

IN THE SUPREME COURT OF PENNSYLVANIA

C.N., L.B., and minor child B.K.L.N.;
J.A.R., E.G.M., and minor child J.G.;
M.N., P.M., and minor child H.M.N.;
G.C., J.J.S.J., and minor child M.S.J.;
M.C., G.S.C., and minor children
G.R.S.C. and N.B.T.; M.E.L., E.O.E.,
and minor child J.O.E.,

No. 76 MM 2020

Petitioners,

v.

Pennsylvania Department of Human
Services,

Respondent.

**APPLICATION FOR RELIEF TO FILE REPLY BRIEF IN SUPPORT OF
PETITIONERS' APPLICATION FOR EXTRAORDINARY RELIEF
UNDER THE COURT'S KING'S BENCH JURISDICTION**

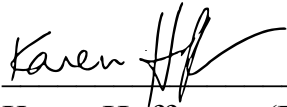
Petitioners C.N. *et al.* hereby move for leave to file a Reply Brief in Support of their Application for Extraordinary Relief under the Court's King's Bench Jurisdiction. A copy of the proposed Reply is attached to this Application. As grounds for this application, a reply brief is necessary to allow Petitioners to respond to the positions taken by the Department of Human Services ("Department") in its Answer to Petitioners' Application for Extraordinary Relief, and to explain fully the effects of the COVID-19 public health crisis on the children detained at the Berks

County Residential Facility (“BCRC”). This is a matter of utmost public importance, affecting both public health and child welfare issues, and thus warranting a reply brief.

WHEREFORE, Petitioners respectfully request that the Court grant this Application for Relief and permit the filing of the attached Reply.

Dated: April 14, 2020

Respectfully submitted,



Karen Hoffmann (Bar No. 323622)

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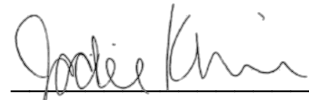
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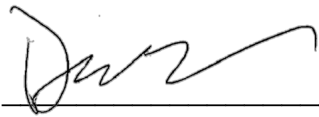
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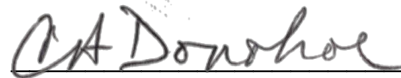
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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Date: April 14, 2020

/s/Karen Hoffmann
Karen Hoffmann, Esq.

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[PROPOSED] REPLY BRIEF

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I. Introduction

Less than a week ago, on April 8, 2020, Petitioners filed their Application for Extraordinary Relief. Since that date, COVID-19 infections in the United States have surged, reaching 603,364 total infections and killing 25,193.¹ Pennsylvania alone now has 25,345 infections. The death toll in the Commonwealth has more than doubled in just six days, reaching 584 dead.²

The virus continues to penetrate the community surrounding the Berks County Residential Center (BCRC). Known infections in Berks County have skyrocketed to 1,247, and 27 people have died.³ Two County staff members in the nursing home across the street from BCRC have tested positive for COVID-19.⁴ The greater Philadelphia area, of which Berks County is commonly considered a part,⁵ has been called an “emerging hot spot” and “area of particular concern” by

¹ United States, *Worldometer*, <https://www.worldometers.info/coronavirus/country/us/> (last updated Apr. 14, 2020, 2:14 PM).

² Compare Petitioners’ Application at 5 (“240 people have died”) with *COVID-19 Cases in Pennsylvania*, Pa. Dep’t Health, <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx> (last updated Apr. 14, 2020, 12:00 PM).

³ *Id.*

⁴ 69 NEWS, *2 Berks Heim employees test positive for coronavirus* (Apr. 9, 2020), https://www.wfmz.com/health/coronavirus/2-berks-heim-staff-members-test-positive-for-covid-19/article_adb6fd22-7ac4-11ea-bf65-87bf6a9b9b1e.html.

⁵ See https://en.wikipedia.org/wiki/Delaware_Valley.

the White House.⁶ One Penn Medicine model predicts a COVID-19 “tsunami” hitting the region in mid-May.⁷

Meanwhile, evidence of the rampant spread of COVID-19 inside immigration detention facilities, including those containing children, continues to mount. Today, April 14, 2020, reports broke that a COVID-19 outbreak at a child migrant facility in Chicago had infected 37 children.⁸ Also today, the Guatemalan Health Minister stated that 75 percent of deportees arriving on a flight from the United States tested positive for COVID-19.⁹

Respondent, the Pennsylvania Department of Human Services (“Department”), claims in its Answer that measures are being taken to prevent the spread of COVID-19 within BCRC and therefore there is no immediate threat to

⁶ WPVI, *Vice President Pence says Philadelphia is area of 'particular concern' amid COVID-19 outbreak* (Apr. 9, 2020), available at <https://6abc.com/coronavirus-philadelphia-news-philly-white-house/6086927/> (“[O]ur message to the people of the Philadelphia area is now more than ever, practice the social distancing so that Philadelphia and to some extent, even Pittsburgh, do not have to endure what other communities before them have had to endure.”). Notably, Philadelphia Health Commissioner Dr. Thomas Farley said the city continues to see cases among clusters or congregate settings including nursing homes and jails. Sixty-two inmates have tested positive for the virus, and 32 people have died from the virus while in a nursing home. *Id.*

⁷ Stephanie Stahl, *Penn Medicine Model Warns Of Coronavirus Tsunami To Hit Philadelphia In Mid-May*, CBS 3 (Apr. 14, 2020), <https://philadelphia.cbslocal.com/video/4494007-penn-medicine-model-warns-of-coronavirus-tsunami-to-hit-philadelphia-in-mid-may>.

⁸ Camilo Montoya-Galvez, *Chicago coronavirus outbreak infects dozens of migrant children in U.S. custody*, CBS News (April 14, 2020), <https://www.cbsnews.com/news/chicago-coronavirus-outbreak-infects-dozens-of-migrant-children-in-us-custody/>.

⁹ Refugees International, *Deportations From The United States Are Spreading Covid-19 To Guatemala, Placing Many At Risk* (Apr. 14, 2020), <https://www.refugeesinternational.org/reports/2020/4/14/deportations-from-the-united-states-are-spreading-covid-19-to-guatemala-placing-many-at-risk>.

the life or health of Petitioners. These measures are wholly inadequate, as set forth in detail below. It is plain from the Department's response that the agency will not take action to protect the children and families in BCRC during this unprecedented crisis. Therefore, the Court should issue a writ of mandamus compelling the Department to take immediate action to remove Petitioners from BCRC.¹⁰

II. The Court has authority under its King's Bench jurisdiction to issue the requested relief.

A. The Department has improperly urged the Court to adopt a novel standard limiting the exercise of its broad King's Bench authority, which the Court should disregard.

In its Answer, the Department attempts to impose a limitation on the Court's King's Bench authority that does not exist. Hoping to persuade the Court to adopt a novel legal standard for exercising its authority, the Department states, "this Court has exercised its King's Bench authority in only three types of cases: those that present an issue of statewide importance; those that implicate the integrity of the judicial process; and those that involve an important constitutional issue."

Respondent's Br. at 4. However, the Department does not cite to a single case in

¹⁰ In her supplemental declaration, attorney Bridget Cambria provides updated information regarding the Petitioner families' situations and sponsors to whom they could be released. See Exh. A, Cambria Supp. Decl. ¶¶ 38(a-f).

which this Court has limited the scope of its King's Bench review to those three types of matters.¹¹

As Petitioners note in their Application, the Court's King's Bench power comprises "every judicial power that the people of the Commonwealth can bestow." *Stander v. Kelly*, 250 A.2d 474, 484 (Pa. 1969) (Roberts, J., with Jones and Pomeroy, J.J., concurring). The Court therefore "would be remiss to interpret the Court's supervisory authority at King's Bench in narrow terms, contrary to precedent and the transcendent nature and purpose of the power." *Commonwealth v. Williams*, 129 A.3d 1199, 1207 (Pa. 2015); *In re Bruno*, 101 A.3d 635, 679 (Pa. 2014). Yet that is just what the Department is asking the Court to do.

The Court should decline to limit its King's Bench authority. Judge Aldisert of the U.S. Court of Appeals for the Third Circuit described the power as follows: "[T]he justices of the King's Bench are the supreme and general justices (*capitales et generales*) of the kingdom, these terms indicating both the order and the extent of their jurisdiction." *Commonwealth v. Ickhoff*, 33 Pa. 80, 80 (Pa. 1859). . . . This is the time-honored, solidly-rooted way of the Pennsylvania

¹¹ The Department cites "generally" to *Pa. State Ass'n of County Comm'rs v. Commonwealth*, 681 A.2d 699 (Pa. 1996), for the proposition that the Court applied its King's Bench authority in that matter *because* it was a case of statewide importance. However, the Court in that case made no statement that it was utilizing its authority because the matter was one of statewide importance, and also did not limit its King's Bench authority to the three types of matters that the Department has laid out. The Department's other case citations are similarly unavailing.

judiciary. Very few (if any) other courts in America possess such judicial power, a power described by Blackstone as ‘high and transcendent.’”¹²

The Department cites *Williams* in support of its proposed restrictions on King’s Bench jurisdiction. Yet in that case, the Court rejected efforts of both parties to limit the Court’s King’s Bench authority. *Williams*, 129 A.3d 1205-07 (“This Court has never adopted such a narrow view of the King’s Bench authority and we decline the invitation of the Governor and Williams to do so in the instant case.”) The *Williams* court cited its decision in *Bruno* to support a broad reading of its authority: “The Court long ago warned against any judicial inclination to narrow [King’s Bench] authority, lest the members of the Court abandon their duty to exercise the power they hold in trust for the people.” *Id.* at 1207, *citing In re Bruno*, 101 A.3d at 679. The Department’s attempt to frame a new, more limited standard for application of King’s Bench authority should be disregarded by the Court now.

B. Petitioners’ claims raise issues of public importance appropriate for the Court’s discretionary exercise of its King’s Bench jurisdiction.

In its Answer, the Department recasts the Court’s established exercise of jurisdiction over “issues of public importance” as “issues of statewide importance”

¹² Aldisert, Ruggero J., *The Honorable Ralph Cappy: Distinguished Keeper of the King's Bench Tradition* (Duquesne Univ. L. Rev., Vol 47, Summer 2009) at 405.

without citing any authority for this proposed change. *See* Resp. Br. at 5 (“Petitioners do not present an issue of statewide public importance because disposition of the case would not affect a large segment of the Commonwealth or the Commonwealth as a whole. Rather, the matter is specific to 18 individuals.”). The Court’s King’s Bench authority should not be limited in this way, but even if it were, the Department’s argument would fail. Issues of “statewide importance” and “public importance” are not mutually exclusive, and Petitioners’ claims clearly implicate issues of public importance on a statewide level.

Some matters appropriate for King’s Bench review may directly impact only a limited number of petitioners but still impact issues of great significance to the general public. *See, e.g., Commonwealth of Pa. v. Robert Williams*, No. 29-31 EM 2018 (Pa. Apr. 24, 2018); *City of Philadelphia v. Schweiker*, 817 A.2d 1217, 1219 n.1 (Pa. Cmwlth. 2003), *aff’d* 858 A.2d 75 (Pa. 2004) (using the Court’s King’s Bench power to confer jurisdiction upon the Commonwealth Court to permit a challenge to the enlargement of the Philadelphia Parking Authority). In fact, the Court recently denied broad relief under its King’s Bench jurisdiction because the impact would be *too* wide and unwieldy. *In re The Petition of the Pa. Prison Soc. et al.*, No. 70 MM 2020 (Pa. Apr. 3, 2020) at 2 (recognizing that “action must be taken to mitigate the potential of a public health crisis . . . [but] the immediate release of specified categories of incarcerated persons in every county correctional

institution, as sought by Petitioners, fails to take into account . . . the diversity of situations present within individual institutions and communities, which vary dramatically in size and population density.”); *In re The Petition of C.Z., et al.*, No. 24 EM 2020 (Pa. Apr. 7, 2020) (similar).

Perhaps because it is proposing a legal standard that does not yet exist, the Department cites no parameters by which an issue of statewide importance is to be defined.¹³ But even on the terms set out by the Department, the Court may hear this matter. The care and protection of infants and small children facing indefinite detention within the Commonwealth is an issue of statewide and even national importance. BCRC has been in the national and international spotlight for years now. The level of public concern, already high, has escalated during the current pandemic. Two weeks ago, Pennsylvania state Rep. Chris Rabb, D-Philadelphia, and Philadelphia City Councilmember Helen Gym, reiterated the health and safety dangers facing migrants detained at BCRC. “I feel compelled to speak out even though this is 75 miles out of my jurisdiction,” Rabb said. “This immigration issue is not connected just to one community.” Only Governor Wolf has the power to

¹³ Must an issue directly impact a certain number of residents of the state or counties within the Commonwealth? Is there a certain number of petitioners required in order to trigger King’s Bench review? The Department does not define the term “statewide,” and references no guidance on the question because this Court has not imposed any such limitation on the exercise of its King’s Bench authority.

release those migrants, Rabb said, adding that “It has taken a pandemic to do what should have been done years ago.”¹⁴

Whether the state honors and enforces state laws relating to the care and protection of children detained at BCRC is, contrary to the Department’s assertions, a matter of statewide importance. Media from Philadelphia¹⁵ to Allentown¹⁶ to Harrisburg¹⁷ to Pittsburgh¹⁸ have covered the controversy surrounding BCRC for years. Pennsylvania’s own Auditor General has called for Berks to be shut down.¹⁹

¹⁴ Michala Butler, *Immigration activists call on Wolf to release detainees from ICE center in Berks County*, Pennsylvania Capital-Star (Apr. 1, 2020), <https://www.penncapital-star.com/civil-rights-social-justice/immigration-activists-call-on-wolf-to-release-detainees-from-ice-center-in-berks-county/>.

¹⁵ Cheri Gregg, *Federal judge releases more immigrants detained in ICE facilities in Pennsylvania*, KYW News Radio (April 7, 2020), <https://kywnewsradio.radio.com/articles/news/judge-releases-more-immigrants-detained-in-ice-facilities> (“six Philadelphia City Councilmembers wrote to Gov. Tom Wolf, asking him to use executive powers to close the county-owned, federally-run facility in Berks County, where families are being held indefinitely.”).

¹⁶ Laura Olson and Andrew Scott, *How does Berks County’s family detention facility fit into Sunday’s planned immigration raids by federal ICE officials?*, Morning Call (Jul. 14, 2019), <https://www.mcall.com/news/pennsylvania/capitol-ideas/mc-nws-pa-immigration-raid-protests-berks-detention-center-20190713-medqudu7pzfk3kr3jg5kt5hipe-story.html> (“Protests against immigrant detentions were held Friday in more than 700 cities nationally, including in Philadelphia, Easton, and outside the Berks facility.”)..

¹⁷ Megan Park, *Berks detention center protesters arrested in Harrisburg*, WFMZ (Dec. 20, 2016), https://www.wfmz.com/news/area/berks/berks-detention-center-protesters-arrested-in-harrisburg/article_f10f0812-9a14-573e-85bf-050f525b75b4.html.

¹⁸ Daniel Moore, *Detention of U.K. family fuels calls to close troubled Berks County facility*, Pittsburgh Post-Gazette (Oct. 14, 2019), <https://www.post-gazette.com/news/politics-nation/2019/10/14/Immigration-detention-center-Berks-County-Tom-Wolf/stories/201910140089>.

¹⁹ Pittsburgh Post-Gazette Editorial Board, *Shut it down: ICE facility in Pa. is immoral and perhaps illegal*, Pittsburgh Post-Gazette (Dec. 31, 2019), available at <https://www.post-gazette.com/opinion/editorials/2019/12/31/div-class-libPageBodyLinebreak-Shut-it-down-div/stories/201912130054> (“A Berks County facility that rakes in millions of federal dollars

In addition, the issue impacts immigrant families around the state, since ICE has detained families from different parts of the state at BCRC as part of its “internal enforcement” operations.²⁰ A parent with one or more children taken together into custody by ICE in any county in Pennsylvania would likely be detained at BCRC rather than being sent to one of the detention centers in Texas. While the number of people detained is currently small, ICE has routinely filled BCRC to capacity and is likely to do so again. In fact, BCRC has applied for permission to double its capacity, indicating ICE’s intent to detain even more families at BCRC.²¹

Moreover, the Department argues that this issue is not one of public importance since BCRC is purportedly not detaining new families. However, the Department misreads the declaration of Licensing Technician Erin Roman when it asserts that “the number of individuals entering BCRC will not increase during the pandemic.” Resp. Br. at 6. Roman actually stated that “BCRC’s procedures in

annually to function as a jailhouse for federally detained children and parents should be shut down. Today . . . ‘No one being held at the Berks facility is facing any criminal charges, but the center still essentially functions as a jail in which adults and children, sometimes mere babies, are detained,’ [Pennsylvania Auditor General Eugene] DePasquale commented.”).

²⁰ Laura Olson and Andrew Scott, *How does Berks County’s family detention facility fit into Sunday’s planned immigration raids by federal ICE officials?*, Morning Call (Jul. 14, 2019), <https://www.mcall.com/news/pennsylvania/capitol-ideas/mc-nws-pa-immigration-raid-protests-berks-detention-center-20190713-medqudu7pzfk3kr3jg5kt5hipe-story.html>.

²¹ See Colin Deppen and Sarah Anne Hughes, *Why PA’s controversial Berks detention center for immigrant families is still open: A chorus of legislators and Philadelphia City Council are calling for the facility’s closure*, as pressure mounts on Gov. Tom Wolf, Billy Penn (Jun. 22, 2018), <https://billypenn.com/2018/06/22/why-pas-controversial-detention-center-for-immigrant-families-is-still-open/>.

response to COVID-19 include . . . [n]o new admissions since March 18” Roman Decl. at ¶ 15(a). First, decisions about whether and where to detain non-citizen families are made by ICE, not BCRC. Second, Roman’s assertion that no individuals have been newly detained at BCRC since March 18 does not mean that new families may not be detained there in the days or weeks to come. Furthermore, the Department provides no information about what criteria BCRC or ICE might use to determine when the pandemic will be considered to have ended. The Department’s assertion that “the number of individuals entering BCRC will not increase during the pandemic” (Resp. Br. at 6) is not supported by the evidence in the record.

Whether the state honors and enforces state laws relating to the care and protection of children detained at BCRC is a matter of great public importance, and, contrary to the Department’s assertions, it is also a matter of statewide importance. Petitioners’ pending Application raises an issue of great public importance that impacts residents throughout the state, and the Court would be within its clear authority to exercise its discretion to hear this matter.

III. Petitioners have a legal right to mandamus relief, and the Department’s exercise of discretion was arbitrary or based on an erroneous interpretation of law.

Petitioners have a legal right to mandamus relief, as they are the individuals most directly impacted by BCRC’s compliance or noncompliance with the

Department's licensing regime. The purpose of the applicable regulation, 55 Pa. Code § 3800, *et seq.*, is "to protect the health, safety and well-being of children receiving care in a child residential facility through the formulation, application and enforcement of minimum licensing requirements." 55 Pa. Code § 3801. The Commonwealth Court recently found in the context of a petition to intervene in BCRC's appeal of the Department's revocation of its childcare license that the detained families "are the ones personally suffering any negative consequences to their health, safety, and well-being posed by the Center operating contrary to law such that their direct interest could diverge from DHS's more general interest in confirming that the Center operates lawfully." *D.G.A. v. Dept. of Human Svcs.*, No. 1059 CD 2018, 2020 WL 283885 at 7 (Pa. Cmwlth. 2020). While the standard for the right to intervene differs slightly from the standard for the right to enforce an action in mandamus, the Commonwealth Court's reasoning in *D.G.A.* is instructive here. The child Petitioners are the individuals most directly impacted by the Department's failure to act; it is literally their life or health which the Department is charged with protecting through the state licensing scheme.

A. Conditions at BCRC constitute an immediate and serious danger to Petitioners' life or health.

1. BCRC is incapable of combating a COVID-19 outbreak at the facility.

In their Application, Petitioners asserted BCRC's incapacity to adequately respond to the pandemic when it breaks out at BCRC. The Department's response wholly failed to provide credible analysis from a medical expert who can aver to BCRC's level of preparedness. Consequently, the record contains no evidence that BCRC has sufficient medical resources to combat a COVID-19 outbreak, or that it has coordinated with local officials to prepare for an outbreak.

Indeed, all evidence indicates the opposite: BCRC remains incapable of combating an all-but-inevitable COVID-19 outbreak at the facility since BCRC is "a single building and congregate care facility for children, with no ability to leave the facility." Exh. A, Cambria Supp. Decl. ¶ 17. Attempts to create social distancing therefore are not sufficient to ensure that no family contracts COVID-19. *Id.* "Every common area is a commingling area, every bathroom is a commingling area, the cafeteria is a commingling area." *Id.* at ¶ 24. Meals are still provided in the cafeteria for all families at the same time. *Id.* at ¶ 32. Petitioners are still required to clean not only their own rooms, but the communal bathrooms and children's playroom as well. *Id.* at ¶ 28. Moreover, the detained families are still at risk because BCRC continues to host County, ICE, and medical staff, who come and go from the facility. *Id.* at ¶ 19.

Beginning April 7, 2020, in response to a County-issued order, adult-sized masks were provided to children as young as one year old. *Id.* at 27. Families

reported that the masks were so big as to cover the entire face of a child, making it difficult for the children to breathe. Many of the children have already broken the masks. Detained Petitioners were provided one mask only and have not been provided replacements. *Id.*

The Department makes much of the fact that two posters describing hand-washing have been put up in the facility. Resp. Br. at 12. However, Petitioners have not been instructed in a language they understand what policies are being implemented to protect them, or the nature of the COVID-19 pandemic in this country. Cambria Supp. Decl. ¶ 30. The predominant language spoken by Petitioners is Haitian Creole. *Id.* There are no news services available in Creole nor any on-site interpreters in Creole; few BCRC staff members are bilingual even in Spanish. *Id.* As a result, Petitioner families are “completely isolated and trapped in an institutional setting during a pandemic” and feel “helpless.” *Id.*

Furthermore, the remote inspection conducted by the Department is not adequate to assess the current risk to the life or health of Petitioners during the COVID-19 crisis. *See* Resp. Br. at 9-11. If remote inspections are necessary because it is a risk to the health of inspectors to enter the facility, that should be a signal *that it is unsafe for the families to live in the facility*. If the inspection was conducted remotely because of risk to Petitioners that a DHS inspector could expose them to coronavirus, then this must also be true of the approximately 60

BCRC staff members and unknown number of ICE officials who regularly enter the facility. In addition, the Department's decision to allow BCRC Director Diane Edwards to facilitate the inspection via Facetime presents a conflict of interest which calls the validity of the inspection into question. *See* Resp. Br. at 9. If the relief Petitioners have requested is granted, BCRC may not be permitted to continue to operate during the pendency of the pandemic. The BCRC Director has an incentive to conduct any such inspection in a way that conceals or diminishes any information about conditions that could lead the Department to conclude there is an immediate risk to the life or health of the children. While a potential for such a conflict is present in the normal course of inspections, the onus is on the Department to be more vigilant than usual given the high stakes of the present moment and the disadvantages inherent to a remote inspection. Now more than ever, DHS must maintain neutrality and independence from the licensee in order to fulfill the purpose of protecting children within the Commonwealth.

The Department's Technical Inspector observed that during the walk-through inspection conducted over Facetime with the BCRC Director, "the inspector observed residents practicing social distancing." Resp. Br. at 11. Missing from the Technical Inspector's declaration was any information she relied upon to determine that Petitioners were practicing social distancing or any parameters or metrics the inspector applied to assess the presence or absence of adequate social

distancing. The Technical Inspector also noted that “[t]he visual walk-through did not include resident rooms or other private areas, to protect the privacy of the residents.” Roman Decl. at ¶ 10. Within the limited scope of the “inspection,” the Department could not reasonably conclude that BCRC was maintaining safe social distancing at all times, in all places within BCRC. Given the highly contagious nature of COVID-19, social distancing “most of the time” in a small, enclosed space such as BCRC will still be likely to result in exposure to and spread of the virus.

2. Social distancing alone does not effectively prevent COVID-19 in a detained setting.

Regardless, social distancing alone, in the absence of other intensive precautionary measures, is not effective to prevent the spread of COVID-19 within the confines of a detention center. Pet. Br. Exh. B (Meyer Decl.) ¶ 10. Isolation of people who are ill is an ineffective way to prevent transmission of the virus through droplets to others because, except in specialized negative pressure rooms (rarely in medical units if available at all), air continues to flow outward from rooms to the rest of the facility. Risk of exposure is thus increased to other people in BCRC and staff. *Id.*

Family residential centers like BCRC are congregate facilities, with shared bedrooms, bathrooms, dining facilities, hallways, lounges, and recreational areas. Exh. B, Shapiro Decl. ¶ 10. These congregate facilities are not designed in a way

that permits appropriate preventative steps to avoid the spread of COVID-19. *Id.* In recent weeks, federal courts around the country have ordered the release of inmates or detainees from prisons and detention centers for that very reason. *See, e.g., United States v. Harris*, 2020 U.S. Dist. LEXIS 53632, 6 (D.D.C. March 27, 2020) (“‘Infections that are transmitted through droplets,’ like COVID-19, ‘are particularly difficult to control in detention facilities, as 6-foot distancing and proper decontamination of surfaces is virtually impossible.’”); *Basank v. Decker*, 2020 U.S. Dist. LEXIS 53191, 17-18 (S.D.N.Y. March 26, 2020) (“Respondents represented that...detention facilities...are taking certain measures to prevent the spread of virus: screening detainees upon intake for risk factors, isolating detainees who report symptoms, conducting video court appearances with only one detainee in the room at a time, providing soap and hand sanitizer to inmates, and increasing the frequency and intensity of cleaning jail facilities. These measures are patently insufficient to protect Petitioners”); *United States v. Fellela*, 2020 U.S. Dist. LEXIS 49198 (D. Conn. March 20, 2020) (“All levels of government nationwide have recently taken drastic measures in light of the COVID-19 pandemic to promote ‘social distancing’ and to prohibit the congregation of large numbers of people with one another. But, as is true for most jails and prisons, the conditions of confinement at Wyatt are not compatible with these safeguards.”); *United States v. Kennedy*, 2020 U.S. Dist. LEXIS 53359, 5 (E.D. Mich. March 27, 2020) (“Even if

all CDC’s interim recommendations are followed...the Court is concerned that such measures will prove insufficient to stem deadly outbreaks”); and *United States v. Nkanga*, 2020 U.S. Dist. LEXIS 56188 (S.D.N.Y. March 31, 2020) (“Realistically, the best – perhaps the only – way to mitigate the damage and reduce the death toll is to decrease the jail and prison population by releasing as many people as possible.”).

3. Rules on social distancing and hygiene cannot realistically be applied to young children.

Most importantly, social distancing rules and other measures to prevent exposure to and spread of COVID-19 by adults are necessarily not applicable to a facility in which children are detained. Children--especially very young children--cannot be expected to observe the same rules and norms of social distancing that are expected of adults. As Dr. Alan Shapiro states, “It is imperative to understand that *children’s developmental and cognitive limitations make consistent social distancing between different families and meticulous hand-washing impossible in congregate settings*. Nor is it possible to prevent children from touching commonly used surfaces, from rubbing their eyes, nose, and mouth, from uncovered coughs or sneezes, or, for young children, from putting toys and other shared objects in their mouth.” Exh. B, Shapiro Decl. ¶ 11 (emphasis added). This is in part why schools around the country, and the world, have closed. *Id.* at ¶ 12. The American Academy of Pediatric goes further in their recommendation and asks parents not to

have their children participate in “play-dates” because social distancing would be breached.²²

Children in detention are likely to act as children do elsewhere--they play together, approach one another unannounced, run from place to place, and disobey their parents’ instructions. It is impossible to maintain social distancing procedures inside crowded schools, resulting in a high likelihood of transmission of COVID-19 among children and later to their homes. That is why, a day after Petitioners filed their Application, Governor Tom Wolf ordered Pennsylvania schools closed until the end of the academic year.²³

Now consider that the children at BCRC are functionally detained inside their school building 24 hours a day, seven days a week. For these reasons, the likelihood of COVID-19 transmission is significantly higher in BCRC than in congregate settings involving only adults. Shapiro Decl. ¶ 13.

Evidence of the rampant spread of COVID-19 inside immigration detention facilities, including those containing children, continues to mount. Today, reports

²² *Id.*; Corinn Cross, *Social Distancing: Why Keeping Your Distance Helps Keep Others Safe*, Am. Acad. of Pediatrics (Mar. 31, 2020), <https://www.healthychildren.org/English/health-issues/conditions/chest-lungs/Pages/Social-Distancing-Why-Keeping-Your-Distance-Helps-Keep-Others-Safe.aspx>. In effect, the Department is urging the Court to disregard the public safety rationale used by school districts throughout the Commonwealth to justify school closure, simply because BCRC houses noncitizen child residents of the state living in ICE custody.

²³ WPVI, *Pennsylvania schools ordered to remain closed until end of academic year due to coronavirus pandemic* (April 9, 2020), available at <https://6abc.com/health/pa-schools-ordered-to-remain-closed-until-end-of-academic-year/6089382/>.

broke that a COVID-19 outbreak at a child migrant facility in Chicago had infected 37 children.²⁴ ICE's reports of low numbers of infected detainees stem largely from its refusal to test detained people in its custody, including families at BCRC.²⁵ The consequences of the unchecked spread of COVID-19 in detention centers in Pennsylvania was tragically highlighted last week when two inmates from the Pike County Correctional Facility, which houses both immigrant detainees and inmates in criminal custody, died after being infected with COVID-19.²⁶

Once COVID-19 infection is introduced into BCRC, it will inevitably spread within the facility to detained families and staff, and from those infected staff members to the local communities. Shapiro Decl. ¶ 25. This raises serious concerns about a surge in the need for emergency department services, personal protective

²⁴ Camilo Montoya-Galvez, *Chicago coronavirus outbreak infects dozens of migrant children in U.S. custody*, CBS News (April 14, 2020), <https://www.cbsnews.com/news/chicago-coronavirus-outbreak-infects-dozens-of-migrant-children-in-us-custody/>.

²⁵ Eric Kiefer, *Cutting-Edge Coronavirus Tests To Be Used At Essex County Prison*, Patch.com (April 14, 2020), <https://patch.com/new-jersey/newarknj/cutting-edge-coronavirus-tests-be-used-essex-county-prison>. Prior to rollout of wide-scale testing at the Essex County Correctional Facility in New Jersey, authorities reported only two infected ICE detainees out of a population of 533, or a rate of infection of 0.37%. When testing of detainees began at scale at the facility this week, 15 of the 22 ICE detainees who received testing were found to test positive, for an infection rate of 68%. *Id.* This indicates that infection levels within immigration detention centers are much higher than ICE has publicly acknowledged.

²⁶ Joseph Kohut, *Two Pike County Inmates Die from Coronavirus; Seven Staff Members, Five Other Inmates Test Positive*, Times Tribune (April 8, 2020), <https://www.thetimes-tribune.com/coronavirus/two-pike-county-inmates-die-from-coronavirus-seven-staff-members-five-other-inmates-test-positive-1.2615732>.

equipment, hospital beds, intensive care units, and critical equipment such as ventilators. *Id.* Not only are local hospital systems likely to be overwhelmed caring for COVID-19 infected patients, but they will also be unable to meet the needs for non-COVID-19 patients as services become inundated. *Id.* The high risk of overwhelming small local hospital systems such as those found in Berks County endangers detainees, staff, and the public. *Id.*

Dr. Shapiro states, “As a pediatrician, it is my ethical duty to protect children and their families.” Shapiro Decl. ¶ 27. Asylum seekers such as Petitioner families are some of the most vulnerable families in the world. *Id.* Protecting them will also protect detention center personnel and the general public and help preserve Pennsylvania’s limited healthcare resources during this unprecedented time. *Id.* Dr. Shapiro notes, “While much of the public discourse in recent years has focused on the egregious harm to the well-being of children separated from their parents at the border, it has been clearly showed that detention as a family unit— especially for prolonged times—is deleterious to the a child’s well-being and the integrity of the family unit.” *Id.*

Keeping families in BCRC during this novel and rapidly spreading pandemic is particularly concerning. *Id.* at ¶ 28. The added restrictions of confinement and isolation will significantly increase the stress on children and their families. *Id.* The stress this can cause in the developing child is known as

“toxic stress” and can lead to short and long-term adverse consequences on a child’s growth, development and psychological well-being.²⁷

Dr. Shapiro concludes, “Knowing the harm that detention causes on the health and the wellbeing of children and their parents in the best of times, it is inconceivable to me as a pediatric specialist why children and their parents should remain in detention during this unprecedented and highly dangerous pandemic.” Shapiro Decl. ¶ 29. Finally, even if the child petitioners are at a lower risk of death or permanent injury from COVID-19 than their parents, the higher risk that their parents—their primary caretakers—will fall seriously ill and potentially die independently constitutes an immediate and serious danger to the children’s life or health.

B. The Department’s exercise of discretion was arbitrary or based on an erroneous interpretation of law.

On the evidence and information before the Court, DHS is obligated to issue an emergency removal order because the available evidence leaves no room for a contrary interpretation. Detaining children in an enclosed space without adequate social distancing and other necessary safety precautions during the COVID-19 pandemic meets the threshold at which immediate action is compulsory because there has been “gross incompetence, negligence, misconduct in operating the

²⁷ *Id.*; Institute of Medicine and National Research Council, *From Neurons to Neighborhoods: The Science of Early Childhood Development* (Nat’l Academies Press 2000).

facility or agency, or mistreatment or abuse of clients, likely to constitute an immediate and serious danger to the life or health of the clients.” See 55 Pa. Code § 20.37. If the Court determines that the Department’s assessment of whether conditions at BCRC meet the threshold to trigger immediate action is discretionary, Petitioners submit that the agency’s discretion cannot be absolute and unchecked. If arbitrarily exercised or based on a mistaken view of the law, it is reviewable by this Court.

Mandamus is a tool to be used “when the tribunal or agency has been ‘sitting on its hands.’”²⁸ This Court has noted that mandamus is only used when the actor has refused to perform or act.²⁹ Mandamus may lie to compel the performance of a legal duty, “even where the existence and scope of such duties must be found and defined in the course of the mandamus action itself.”³⁰ Further, mandamus will lie to compel action by an official where his refusal to act in the requested way stems from his erroneous interpretation of the law.³¹

Where the agency action sought to be compelled is discretionary, “courts will review the exercise of the actor’s discretion where it is arbitrary or fraudulently exercised or is based upon a mistaken view of the law.” *Banfield v.*

²⁸ *Chanceford Aviation Properties, L.L.P. v. Chanceford Tp. Bd. of Supervisors*, 923 A.2d 1099, 1108 (Pa. 2007).

²⁹ *Coady v. Vaughn*, 770 A.2d 287, 290 (Pa. 2001).

³⁰ *Del. River Port Auth. v. Thornburgh*, 508 Pa. 11, 493 A.2d 1351, 1355 (1985).

³¹ *Fagan v. Smith*, 615 Pa. 87, 41 A.3d 816, 821-22 (2012); *Volunteer Firemen’s Relief Ass’n of City of Reading v. Minehart*, 415 Pa. 305, 203 A.2d 476, 479-80 (1964).

Cortes, 631 Pa. 229, 110 A.3d 155, 175 (2015); *Pa. State Ass’n of Cty. Comm’rs v. Commonwealth*, 681 A.2d at 702 (mandamus will not lie to control discretionary acts, but “courts will review the exercise of the actor’s discretion where it is arbitrary or fraudulently exercised or is based upon a mistaken view of the law”); *Camiel v. Thornburgh*, 507 Pa. 337, 489 A.2d 1360, 1362 n.2 (1985) (“Mandamus does not lie to compel the performance of discretionary acts except where the exercise or non-exercise of discretion is arbitrary, fraudulent, or based upon a mistaken view of the law.”).

Justice Wecht, in his dissent in *Brown v. Wetzel*, articulated a key rationale for the judicial safeguard of mandamus to check arbitrary, fraudulent, or legally erroneous agency action:

Deference to the discretionary functions of administrative agencies and lower tribunals is a core principle in our law. Nonetheless, “discretion” and “deference” cannot be elevated to talismanic status such that they become “magic words,” the invocation of which forces a reviewing court to close its eyes to arbitrary or vindictive decisions. Nor can such words insulate those decisions from judicial scrutiny, “render[ing] appellate review a mere empty formality.”

177 A.3d 200, 207 (Pa. 2018) (dissenting opinion), *citing Pittman v. Pa. Bd. of Prob. & Parole*, 159 A.3d 466, 474 (2017).

Here, for the reasons stated above, the Department’s determination that the conditions at BCRC are not likely to constitute an immediate and serious danger to the life or health of Petitioners represents an arbitrary exercise of its discretion, or

one based on a mistaken interpretation of the legal standard set forth in 55 Pa. Code § 20.37. The flawed methodology of a remote inspection, tainted by its dependence on the licensee's director and conducted via FaceTime *because it was unsafe for the inspector to herself set foot inside the facility*, could not provide reliable information to reasonably support the Department's conclusion that "BCRC is not operating its facility in a manner that constitutes an immediate and serious danger to the life or health of its residents." *See* Resp. Br. at 12. The Department has ignored voluminous evidence to the contrary presented by Petitioners. Because Petitioners have a right to relief and because the Department's exercise of discretion was arbitrary or based on an erroneous interpretation of law, this Court should grant their Application.

IV. In the alternative, the Court should exercise its plenary jurisdiction to hear *J.S.C. v. D.H.S.*

Regarding Petitioners' request for relief in the alternative that the Court exercise its plenary jurisdiction to hear *J.S.C., et al. v. D.H.S.* (678 MD 2019), and grant the relief requested therein, the Department falsely claims that Petitioners "have presented no facts or law that would suggest Commonwealth Court is ill-equipped to consider and rule on that matter." Resp. Br. at 13. To the contrary, Petitioners presented ample facts in their Application to demonstrate the urgency of expedited proceedings pending in the Commonwealth Court. Petitioners,

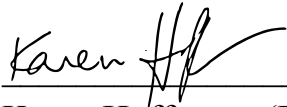
families detained in BCRC, are facing an unprecedented health crisis. *J.S.C. et al.* is a case in which detained families allege that the Department has illegally entered into stipulations allowing BCRC to keep operating. The matter is very much related and urgent to Petitioners. Therefore, in the alternative, Petitioners reiterate their request for this Court to hear the matter pending below.

V. Conclusion

Petitioners' continued detention becomes more dangerous by the day. Petitioners respectfully request the Court issue a writ of mandamus compelling the Department to take immediate action to remove Petitioners from BCRC pursuant to 55 Pa. Code § 20.37 and enter an injunction preventing the Department from lifting the emergency removal order after Petitioners are removed from BCRC during the pendency of any state, county, or local stay-at-home order relating to COVID-19. Alternatively, Petitioners request the Court exercise its plenary jurisdiction pursuant to 42 Pa.C.S. § 726 to hear the related matter now pending in Commonwealth Court, *J.S.C., et al. v. DHS* (678 MD 2019), and grant the relief requested therein; or transfer this matter to the Commonwealth Court pursuant to 42 Pa.C.S. § 5103(a) with instructions to establish an expedited briefing and hearing schedule.

Dated: April 14, 2020

Respectfully submitted,



Karen Hoffmann (Bar No. 323622)

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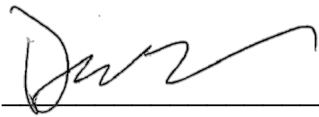
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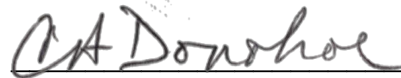
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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Date: April 14, 2020

/s/Karen Hoffmann
Karen Hoffmann, Esq.

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EXHIBIT A

DECLARATION OF BRIDGET CAMBRIA, ESQ.

I, Bridget Cambria, declare and say as follows:

1. My name is Bridget Cambria, and I am providing this supplemental declaration to depict the situation of detained families in immigration detention in Pennsylvania during the COVID-19 pandemic, and the incorporation of protective measures. This is also a declaration in response to the statements provided by the government in the *O.M.G. v. Wolf* litigation as well as the ongoing litigation concerning the *Flores Settlement*.
2. My statements are based on my review of the evidence provided by the government and my organization's continued representation of detained families in Pennsylvania during the COVID-19 pandemic.
3. As of this writing, persons detained in Immigration and Customs Enforcement ("ICE") x detention centers in Pennsylvania are suffering the devastating impact of the COVID-19 pandemic. Pennsylvania detention centers have the most positive cases of the novel coronavirus among ICE detainees than any other area in the country. The same Enforcement and Removal branch of the Department of Homeland Security ("DHS") that controls ICE detention centers in Pennsylvania, also oversees the family detention center in PA. The outbreak ensuing at Pennsylvania detention centers is occurring despite DHS assurances of precautions.
4. The Berks County Residential Center ("BCRC") is a family detention facility in Leesport, Pennsylvania housing immigrant families. Primarily, the families who are brought to the detention center are seeking asylum in the United States. Each family currently detained has a close family member living in the United States who is willing to receive each family member, today.
5. Additionally, ICE contracts with the County of Berks, PA to provide housing, care and guard services pursuant to an Intergovernmental Service Agreement. The ICE contract requires that no family brought to the BCRC have an adverse or criminal history. In turn, no family currently detained at the BCRC has a criminal history.
6. In return for the services performed by the County, ICE provides compensation to the County of Berks for every person that is detained, as well as supplemental compensation for the costs and additional services rendered. Medical services, however, are not provided by the County of Berks, but rather all medical care and decisions are made by an ICE contracted medial service provider called "ICE Health Service Corps."
7. Our organization, Aldea – the People's Justice Center ("Aldea"), continues to provide universal *pro bono* representation to families at the BCRC. As of this writing, Aldea represents every family who remains in the BCRC, consisting of six asylum seeking immigrant families.
8. Currently in the BCRC are a family from Ecuador with a five-year-old daughter, a Mexican family with a one-year-old daughter, a Haitian family with a one-year-old

daughter, a Haitian family with an 11-year-old daughter and a three-year-old daughter, a Haitian family with a two-year-old daughter, and a Haitian family with a seven-year-old son.

9. Each family is in the process of seeking asylum in the United States.
10. Legal visitation has ceased in the BCRC since March 20, 2020. Since then, Aldea staff has only been permitted phone visitation. The phone visitation provided is not offered at the historically normal legal visitation times, from 8AM to 8PM. Rather, we are only permitted phone visitation when it can be scheduled by a caseworker, if and when the caseworker is present for a shift. When a caseworker is on shift, with the exception of one occasion, they have facilitated phone visitation. From experience, my staff and I can report that the phones in the Berks facility have a very low-quality connection and often drop calls. Calls from the facility are very difficult to hear. Unlike the other family detention facilities, ICE has not arranged for video visitation in the Berks facility, despite our request.
11. Even though legal visitation has ended, efforts to deport families who are participating in a legal process to seek asylum have not. Court hearings and asylum interviews continue with minimized legal access. The lack of proper legal access is detrimental to not only their case, but the lives of each and every parent and child. The outcome of a family's case at the BCRC is a life and death determination.
12. Importantly, every part of the legal asylum process can, and is, conducted both inside and outside detention. Continued detention is not necessary to facilitate the asylum process. By and large families seeking asylum are not detained, but rather are placed in a removal proceeding outside of detention to pursue protection.
13. As of this writing, every family at the BCRC has expressed a fear of contracting COVID-19 and dying.
14. As mentioned in Assistant Field Office Director Christopher George ("AFOD George")'s declaration, one child currently in the BCRC was tested for COVID-19. Her parents were not tested, despite displaying cold symptoms themselves and the fact that even asymptomatic people can carry the novel coronavirus. AFOD George offers that child's symptoms of "coughing and wheezing" were considered cold symptoms and not COVID-19 symptoms, despite coughing and difficulty breathing being primary conditions of COVID-19. He testifies that the child was tested "in an abundance of caution," however, it was determined by a hospital provider that she be tested for COVID-19 and that she be quarantined to await the test results. She and her mother were quarantined, but her father – with whom she had traveled to the United States with and was detained with – was not. If, in fact the results were different, and she had been positive, their negligent handling of this child's medical condition would have resulted in every person in the facility being exposed to COVID-19.
15. During the incident with this child, Aldea requested medical confirmation of the child's test result and corresponding records on behalf of our client, the child's father. We requested such records and/or confirmation of the negative results of the COVID-19 test

on March 25, 2020. We provided a notice of representation, a HIPPA authorization, along with the request. Thereafter, and at the AFOD's request, we provided a Berks medical authorization, and a duly executed DHS privacy waiver form. DHS refused to release any results or records to us. However, DHS did release the results of the test to a reporter from Mother Jones and to this court.

16. AFOD George only provided a response to the child's counsel today, April 7, 2020, confirming that the child's test was negative.
17. Following the orders of Judge Gee and Judge Boasberg, ICE has attempted to engage in precautionary measures to prevent the spread of COVID-19 in the BCRC, a congregate care facility. I have observed the video and declaration provided by AFOD Christopher George. Attempts to create social distancing in the BCRC, a single building and congregate care facility for children, with no ability to leave the facility, is not sufficient to ensure that no family contracts COVID-19.
18. Since the filing of the lawsuit, ICE has reduced the number of family's currently detained at the BCRC.
19. However, the families who remain detained are still at risk of contracting COVID-19 given not only there being six whole families, but also the fact that the facility continues to house staff from the County of Berks, Immigration and Customs Enforcement and medical staff. It is unknown the total number of employees who come and go from the Berks facility, however the families, themselves, constitute more than 10 individuals, unrelated who are present within this facility.
20. The last family to arrive at the BCRC arrived on March 18, 2020. Fifteen families have been brought to the BCRC since March 1, 2020. Notably the first confirmed test in the United States was on January 21, 2020. From March 8, 2020 through April 7, 2020 the number of confirmed cases has reached at or about 400,000 cases.
21. Families reported that the only time their temperature was affirmatively taken was at intake, and that at intake no family was questioned regarding the coronavirus. In fact, the word coronavirus was not mentioned to the detained families until the week of March 23, 2020. In fact, many of the last detained families to enter the facility, came to the facility sick and each family had entered the BCRC after placement in a hielera ("icebox") which is a notoriously unsanitary environment. Despite this, they were not tested for COVID-19 or per AFOD George screened for COVID-19. In fact, the precaution listed is that a detainee will be "screened for the symptoms with 24 hours of known exposure." At this point, it's too late.
22. Prior to legal visitation being suspended, a sign posted on the outside of the visitation door described the pandemic as a "flu outbreak."
23. Detained families were not spoken to about COVID-19 until the week of March 23, 2020. They reported a meeting where they were advised to wash their hands. Other questions like how the facility can help them prevent an outbreak or what would happen if they became sick, went unanswered. Besides this one meeting during the week of March 23,

2020, no continued education about COVID-19 has taken place.

24. The BCRC is a detention center that consists of a single building. The video provided by government counsel demonstrates that every area, including the rooms where families sleep, do not permit isolated environments. Every common area is a commingling area, every bathroom is a commingling area, the cafeteria is a commingling area, and in fact every area depicted in the video is a commingling area – with the exception of the medical isolation room.
25. The detained families reported that prior to the video being taken, the facility staff cleaned and organized the facility in anticipation of the video. After all the last minute cleaning and organizing, the conditions captured in the video were not representative of how the facility was operating prior to April 2, 2020.
26. It is not true that families since March 12, 2020 have been provided PPE upon request. In fact, no family was advised otherwise, or that they could request PPE. AFOD George also fails to state what PPE was available to detainees and when.
27. Detained families routinely reported being denied their own sanitizer and were not provided masks or gloves, except when cleaning the facility. Only today, April 7, 2020, in conjunction with an order issued by the County of Berks, were masks provided to detained families. The masks that were provided are adult size masks, and were provided to everyone, even the children as young as one year old. Families reported that the masks were so big as to cover the entire face of a child, making it difficult for the children to breathe. Many of the children have already broken the masks. Detained families were provided one mask only and have not been provided replacements.
28. Residents still report that they are required to not only clean their rooms, but also the communal bathrooms and child's playroom. AFOD George represents that additional cleaning measures have been implemented, and the residents did notice the staff clean prior to the filming of the facility, however, he does not provide a schedule of cleaning, who conducts the cleaning, or describe what is cleaned. In any event, rooms are not cleaned after every use by a child, bathrooms are not cleaned after every use, and neither are showers.
29. Since my last declaration, and during the week of March 23, 2020, the detained families report that two sanitizer stations were placed inside the facility.
30. Since the order of this Court, additional posters have been placed within the facility to describe what COVID-19 is. However, families still report that they have not been instructed, in a language they understand, what policies are being implemented to protect them and what the nature of the COVID-19 situation is in the United States. Importantly, the main language currently spoken in the BCRC is Creole. There are no news services available in Creole and no on-site interpreters in Creole. Additionally, few Berks staff members are even bilingual in Spanish. As a result, families are completely isolated and trapped in an institutional setting during a pandemic, and are helpless.
31. The families were present when AFOD George filmed the video of the BCRC. The families

called Aldea to report that they were afraid of someone videoing them. They expressed that, as asylum seekers, they did not want their face on a video, and generally, that it was unnecessary to demonstrate the conditions of the facility. The detained families inherently mistrust authorities given they are fleeing governmental persecution and are in a detention setting. We sent an email to AFOD George and requested that he not film the detainees given their privacy concerns. Despite this request, and his acknowledgement, the detained families appeared on the footage. However, their fears are apparent on camera, as they clearly pull hoods over their faces and flee the areas as AFOD George films.

32. Meals are still provided at one time in the cafeteria. Although the families are to sit one at each table, they still eat together. They are served food one at a time from the buffet by BCRC staff.
33. Finally, since my last declaration ICE has made no efforts to provide suitable medical care to the detained families, has failed to provide a safe facility for the remaining families, and most notably have failed to comply with the Flores orders which require continuous efforts at the release of detained families in accordance with the Settlement.
34. Judge Gee specifically ordered compliance with the conditions of the settlement without regard to the parents' immigration status. She required children to be processed and released within 20 days. She also specifically ordered that ICE provide specific, tangible, and individual reasons to continue the detention of a child beyond that point.
35. AFOD George fails to demonstrate "*continuous efforts at release*" of the children in his care. He states that the parole factors are gathered "shortly after intake" and not that they have worked continuously at securing release of the children in the BCRC. In fact, if at all, it appears only one determination has ever been made, and that is the one made upon arrival at the BCRC. He has not provided the parole worksheets that he alleges have been maintained and has not provided evidence that said parole determinations are continuously maintained.
36. He states that "most families are released within 20 days." This is not true. A family being released from the BCRC within 20 days is the exception and not the rule. Additionally, when a family enters the BCRC most of the time they arrive from a CBP holding facility called a *hielera* ("icebox") where they have been held from anywhere from 1-14 days or more, which factor into the calculation. Even calculating the 20-day number for the time spent at the BCRC, by and large most families remain detained vastly longer. For example, the last two families to be released subsequent to this Courts' order had been detained for 277 days and 39 days, not counting their time in the *hieleras*.
37. As of this date, every family in the BCRC has been detained in excess of 20 days.
38. AFOD George also considers all of the remaining families to be flight risks but offers no indication why they are flight risks. Each family has a suitable sponsor and fixed home to which they could be released and monitored electronically given the pandemic. Each day matters. We will offer information concerning each family in the following paragraphs:

- a. M.E.-L., E.O.-E. and five-year-old daughter J. O.-E., are currently the beneficiaries of a stay of removal from the San Antonio Immigration Court and a pending motion to reopen a removal order issued in their case. Importantly, they are victims of human trafficking who have, and will, cooperate with law enforcement. They also have asylum applications pending with the San Antonio Immigration Court. The family's sponsor to receive them is M.E.-L.'s sister and her uncle who reside in Chicago, IL, who have a fixed address and phone which can easily be provided to the government.

This family was hospitalized in Texas prior to coming to the BCRC on March 14, 2020. They were not immediately isolated in the BCRC or provided PPE or precautions upon entering the BCRC despite hospitalization before entering the BCRC. Rather their child, and each parent, had extreme symptoms of illness including coughing, throat soreness and trouble breathing and were in the general population. Their child was taken to the hospital two times while at the BCRC since March 14, 2020. Following a hospital visit, the child and mother were isolated for three days. The father was not isolated. The five-year-old was tested for COVID-19 and was determined negative, neither parent was tested for COVID-19.

- b. J. A.-R., E. G.-M., and one-year-old J.G.-G. are seeking asylum and are in the credible fear process. Should they receive a positive determination, they will be released, should they receive a negative decision, they will seek a reconsideration and/or evaluation concerning the procedural sufficiency of their fear screening for review. The family's sponsor is E.G.-M.'s sister-in-law who resides in North Carolina and has a fixed address and phone which can easily be provided the government.

As of March 23, 2020 each parent has cold symptoms and expressed that they could barely speak due to sore throats. Their one year old has had an ear infection for many days. Daughter was provided medicine however the parents were advised to drink a lot of water. The one-year-old's formula was confiscated by the BCRC and is now required to drink regular milk.

- c. C. N., L. B., and 19-month-old B.K. L.-N. are seeking asylum and are in the credible fear process. Should they receive a positive determination, they will be released, should they receive a negative decision, they will seek a reconsideration and/or evaluation concerning the procedural sufficiency of their fear screening for review. The family's sponsor is L.B.'s cousin who resides in Florida and has a fixed address and phone which can easily be provided the government.
- d. G. SC., M.C., 11-year-old N.B.T, and three-year-old G.R. S.-C. are seeking asylum and are in the credible fear process. Should they receive a positive determination, they will be released, should they receive a negative decision, they will seek a reconsideration and/or evaluation concerning the procedural sufficiency of their fear screening for review. The family's sponsor is M.C.'s cousin who resides in Connecticut and has a fixed address and phone which can easily be provided the

government.

- e. P.M., M.N. and two-year-old H. M.-N. are seeking asylum and are in the credible fear process. Should they receive a positive determination, they will be released, should they receive a negative decision, they will seek a reconsideration and/or evaluation concerning the procedural sufficiency of their fear screening for review. The family's sponsors are P.M.'s aunts in Brooklyn and have a fixed address and phone which can easily be provided the government.

H.M.-N. suffered for a fever for four days since their arrival in the BCRC on March 18, 2020. She also developed sores inside and outside of her mouth that resulted in bleeding from her throat and mouth.

- f. J.J. S.-J., G.C., and seven-year-old M.S.-J. are seeking asylum and are in the credible fear process. Should they receive a positive determination, they will be released, should they receive a negative decision, they will seek a reconsideration and/or evaluation concerning the procedural sufficiency of their fear screening for review. The family's sponsor is G.C.'s brother who resides in Florida and has a fixed address and phone which can easily be provided the government.

G.C. has an allergy or infection in her mouth, migraines and has been hospitalized since entering the BCRC mid-March.

39. Inasmuch as removal has not occurred, their continued detention becomes more dangerous every single day. COVID-19 cases nationwide have approached 400,000, and in the state of Pennsylvania alone there are 14,956 cases as of the writing of this statement. Deaths are skyrocketing in Pennsylvania and COVID-19 is prevalent in ICE detention centers in Pennsylvania. Two incarcerated persons in the Pike County Correctional facility in Pennsylvania have died. Failure to adhere to very clear and simple obligations under the Flores Settlement and pursuant to the Judge's order places each of the families described in this declaration at risk. ICE can easily place each family outside detention, today, and have available sponsors to provide care and quarantine, and addition may comport with the requirement imposed by ICE to secure their appearance at court or subsequent supervision appointments.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct pursuant to 28 U.S.C. ¶ 1746.

Executed this 7th of April, 2020 in Reading, Pennsylvania.



Bridget Cambria, Esq.

EXHIBIT B

SUPPLEMENTAL DECLARATION OF DR. ALAN SHAPIRO

I, Alan Shapiro, MD, make the following supplemental declaration in support of Petitioners' request for injunctive relief:

1. This supplemental declaration incorporates each and every statement from my previously filed declaration dated March 29, 2020 in *O.M.G. v. Wolf*, No. 1:20-cv-00786-JEB (D.D.C.) (ECF No. 25-1) (filed Mar. 30, 2020).

2. I have reviewed the declarations of Melissa B. Harper (ECF 39-1), Michael Sheridan (ECF 39-2), and Christopher George (ECF 39-3) submitted by the Government on April 6, 2020 in *O.M.G. v. Wolf*. This supplemental declaration summarizes response to those declarations, as well as my further observations and opinions in light of the evolving facts concerning the current global pandemic.

3. I address four main points in this supplemental declaration:

- the high risk of COVID-19 infection in the FRCs due to the inability to implement adequate infectious control measures in congregate detention settings involving children and families;
- the futility of ICE's screening protocols;
- the high risk of spreading COVID-19 among detainees ICE cohorts with other potentially exposed detainees, in violation of CDC guidelines; and
- the danger of overwhelming local hospital systems where FRCs located.

A. The Expanding Coronavirus Pandemic

4. At the time of my March 29, 2020 declaration, there were over 685,000 COVID-19 cases and over 32,000 deaths globally, and 122,653 confirmed COVID-19 cases and 2,112 deaths in the United States. *See* Shapiro Decl. (ECF 25-1_ at ¶ 9. As of April 9, 2020, the date of this declaration, the pandemic has exponentially spread, with 1,587,209 confirmed cases and 94,850 deaths globally.¹ According to the Centers for Disease Control and Prevention (CDC) there have been 427,460 confirmed cases and 14,696 deaths nationally as of April 8, 2020 (the latest available data).² Every U.S. state and territory has been affected, and COVID-19 is rapidly spreading from urban centers to rural areas.

5. A study from the University of Texas at Austin estimated that as of April 3, 2020—a week ago—“72% of US counties with 94% of the national population have over

¹ Johns Hopkins University Coronavirus Resource Center (updated April 9, 2020, 12:00 p.m. ET), <https://coronavirus.jhu.edu/map.html>.

² Centers for Disease Control, “Coronavirus Disease 2019 (COVID-19): Cases in U.S.” (updated April 9, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

a 50% chance of ongoing COVID-19 transmission.”³ The authors emphasized that “[a] single reported case suggests that community transmission is likely,” and that even in places that did not have confirmed COVID-19 cases as of April 3, 2020, the situation was not likely to last.⁴

It is likely that our entire map will be bright red within a week or two, given that COVID-19 spreads very quickly and often silently. The fate of outbreaks in counties across the US very much hinges on the speed of local interventions. Early and extensive social distancing can block community transmission, avert rises in hospitalizations that overwhelm local capacity, and save lives.⁵

As of April 6, 2020, two-thirds of all rural counties had confirmed cases of COVID-19.⁶

6. As of the date of this supplemental declaration, all three counties where the Family Residential Centers are located have confirmed COVID-19 cases.⁷ Of these, Berks County, PA is the most severely affected with 419 confirmed COVID-19 cases, and 7 deaths to date.⁸

B. FRC Children and Families are More Likely to be Exposed to COVID-19 Than Adult Inmates or Detainees

7. Due to the highly infectious nature of SARS-CoV-2, the virus that causes COVID-19, infectious disease specialists and public health experts have strongly recommended minimizing interpersonal contact to mitigate transmission and minimize disease.⁹ The U.S. federal and state governments, like many governments around the world, have taken unprecedented steps to follow expert recommendations by ordering the closure of all but essential businesses and putting into place strict social distancing policies such as “shelter in place,” gatherings of no more than ten persons, and avoiding congregate environments such as schools and places of worship.

8. Moreover, due to the congregate nature of detention facilities and the heightened risk of transmitting infection, localities in the U.S. and around the world have been releasing nonviolent detainees for their safety and that of facility staff.¹⁰

³ Emily Javan, et al., “Probability of current COVID-19 outbreaks in all US counties” (Apr. 3, 2020), https://cid.utexas.edu/sites/default/files/cid/files/covid-risk-maps_counties_4.3.2020.pdf?m=1585958755.

⁴ *Id.*

⁵ *Id.* (citations omitted).

⁶ Jack Healy, et al., “Coronavirus Was Slow to Spread to Rural America. Not Anymore.,” N.Y. TIMES (Apr. 8, 2020), <https://www.nytimes.com/interactive/2020/04/08/us/coronavirus-rural-america-cases.html>.

⁷ “Coronavirus in the U.S.: Latest Map and Case Count,” N.Y. TIMES (updated April 9, 2020, 6:00 pm ET), <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>.

⁸ *Id.*

⁹ Centers for Disease Control, Coronavirus (COVID-19), <https://www.cdc.gov/coronavirus/2019-ncov/index.html>.

¹⁰ See, e.g., Scott Neuman, “Judge Orders 10 ICE Detainees Released From N.J. Jails Over COVID-19 Concerns,” NPR (Mar. 27, 2020), <https://www.npr.org/sections/coronavirus-live->

9. Importantly, there is no guidance on the prevention and control of COVID-19 in congregate detention facilities that addresses the unique needs of facilities that detain children. The CDC's *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities* (the "Interim Guidance")¹¹ focuses entirely on adult detention, does not discuss child or family detention centers at all. The Interim Guidance does not address the particular and significant difficulties that children have with preventative measures such as maintaining social distancing, appropriate and consistent hand hygiene, and/or avoiding touching one's face.

10. The FRCs are designed to be congregate facilities, with shared bedrooms, bathrooms, dining facilities, hallways, lounges, and recreational areas. These congregate facilities are not designed in a way that permits appropriate preventative steps to avoid the spread of COVID-19. Complicating this further and most significantly is the fact that that half of the detainees in the FRCs are children, including large numbers of infants, toddlers, and preschool age children.

11. It is imperative to understand that children's developmental and cognitive limitations make consistent social distancing between different families and meticulous hand-washing impossible in congregate settings. Nor is it possible to prevent children from touching commonly used surfaces, from rubbing their eyes, nose, and mouth, from uncovered coughs or sneezes, or, for young children, from putting toys and other shared objects in their mouth.

12. This is in part why schools around the country (and the world) have closed. The American Academy of Pediatrics goes further in their recommendation and asks parents not to have their children participate in "play-dates" for the very fact that social distancing would be breached.¹²

13. For these reasons, the likelihood of COVID-19 transmission is significantly higher in the FRCs than in congregate settings involving adults only.

14. Notably, the specific challenges addressing infectious control measures in facilities with children and families are not specifically addressed in the Declarations submitted by the government.

[updates/2020/03/27/822348039/federal-judge-orders-10-ice-detainees-released-from-n-j-jails-over-covid-19-conc](https://www.nytimes.com/2020/03/27/822348039/federal-judge-orders-10-ice-detainees-released-from-n-j-jails-over-covid-19-conc); Katie Benner, "Barr Expands Early Release of Inmates at Prisons Seeing More Coronavirus Cases," N.Y. Times (April 3, 2020), <https://www.nytimes.com/2020/04/03/us/politics/barr-coronavirus-prisons-release.html>; "Thousands of prisoners released from prisons in UK, France, US due to coronavirus" (Apr. 5, 2020), <https://112.international/society/thousands-of-prisoners-released-from-prisons-in-britain-france-and-united-states-due-to-coronavirus-50215.html>.

¹¹ Centers for Disease Control, "Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities" (Mar. 23, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf>.

¹² Corinn Cross, "Social Distancing: Why Keeping Your Distance Helps Keep Others Safe" (Am. Acad. of Pediatrics, Mar. 31, 2020), <https://www.healthychildren.org/English/health-issues/conditions/chest-lungs/Pages/Social-Distancing-Why-Keeping-Your-Distance-Helps-Keep-Others-Safe.aspx>

C. The FRC's Screening Protocols Are Insufficient to Prevent the Introduction of Coronavirus Infection

15. New data has demonstrated that asymptomatic persons infected with the novel coronavirus SARS-CoV-2 (the virus that causes COVID-19) can be contagious and spread infection.¹³ This new data prompted the CDC to recommend as of April 3, 2020 that everyone wear masks in public to help mitigate spread of disease.¹⁴

16. Evidence that demonstrated that ability of asymptomatic infected persons to spread the virus makes it impossible for screening protocols to identify all those who infected and contagious. A recently published study by the CDC has shown strong evidence suggesting the spread of infection by asymptomatic COVID-19 infection. The authors conclude that the findings have implication in “containment measures” and that “to control the pandemic it might not be enough for only persons with symptoms to limit their contact with others because persons without symptoms might transmit infection.” The authors specifically state, “these findings underscore the importance of social distancing in the public health response to the COVID-19 pandemic, including the avoidance of congregate settings.”¹⁵

17. Because many persons infected with COVID-19 are asymptomatic, the screening protocols discussed in the Declarations submitted by the government therefore cannot prevent the entry of COVID-19 infected persons into a family detention facility. The most the screening protocols can do is to help isolate and quarantine detainees with symptoms, identify symptomatic staff, and to prevent staff and others who are already showing signs of infection from entering the facility.

18. The screening measures described in the declarations submitted by ICE personnel include temperature checks, verbal screening for symptoms (e.g., cough, fever), and questioning those entering the facility if they have had a known contact with a person infected or suspected of having COVID-19. These screening measures are not effective, because they will not identify asymptomatic infected persons. As the CDC has noted, “Because many individuals infected with COVID-19 do not display symptoms, the virus could be present in facilities before cases are identified.” Interim Guidance at 8.

19. Likewise, questioning detainees, staff, vendors or visitors upon entry whether they have been in contact with those with known COVID-19 positive disease is also ineffective for the same reason that they may have been in contact with someone asymptomatic and therefore unaware of their infection.

¹³ See Centers for Disease Control, “Recommendation Regarding the Use of Cloth Face Coverings, Especially in Areas of Significant Community-Based Transmission” (Apr. 3, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html#studies>.

¹⁴ *Id.* (“In light of this new evidence, CDC recommends wearing cloth face coverings in public settings where other social distancing measures are difficult to maintain (e.g., grocery stores and pharmacies) **especially** in areas of significant community-based transmission.”) (emphasis in original).

¹⁵ Wycliffe E. Wei, et al., “Presymptomatic Transmission of SARS-CoV-2 — Singapore, January 23–March 16, 2020” (Apr. 1, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6914e1.htm>.

D. ICE's Plans to Cohort Families and Children is Contrary to CDC Guidance

20. Cohorting is “the practice of isolating multiple laboratory-confirmed COVID-19 cases together as a group, or quarantining close contacts of a particular case together as a group.” Interim Guidance at 3. It is not the same as quarantine or medical isolation, and is to be used only as a last resort in those “correctional facilities and detention centers do not have enough individual cells” for quarantine or medical isolation. *Id.* at 3, 15; *see also id.* at 16, 19 (discussing cohorting in cells). The practice of cohorting is dangerous in that it risks “transmit[ting] COVID-19 from those who are infected to those who are uninfected.” Interim Guidance at 19.

21. The declarations submitted by the Government indicate that ICE will place any asymptomatic resident known to have been exposed to a person with confirmed COVID-19 in a cohort with other exposed-but-asymptomatic residents for a minimum of 14 days. Sheridan Decl. ¶ 13, 36-37; George Decl. ¶ 12. During that time, the individual's movement is “restricted” and the cohorting will last until each individual in the cohort is symptom free for 14 days; if any individual in the cohort develops COVID-19, the 14 day clock for all detainees restarts. *Id.*

22. ICE's planned cohorting of FRC detainees directly contradicts CDC guidance in several ways including, most critically, that ICE officials describe cohorting as the planned response to a known COVID-19 exposure, not a practice of last resort. Notably, ICE has no plans to place suspected COVID-19 cases in individual medical isolation in which “[e]ach isolated individual should be assigned their own housing space and bathroom” as recommended by CDC. *See* Interim Guidance at 15.

23. Similarly, there is no indication that a cohorted group will be permitted to practice social distancing as recommended by CDC (*id.* at 16), or that a cohorted group will be provided with masks to prevent transmission of COVID-19 (*id.* at 20).

24. Furthermore, cohorting of children and families is never appropriate in a FRC setting. In my expert medical opinion, cohorting increases the likelihood of a widespread outbreak in the facility, placing detainees and staff in danger. Importantly, staff would be placed at risk for transmitting infection to their families and communities in which they live.

E. Continued Detention Puts Not Only Detainee Children and Families at Risk, but Also Endangers the Public by Threatening to Overwhelm Local Medical Resources.

25. Once COVID-19 infection is introduced into the FRCs, it will all-but-unavoidably spread within the facility to detained families and staff, and from those infected staff members to the local communities. This raises serious concerns about a surge in the need for emergency department services, personal protective equipment, hospital beds, intensive care units, and critical equipment such as ventilators. Not only do local hospital systems get overwhelmed caring for COVID-19 infected patients but are unable

to meet the needs for non-COVID-19 patients as services become inundated. The high risk of overwhelming small local hospital systems such as those found in the counties where FRCs are located endangers detainees, staff, and the public.

26. The government's declarations do not address the number of physicians and healthcare providers on staff at the FRCs to care for detainees sick with COVID-19 and those in need of care for other health reasons. Nor do the declarations mention the number of inpatient and ICU beds or ventilators available at hospitals located within 50 miles of the FRCs. The closest hospital to the Dilley FRC is Frio Regional Hospital, a 22 bed facility in Pearsall, TX.¹⁶ The only hospital within 30 miles of the Karnes FRC has just 25 beds.¹⁷ It has also been widely reported in the news that rural communities in Texas, like those where the FRCs are located, are already desperate for coronavirus medical supplies, including masks, gloves, and other personal protective equipment, hand sanitizer, and ventilators.¹⁸ In fact, *The Washington Post* researched the preparedness of hospitals around the country and based on its data the areas around the FRCs would be overwhelmed in the event of a COVID-19 outbreak.¹⁹ Given the number of detainees at each facility, the lack of hospital beds and medical resources, it is my opinion that if an outbreak were to occur at any of these facilities it would not only put the detainees at serious risk for death and it would risk the lives of those in the local community.

27. As a pediatrician, it is my ethical duty to protect children and their families. Asylum seekers are some of the most vulnerable families in the world. Protecting them will also protect detention center personnel and the general public and help preserve our limited healthcare resources during this unprecedented time. While much of the public discourse in recent years has focused on the egregious harm to the well-being of children separated from their parents at the border, it has been clearly showed that detention as a family unit—especially for prolonged times—is deleterious to the a child’s well-being and the integrity of the family unit.²⁰

28. Keeping families in the FRC during this novel and rapidly spreading pandemic is particularly concerning. The added restrictions of confinement and isolation will significantly increase the stress on children and their families. The stress this can cause in the developing child is known as “toxic stress” and can lead to short and long-term

¹⁶ American Hospital Directory, Frio Regional Hospital, https://www.ahd.com/free_profile/450293/Frio_Regional_Hospital/Pearsall/Texas/ (last visited Apr. 9, 2020).

¹⁷ American Hospital Directory, Otto Kaiser Memorial Hospital, https://www.ahd.com/free_profile/451364/Otto_Kaiser_Memorial_Hospital/Kenedy/Texas/ (last visited Apr. 9, 2020).

¹⁸ Anastasiya Bolton, “Rural Texas hospitals 'desperate' for medical supplies needed to fight coronavirus,” KHOU11 (Apr. 6, 2020), <https://www.khou.com/article/news/health/coronavirus/rural-hospitals-desperate-for-coronavirus-medical-supplies/285-a8438a49-c178-43b0-95f5-1f3c4583be85>.

¹⁹ Amy Brittan, et al., “How a surge of coronavirus patients could stretch hospital resources in your area,” Wash. Post (updated Apr. 9, 2020), https://www.washingtonpost.com/graphics/2020/investigations/coronavirus-hospitals-data/?itid=hp_hp-banner-main_virusystems-1050am%3Ahomepage%2Fstory-ans.

²⁰ Linton JM, Griffin M, Shapiro AJ, “Detention of Immigrant Children,” PEDIATRICS 2017; 139(5):e20170483.

adverse consequences on a child's growth, development and psychological well-being.²¹

29. Knowing the harm that detention causes on the health and the wellbeing of children and their parents in the best of times, it is inconceivable to me as a pediatric specialist why children and their parents should remain in detention during this unprecedented and highly dangerous pandemic.

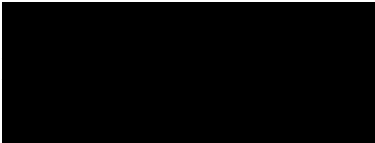
I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, based on my personal knowledge.

Executed in New York, NY on April 10, 2020.



Alan Shapiro, MD
Senior Medical Director
Community Pediatric Programs
Children's Hospital at Montefiore

Terra Firma: Healthcare and Justice for Immigrant Children
Co-Founder and Medical Director



²¹Institute of Medicine and National Research Council, *From Neurons to Neighborhoods: The Science of Early Childhood Development* (Nat'l Academies Press 2000).