

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS**

SOULEYMANE DEMBELE,  
MUHAMMAD TAUFIQ BUTT,

Petitioners-Plaintiffs,

v.

BILL PRIM, in his individual capacity and official capacity as Sheriff of McHenry County; DANIEL SITKIE, in his individual capacity and official capacity as Chief of Corrections of the McHenry County Jail; ROBERT GUADIAN, in his individual capacity and official capacity as Field Office Director, Enforcement and Removal Operations, U.S. Immigration and Customs Enforcement; MATTHEW ALBENCE, in his individual capacity and official capacity as Acting Director, U.S. Immigration and Customs Enforcement; and CHAD WOLF, in his individual capacity and official capacity as Acting Secretary, U.S. Department of Homeland Security,

Respondents-Defendants.

Case No. \_\_\_\_\_

**EMERGENCY PETITION FOR  
A WRIT OF HABEAS CORPUS  
PURSUANT TO 28 U.S.C. § 2241**

**AND**

**COMPLAINT FOR  
INJUNCTIVE AND  
DECLARATORY RELIEF**

## INTRODUCTION

1. COVID-19, the disease caused by a novel coronavirus, is rampaging across the world like an out-of-control wildfire. It has become a global pandemic with lethal consequences, especially for older adults and people with certain pre-existing medical conditions. As of April 15, 2020, more than 1.9 million people have tested positive for the virus, and 123,126 people have died. The death toll in the United States, and Illinois, is steadily rising. There is no vaccine against COVID-19, and there is no known cure. It is no longer a question of whether and when, but of how many victims and who dies.

2. Petitioners-Plaintiffs Souleymane Dembele and Muhammad Taufiq Butt (“Petitioners”) are held in *civil detention* by U.S. Immigration and Customs Enforcement (“ICE”) at the McHenry County Adult Correctional Facility (“McHenry County Jail”) while they await disposition of their immigration cases or deportation. They both have serious pre-existing medical conditions, including diabetes, hypertension, and hyperlipidemia. Mr. Butt, moreover, is 65 years old.

3. While coronavirus is extraordinarily infectious, the highest risk of serious illness and death from COVID-19 is for individuals who, like Petitioners, have certain pre-existing medical or health conditions or are more than 50 years old. Epidemiological studies indicate that about 15% in this group—or one in seven people—will die. For others, COVID-19 can cause severe damage to lung

tissue, sometimes leading to a permanent loss of respiratory capacity, and can damage tissues in other vital organs including the heart and liver. Patients with serious cases of COVID-19 require advanced medical support, including positive pressure ventilation and extracorporeal mechanical oxygenation in intensive care. Patients who do not die from serious cases of COVID-19 may face prolonged recovery periods, including extensive rehabilitation from neurological damage and loss of respiratory capacity.

4. Because COVID-19 spreads exponentially, meaning that a single infection can grow into hundreds in a matter of days, the only known measure to mitigate the widespread contagion is to deprive COVID-19 of the fuel it needs by allowing people to practice social distancing to reduce the number of infections and ease the strain on overwhelmed local health systems. This is why officials around the world have implemented extraordinary measures to mitigate spread of coronavirus, like closing schools, courts, sporting events, theaters, and other congregate settings. Across the United States, 316 million people in at least 42 states, three counties, nine cities, District of Columbia, and Puerto Rico are being urged to stay home under a statewide or local order.

5. Since declaring Illinois a disaster area on March 9, 2020, Illinois Governor J.B. Pritzker has issued numerous executive orders that reflect the

critical importance of social distancing to combat the COVID-19 pandemic.<sup>1</sup> On March 20, 2020, Governor Pritzker ordered everyone to stay at home and cease all non-essential activities, banned gatherings of 10 or more people, and required people to maintain at least six feet between themselves and others when leaving home to pursue essential activities.<sup>2</sup> On March 26, 2020, Governor Pritzker suspended all admissions to the Illinois Department of Corrections (“IDOC”) from Illinois county jails, with exceptions solely authorized by the IDOC Director, out of recognition that people in correctional settings “are especially vulnerable to contracting and spreading COVID-19” due to “their close proximity and contact with each other in housing units and dining halls.”<sup>3</sup>

6. Immigration detention facilities are enclosed environments, much like the cruise ships that have been the site of the largest concentrated outbreaks of COVID-19. Because carceral facilities also include security restrictions, they pose the highest public health risk to the spread of COVID-19. People live in close quarters and are subject to security measures which prohibit successful “social distancing” that is needed to effectively prevent the spread of COVID-19. Toilets,

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<sup>1</sup> Ill. Exec. Order in Response to COVID-19 (COVID-19 Exec. Order No. 8), Ill. Exec. Order No. 2020-10, (Mar. 20, 2020), <https://www2.illinois.gov/Documents/ExecOrders/2020/ExecutiveOrder-2020-10.pdf>, attached as Ex. B to the Declaration of Nusrat J. Choudhury (“Choudhury Decl.”).

<sup>2</sup> *Id.*

<sup>3</sup> Ill. Exec. Order in Response to COVID-19 (COVID-19 Exec. Order No. 11), Ill. Exec. Order 2020-13, (Mar. 26, 2020), <https://www2.illinois.gov/Documents/ExecOrders/2020/ExecutiveOrder-2020-13.pdf>, Ex. C to the Choudhury Decl.

sinks, and showers are shared, without disinfection between use. Food preparation and food service is communal, with little opportunity for surface disinfection. Staff arrive and leave on a shift basis; there is little to no ability to adequately screen staff for new, asymptomatic infection.

7. For this reason, jails and prisons have become hotspots for spreading the coronavirus. Cook County Jail has become an epicenter of infection, with the number of confirmed cases of COVID-19 in the jail skyrocketing from two to 353 in the two weeks following March 23, 2020.<sup>4</sup> There were only three confirmed cases in the Stateville Correctional Facility in Illinois on March 25, 2020,<sup>5</sup> but in less than two weeks, 49 inmates and 17 staff members at the facility had tested positive for coronavirus.<sup>6</sup> In southern Illinois, coronavirus infection has already been confirmed in the Pulaski County Detention Center, which houses both ICE detainees and people involved in pre-trial and post-conviction criminal matters.<sup>7</sup>

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<sup>4</sup> Timothy Williams & Danielle Ivory, *Chicago's Jail is Top U.S. Hot Spot as Virus Spreads Behind Bars*, New York Times (Apr. 8, 2020), <https://www.nytimes.com/2020/04/08/us/coronavirus-cook-county-jail-chicago.html>, attached as Ex. M to the Choudhury Decl.

<sup>5</sup> *Coronavirus in Illinois Updates: Here's What Happened March 25 with COVID-19 in the Chicago Area*, Chi. Trib. (Mar. 25, 2020, 7:48 PM), <https://www.chicagotribune.com/coronavirus/ct-coronavirus-pandemic-chicago-illinois-news-20200325-swgp5hlecrbabjqx52etj2rruq-story.html>, attached as Ex. N to the Choudhury Decl.

<sup>6</sup> Josh McGhee, *Stateville Prison Outbreak Signals COVID-19 Threat to Inmates, Surrounding Hospital Systems*, Chi. Reporter (Apr. 13, 2020), <https://www.chicagoreporter.com/stateville-prison-outbreak-signals-covid-19-threat-to-inmates-surrounding-hospital-systems/>, attached as Ex. O to the Choudhury Decl.

<sup>7</sup> Molly Parker, *3 Detainees, 1 Correctional Officer of Pulaski County Detention Center Diagnosed with COVID-19*, Southern Illinoisan (Apr. 13, 2020), [https://thesouthern.com/news/local/3-detainees-1-correctional-officer-of-pulaski-county-detention-center-diagnosed-with-covid-19/article\\_8ce1ca7e-7b28-5884-8113-badf0e385a21.html](https://thesouthern.com/news/local/3-detainees-1-correctional-officer-of-pulaski-county-detention-center-diagnosed-with-covid-19/article_8ce1ca7e-7b28-5884-8113-badf0e385a21.html), attached as Ex. AA to the Choudhury Decl.

8. Current conditions and procedures in place for ICE detainees at the McHenry County Jail are insufficient to prevent the introduction of coronavirus or to prevent its rapid transmission among both detainees and staff. The McHenry County Jail is not following Centers for Disease Control and Prevention (“CDC”) guidance concerning social distancing in detention facilities. Corrections officers at the facility have expressed concern that insufficient sanitation, social distancing, and screening of new inmates will lead to the rapid spread of the coronavirus once it enters the facility.<sup>8</sup> This failure puts all detainees—especially those at high risk of severe disease and death—in jeopardy. The only viable public health strategy available, given the lack of a vaccine for prevention or effective treatment at this stage of the pandemic, is to release individuals who can be considered at high risk of severe disease if infected with COVID-19.

9. Petitioners’ public health and medical experts attest that the crowded conditions at the McHenry County Jail make social distancing, the most vital preventative measure, impossible. Petitioners are in crowded pods, using the same tables and equipment as dozens of other detainees, and must stand in line close to others in order to get food and medicine, making it impossible to keep six feet of distance from other people. They eat sitting right next to other detainees during

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<sup>8</sup> Cassie Buchman, *COVID-19 Concerns Abound at McHenry County Jail: Jail Workers Weigh in on COVID-19 Action; Sheriff’s Office Says Precautions in Place*, Northwest Herald (Mar. 29, 2020), <https://www.nwherald.com/2020/03/28/covid-19-concerns-abound-at-mchenry-county-jail/a2tyboc/>, attached as Ex. AB to Choudhury Decl.

meals served in unsanitary conditions. Petitioners sleep in bunkbeds in cells that are so small that they can touch their cellmate's beds while lying on their own and must get close to their cellmates when walking to the toilet or sink or when entering or leaving the cell. Mr. Butt shares his tiny cell with a man who coughs all night. Based on the inability to practice CDC-recommended social distancing and hygiene practices and the unhygienic feeding and bathrooms situations, Petitioners' experts testify that the conditions greatly heighten likelihood of contagion, putting Petitioners at grave risk of serious illness and death.

10. Clustering vulnerable individuals under these circumstances and waiting for COVID-19 to explode in detention centers is not just a humanitarian crisis, it is a constitutional one. Courts have long recognized that the Eighth Amendment's prohibition on cruel and unusual punishment forbids the government from leaving incarcerated people to suffer and die from infectious disease. The nature of the pandemic and the conditions of confinement at the McHenry County Jail make it impossible for Respondents-Defendants to protect vulnerable Petitioners from risk of infection. That risk of harm, which includes a one-in-seven chance of death, is "so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk." *Helling v. McKinney*, 509 U.S. 25, 36 (1993). Such conditions violate Plaintiffs' rights to due process as *civil* detainees, which prohibits Respondents-Defendants from confining them in conditions that

constitute punishment. *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979) (“Due process requires that a pretrial detainee not be punished.”).

11. The risk to Petitioners in McHenry County Jail, moreover, are obvious. Two medical experts for the Department of Homeland Security recently wrote a letter to Congress warning of the unique dangers COVID-19 poses to ICE detention facilities, describing current conditions as a “tinderbox” threatening to overwhelm local hospital systems with the patient flow from detention center outbreaks, making health resources less available for local communities.<sup>9</sup>

12. There is growing recognition among courts that release from detention is the only way to protect vulnerable detainees from COVID-19. Federal courts around the country have recently ordered the release of immigrants from ICE detention in light of the dangers posed by the COVID-19 crisis. A district court in Pennsylvania ordered the release of 33 older and medically vulnerable detainees, noting that the ICE facilities in question “are plainly not equipped to protect Plaintiffs from a potentially fatal exposure to COVID-19” and that “should we fail to afford relief to Plaintiffs we will be a party to an unconscionable and possibly barbaric result.” *Thakker v. Doll*, No. 1:20-cv-00480, 2020 WL 1671563, at \*9 (M.D. Pa. Mar. 31, 2020) (ordering release of eleven detainees); *Hope v. Doll*, No.

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<sup>9</sup> Letter from Scott A. Allen, MD, FACP and Josiah Rich, MD, MPH to House and Senate Committees on Homeland Security (Mar. 19, 2020), <https://whistleblower.org/wp-content/uploads/2020/03/Drs.-Allen-and-Rich-3.20.2020-Letter-to-Congress.pdf>, attached as Ex. R to the Choudhury Decl.

1:20-cv-00562, Dkt. 22 (M.D. Pa. Apr. 10, 2020) (denying motion for reconsideration of TRO grant and ordering immediate release of 22 medically vulnerable immigrant detainees). Courts in California, Michigan, New York, and New Jersey have similarly released vulnerable ICE detainees due to the risk of serious illness or death posed by COVID-19 in a detention setting. *See, e.g., Xochihua-Jaimes v. Barr*, Order, No. 18-71460, 2020 WL 1429877 (9th Cir. Mar. 24, 2020) (ordering release “[i]n light of the rapidly escalating public health crisis, which public health authorities predict will especially impact immigration detention centers”); *Malam v. Adduci*, No. 20-10829, 2020 WL 1809675 (E.D. Mich. Apr. 5, 2020) (ordering release of immigrant woman in mandatory detention due to danger posed to her by pandemic); *Toma v. Adducci*, No. 2:20-cv-10829-JEL-APP, Dkt. 29 (E.D. Mich. Apr. 9, 2020) (granting TRO releasing medically vulnerable immigrant detainee because of the risk of COVID-19); *Basank v. Decker*, No. 20 CIV. 2518 (AT), 2020 WL 1481503, at \*3 (S.D.N.Y. Mar. 26, 2020) (same, because “[t]he nature of detention facilities makes exposure and spread of the [coronavirus] particularly harmful”); *Rafael L.O. v. Tsoukaris*, No. 2:20-cv-3481-JMV, Dkt. 24, 2020 WL 1808843 (D.N.J. Apr. 9, 2020) (same for three detainees).

13. In order after order, courts around the country have confirmed the need to release of vulnerable detainees in the face of this pandemic. *See, e.g.,*

*Christian A.R. v. Decker*, No. 20-3600 (D.N.J. Apr. 12, 2020) (ordering release of five medically vulnerable people from ICE detention), attached as Ex. AC to the Choudhury Decl.; *Coronel v. Decker*, No. 20-CV-2472 (AJN), 2020 WL 1487274, at \*9-10 (S.D.N.Y. Mar. 27, 2020) (ordering release of four detainees); *Savino v. Souza*, No. 20-10617-WGY, 2020 WL 1703844 (D. Mass. Apr. 8, 2020) (granting motion for class cert resulting in release of at least 49 detainees as of this filing, including detainees with medical vulnerabilities).<sup>10</sup>

14. Both in the context of prisons and jails and in the context of immigration detention, courts have recognized the need to release people *before* cases of COVID-19 have been identified in detention facilities. One court ordered the release from jail of a 74-year old pre-trial detainee and concluded, “the government’s suggestion that [the plaintiff] should wait until there is a confirmed outbreak of COVID-19 in [the facility] before seeking release is impractical. By then it may be too late.” *In re Extradition of Alejandro Toledo Manrique*, No. 19-71055, 2020 WL 1307109, at \*1 (N.D. Cal. Mar. 19, 2020). As another court explained, in ordering the release of 22 medically vulnerable immigration detainees:

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<sup>10</sup> See, e.g., *Bent v. Barr*, No. 4:19-cv-06123, Dkt. 26 (N.D. Cal. Apr. 9, 2020); *Bahena Ortuno v. Jennings*, No. 3:20-cv-02064-MMC, Dkt. 38 (N.D. Cal. Apr. 8, 2020) (same for four detainees); *Hernandez v. Decker*, No. 20-cv-1589 (JPO), 2020 WL 1547459 (S.D.N.Y. Mar. 31, 2020); *Robles Rodriguez v. Wolf*, No. 5:20-cv-00627-TJH-GJS, Dkt. 32, 35-39 (C.D. Cal. Apr. 2, 2020) (same for six detainees).

Petitioners face the inexorable progression of a global pandemic creeping across our nation—a pandemic to which they are particularly vulnerable due to age and underlying medical conditions. At this point, it is not a matter of *if* COVID-19 will enter Pennsylvania prisons, but *when* it is finally detected therein.

*Thakker*, 2020 WL 1671563 at \*3; *see also United States v. Fellela*, No. 3:19-cr-79, 2020 U.S. Dist. LEXIS 49198, at \*1 (D. Conn. Mar. 20, 2020); *United States v. Stephens*, No. 15- cr-95, 2020 WL 1295155, at \*2 (S.D.N.Y. Mar. 19, 2020) (releasing pretrial detainee because “[a]lthough there is not yet a known outbreak among the jail and prison populations, inmates may be at heightened risk of developing COVID-19 should an outbreak develop.”).

15. Petitioners thus bring this action to enforce their rights under the Fifth and Fourteenth Amendments to the U.S. Constitution against the local and federal officials who are detaining them in a facility that places them at risk of losing their lives to COVID-19. This Court has the authority and the obligation to order Respondents-Defendants (“Respondents”) to comply with the Fifth and Fourteenth Amendments and release Petitioners from civil detention. For the reasons discussed below and in the accompanying legal memorandum, this Court should immediately grant Petitioners’ emergency request for a writ of habeas corpus, or issue a temporary restraining order or preliminary injunction, requiring ICE to temporarily release Petitioners from custody so that they have a chance to avoid

infection that is likely to lead to their serious illness, and possibly even their death, from COVID-19.

16. The wildfire is entering the jails. Petitioners implore this Court to issue an order saving those who are most vulnerable to severe illness and death from the oncoming calamity.

### **JURISDICTION AND VENUE**

17. This Court has subject matter jurisdiction over this matter under 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1346 (original jurisdiction), 5 U.S.C. § 702 (waiver of sovereign immunity); 28 U.S.C. § 2241 (habeas jurisdiction), and Article I, Section 9, clause 2 of the United States Constitution (the Suspension Clause).

18. Venue lies in the United States District Court for the Northern District of Illinois because Petitioners are detained by Respondents-Defendants Bill Prim, Daniel Sitkie, Robert Guadian, Matthew Albence, and Chad Wolf at the McHenry County Jail, which is located within the Northern District. 28 U.S.C. § 2242. Venue is proper in the Northern District of Illinois because a substantial portion of the relevant events occurred in the District and because several Respondents reside in the District. 28 U.S.C. § 1391(b), (e)(1).

## **PARTIES**

### **A. Petitioners**

19. Petitioner Souleymane Dembele is a 43-year-old citizen of Mali who has been detained by ICE at McHenry County Jail for over six weeks. Declaration of Souleymane Dembele (“Dembele Decl.”) ¶¶ 2, 6, 28. He suffers from pre-diabetes and hypertension. Dembele Decl. ¶¶ 7–12. Mr. Dembele’s serious health conditions place him at high risk of severe illness or death if he contracts COVID-19.

20. Petitioner Muhammad Tauris Butt is a 65-year-old citizen of Pakistan who has been detained by ICE at McHenry County Jail for three months. Declaration of Muhammad Taufiq Butt (“Butt Decl.”) ¶¶ 2, 6, 26. He suffers from diabetes, hypertension, hyperlipidemia, and sleep apnea. Butt Decl. ¶¶ 7–11. Mr. Butt’s age and serious health conditions place him at high risk of severe illness or death if he contracts COVID-19.

### **B. Respondents**

21. Respondent Bill Prim is the Sheriff of McHenry County, Illinois. Under state law, Respondent Prim is charged with “the custody and care” of the McHenry County Jail, where Mr. Dembele and Mr. Butt are detained. *See* 55 ILCS 5/3-6017. He is therefore Petitioners’ physical custodian and a proper respondent

to Petitioners' emergency petition for a writ of habeas corpus. Respondent-Defendant Prim is sued in his official and individual capacities.

22. Respondent Daniel Sitkie is the Chief of Corrections of the McHenry County Jail, where Mr. Dembele and Mr. Butt are detained. Respondent Sitkie is the immediate, physical custodian of these Petitioners, and is therefore a proper respondent to Petitioners' emergency petition for a writ of habeas corpus. He is sued in his official and individual capacities.

23. Respondent Robert Guadian is the Field Office Director for Enforcement and Removal Operations ("ERO") in the Chicago Field Office of U.S. Immigration and Customs Enforcement ("ICE"). ICE is a federal law enforcement agency within the Department of Homeland Security ("DHS") and is responsible for the criminal and civil enforcement of immigration laws, including the detention and removal of immigrants. ERO is a division of ICE that manages and oversees the immigration detention system. In his capacity as Field Director for ERO, Respondent Guadian exercises control over and is a custodian of immigration detainees held at the McHenry County Jail, including Petitioners. At all times relevant to this Complaint, Respondent Guadian was acting within the scope and course of his employment with ICE. Petitioners sue Respondent Guadian for injunctive and declaratory relief under the Fifth Amendment to the U.S. Constitution. He is sued in his official and individual capacities.

24. Respondent Matthew T. Albence is the Deputy Director and Senior Official Performing the Duties of the Director of ICE. Respondent Albence is responsible for ICE's policies, practices, and procedures, including those relating to the detention of immigrants. Respondent Albence is a legal custodian of Petitioners and, at all times relevant to this complaint, was acting within the scope and course of his position as an ICE official. Petitioners sue Respondent Albence for injunctive and declaratory relief under the Fifth Amendment to the U.S. Constitution. He is sued in his official and individual capacities.

25. Respondent Chad Wolf is sued in his official capacity as the Acting Secretary for DHS. In this capacity, he has responsibility for the administration of immigration laws pursuant to 8 U.S.C. § 1103(a), has authority over ICE and its field offices, and has authority to order the release of Petitioners. At all times relevant to this complaint, Respondent Wolf was acting within the scope and course of his position as the Acting Secretary for DHS. He also is a legal custodian of Petitioners. Petitioners sue Respondent Wolf for declaratory and injunctive relief under the Fifth Amendment. He is sued in his official and individual capacities.

## STATEMENT OF FACTS

### A. COVID-19 Poses A Grave Risk of Harm, Including Serious Illness or Death, to People Age 50 and Over and Those with Certain Medical or Health Conditions.

26. COVID-19 is a disease caused by coronavirus that has reached pandemic status. According to the World Health Organization, as of April 15, more than 1.9 million people have been diagnosed with COVID-19 in 213 countries or territories around the world and 123,126 have died as a result.<sup>11</sup> In the United States, about 605,390 people have been diagnosed with the disease and 24,582 people have died thus far.<sup>12</sup> In Illinois, there are at least 24,593 confirmed cases and 948 deaths.<sup>13</sup>

27. The rates of infection are exponential, not linear, meaning that, for each person infected one day, the next day we should expect to see not one, but many more instances of infection. Declaration of Dr. Homer Venters (“Venters Decl.”) ¶¶ 10, 13–14. Without effective public health interventions, CDC projections indicate about 200 million people in the United States could be infected over the course of the pandemic, with as many as 1.5 million people dying from this infection. Declaration of Dr. Jonathan Louis Golob (“Golob Decl.”) ¶ 11.

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<sup>11</sup> Choudhury Decl. ¶ 3; World Health Org., *Coronavirus (COVID-19)*, <https://covid19.who.int/> (last visited Apr. 15, 2020), attached as Ex. A to the Choudhury Decl.; World Health Org., *Coronavirus Disease (COVID-19) Pandemic*, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019> (last visited Apr. 15, 2020), attached as Ex. E to the Choudhury Decl.

<sup>12</sup> *Id.*; Ex. F to the Choudhury Decl.

<sup>13</sup> State of Ill., *Coronavirus (COVID-19) Response, Coronavirus Disease 2019 (COVID-19)*, <https://coronavirus.illinois.gov/s/> (last visited Apr. 15, 2020), attached as Ex. G to the Choudhury Decl.

28. Outcomes from COVID-19 vary from asymptomatic infection to death. Individuals who are at low risk may experience mild symptoms, while high-risk individuals may suffer respiratory failure from the disease. Golob Decl. ¶¶ 3–5. In the highest risk populations, the fatality rate is about 15 percent, meaning that out of 100 vulnerable people infected, fifteen will die. Golob Decl. ¶ 4. In other words, more than one in every seven people in this high-risk group are likely to die, and an even higher percentage will suffer serious illness.

29. Those who do not die may experience long-term harm. COVID-19 can severely damage lung tissue, which requires an extensive period of rehabilitation, and in some cases, can cause a permanent loss of respiratory capacity. Golob Decl. ¶ 9.

30. COVID-19 may also target the heart muscle, causing a medical condition called myocarditis, or inflammation of the heart muscle. Myocarditis can affect the heart muscle and electrical system, reducing the heart's ability to pump. This reduction can lead to rapid or abnormal heart rhythms in the short term, and long-term heart failure that limits exercise tolerance and the ability to work. Golob Decl. ¶ 9.

31. Emerging evidence also suggests that COVID-19 can trigger an over-response of the immune system, further damaging tissues in a cytokine release

syndrome that can result in widespread damage to other organs, including permanent injury to the kidneys and neurologic injury. Golob Decl. ¶ 9.

32. People age 50 and older and those of any age with serious underlying medical and health conditions are at the *highest risk* of severe disease and death if they are infected with COVID-19. Golob Decl. ¶ 3; Venters Decl. ¶ 22. According to the CDC, these underlying conditions include: blood disorders, chronic kidney or liver disease, compromised immune system, endocrine disorders (including diabetes), metabolic disorders, heart and lung disease, neurological and neurodevelopmental conditions, current or recent pregnancy, and having a body mass index over 40. Golob Decl. ¶ 3; Venters Decl. at ¶ 22. Additional risk factors include being a current smoker, having a history of smoking, or suffering from asthma or chronic obstructive pulmonary disease. Venters Decl. ¶ 22. While patients over 70 are at the highest risk, age-related risks of severe disease from infection increase starting at age 50. Golob Decl. ¶ 3; Venters Dec. ¶ 22.

33. There is no vaccine to prevent COVID-19. Golob Decl. ¶ 10. There is no known cure or anti-viral treatment for COVID-19 at this time. *Id.* The only way to protect vulnerable people from serious health outcomes, including death, is to prevent them from being infected with the coronavirus—the virus that causes COVID-19. *Id.*

34. People develop COVID-19 when they come into contact with respiratory droplets that contain the coronavirus.<sup>14</sup> Such contact can occur at a distance of up to six feet.<sup>15</sup> *Id.* It is also possible that an individual can become infected by touching a surface with the virus and then touching their face. *Id.* Thus, the only known means of minimizing the risk of infection are social distancing and increased sanitization. Golob Decl. ¶ 10.

35. Increasingly, research shows that social distancing is the primary means of risk mitigation. Venters Decl. ¶ 25. Distancing must occur before individuals display symptoms, as they may be contagious before they are symptomatic. “Some recent studies have suggested that COVID-19 may be spread by people who are not showing symptoms.”<sup>16</sup> The CDC recommends a social distance of around six feet to minimize the risk of spread.<sup>17</sup>

36. In response to this research, countries around the world have sought to make social distancing into public policy. Italy has enacted a national lock-down, prohibiting people from leaving their homes.<sup>18</sup> Across the United States, 316

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<sup>14</sup> Ctrs. for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19): How It Spreads*, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (last visited Apr. 15, 2020), attached as Ex. H to the Choudhury Decl.

<sup>15</sup> Ctrs. for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19): Protect Yourself*, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (last visited Apr. 15, 2020), attached as Ex. I to the Choudhury Decl.

<sup>16</sup> Ex. I to the Choudhury Decl.

<sup>17</sup> Ex. H to the Choudhury Decl.

<sup>18</sup> Valentina Di Donato et al., *All of Italy Is in Lockdown as Coronavirus Cases Rise*, CNN (Mar. 13, 2020, 2:50 PM), <https://www.cnn.com/2020/03/09/europe/coronavirus-italy-lockdown-intl/index.html>, attached as Ex. J to the Choudhury Decl.

million people in at least 42 states, three counties, nine cities, District of Columbia, and Puerto Rico are being urged to stay home under a statewide or local order.<sup>19</sup>

37. Illinois has ordered people to stay at home, shut down all non-essential businesses where people might come into contact with each other, banned people from congregating in groups of more than ten people, and requires people to keep six feet of distance between themselves and others when leaving home to engage in essential activities.<sup>20</sup> The idea behind these actions is that, by “flattening the curve,” those most vulnerable will be less likely to become infected and, if they do, the numbers of infected individuals will be low enough that medical facilities will have enough beds, masks, and ventilators for those who need them. *See* Declaration of Dr. Dora Schriro (“Schriro Decl.”) ¶ 48.<sup>21</sup>

**B. Conditions for ICE Detainees in the McHenry County Jail Increase the Risk of Coronavirus Infection.**

38. The conditions for ICE detainees in the McHenry County Jail contravene all medical and public health directives for risk mitigation. People live in close quarters and cannot achieve the “social distancing” needed to effectively prevent the spread of COVID-19. Nor is such social distancing a possible solution,

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<sup>19</sup> Sarah Mervosh et al., *See Which States and Cities Have Told Residents to Stay Home*, N.Y. Times (Apr. 7, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html>, attached as Ex. K to the Choudhury Decl.

<sup>20</sup> Ex. B to the Choudhury Decl.

<sup>21</sup> Siobhan Roberts, *Flattening the Coronavirus Curve*, N.Y. Times (Mar. 27, 2020), <https://www.nytimes.com/article/flatten-curve-coronavirus.html>, attached as Ex. L to the Choudhury Decl.

given the crowding of the facilities and the limitations on space. Schriro Decl. ¶¶ 28; Venters Decl. ¶ 17–18, 21.

39. At the McHenry County Jail, Mr. Dembele and Mr. Butts live in units consisting of two stories of two-person cells and a common dayroom. Dembele Decl. ¶ 30; Butt Decl. ¶ 27. Their cells are too small to allow cellmates to ever be six feet apart. Dembele Decl. ¶¶ 31, 37; Butt Decl. ¶ 29; Declaration of Claudia Valenzuela (“Valenzuela Decl.”) ¶ 12. The close quarters are particularly horrifying for Mr. Dembele because his cellmate has been coughing all night since early April. Dembele Decl. ¶ 61.

40. Other aspects of detention also preclude the CDC-recommended social distancing and increase transmission opportunities. Shared use of common facilities generates further opportunities for infection. High-touch surfaces and objects, such as phones, tables, chairs, books, fixtures in bathrooms, cells, and common spaces, and surfaces in various staging and holding areas, such as Intake and the medical unit, “are not sanitized or replaced routinely.” Schriro Decl. ¶ 34. Food preparation and service are handled without a screening protocol to ensure that people who serve meals and clean the area are not sick or symptomatic and are wearing appropriate PPE to ensure they do not transmit infection. *Id.* ¶ 26.

41. For instance, at the McHenry County Jail, detainees in the Petitioners’ units spend most of their day in the dayroom, which is too small to allow for six

feet between them. Dembele Decl. ¶ 37; Butt Decl. ¶ 30; Valenzuela Decl. ¶ 12. They have to stand in line close together for medication and meals. Dembele Decl. ¶¶ 40, 47; Butt Decl. ¶¶ 30, 41. They sit at small tables throughout the day to eat meals, play cards, and socialize. Dembele Decl. ¶ 33; Butt Decl. ¶ 31. The tables are meant for four people, but in Mr. Dembele's unit, which has been at full capacity since he arrived, groups of five or six must crowd around a table. Dembele Decl. ¶¶ 32, 47. People cannot practice social distancing because there is simply nowhere for them to go.

42. Detainees clean the dayroom and the tables only once a day. Dembele Decl. ¶57; Butt Decl. ¶ 46. They have no access to hand sanitizer and are not issued masks or gloves. Dembele Decl. ¶ 41, 54; Butt Decl. ¶ 40. Nor do correctional staff consistently wear masks or gloves when interacting with detainees. Dembele ¶ 39; Butt Decl. ¶¶ 38, 41. They are responsible for cleaning their own cells and are given basic supplies to do it, Dembele Decl. ¶¶ 58–59; Butt Decl. ¶ 48, but at one point, when Mr. Dembele and his roommate were transferred to a new pod, they were forced to spend the night in a filthy cell, with no opportunity to clean it until morning. Dembele Decl. ¶ 60. The most Mr. Dembele could do was wet some toilet paper to wipe his mattress before putting the blanket down. *Id.*

43. These crowded conditions, in both sleeping and social areas, and the shared objects, such as tables, telephones, and video monitors, Valenzuela Decl. ¶ 11, maximize the likelihood that coronavirus will spread rapidly across the McHenry County Jail, infecting vulnerable detainees and leading to serious cases of COVID-19. Venters Decl. ¶¶ 39, 40, 42. Rapid spread is also likely because of the lack of access to hand washing and sanitizing supplies and the failure to establish standard use of gloves and masks. *Id.* ¶ 38(b).

44. We have already seen this kind of exponential spread of coronavirus in other facilities. Cook County Jail has become an epicenter of infection with the number of confirmed cases of COVID-19 in the jail skyrocketing from two to 353 in the two weeks following March 23, 2020. Venters Decl. ¶ 14. Coronavirus has also spread rapidly in the Illinois Department of Corrections. On March 25, 2020, one incarcerated person and two correctional officers at Stateville Correctional Facility in Illinois tested positive for the coronavirus.<sup>22</sup> By April 3, 2020, 49 inmates and 17 staff members at the facility had tested positive for coronavirus.<sup>23</sup>

45. There is growing evidence of contagion and inadequate medical care in McHenry County Jail. Since COVID-19 has become a known public health threat, the McHenry County Jail has failed to take precautions. Venters Decl. ¶ 36,

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<sup>22</sup> Ex. N to the Choudhury Decl.

<sup>23</sup> Ex. O to the Choudhury Decl.

38(b). The measures taken are insufficient to prevent spread across the facility. For example, correctional officers in regular contact with detained individuals often have not worn gloves or masks. Dembele Decl. ¶ 39; Butt Decl. ¶ 38. Even medical workers sometimes do not wear masks. Butt Decl. ¶ 39. Petitioners sometimes hear talk about short staffing because officers are on leave or are self-isolating, but they are given no clear information about what, if any, steps have been taken to prevent officers or new detainees from bringing the virus into the jail. Dembele Decl. ¶¶ 35, 42, 45; Butt Decl. ¶¶ 33, 36. They have seen sick detainees isolated or taken away, but have no idea if anyone has tested positive for COVID-19—or if anyone has been tested at all. Dembele ¶¶ 49-51; Butt Decl. ¶ 45.

46. Moreover, as of April 15, 2020, there were 274 confirmed cases of COVID-19 and 12 deaths from the disease in McHenry County.<sup>24</sup> Yet, there is no indication that the McHenry County Jail is performing tests of staff. Public health experts recognized that detention center staff have ongoing community contacts and are likely to bring coronavirus into the facility. Venters Decl. ¶12. Even if the McHenry County Jail takes the temperatures of staff, because people with coronavirus infection may be asymptomatic or not yet presenting symptoms, such

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<sup>24</sup> McHenry Cty. Dep't. of Health, *COVID-19 (Novel Coronavirus)*, <https://www.mchenrycountyil.gov/county-government/departments-a-i/health-department/covid-19-novel-coronavirus> (last visited Apr. 15, 2020), attached as Ex. S to the Choudhury Decl.

screening measures cannot guard against introduction of the virus into the facility.

Golob Decl. ¶13.

47. It is only a matter of time before there are confirmed cases of COVID-19 in the McHenry County Jail. There have already been four confirmed cases of COVID-19 in the Pulaski County Detention Center in southern Illinois, which like the McHenry County Jail, houses both ICE detainees and people involved in pre-trial and post-conviction criminal matters.<sup>25</sup>

48. A lack of proven cases of COVID-19 where there is little to no testing is “functionally meaningless for determining if there is a risk for COVID-19 transmission in a community or institution.” Golob Decl. ¶ 7. In other jurisdictions where testing has been made available to correctional officers who enter and leave facilities regularly, the rates of infection are high. Venters Decl. ¶¶ 13–15 (describing New York City jail system and Cook County Jail). These officers are further vectors of the virus: like detainees, they may be asymptomatic while still contagious. As a result, it is simply a question of when the virus will be introduced into these immigration detention facilities—if it has not been introduced into the facilities already.

49. Once introduced, it will be impossible to stop the spread of the virus within the facility, where social distancing measures are impossible. Venters Decl.

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<sup>25</sup> Ex. AA to the Choudhury Decl.

¶¶ 16–17, 40; Schriro Decl. ¶ 28. CDC guidance specifically recommends implementing social distancing strategies to increase the physical space between incarcerated and detained persons, “ideally to maintain at least 6 feet between all individuals, even those who are asymptomatic,”<sup>26</sup> but Defendants continue to hold Petitioners in conditions where they sleep an arm’s reach away from their cellmate and spend most of their time in crowded cells and common areas. Dembele Decl. ¶¶ 31, 40, 47, 48, 61–62; Butt Decl. ¶¶ 29–30, 35, 44, 49.

**C. Continued ICE Detention is Unsafe for Those Most Vulnerable to COVID-19.**

50. Without a vaccine or cure for COVID-19, mitigating the risk of contracting coronavirus is the only known way to protect those who are most vulnerable to serious harm from infection. Golob Decl. ¶ 10.

51. Because the risk of infection is at its zenith in detention centers where social distancing measures are impossible to implement, where people share common spaces that are not regularly sanitized, and where individuals are regularly exposed to potential vectors of infection, public health experts with experience in detention and correctional settings have recommended release of vulnerable individuals from custody. Venters Decl. ¶ 40; Schriro Decl. ¶ 42.

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<sup>26</sup> Ctrs. for Disease Control and Prevention, *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>, attached as Ex. P to the Choudhury Decl., at 4.

52. High-risk individuals who become infected will not receive adequate treatment. Immigration detention facilities lack adequate medical care infrastructure to address the strain of an outbreak. Venters Decl. ¶ 16. As a result, detained individuals who have any medical or health conditions that put them at high risk of illness if they are infected by coronavirus and contract COVID-19 are at grave risk of severe illness and death and should be released. Venters Decl. ¶ 40; Schriro Decl. ¶ 42.

53. If they are not released before the virus spreads through the McHenry County Jail, ill detainees will likely be unable to access necessary medical care, including positive pressure ventilation and, in extreme cases, extracorporeal mechanical oxygenation. *See* Golob Decl. ¶ 8. This is because an outbreak among detainees and corrections staff will strain the limited medical infrastructure in the rural counties in which these detention facilities are located. Once infection spreads throughout the detention center, the burden of caring for these individuals will shift to local medical facilities. The few facilities will likely not be able to provide care to all infected individuals with serious cases, increasing the likelihood that these individuals will die. Thus, high-risk individuals should be released from detention centers before it is too late.

**D. Petitioners Must Be Released from ICE Custody Because They Are Particularly Vulnerable to Serious Illness or Death If Infected by COVID-19.**

54. Petitioners are especially vulnerable to serious illness and death if they are infected with COVID-19, but Defendants nonetheless continue to detain them at the McHenry County Jail while they await disposition of their immigration cases or deportation.

55. Plaintiff Souleymane Dembele, a 43-year-old father of three U.S. citizens, suffers from hypertension, prediabetes, and sciatic nerve damage. Dembele Decl. ¶¶ 2-3, 7. Mr. Dembele was diagnosed with prediabetes and hypertension in February 2018, when he arrived at Dodge County Detention Facility with blood pressure of 164/119. Dembele Decl. ¶ 8. He suffered symptoms of hypertension before he was diagnosed, including periodic dizzy spells during which he can do nothing but sit and wait for them to pass. Dembele Decl. ¶ 11. These spells may occur multiple times a day for days in a row, or he may go as long as a week without one. *Id.* His most recent dizzy spell was in early April 2020. Dembele Decl. ¶ 12. He has been taking medication for hypertension since his diagnosis. Dembele Decl. ¶¶ 8–10.

56. Plaintiff Muhammad Tauris Butt, a 65-year-old grandfather, suffers from diabetes, hypertension, and hyperlipidemia, and takes daily medication for these conditions. Butt Decl. ¶¶ 2, 7–9. He has sleep apnea, a breathing disorder that

makes it difficult for him to sleep and causes him to feel tired all day. Butt Decl. ¶¶ 10–11. His sleep apnea is untreated in detention. Butt Decl. ¶ 11. He also has a history of smoking. Butt Decl. ¶ 13.

**E. ICE Continues to Expose Petitioners to Dangerous Conditions of Confinement Despite Being Advised of These Dangers.**

57. Public health measures across the country, including in Illinois, demonstrate the widespread recognition that the only clinically recommended course of action to protect individuals who have medical conditions that make them vulnerable to serious illness or death from COVID-19 is to practice social distancing and increased hygiene. Only these practices mitigate the risk of contracting this novel virus that has no cure. Golob Decl. ¶10.

58. CDC guidance for detention centers and prisons specifically recommends implementing social distancing strategies to increase the physical space between people, “ideally 6 feet between all individuals, regardless of the presence of symptoms.”<sup>27</sup>

59. McHenry County Jail is not following CDC guidance in relation to social distancing, putting all detainees, and especially those at high risk of severe disease and death, in jeopardy. Venters Decl. at ¶¶ 38(c), 39. Petitioners are forced to sleep on top of one another in small cells that do not allow six feet of distance

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<sup>27</sup> Ex. N to the Choudhury Decl.

from each other, Dembele Decl. ¶¶ 30, 31, 37; Butt Decl. ¶¶ 28–29, and spend all day with 35 or 64 others in one room, sitting together at small tables or packed tightly in line. Dembele Decl. ¶¶ 32, 37, 40, 43, 46, 47; Butt Decl. ¶¶ 30, 41, 44, 49.

60. Nor will the policy of “cohorting” prevent the spread of the virus to Petitioners. Contrary to CDC recommendations to cohort individually, ICE cohorts many people together. Even if ICE is to implement a cohorting policy at the facilities, asymptomatic transmission will allow individuals to infect others before showing the signs that would trigger the cohorting measures.

61. CDC guidance on correctional and detention facilities emphasizes that there are many opportunities for the coronavirus to be introduced into a correctional or detention facility, including from staff and transfer of incarcerated/detained persons. Venters Decl. ¶¶ 11, 12, 18.<sup>28</sup> ICE claims to be following CDC guidance at its facilities. But asymptomatic transmission of the virus means that monitoring fever of staff or detainees is inadequate for identifying all who may be infected and preventing transmission. *See* Golob ¶ 6.

62. Respondents also expose Petitioners to unsanitary conditions that increase the risk of infection and spread. They share a sink and toilet with their cellmates, and share showers with their entire unit. Dembele Decl. ¶¶ 31, 34. The

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<sup>28</sup> Ex. P to the Choudhury Decl. at 2.

showers, the dayroom, and the tables where they spend most of their time and eat three times a day are cleaned only once a day. Dembele Decl. ¶¶ 57–58; Butt Decl. ¶¶ 46–47.

63. Respondents have been aware of the serious hygiene issues at McHenry County Jail. On March 17, 2020, as infection rates began to increase in Illinois at an alarming rate, the National Immigrant Justice Center (“NIJC”) sent a letter to Respondents Albence, Guadian, and other agency officials, alerting them to the high risk of COVID-19 infection in detention facilities and the dangerous health outcomes of an infection for vulnerable individuals.<sup>29</sup>

64. Neither Mr. Guadian nor any other agency official has responded to the letter, and there has been no indication that ICE has released or is releasing vulnerable persons.

65. CDC guidance recognizes that incarcerated/detained persons are at heightened risk for COVID-19 infection once the virus is introduced.<sup>30</sup> All of the risks are present here, where Petitioners cannot practice social distancing, share common spaces and touch common surfaces, and where new individuals and staff come into the facility each day.

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<sup>29</sup> Letter from Hena Mansori & Keren Zwick, National Immigrant Justice Center, to Matthew T. Albence, Acting Director, U.S. Immigration and Customs Enforcement, et al. (Mar. 17, 2020), attached as Ex. Q to the Choudhury Decl.

<sup>30</sup> Ex. P to the Choudhury Decl., at 2.

66. Yet ICE continues to detain Petitioners, and many other medically vulnerable people, in contradiction of medical advice. Even if ICE has implemented screening measures, which they have not, these measures are insufficient to prevent introduction of the virus into a setting where it will spread like wildfire.

## LEGAL FRAMEWORK

### **A. Immigrant Detainees are Entitled to Constitutional Due Process Protections Against Exposure to Infectious Disease.**

67. Immigrant detainees, even those with prior criminal convictions, are civil detainees entitled to the same Fifth and Fourteenth Amendment due process protections as any other pretrial detainee. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). The Fifth Amendment requires the Respondents Guadian, Albence, and Wolf to provide due process protections to Petitioners. The Fourteenth Amendment requires Respondents Prim and Sitkie to provide the same due process.

68. Due process entitles civil detainees to more considerate treatment and conditions of confinement than people convicted of criminal offenses, whose conditions of confinement are designed to punish. *See Davis v. Wessel*, 792 F.3d 793, 800 (7th Cir. 2015) (conditions of confinement for civil detainees violate due process if they are expressly intended to punish) (citing *Bell, v. Wolfish*, 441 U.S. 520, 538 (1979)).

69. The conditions of confinement for an individual in immigration detention must be reasonably related to a legitimate governmental objective. *Hardeman v. Curran*, 933 F.3d 816, 823 (7th Cir. 2019). Conditions of confinement that either serve no legitimate purpose or are not reasonably related to a legitimate governmental objective constitute unconstitutional punishment.

70. The government has an affirmative duty to provide conditions of reasonable health and safety to the people it holds in its custody, and violates due process when it fails to provide for basic needs, such as food, clothing, shelter, medical care, and reasonable safety. *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 199–200 (1989).

**B. Respondents Are Violating Petitioners' Due Process Rights.**

71. The conditions at the McHenry County Jail described above are sufficient to demonstrate that Petitioners' constitutional due process rights are being violated. Keeping medically vulnerable Petitioners detained in such close proximity to one another and without the sanitation necessary to combat the spread of the virus serves no legitimate purpose. Nor is detention under these circumstances rationally related to the enforcement of immigration laws.

72. Petitioners' due process rights are also being violated because their conditions of confinement place them at serious risk of being infected with

coronavirus and developing complications from COVID-19, and Respondents are being deliberately indifferent to this critical safety concern.

73. There is no question that COVID-19 poses a serious risk to Petitioners. The coronavirus is highly contagious and can lead to COVID-19 cases that cause severe illness and death in high risk individuals. Petitioners are at a heightened risk because of their age and/or underlying health conditions.

74. Respondents are aware of and have completely disregarded the serious risk that COVID-19 poses to Petitioners. *See supra* ¶ 38; Letter from Hena Mansori & Keren Zwick, National Immigrant Justice Center, to Matthew T. Albence, Acting Director, U.S. Immigration and Customs Enforcement, *et al.*, attached as Ex. Q to the Choudhury Decl. (notifying local and federal officials of the need to take measures to protect medically vulnerable ICE detainees in the McHenry County Jail).

75. The risk that COVID-19 poses to Petitioners is also obvious, including to Respondents. Prisons and jails around the country are *already* releasing non-violent detainees because the risk of contagion is overwhelming.<sup>31</sup>

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<sup>31</sup> *See* Supreme Court of N.J., Order In The Matter of the Request to Commute or Suspend County Jail Sentences, Dkt. 084230 (Mar. 22, 2020), <https://njcourts.gov/notices/2020/n200323a.pdf?c=4EF>, attached Ex. AD to the Choudhury Decl.; *United States v. Stephens*, No. 15-cr-95, 2020 WL 1295155, at \*2 (S.D.N.Y. Mar. 19, 2020) (concluding that the “unprecedented and extraordinarily dangerous nature of the COVID-19 pandemic” constituted compelling circumstances to adjust a defendant’s bail conditions and release him, even though there was “not yet a known outbreak among the jail and prison populations” when the order was issued).

Medical experts for the Department of Homeland Security have also identified the risk of COVID-19 spreading to ICE detention centers. John Sandweg, a former acting director of ICE, has written publicly about the need to release nonviolent detainees because ICE detention centers “are extremely susceptible to outbreaks of infectious diseases” and “preventing the virus from being introduced into these facilities is impossible.”<sup>32</sup>

76. Two medical experts for the Department of Homeland Security wrote a letter to Congress warning of the unique dangers COVID-19 poses to ICE detention facilities, describing current conditions as a “tinderbox”:

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 [hospitals] 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.).<sup>33</sup>

77. The circumstances of this case make clear that release is the only means to ensure compliance with Petitioners’ due process rights. Public health information makes clear that the only way to prevent infection is through social

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<sup>32</sup> John Sandweg, *I Used to Run ICE. We Need to Release the Nonviolent Detainees*, Atlantic (March 22, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/release-ice-detainees/608536/>, attached as Ex. AE to the Choudhury Decl.

<sup>33</sup> Ex. R to the Choudhury Decl.

distancing and increased hygiene, and that these measures are most imperative to protect individuals with underlying medical conditions. The only course of action that can remedy these unlawful conditions is release from the detention centers where risk mitigation is impossible.

**C. Mr. Butt Must be Released from Post-Order Custody Because, due to the Impact of the COVID-19 Crisis on International Travel and Removals, his Removal is not Significantly Likely in the Reasonably Foreseeable Future.**

78. Mr. Butt, who was ordered removed to Pakistan, has been detained since January 17, 2020, for 90 days. As a result of the COVID-19 crisis, Mr. Butt is not significantly likely to be removed in the reasonably foreseeable future, and therefore must be released pursuant to *Zadvydas v. Davis*, 533 U.S. 678 (2001).

79. Mr. Butt has a final order of removal, and is therefore detained under 8 U.S.C. § 1231, the statute governing post-order detention. 8 U.S.C. § 1231(a)(2) authorizes a 90-day period of mandatory post-final-order detention during which time ICE is supposed to effectuate removal, also known as “the removal period.” 8 U.S.C. § 1231(a)(1)(A).

80. People whom the government is unable to remove during the 90-day removal period should be released under conditions of supervision. 8 U.S.C. § 1231(a)(3) (“If the alien . . . is not removed within the removal period, the alien, pending removal, shall be subject to supervision.”). These conditions include

periodic reporting and other “reasonable written restrictions on the alien’s conduct.” *Id.*

81. As of today, April 17, 2020, Mr. Butt has been detained for the entire 90-day removal period. Every day thereafter, he will have been detained for longer than the 90-day removal period.

82. In certain circumstances, the government “*may*” continue to detain certain individuals “beyond the removal period,” including when individuals have been ordered removed on criminal grounds or where the government deems them to be a risk to the community or unlikely to comply with a removal order. 8 U.S.C. § 1231(a)(6) (emphasis added).

83. Mr. Butt has no criminal history. There is no process by which Mr. Butt can appeal the government’s unilateral determination to detain him past the 90-day removal period.

84. In *Zadvydas v. Davis*, the Supreme Court held that 8 U.S.C. § 1231(a)(6) authorizes continued detention beyond the removal period only insofar as removal is “reasonably foreseeable.” 533 U.S. at 699. That is because, to satisfy due process, detention must bear a “reasonable relation to the purpose for which the individual [was] committed.” *Id.* at 690 (citations omitted). Because the principal purpose of the post-final-order detention statute is to effectuate removal, if removal cannot be effectuated, detention bears no reasonable relation to the

statute's purpose. *Id.* at 697. Thus, in order to avoid the serious constitutional problem that would be created if the statute authorized detention in such circumstances, the Court construed Section 1231(a)(6) as authorizing post-final-order detention only for a "period reasonably necessary to secure removal," a period that the Court determined to be presumptively six months. *Id.* at 699–701. After this six-month period, if a detainee provides "good reason" to believe that his or her removal is not significantly likely in the reasonably foreseeable future, "the Government must respond with evidence sufficient to rebut that showing." *Id.* at 701. If the government cannot do so, the individual must be released.

85. The COVID-19 crisis provides good reason to believe Mr. Butt's removal is not significantly likely in the reasonably foreseeable future. Therefore, he must be released unless Respondents provide evidence that rebuts Petitioner's showing that removal is unlikely in the reasonably foreseeable future.

86. Even under normal circumstances before the COVID-19 pandemic, securing the necessary documents for deportees and coordinating their travel could be a time-consuming, complicated, and costly process.

87. That process has now ground to a halt. The COVID-19 crisis has resulted in an unprecedented shutdown of international travel, a closure of international borders, the shuttering of embassy and consular services that are an

integral part of removal processing, and a drastic curtailment of immigration case processing.

88. International travel has come to a virtual standstill. Sixty-four global airlines have completely suspended operations, and U.S. airlines have greatly reduced operations.<sup>34</sup> Delta will cut its international flights by 80%.<sup>35</sup> American Airlines plans to cut its international flights by 90% through April and May.<sup>36</sup> It is unclear when regular commercial air travel will resume, and, even when it does, it will likely take a great deal of time before regular routes are reestablished to many countries, meaning that it is likely to remain extremely difficult to effectuate removals.

89. While ICE uses charter flights to effectuate removals to some countries, for many countries ICE relies on commercial airlines. Removals are not significantly likely in the reasonably foreseeable future to countries where ICE cannot currently operate charter flights and where there is no regular commercial air travel.

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<sup>34</sup> Thomas Pallini, *64 Global Airlines Have Completely Stopped Flying Scheduled Flights Due to Travel Bans, Airspace Closures, and Low Demand for Travel – See the Full List*, Bus. Insider (Apr. 1, 2020, 8:20 AM), <https://www.businessinsider.com/coronavirus-global-airlines-stopping-flights-suspending-operations-2020-3>, attached as Ex. T to the Choudhury Decl.

<sup>35</sup> Kelly Yamanouchi, *Delta Says it Still Flies to All Points in its Domestic Network*, Atl. Journal-Constitution (Apr. 3, 2020), <https://www.ajc.com/blog/airport/delta-says-still-flies-all-airports-its-domestic-network/Rym2MyGFFHdanXuKP7VPPK/>, attached as Ex. U to the Choudhury Decl.

<sup>36</sup> Keith Griffin, *American Airlines Cuts International Flights by 90% Through May – but Vows Not to Halt Domestic Service During the Coronavirus Crisis*, Daily Mail (Apr. 4, 2020, 11:18 AM), <https://www.dailymail.co.uk/news/article-8186105/American-Airlines-cuts-international-flights-90-May.html>, attached as Ex. V to the Choudhury Decl.

90. In addition, many countries have closed their borders as a result of COVID-19. Both commercial and charter flights are affected. It is unclear how long it will be until countries reopen their borders, or, when they do, whether countries will agree to accept people deported from the United States, particularly those coming from Illinois, one of the areas in the United States hardest hit by COVID-19. It is also unclear what requirements countries will impose in order to accept individuals coming from abroad. For example, even if a country opens its borders and allows entry conditioned on a period of quarantine, it is unclear that deportees, who are unlikely to have the resources to isolate in a hotel for several weeks, will be admitted.

91. The shuttering of consular and embassy services makes removals more difficult still. Even absent the COVID-19 crisis, individuals set to be deported must obtain travel documents, usually a passport. It was already quite difficult for ICE to obtain passports or other travel documents for nationals of certain countries. Given the global scale of the COVID-19 crisis, foreign governments are fully occupied with protecting their countries from the pandemic. As in the United States, government employees in other countries responsible for processing passport and document requests are likely to be working from home, assuming that they have internet and computers, which often will not be the case. Similarly, foreign consular and embassy staff in the United States face challenging

working conditions, if they are working at all. As a result, ICE is unlikely to obtain passports or travel documents for petitioners who do not already have them, at any time in the near future.

92. The slowing and shutdown of consular and embassy services will also affect removals to countries where transit visas through third countries are necessary in order to remove a person because there are no direct flights to the country of deportation. Because many deportees are escorted by ICE officers on such flights, in order to travel through the transit country or countries, ICE needs to procure transit visas not just for the deportee, but also for the ICE escorts.

93. Defendants Guadian, Albence, and Wolf seek to deport Mr. Butt to Pakistan. Pakistan shut down its borders for fifteen days on March 15, 2020. The country has suspended all domestic and international flights until April 21, 2020.<sup>37</sup> Pakistan is on nationwide lockdown until April 30, 2020.<sup>38</sup>

94. The World Health Organization reports that, as of April 17, 2020, there are 7,025 total cases of COVID-19 in Pakistan and that 135 people have died.<sup>39</sup>

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<sup>37</sup> See *Coronavirus: Travel Restrictions, Border Shutdowns by Country*, Al Jazeera (Apr. 13, 2020), <https://www.aljazeera.com/news/2020/03/coronavirus-travel-restrictions-border-shutdowns-country-200318091505922.html>, attached Ex. Y to the Choudhury Decl.

<sup>38</sup> U.S. Embassy & Consulates in Pakistan, *Health Alert – Update #21 Pakistan Government Extends Lockdown until April 30* (Apr. 15, 2020), <https://pk.usembassy.gov/health-alert-%e2%80%afupdate-21-pakistan-government-extends-lockdown-until-april-30/>, attached as Ex. Z to the Choudhury Decl.

<sup>39</sup> *Coronavirus (COVID-19)*, World Health Organization, (Apr. 17, 2020), <https://covid19.who.int/region/emro/country/pk.>, attached as Ex. AF to the Choudhury Decl.

95. Given these facts, Mr. Butt has provided good reason to believe that his removal is not significantly likely in the reasonably foreseeable future. He must therefore be released unless Defendants can rebut that showing.

**D. ICE Regularly Releases People from Immigration Detention Because They Suffer Serious Medical Conditions or are Medically At-Risk.**

96. ICE has a longstanding practice of prosecutorial discretion, which demonstrates that the agency understands that its authority extends to—and includes—humanitarian releases from custody. The agency has routinely exercised its authority to release particularly vulnerable detainees on medical grounds. As founding Director of the ICE Office of Detention Policy and Planning, Dr. Dora Schriro explains, “ICE exercises discretion to release or decline to detain medically vulnerable individuals, even when those individuals are, per statute, mandatorily detained.” Schriro Decl. ¶ 23.

97. ICE has a range of highly effective tools at its disposal to ensure that individuals report for court hearings and other appointments, including conditions of supervision. For example, ICE’s conditional supervision program, called Intensive Supervision Appearance Program (“ISAP”), utilizes electronic ankle monitors, biometric voice recognition software, unannounced home visits, employer verification, and in-person reporting to supervise participants. Schriro Decl. ¶ 47. A government-contracted evaluation of this program reported a 99% attendance rate at all immigration court hearings. *See id.* ¶ 45.

98. Here the Due Process Clause of the Fifth Amendment to the U.S. Constitution requires ICE to release detainees where civil detention has become punitive and where release is the only remedy to prevent this impermissible punishment. The fact that ICE already has a longstanding practice of releasing immigrants on medical grounds, on conditions of supervision it deems necessary to address flight risk, indicates that the remedy Petitioners request is neither unprecedented nor unmanageable for the agency.

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

99. Courts have broad power to fashion equitable remedies to address constitutional violations in prisons. *Hutto v. Finney*, 437 U.S. 678, 687 n.9 (1978).

100. This authority extends to placing limits on a prison's population when necessary to ensure compliance with the Constitution. *See Duran v. Elrod*, 713 F.2d 292, 297–98 (7th Cir. 1983) (concluding that district court did not exceed authority in directing release of pretrial detainees to reach a population cap), *cert denied*, 465 U.S. 1108 (1984).

101. The circumstances of this case make clear that release is the only means to ensure compliance with the Fifth Amendment's prohibition against punitive detention. Petitioners' medical conditions put them at grave risk of severe illness or death if they contract COVID-19. Public health information makes clear that the only way to prevent infection is through social distancing and increased

hygiene, and that these measures are most imperative to protect individuals with pre-existing medical conditions. Yet, Respondents are detaining vulnerable Petitioners under conditions where they are forced into close contact with many other detainees and officers. By continuing detention in these circumstances, Defendants are subjecting Petitioners to unreasonable harm. The only course of action that can remedy these unlawful conditions is release from the detention centers where risk mitigation is impossible.

### **CLAIM ONE**

#### **FOR A WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2241 AND INJUNCTIVE AND DECLARATORY RELIEF**

##### Unlawful Punishment and Cruel Treatment and Conditions of Confinement

(in violation of the Due Process Clause of the Fifth Amendment to the U.S. Constitution, by all Petitioners against all Respondents in their official and individual capacities)

102. Petitioners re-allege and incorporate by reference as if fully set forth herein the allegations in all preceding paragraphs.

103. The Fifth Amendment to the U.S. Constitution guarantees that civil detainees, including all immigrant detainees, may not be subjected to punishment. Government officials violate this substantive due process right when they fail to satisfy their affirmative duty to provide conditions of reasonable health and safety to civil detainees held in their custody, and when they fail to provide for the basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—

of these people. Government officials also violate substantive due process when they subject civil detainees to cruel treatment and conditions of confinement that amount to punishment.

104. By detaining Petitioners in the McHenry County Jail, Respondents are subjecting Petitioners to a heightened risk of contracting COVID-19, for which there is no vaccine and no cure. Petitioners are particularly vulnerable to serious medical complications from COVID-19 and are at risk of illness and death as long as they are held in detention. By subjecting Petitioners to this risk Respondents are maintaining detention conditions that amount to punishment and fail to ensure safety and health in violation of Petitioners' due process rights.

105. Likewise, the continued detention of Petitioners in the McHenry County Jail is deliberately indifferent to Petitioners' serious medical needs because only releasing Petitioners from custody can adequately protect them from COVID-19. Respondents are aware of the serious risk posed by COVID-19 and are failing to take the only action that can respond to Petitioners' medical needs, which is to release Petitioners.

106. As the physical and legal custodians of Petitioners, Respondents Prim and Sitkie may be subject to a writ of habeas corpus ordering Petitioners' temporary release.

## CLAIM TWO

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

#### Unlawful Detention Where Removal Is Not Significantly Likely in the Foreseeable Future

(in violation of the Due Process Clause of the Fifth Amendment to the U.S. Constitution, by Petitioner Butt against Respondents in their official and individual capacities)

107. Petitioners re-allege and incorporate by reference as if fully set forth herein the allegations in all preceding paragraphs.

108. Due Process requires that immigration detention bear a reasonable relation to its purpose. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). The principal purpose of the statute that authorizes post-final order detention, 8 U.S.C. § 1231, is to effectuate removal. Where removal cannot be effectuated, detention is not reasonably related to its purpose, would violate due process, and is not statutorily authorized.

109. Mr. Butt has met his burden of establishing a good reason to believe that his removal is not reasonably likely in the foreseeable future. Defendants have not rebutted this showing, as they have provided no evidence that Mr. Butt's removal is reasonably foreseeable. Absent such evidence, Mr. Butt's continued detention is not authorized by statute and he is entitled to immediate release under an order of supervision.

## **PRAYER FOR RELIEF**

WHEREFORE Petitioners request that the Court grant the following relief:

- a. Issue a Writ of Habeas Corpus and order Petitioners' immediate release, with appropriate precautionary public health measures, on the ground that their continued detention violates the Due Process Clause;
- b. In the alternative, Issue injunctive relief ordering Defendants to immediately release Petitioners, with appropriate precautionary public health measures, on the grounds that their continued detention violates the Due Process Clause;
- c. Issue a declaration that Defendants' continued detention in civil immigration custody of individuals at increased risk for severe illness, including all people over the age of 50 and people of any age with underlying medical conditions that may increase the risk of serious illness or death from COVID-19, violates the Due Process Clause;
- d. Declare that for people held in post-final-order detention under 8U.S.C. §1231, including Petitioner Butt, there is good reason to believe that, due to the COVID-19 crisis, there is no significant likelihood of their removal in the reasonably foreseeable future, and that such persons, including Petitioner Butt, must be released unless the government can rebut that showing;
- e. Find that Defendants have failed to rebut the showing of Petitioner Butt

that his removal is not significantly likely in the reasonably foreseeable future; order the government to immediately release Petitioner Butt from detention under an order of supervision; and enjoin Defendants from re-detaining Petitioner Butt unless or until Defendants can establish that their removal is significantly likely in the reasonably foreseeable future;

f. Award Petitioners their costs and reasonable attorneys' fees in this action under the Equal Access to Justice Act, as amended, 5 U.S.C. § 504 and 28 U.S.C. § 2412, and on any other basis justified under law; and

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

Dated: April 17, 2020

Respectfully Submitted,  
/s/ Rebecca K. Glenberg  
*Counsel for Petitioners-Plaintiffs.*

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*\*Application to appear Pro Hac Vice to be filed.*