Senate Whistleblower Caucus Chairs from Drs. Scott Allen and Pamela McPherson, available at https://www.wyden.senate.gov/imo/media/doc/Doctors%20Congressional%20Disclosure%20SWC.pdf. Those concerns, including but not limited to inadequate medical staffing, a lack of translation services, and the risk of

immigration detention, according to press reports, six died of infectious disease, including three deaths from influenza.[10] Containing the spread of an infection in a congregate facility housing families creates the conditions where many of those infected children who do not manifest symptoms will unavoidably spread the virus to older family members who may be a higher risk of serious illness.

Finally, as you well know, social distancing is essential to slow the spread of the coronavirus to minimize the risk of infection and to try to reduce the number of those needing medical treatment from the already-overwhelmed and inadequately prepared health care providers and facilities. However, social distancing is an oxymoron in congregate settings, which because of the concentration of people in a close area with limited options for creating distance between detainees, are at very high risk for an outbreak of infectious disease. This then creates an enormous public health risk, not only because disease can spread so quickly, but because those who contract COVID-19 with symptoms that require medical intervention will need to be treated at local hospitals, thus increasing the risk of infection to the public at large and overwhelming treatment facilities.

As local hospital systems become overwhelmed by the patient flow from detention center outbreaks, precious health resources will be less available for people in the community.To be more explicit, a detention center with a rapid outbreak could result in multiple detainees—five, ten or more—being sent to the local community hospital where there may only be six or eight ventilators over a very short period. As they fill up and overwhelm the ventilator resources, those ventilators are unavailable when the infection inevitably is carried by staff to the community and are also unavailable for all the usual critical illnesses (heart attacks, trauma, etc). In the alternate scenario where detainees are released from high risk congregate settings, the tinderbox scenario of a large cohort of people getting sick all at once is less likely to occur, and the peak volume of patients hitting the community hospital would level out. In the first scenario, many people from the detention center *and the community* die unnecessarily for want of a ventilator. In the latter, survival is maximized as the local mass outbreak scenario is averted.

It is additionally concerning that dozens of immigration detention centers are in remote areas with limited access to health care facilities. Many facilities, because of the rural locations, have only one on-site medical provider. If that provider gets sick and requires being quarantined for at least fourteen days, the entire facility could be without any medical providers at all during a foreseeable outbreak of a rapidly infectious disease. We simply can't afford a drain on resources/medical personnel from any preventable cases.

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communication breakdowns and confusion that results from different lines of authority needing to coordinate between various agencies and partners from different government programs and departments responsible for detention programs with rapid turnover, all continue to contribute to heightened risks to meeting the medical challenges posed by the spread of the coronavirus.

[10] Nicole Acevedo, "Why are children dying in U.S. custody?," *NBC News*, May 29, 2019, available at https://www.nbcnews.com/news/latino/why-are-migrant-children-dying-u-s-custody-n1010316

Proactive Approaches Required

Before coronavirus spreads through immigration detention, proactivity is required in three primary areas: 1) Processes for screening, testing, isolation and quarantine; 2) Limiting transport and transfer of immigrant detainees; and 3) Implementing alternatives to detention to facilitate as much social distancing as possible.

Protocols for early screening, testing, isolation and quarantine exist in detention settings to address infectious diseases such as influenza, chicken pox and measles. However, the track record of ICE facilities implementing these protocols historically has been inconsistent. In the current scenario, with widespread reporting about the lack of available tests for COVID-19 and challenges for screening given the late-onset display of symptoms for what is now a community-spread illness, detention facilities, like the rest of country, are already behind the curve for this stage of mitigation.

Detention facilities will need to rapidly identify cases and develop plans to isolate exposed cohorts to limit the spread, as well as transfer ill patients to appropriate facilities. Screening should occur as early as possible after apprehension (including at border holding facilities) to prevent introduction of the virus into detention centers. We strongly recommend ongoing consultation with CDC and public health officials to forge optimal infection prevention and control strategies to mitigate the health risks to detained patient populations and correctional workers. Any outbreak in a facility could rapidly overwhelm the capacity of healthcare programs. Partnerships with local public health agencies, hospitals and clinics, including joint planning exercises and preparedness drills, will be necessary.

Transferring detainees between facilities should be kept to an absolute minimum. The transfer process puts the immigrants being transferred, populations in the new facilities, and personnel all at increased risk of exposure. The nationwide network of detention centers, where frequent and routine inter-facility transfers occur, represents a frighteningly efficient mechanism for rapid spread of the virus to otherwise remote areas of the country where many detention centers are housed.

Finally, regarding the need to implement immediate social distancing to reduce the likelihood of exposure to detainees, facility personnel, and the general public, ***it is essential to consider releasing all detainees who do not pose an immediate risk to public safety.***

Congregant settings have a high risk of rapid spread of infectious diseases, and wherever possible, public health mitigation efforts involve moving people out of congregate settings (as we are seeing with colleges and universities and K-12 schools).[11] Minimally, DHS should consider releasing all detainees in high risk medical groups such as older people and those with

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[11] Madeline Holcombe, "Some schools closed for coronavirus in US are not going back for the rest of the academic year," *CNN*, March 18, 2020, available at https://www.cnn.com/2020/03/18/us/coronavirus-schools-not-going-back-year/index.html; Eric Levenson, Chris Boyette and Janine Mack, "Colleges and universities across the US are canceling in-person classes due to coronavirus," *CNN*, March 12, 2020, available at https://www.cnn.com/2020/03/09/us/coronavirus-university-college-classes/index.html.

chronic diseases. COVID-19 infection among these groups will require many to be transferred to local hospitals for intensive medical and ventilator care—highly expensive interventions that may soon be in short supply.

Given the already established risks of adverse health consequences associated with the detention of children and their families,[12] the policy of detention of children and their families in should be reconsidered in light of these new infectious disease threats so that children would only be placed in congregate detention settings when lower risk community settings are not available and then for as brief a time as possible.

In addition, given the low risk of releasing detainees who do not pose a threat to public safety—i.e., those only charged with immigration violations—releasing *all* immigration detainees who do not pose a security risk should be seriously considered in the national effort to stop the spread of the coronavirus.

Similarly, the practice of forcing asylum seekers to remain in Mexico has created a *de facto* congregate setting for immigrants, since large groups of people are concentrated on the US southern border as a result of the MPP program in the worst of hygienic conditions without any basic public health infrastructure or access to medical facilities or the ability to engage in social distancing as they await asylum hearings, which are currently on hold as a consequence of the government's response to stop the spread of the coronavirus.[13] This is a tinderbox that cannot be ignored in the national strategy to slow the spread of infection.

ICE recently announced that in response to the coronavirus pandemic, it will delay arresting immigrants who do not pose public safety threats, and will also stop detaining immigrants who fall outside of mandatory detention guidelines.[14] But with reporting that immigrant detainees at ICE facilities are already being isolated for possible exposure to coronavirus, it is not enough to simply stop adding to the existing population of immigrant detainees. Social distancing through release is necessary to slow transmission of infection.[15]

Reassessing the security and public health risks, and acting immediately, will save lives of not only those detained, but also detention staff and their families, and the community-at-large.

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[12] Report of the DHS Advisory Committee on Family Residential Centers, September 30, 2016, available at https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc16093.pdf

[13] *See* Rick Jervis, "Migrants waiting at US-Mexico border at risk of coronavirus, health experts warn," *USA Today*, March 17, 2020, available at https://www.usatoday.com/story/news/nation/2020/03/17/us-border-could-hit-hard-coronavirus-migrants-wait-mexico/5062446002/.

[14] ICE website, Guidance on COVID-19, Immigration and Enforcement Check-Ins, Updated March 18, 2020, 7:45 pm, available at https://www.ice.gov/covid19.

[15] Release of immigrants from detention to control the coronavirus outbreak has been recommended by John Sandweg, former acting head of ICE during the Obama administration, who further noted, "'The overwhelming majority of people in ICE detention don't pose a threat to public safety and are not an unmanageable flight risk.'…'Unlike the Federal Bureau of Prisons, ICE has complete control over the release of individuals. ICE is not carrying out the sentence imposed by a federal judge….It has 100% discretion.'" *See* Camilo Montoya-Galvez, "'Powder kegs': Calls grow for ICE to release immigrants to avoid coronavirus outbreak, *CBS News*, March 19, 2020, available at https://www.cbsnews.com/news/coronavirus-ice-release-immigrants-detention-outbreak/.

Our legal counsel, Dana Gold of the Government Accountability Project, is supporting and coordinating our efforts to share our concerns with Congress and other oversight entities about the substantial and specific threats to public health and safety the coronavirus poses by congregate settings for immigrants. As we similarly offered to DHS, we stand ready to aid you in any way to mitigate this crisis and prevent its escalation in light of our unique expertise in detention health and experience with ICE detention specifically. Please contact our attorney, Dana Gold, at danag@whistleblower.org, or her colleague, Irvin McCullough, at irvinm@whistleblower.org, with any questions.

Sincerely,

/s/

Scott A. Allen, MD, FACP
Professor Emeritus, University of California, School of Medicine
Medical Subject Matter Expert, CRCL, DHS

/s/

Josiah D. Rich, MD, MPH
Professor of Medicine and Epidemiology
The Warren Alpert Medical School of Brown University
Medical Subject Matter Expert, CRCL, DHS

Cc: Dana Gold, Esq. and Irvin McCullough, Government Accountability Project
Senate Committee on the Judiciary
House Committee on the Judiciary
White House Coronavirus Task Force

EXHIBIT B

SUPREME COURT OF NEW JERSEY
DOCKET NO. 084230

CRIMINAL ACTION

In the Matter of the Request to Commute or Suspend County Jail Sentences

CONSENT ORDER

This matter having come before the Court on the request for relief by the Office of the Public Defender (see attached letter dated March 19, 2020), seeking the Court's consideration of a proposed Order to Show Cause (see attached) designed to commute or suspend county jail sentences currently being served by county jail inmates either as a condition of probation for an indictable offense or because of a municipal court conviction; and

The Court, on its own motion, having relaxed the Rules of Court to permit the filing of the request for relief directly with the Supreme Court, based on the dangers posed by Coronavirus disease 19 ("COVID-19"), and the statewide impact of the nature of the request in light of the Public Health Emergency and State of Emergency declared by the Governor. *See* Executive Order No. 103 (2020) (Mar. 9, 2020); and

The Office of the Attorney General, the County Prosecutors Association, the Office of the Public Defender, the American Civil Liberties Union of New Jersey having engaged in mediation before the Honorable Philip S. Carchman, P.J.A.D. (ret.); and

The parties having reviewed certifications from healthcare professionals regarding the profound risk posed to people in correctional facilities arising from the spread of COVID-19; and

The parties agreeing that the reduction of county jail populations, under appropriate conditions, is in the public interest to mitigate risks imposed by COVID-19; and

It being agreed to by all parties as evidenced by the attached duly executed consent form;

IT IS HEREBY ORDERED, that

A. No later than 6:00 a.m. on Tuesday, March 24, 2020, except as provided in paragraph C, any inmate currently serving a county jail sentence (1) as a condition of probation, or (2) as a result of a municipal court conviction, shall be ordered released. The Court's order of release shall include, at a minimum, the name of each inmate to be released, the inmate's State Bureau of Identification (SBI) number, and the county jail where the inmate is being detained, as well as any standard or

specific conditions of release. Jails shall process the release of inmates as efficiently as possible, understanding that neither immediate nor simultaneous release is feasible.

1. For inmates serving a county jail sentence as a condition of probation, the custodial portion of the sentence shall either be served at the conclusion of the probationary portion of the sentence or converted into a "time served" condition, at the discretion of the sentencing judge, after input from counsel.
2. For inmates serving a county jail sentence as a result of a municipal court conviction, the custodial portion of the sentence shall be suspended until further order of this Court upon the rescission of the Public Health Emergency declared Executive Order No. 103, or deemed satisfied, at the discretion of the sentencing judge, after input from counsel.

B. No later than noon on Thursday, March 26, 2020, except as provided in paragraph C, any inmate serving a county jail sentence for any reason other than those described in paragraph A shall be ordered released. These sentences include, but are not limited to (1) a resentencing following a finding of a violation of probation in any Superior Court or municipal court, and (2) a county jail sentence not tethered to a

probationary sentence for a fourth-degree crime, disorderly persons offense, or petty disorderly persons offense in Superior Court. The custodial portion of the sentence shall be suspended until further order of this Court upon the rescission of the Public Health Emergency declared Executive Order No. 103, or deemed satisfied, at the discretion of the sentencing judge, after input from counsel. Jails shall process the release of inmates as efficiently as possible, understanding that neither immediate nor simultaneous release is feasible.

C. Where the County Prosecutor or Attorney General objects to the release of an inmate described in Paragraph A, they shall file a written objection no later than 5:00 p.m. on Monday, March 23, 2020. Where the County Prosecutor or Attorney General objects to the release of an inmate described in Paragraph B, they shall file a written objection no later than 8:00 a.m. on Thursday, March 26, 2020.

1. The objection shall delay the order of release of the inmate and shall explain why the release of the inmate would pose a significant risk to the safety of the inmate or the public.
2. Written objections shall be filed by email to the Supreme Court Emergent Matter inbox with a copy to the Office of the Public Defender.

3. The Office of the Public Defender shall provide provisional representation to all inmates against whom an objection has been lodged under this Paragraph.
4. The Office of the Public Defender shall, no later than 5:00 p.m. on Tuesday, March 24, 2020, provide responses to any objections to release associated with inmates described in Paragraph A, as it deems appropriate. The Office of the Public Defender shall, no later than 5:00 p.m. on Thursday, March 26, 2020, provide responses to any objections to release associated with inmates described in Paragraph B, as it deems appropriate.
5. The Court shall appoint judge(s) or Special Master(s) to address the cases in which an objection to release has been raised.
    a. On or before Wednesday, March 25, 2020, the judge(s) or Special Master(s) will begin considering disputed cases arising from Paragraph A; on or before Friday, March 27, 2020, the judge(s) or Special Master(s) will consider disputed cases arising from Paragraph B.
        i. The judge(s) or Special Master(s) shall conduct summary proceedings, which shall be determined on the papers. In the event the judge(s) or Special

Master(s) conduct a hearing of any sort, inmates' presence shall be waived.

ii. Release shall be presumed, unless the presumption is overcome by a finding by a preponderance of the evidence that the release of the inmate would pose a significant risk to the safety of the inmate or the public.

iii. At any point, the Prosecutor may withdraw its objection by providing notice to the judge(s) or Special Master(s) with a copy to the Office of the Public Defender. In that case, inmates shall be released subjected to the provisions of Paragraphs D-I.

iv. If the judge(s) or Special Master(s) determine by a preponderance of the evidence that the risk to the safety of the inmate or the public can be effectively managed, the judge(s) or Special Master(s) shall order the inmate's immediate release, subject to the provisions of paragraphs D-I.

1. The Order of the judge(s) or Special Master(s) may be appealed on an emergent basis, in a summary manner to the Appellate Division.
2. Should a release Order be appealed, the release Order shall be stayed pending expedited review by the Appellate Division.
3. The record on appeal shall consist of the objection and response filed pursuant to this Paragraph.

v. If the judge(s) or Special Master(s) determine by a preponderance of the evidence that risks to the safety of the inmate or the public cannot be effectively managed, the judge(s) or Special Master(s) shall order the inmate to serve the balance of the original sentence.

1. The Order of the judge(s) or Special Master(s) may be appealed on an emergent basis, in a summary manner to the Appellate Division.

2. Should an Order requiring an inmate to serve the balance of his sentence be appealed, the Appellate Division shall conduct expedited review.
3. The record on appeal shall consist of the objection and response filed pursuant to this Paragraph.

b. The judge(s) or Special Master(s) should endeavor to address all objections no later than Friday, March 27, 2020.

D. Any warrants associated with an inmate subject to release under this order, other than those associated with first-degree or second-degree crimes, shall be suspended. Warrants suspended under this Order shall remain suspended until ten days after the rescission of the Public Health Emergency associated with COVID-19. *See* Executive Order No. 103 (2020) (Mar. 9, 2020).

E. In the following circumstances, the county jail shall not release an inmate subject to release pursuant to Paragraphs A, B, or C(5)(a)(iii) or (iv), absent additional instructions from the judge(s) or Special Master(s):

1. For any inmate who has tested positive for COVID-19 or has been identified by the county jail as presumptively positive for COVID-19, the county jail shall immediately notify the parties and the County Health Department of the inmate's medical condition, and shall not release the inmate without further instructions from the judge(s) or Special Master(s). In such cases, the parties shall immediately confer with the judge(s) or Special Master(s) to determine a plan for isolating the inmate and ensuring the inmate's medical treatment and/or mandatory self-quarantine.
2. For any inmate who notifies the county jail that he or she does not wish, based on safety, health, or housing concerns, to be released from detention pursuant to this Consent Order, the county jail shall immediately notify the parties of the inmate's wishes, and shall not release the inmate without further instructions from the judge(s) or Special Master(s). In such cases, the parties shall immediately confer with the judge(s) or Special Master(s) to determine whether to release the inmate over the inmate's objection.

F. Where an inmate is released pursuant to Paragraphs A, B, or C(5)(a)(iii) or (iv), conditions, other than in-person reporting, originally imposed by the trial court shall remain in full force and effect. County jails shall inform all inmates, prior to their release, of their continuing obligation to abide by conditions of probation designed to promote public safety. Specifically:

1. No-contact orders shall remain in force.
2. Driver's license suspensions remain in force.
3. Obligations to report to probation officers in-person shall be converted to telephone or video reporting until further order of this Court.
4. All inmates being released from county jails shall comply with any Federal, State, and local laws, directives, orders, rules, and regulations regarding conduct during the declared emergency. Among other obligations, inmates being released from county jails shall comply with Executive Order No. 107 (2020) (Mar. 21, 2020), which limits travel from people's homes and mandates "social distancing," as well as any additional Executive Orders issued by the Governor during the Public Health Emergency associated with COVID-19.

5. All inmates being released from county jails are encouraged to self-quarantine for a period of fourteen (14) days.

6. Unless otherwise ordered by the judge(s) or Special Master(s), any inmate being released from a county jail who appears to be symptomatic for COVID-19 is ordered to self-quarantine for a period of fourteen (14) days and follow all applicable New Jersey Department of Health protocols for testing, treatment, and quarantine or isolation.

G. County Prosecutors and other law enforcement agencies shall, to the extent practicable, provide notice to victims of the accelerated release of inmates.

1. In cases involving domestic violence, notification shall be made. N.J.S.A. 2C:25-26.1. Law enforcement shall contact the victim using the information provided on the "Victim Notification Form." Attorney General Law Enforcement Directive No. 2005-5.

a. Where the information provided on the "Victim Notification Form" does not allow for victim contact, the Prosecutor shall notify the Attorney General.

b. If the Attorney General, or his designee, is convinced that law enforcement has exhausted all reasonable efforts to contact the victim, he may relax the obligations under N.J.S.A. 2C:25-26.1.

2. In other cases with a known victim, law enforcement shall make all reasonable efforts to notify victims of the inmate's accelerated release.

3. To the extent permitted by law, the Attorney General agrees to relax limitations on benefits under the Violent Crimes Compensation Act (N.J.S.A. 52:4B-1, *et seq.*) to better provide victims who encounter the need for safety, health, financial, mental health or legal assistance from the State Victims of Crime Compensation Office.

H. The Office of the Public Defender agrees to provide the jails information to be distributed to each inmate prior to release that includes:

1. Information about the social distancing practices and stay-at-home guidelines set forth by Executive Order No. 107, as well as other sanitary and hygiene practices that limit the spread of COVID-19;

2. Information about the terms and conditions of release pursuant to this consent Order;
3. Guidance about how to contact the Office of the Public Defender with any questions about how to obtain services from social service organizations, including mental health and drug treatment services or any other questions pertinent to release under this consent Order.

I. Any inmate released pursuant to this Order shall receive a copy of this Order, as well as a copy of any other Order that orders their release from county jail, prior to their release.

J. Relief pursuant to this Order is limited to the temporary suspension of custodial jail sentences; any further relief requires an application to the sentencing court.

3/22/2020 9:50 p.m. /s/Stuart Rabner
Date Chief Justice Stuart Rabner, for the Court

The undersigned hereby consents to the form and entry of the foregoing Order.

3/22/2020 /s/Gurbir S. Grewal
Date Office of the Attorney General

3/22/2020 /s/Angelo J. Onofri
Date County Prosecutors Association of New Jersey

3/22/2020 /s/Joseph E. Krakora
Date Office of the Public Defender

3/22/2020 /s/Alexander Shalom
Date American Civil Liberties Union of New Jersey