UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

Souleymane Dembele, *et al.*, Petitioners-Plaintiffs, v. Bill Prim, *et al.*, Respondents-Respondents.	Case No. 20-cv-02401 Hon. Joan H. Lefkow

MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' EMERGENCY PETITION FOR A WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2241 AND MOTION FOR A TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

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INTRODUCTION

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 or health conditions. As of April 18, 2020, more than 2.1 million people have tested positive for the virus, and 146,198 people have died.[1] The number of new cases and deaths in the United States is steadily rising, and Illinois is one of the country's hardest hit areas.[2] There are no vaccines, no cures, and no end in sight. The question now is what we can do to protect the most vulnerable individuals from contracting COVID-19, fanning the further spread of the disease, and experiencing acute illness or dying. The only answer, according to public health experts, is to deprive COVID-19 of the fuel it needs by allowing people to keep safe distances from one another, to reduce infections, and ease the strain on overwhelmed local health systems.

Petitioners-Plaintiffs Souleymane Dembele[3] and Muhammad Taufiq Butt ("Petitioners") are civil detainees of U.S. Immigration and Customs Enforcement ("ICE") in the McHenry County Adult Correctional Facility ("McHenry County Jail"), where jail conditions put them right in the path of the fire. Both have pre-existing medical conditions, such as diabetes, hypertension, and hyperlipidemia, which make them particularly vulnerable to serious complications or death from COVID-19. Because Mr. Butt is 65 years old, he also faces increased risk of serious complications or death from COVID-19 due to his age. Petitioners are

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[1] World Health Org., *Coronavirus Disease (COVID-19) Pandemic*, https://www.who.int/emergencies/diseases/novel-coronavirus-2019 (last visited Apr. 18, 2020), attached as Ex. AG to the Supplemental Declaration of Nusrat J. Choudhury ("Supp. Choudhury Decl.").
[2] Ctrs. for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19): Cases in the US*, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html, attached as Ex. AH to the Supp. Choudhury Decl.
[3] On April 21, 2020, Petitioners amended this Motion to note that due to his release, Petitioner Dembele no longer seeks preliminary relief. Dkt. 22.

held in cramped conditions where "social distancing" and adequate hygiene are impossible.

Clustering vulnerable people into a tinderbox and waiting for COVID-19 to explode is not just a humanitarian crisis, it is a constitutional one. Courts have long recognized that the Eighth Amendment prohibition on cruel and unusual punishment forbids the government from leaving incarcerated people to suffer and die from infectious disease. As civil detainees, Petitioners are entitled to even greater protections under the Fifth Amendment. The Defendants-Respondents—the McHenry County Sheriff, the McHenry County Chief of Corrections, the Acting Director and Regional Director of ICE, and the Acting Secretary of the U.S. Department of Homeland Security ("DHS") (collectively, "Respondents")—are public officials charged to uphold the U.S. Constitution and to protect Petitioners. The Constitution demands that Respondents act ***before*** the COVID-19 wildfire sweeps through the McHenry County Jail, not wait until it is too late.

Petitioners filed an Emergency Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 and Complaint for Injunctive and Declaratory Relief (Dkt. 1) ("Emergency Petition") to enforce their constitutional right to protection from conditions placing them at risk of serious harm or death from COVID-19. Petitioners also filed a Motion for a Temporary Restraining Order and/or Preliminary Injunction ("TRO Motion").[4] This brief supports Petitioner's request for immediate, temporary release, whether it is granted through an exercise of this Court's habeas authority under 28 U.S.C. § 2241 or its equitable power to remedy constitutional violations.

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[4] Petitioners' TRO Motion seeks immediate temporary release only with respect to Claim One of the Emergency Petition, which challenges Petitioners' detention in conditions that constitute unlawful punishment and cruel treatment, and not with respect to Mr. Butt's claim that his detention pending deportation is unlawful because removal is not significantly likely in the foreseeable future. *See* Dkt. 1 ¶¶ 107–09.

Because Respondents fail to protect Petitioners' health, this Court must intervene. There is growing recognition among courts that releasing medically vulnerable detainees is the only way to protect them from the dangers posed by COVID-19 in detention facilities. A district court in Pennsylvania ordered the release of 33 medically vulnerable detainees, noting that the ICE facilities in question "are plainly not equipped to protect Petitioners from a potentially fatal exposure to COVID-19" and that "should we fail to afford relief to Petitioners we will be a party to an unconscionable and possibly barbaric result." *Thakker v. Doll*, No. 1:20-cv-480, 2020 WL 1671563, at *9 (M.D. Pa. Mar. 31, 2020) (ordering release of eleven detainees); *Hope v. Doll*, No. 1:20-cv-00562, Dkt. 22 (M.D. Pa. Apr. 10, 2020) (denying motion for reconsideration of TRO and ordering immediate release of 22 detainees). Courts in California, Michigan, New York, New Jersey, Texas, and Massachusetts 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*, 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"); *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); Memorandum and Order, *Vasquez-Barrera v. Wolf*, No. 4:20-cv-01241, ECF No. 41 at 15 (S.D. Tex. April 17, 2020); *Savino v. Souza*, No. 20-10617-WGY, 2020 WL 1703844 (D. Mass. Apr. 8, 2020) (granting motion for class certification

resulting in release of at least 49 detainees as of this filing, including detainees with medical vulnerabilities).[5]

This Court should join the growing chorus of courts around the country that recognize this public health crisis demands immediate intervention. For the reasons discussed below, the Court should immediately grant Petitioners' emergency petition for a writ of habeas corpus, or in the alternative, issue a temporary restraining order or preliminary injunction requiring ICE to temporarily release Petitioners from custody so they have a chance to avoid infection and potential death from COVID-19. The Court has the authority to do so, and both the Constitution and public interest demand it in these extraordinary times.

NOTICE TO RESPONDENTS

On April 17, 2020, counsel for the Petitioners emailed the Office of the U.S. Attorney for the Northern District of Illinois and the McHenry County State's Attorney to advise them of the emergency reasons requiring them to seek a temporary restraining order and/or preliminary injunction. Petitioners' Counsel e-mailed a copy of the Emergency Petition with exhibits to Assistant U.S. Attorney Craig A. Oswald and McHenry County State's Attorney Patrick D. Kenneally that day, and emailed them the TRO Motion and attached exhibits on April 20, 2020.

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[5] *See also, e.g.*, *Malam v. Adducci*, No. 20-10829, 2020 WL 1809675 (E.D. Mich. Apr. 9, 2020) (ordering release of immigrant woman in mandatory detention due to danger posed to her by pandemic);*Christian A.R. v. Decker*, No. 20-3600 (D.N.J. Apr. 12, 2020) (ordering release of five medically vulnerable ICE detainees), 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 medically vulnerable detainees); *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).

FACTUAL BACKGROUND

As the Court is undoubtedly aware, COVID-19 is a disease that has reached pandemic status. Nevertheless, to support Petitioner's Emergency Petition and TRO Motion and to provide a broader context for the requested relief, Petitioners have submitted a host of declarations from corrections, medical, and public health experts:[6]

- The declaration of Dr. Jonathan Louis Golob, Dkt. 1-3 ("Golob Decl."), a specialist in infectious diseases and internal medicine, subspecializing in infections in immunocompromised patients, who is an Assistant Professor at the University of Michigan School of Medicine. Golob Decl. ¶ 1. Dr. Golob obtained his medical degree and completed his residency at the University of Washington School of Medicine in Seattle, where he also completed a Fellowship in Internal Medicine Infectious Disease. *Id.* Dr. Golob currently is "actively involved in planning and care for patients with COVID-19." *Id.*

- The declaration of Dr. Homer Venters, Dkt. 1-4 ("Venters Decl."), a physician, internist, epidemiologist, and correctional health expert, who is the president of Community Oriented Correctional Health Services, a non-profit organization that promotes evidence-based improvements to correctional practices. Venters Decl. ¶¶ 1, 4. Dr. Venters obtained his medical degree from the University of Illinois, completed his residency at Montefiore Medical Center/Albert Einstein University, and completed his fellowship in Public Health Research at New York University. He has nine years of experience leading health services for New York City's twelve jails and two years of experience conducting analyses of health policies and procedures for people detained by DHS. *Id.* ¶¶ 1, 2. He has visited immigration detention centers, worked with ICE on cases of medical release and the formulation of health policies, and has testified before the U.S. Congress on mortality in ICE detention facilities. *Id.* ¶ 1.

- The declaration of Dr. Dora Schriro, Dkt. 1-5 ("Schriro Decl."), a corrections expert with extensive experience in running prisons and jails and establishing policy and practices relating to ICE detainees. Dr. Schriro served as a Senior Advisor to DHS Secretary Janet Napolitano and as the founding Director of the ICE Office of Detention Policy and Planning. Schriro Decl. 1-5 ¶ 3. She also served as the commissioner of the New York City and St. Louis jail systems and as the director of corrections for Missouri and Arizona. *Id.* ¶¶ 4–5. Dr. Schriro is knowledgeable about the operation of facilities that house both civil detainees and criminal pre-trial and sentenced populations, and has participated in the development of professional standards for correctional systems and ICE detention facilities. *Id.* ¶¶ 8–9.

[6] The declarations were filed in conjunction with Petitioners' Emergency Petition.

I. COVID-19 Poses a Grave Risk of Serious Illness or Death to Older Adults and Those with Certain Underlying Medical Conditions.

According to the World Health Organization, as of April 18, 2020 there are 2,164,111 confirmed cases of COVID-19 worldwide and 146,198 confirmed deaths.[7] In the United States alone, there are 690,714 confirmed cases and 35,443 confirmed deaths.[8] These numbers are growing exponentially. *See* Golob Decl. ¶ 2; Venters Decl. ¶ 10.

People over the age of 50 and those of any age with certain medical or health conditions face a greater risk of serious illness or death from COVID-19. Golob Decl. ¶ 3; Venters Decl. ¶ 22. According to the Centers for Disease Control and Prevention ("CDC"), these underlying conditions include heart disease, lung disease, liver disease, kidney disease, blood disorders (including sickle cell disease), compromised immune system (such as from cancer, HIV, or autoimmune disease), endocrine disorders (including diabetes), inherited metabolic disorders, stroke, developmental delay, current or recent pregnancy, and body mass index over 40. Golob Decl. ¶ 3; Venters Decl. ¶ 22. Additional risk factors include smoking, a history of smoking, asthma or chronic obstructive pulmonary disease, and being a person of at least 50 years of age. Venters Decl. ¶ 22. Petitioners have one or more of these conditions and are thus at an increased risk of developing serious complications or dying from COVID-19. Venters Decl. ¶¶ 38–39. Mr. Butt, who is 65 years old, faces higher risk of complications and death from the disease due to both pre-existing conditions and age. *Id*.

In many people, COVID-19 causes fever, cough, and shortness of breath. Golob Decl. ¶ 5. But for people over the age of 50[9] or with medical or health conditions that increase the risk of

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[7] Ex. AG to the Supp. Choudhury Decl.
[8] Ex. AH to the Supp. Choudhury Decl.
[9] Even some younger and healthier people who contract COVID-19 may require supportive care, which includes supplemental oxygen, positive pressure ventilation, and in extreme cases, extracorporeal mechanical oxygenation. Golob Decl. ¶ 5.

serious COVID-19, shortness of breath can be severe. *Id*. 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. *Id*. ¶ 9. COVID-19 may also cause inflammation of the heart muscle. *Id.* ¶ 9. This is known as myocarditis; it can affect the heart muscle and electrical system, reducing the heart's ability to pump. *Id.* This reduction can lead to rapid or abnormal heart rhythms in the short term, and long-term heart failure that limits the ability to work and exercise tolerance. *Id.* 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. *Id.* The disease can develop at an alarming pace. *Id.* ¶ 6. Patients can show the first symptoms of infection within two days of exposure, and their condition can seriously deteriorate in five days or less. *Id.*

COVID-19 leads to a much greater need for intensive care and likelihood of death than influenza. Golob Decl. ¶ 4. According to recent estimates, the fatality rate of people with COVID-19 is about ten times higher than a severe seasonal influenza, even in advanced countries with highly effective health care systems. *Id.* For people in the highest-risk populations, the fatality rate of COVID-19 is about 15 percent—or one in seven people. *Id.* Patients in high-risk categories who do not die from COVID-19 should expect a prolonged recovery, including the need for extensive rehabilitation for profound deconditioning, loss of digits, neurologic damage, and the loss of respiratory capacity. *Id.*

There is no vaccine against COVID-19, and there is no known medication to prevent or treat the disease. Golob Decl. ¶ 10. The only way to protect vulnerable people from serious health outcomes, including death, is to prevent coronavirus infection. *Id.* People are infected

when they contact respiratory droplets that contain the virus, which can occur at a distance of up to six feet.[10] People can also be 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, which involves remaining physically separated from known or potentially infected individuals, and vigilant hygiene, including washing hands with soap and water. *Id*. Social distancing is the primary means of risk mitigation. Venters Decl. ¶ 25. It must occur before people display symptoms due to the possibility of asymptomatic transmission of coronavirus.[11] The CDC recommends a social distance of around six feet to minimize the risk of spread.[12]

CDC projections indicate that over 200 million people in the United States could become infected with coronavirus without effective public health intervention, with as many as 1.5 million deaths in the most severe projections. Golob Decl. ¶ 11.

II. COVID-19 Is Overwhelming Local Healthcare Systems.

Most people in higher-risk categories who contract COVID-19 need advanced support. Golob Decl. ¶ 8. This level of supportive care requires highly specialized equipment that is in limited supply, and an entire team of care providers, including 1:1 or 1:2 nurse-to-patient ratios, respiratory therapists, and intensive care physicians. *Id.* The extensive degree of support that COVID-19 patients need can quickly exceed local health care resources. *Id*. When healthcare systems are overwhelmed, doctors and public health authorities are inevitably left to allocate scarce resources and make difficult decisions about who receives care.

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[10] 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), Dkt.1-7 at pageID 269–70 (Ex. H to the Choudhury Decl.).
[11] "Some recent studies have suggested that COVID-19 may be spread by people who are not showing symptoms." 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, Dkt. 1-7 at pageID 271–74 (Ex. I to the Choudhury Decl.).
[12] *Id*.

As of April 18, 2020, there were 29,160 confirmed cases of COVID-19 and 1,259 COVID-19-related deaths in Illinois.[13] The risk of health care overload from rampant coronavirus infection poses such a serious threat to the public that Illinois has enacted unprecedented measures to enforce social distancing. The state has ordered people to stay at home, closed all non-essential businesses where people might come into contact with each other, banned gatherings of more than ten people, and required people to keep six feet of distance between themselves and others when leaving home for essential activities.[14] The purpose of these actions is to "flatten the curve," so that fewer vulnerable people will become infected and medical facilities will have enough beds, masks, and ventilators for those who need them. *See* Schriro Decl. ¶ 48.[15]

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

Prisons, jails, and immigration detention centers "are known notorious amplifiers of infectious disease." Schriro Decl. ¶ 18. Predictably, jails have emerged as epicenters of infection, spreading COVID-19 to detainees, staff, and the public at large. As of April 8, 2020 Cook County Jail in Illinois had the highest concentration of confirmed COVID-19 in the entire United States, with more confirmed cases than the U.S.S. Theodore Roosevelt.[16] The number of

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[13] State of Ill., *Coronavirus (COVID-19) Response, Coronavirus Disease 2019 (COVID-19)*, https://coronavirus.illinois.gov/s/ (last visited Apr. 18, 2020), attached as Ex. AI to the Supp. Choudhury Decl.

[14] 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, Dkt. 1-7 at pageID 227–37 (Ex. B to the Choudhury Decl.).

[15] Siobhan Roberts, *Flattening the Coronavirus Curve*, N.Y. Times (Mar. 27, 2020), https://www.nytimes.com/article/flatten-curve-coronavirus.html, Dkt. 1-7 at pageID 293–97 (Ex. L to the Choudhury Decl.).

[16] *See* Timothy Williams & Danielle Ivory, *Chicago's Jail Is Top U.S. Hot Spot as Virus Spreads Behind Bars*, N.Y. Times (Apr. 8, 2020), https://www.nytimes.com/2020/04/08/us/coronavirus-cook-county-jail-chicago.html, Dkt.1-7 at pageID 298–301 (Ex. M to the Choudhury Decl.).

confirmed cases in the Cook County jail skyrocketed from two to 353 people within two weeks after the first cases were identified on March 23, 2020. Venters Decl. ¶ 14. The New York City jail system showed a similar explosive growth with no cases on March 17, 2020; 28 confirmed infections just five days later; and 728 confirmed infections by April 8, 2020. *Id.* ¶ 13. COVID-19 is also spreading quickly through Illinois prisons, with the number of cases shooting from three to 66 in the Stateville Correctional Facility in the nine days after March 25, 2020.[17]

COVID-19 is at the doors of the McHenry County Jail, if it has not entered already. As of April 18, 2020, there are 343 confirmed cases of COVID-19 and 16 deaths from the disease in McHenry County.[18] Yet, in the weeks following the outbreak in March 2020, the jail received 112 *additional* ICE detainees.[19] Corrections officers raised concerns about the high numbers of new people, including ICE detainees, admitted to the jail, and inadequate screening of newly admitted people, insufficient sanitation, and little adherence to social distancing guidelines.[20] Their concern was well-founded. COVID-19 has hit the Pulaski County Detention Center, which, like the McHenry County Jail, houses both ICE detainees and pre-trial detainees. Venters Decl. ¶ 15.[21] And nationwide, facilities housing ICE detainees are experiencing rapid spread of

[17] *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, Dkt. 1-7 at pageID 302-17 (Ex. N to the Choudhury Decl.); 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/, Dkt. 1-7 at pageID 318–21 (Ex. O to the Choudhury Decl.).
[18] 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. 18, 2020), attached as Ex. AJ to the Supp. Choudhury Decl.
[19] Cassie Buchman, *COVID-19 Concerns Abound at McHenry County Jail*, Nw. Herald, (Mar. 29, 2020), https://www.nwherald.com/2020/03/28/covid-19-concerns-abound-at-mchenry-county-jail/a2tyboc/, Dkt. 1-7 at pageID 517–22 (Ex. AB to the Choudhury Decl.).
[20] *Id.*
[21] *See* Molly Parker, *3 Detainees, 1 Correctional Officer of Pulaski County Detention Center Diagnosed with COVID-19*, S. Illinoisan (Apr. 13, 2020), https://thesouthern.com/news/local/3-detainees-1-

infection. *See* Venters Decl. ¶¶ 11–15 (describing spread of COVID-19 in ICE facilities, jails, and prisons).

A. Conditions at the McHenry County Jail Promote Coronavirus Infection.

There is evidence of contagion and inadequate measures to prevent the rampant spread of COVID-19 in the McHenry County Jail. Declarations from Petitioners and Claudia Valenzuela, a lawyer familiar with the McHenry County Jail, attest to cramped living conditions where social distancing is impossible and sanitation is insufficient. For example, in the units where Mr. Dembele and Mr. Butt live, detainees are housed in two-person cells that are too small to allow cellmates ever to be six feet apart. Declaration of Souleymane Dembele, Dkt. 1-1 ("Dembele Decl.") ¶¶ 30, 37; Declaration of Muhammad Taufiq Butt, Dkt. 1-2 ("Butt Decl.") ¶ 29; Declaration of Claudia Valenzuela, Dkt. 1-6 ("Valenzuela Decl.") ¶ 12. They sleep in bunk beds, with their cellmates literally right on top of them. Dembele Decl. ¶ 30; Butt Decl. ¶ 28. In Mr. Dembele's cell, the bunk beds take up most of one wall, leaving a narrow alley of about two feet along which he may walk from the front of the cell to the toilet and sink in the back. Dembele Decl. ¶ 31. The close quarters are particularly horrifying for Mr. Dembele because his cellmate has been coughing all night since early April. Dembele Decl. ¶ 61.

Petitioners and other detainees spend most of their day in their unit's dayroom, which is also too small to allow for six feet between one another. Dembele Decl. ¶ 37; Butt Decl. ¶ 30; Valenzuela Decl. ¶ 12. Detainees who need medication stand in line right next to each other to receive it; there is no room for them to spread apart. Dembele Decl. ¶ 40; Butt Decl. ¶ 30. At mealtimes, trays are brought to the dayroom on a cart by officers or detainees who do not wear masks or, in Mr. Dembele's unit, gloves. Dembele Decl. ¶ 46; Butt Decl. ¶ 41. Detainees stand in

correctional-officer-of-pulaski-county-detention-center-diagnosed-with-covid-19/article_8ce1ca7e-7b28-5884-8113-badf0e385a21.html, Dkt. 1-7 at pageID 507–16 (Ex. AA to the Choudhury Decl.).

line to pick up their trays, with no room for social distancing. Dembele Decl. ¶ 46; Butt Decl. ¶ 41. Detainees eat at small tables in the dayroom. Dembele Decl. ¶ 47; Butt Decl. ¶ 44; Valenzuela Decl. ¶ 11. In Mr. Dembele's unit, which has been at full capacity since he arrived, five or six detainees usually sit cheek by jowl at tables meant for four. Dembele Decl. ¶¶ 32, 47. Despite their close proximity to each other at all times, detainees are not provided face coverings. Dembele Decl. ¶ 41; Butt Decl. ¶ 40. Nor do they receive gloves even though they constantly touch all the same surfaces, including tables, telephones, and monitors for video visitation. *Id.*; Valenzuela Decl. ¶ 11.

Cleaning and hygiene are grossly deficient at the McHenry County Jail. Valenzuela Decl. ¶ 18. Alternating groups of four detainees (two cells) clean the dayroom once every evening, without adequate protective gear. Dembele Decl. ¶¶ 41, 57–58; Butt Decl. ¶¶ 46–47. Although the detainees use the tables throughout the day for cards, socializing, and three meals a day, the tables are not generally cleaned at any other point in the day. Dembele Decl. ¶ 33; Butt Decl. ¶¶ 31, 46. Detainees are responsible for cleaning their own cells, using the same supplies that they use to clean the dayroom. Dembele Decl. ¶ 59; Butt Decl. ¶ 48. 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.*

Moreover, while COVID-19 is spreading in McHenry County, there is no indication that the McHenry County Jail is performing tests of staff. Public health experts recognize 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 screening measures cannot guard against introduction of the virus into the facility. Golob Decl. ¶ 13. 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. ¶¶ 13–14 (describing New York City jail system and Cook County Jail).

B. Neither ICE nor the McHenry County Jail Ensures Measures to Protect Vulnerable Detainees from Serious Illness or Death due to COVID-19.

While Respondents are likely to argue that they have adequate protocols in place to address the epidemic, any such protocols are insufficient to protect medically vulnerable detainees from serious illness or death due to COVID-19. Dr. Schriro and Dr. Venters have reviewed inspection reports concerning the McHenry County Jail, the operative CDC guidelines on managing COVID-19 in detention facilities, and five ICE COVID-19 protocols and guidance related to COVID-19 issued between March 6, 2020 and April 10, 2020. *See* Schriro Decl. ¶¶ 14, 16; Venters Decl. ¶¶ 23, 37. Dr. Schriro concludes, "[B]ased on . . . my experience as Warden and then Commission of four correctional systems and Director of the ICE Office of Detention Policy and Planning, and my continuing oversight and assessments of correctional and immigration detention facilities in the capacity as an Expert, that the plans implemented at the McHenry county jail *are insufficient to protect the detained population, detention staff, and the public at-large.*" Schriro Decl. ¶ 17 (emphasis supplied). Dr. Venters similarly concludes, "No COVID-19 mitigation plan appears to exist for McHenry County based on the description of current practices in the McHenry County Jail" by Petitioners, "represent[ing] a stark and dangerous departure from ICE's own policies and CDC guidelines." Venters Decl. ¶ 36. He further finds that the McHenry County Jail lacks "basic infection control measures," including:

hand washing and sanitizing supplies, masks, and gloves; staff shortages that result in lack of supervision of ill detainees; lack of social distancing; failure to establish standards for use of glove and masks by security personnel and inconsistent or no use of this gear by security personnel. *Id*. ¶ 38(b).

Dr. Venters and Dr. Schriro find that detention facilities like the McHenry County Jail promote the spread of coronavirus infection because of crowding, the proportion of vulnerable people detained, security-related restrictions, insufficient sanitation, and inadequate medical care resources. Venters Decl. ¶¶ 16–17, 40; Schriro Decl. ¶¶ 18, 25–28, 32–34. These facilities have "densely packed housing areas" and constantly place people in close proximity for health services, food, recreation, and bathroom and shower facilities for detainees, as well as entry, locker rooms, meal areas, and control rooms for staff. Venters Decl. ¶ 17; *see id*. ¶¶ 18–19, Schriro Decl. ¶ 25. Toilets, sinks, and showers are shared, and food preparation and service is communal. Venters Decl. ¶ 21; Schriro Decl. ¶¶ 25, 28 33–34, 38. Staff arrive and leave on a shift basis, and there is limited ability to adequately screen staff for new, asymptomatic infection. Venters Decl. ¶¶ 32, 3. Such conditions make it impossible to ensure that medically vulnerable people are protected from severe illness or death from COVID-19.

Nor do the ICE COVID-19 protocols and guidance address these barriers to so as to mitigate the threat of harm to vulnerable detainees in the McHenry County Jail. Dr. Schriro concludes that the ICE Enforcement and Removal Operations COVID-19 Pandemic Response Requirements issued on April 10, 2020 ("ERO Pandemic Response Requirements")—the agency's most recent guidance concerning COVID-19—contains "significant" inconsistencies with CDC guidelines and "impede[s] compliance" with CDC protocols for intake screening, the monitoring and management of suspected coronavirus exposures, social distancing, intra- and

inter-facility movement, cleaning, and sanitation. *Id.* ¶ 25. Dr. Schriro also concludes that because certain measures are only required to the extent "practicable," the ERO Pandemic Response Requirements "convey[] a lack of urgency when nothing is needed more than to focus and press quickly, comprehensively towards full implementation." *Id.*

Dr. Venters similarly concludes that the ICE protocols and guidance "are deficient and at odds with CDC recommendations regarding detention settings in a manner that threatens the health and survival of ICE detainees, including the Petitioners in this action." Venters Decl. ¶ 24. He finds that ICE's instructions treat social distancing as "merely recommended" and "fail to address the most common scenarios in which high-risk detainees find themselves in close quarters that make social distancing impossible, including shared cells, medication lines, bathroom facilities, common walkways, day rooms, sally ports, and transportation." *Id.* ¶¶ 25, 29. Dr. Venters concludes that ICE "fail[s] to provide a complete list of risk factors consistent with CDC guidelines," incorrectly provides age 65 (rather than 50) as the benchmark for age-related risk, and indicates the need for 14 days of quarantine and monitoring for asymptomatic people with suspected COVID-19 contact or risk factors without ensuring that facilities have capacity to implement this measure. *Id.* ¶ 26. He finds that the ERO Pandemic Response Requirements fail to "encourage or require" specific measures to protect vulnerable detainees, such as "twice daily symptom and temperature checks," "fail[] to address the lack of comprehensive COVD-19 testing in ICE facilities," and fall far short of ensuring compliance with CDC guidelines on sanitation, staff communication with detainees about how to reduce infection risk, the establishment of a respiratory protection program, and the need for adequate staffing and staff training. *Id.* ¶¶ 27, 29, 32–33. Finally, Dr. Venters concludes that "none of the ICE COVID-19 protocols and guidance mandate that the McHenry County Jail ensures that the

facility is at 50% capacity as required to provide sufficient space for proper isolation and quarantine of people with COVID-19 symptoms or known exposure . . . ." *Id.* ¶ 31(b).

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

Release from detention is the ***only*** option to protect vulnerable people from serious illness or death due to COVID-19 because of the above-described conditions at the McHenry County Jail. This fact has been recognized by public health experts and prison administrators alike. Dr. Venters finds that ICE and the McHenry County Jail "do not plan to establish specific protections for high-risk patients and will wait for them to become symptomatic," which "will result in preventable morbidity and mortality." Venters Dec. ¶ 40. Dr. Venters recommends the release of high-risk people from detention for that reason and because of the "basic limitations of the physical plant and looming staffing concerns" and because transfer to other facilities "will only compound exposure and transmission." *Id.* In the event that vulnerable detainees have been exposed to COVID-19, Dr. Venters recommends testing where possible and the release of detainees to a quarantine setting outside of detention in coordination with local health authorities. *Id.* ¶ 30.

Similarly, Dr. Schriro also concludes that "best correctional and correctional health care practice would require, at a minimum, the preemptive release of individuals who are at-risk of serious illness or death if they become infected with COVID-19," because in her expert opinion, "ICE is not yet able to identify infected individuals and ensure that they do not come into contact with other people living and working in detention facilities." Schriro Decl. ¶ 42. Dr. Schriro further concludes that ICE must consider releasing even people at low risk of serious complications or death from COVID-19 in order to "reduce the risk of contracting COVID-19 in the detention facilities and the community." *Id.* ¶ 43. Other public officials have also called for release of ICE detainees in order to mitigate the spread of coronavirus in detention facilities.

Former Acting Director of ICE, John Sandweg, stated that "ICE can, and must, reduce the risk [COVID-19] poses to so many people, and the most effective way to do so is to drastically reduce the number of people it is currently holding."[22]

For these reasons, courts around the country have ordered the release of people from ICE detention because of the risk of illness and death from COVID-19 in these facilities. *See supra* at 2-3 & n.3 (collecting decisions from California, Massachusetts, Michigan, New Jersey, New York, and Texas ordering release of ICE detainees); *see, e.g.*, *Thakker v. Doll*, No. 1:20-cv-00480, 2020 WL 1671563, at *9 (ICE detention facilities "are plainly not equipped to protect Plaintiffs from a potentially fatal exposure to COVID-19"); *Xochihua-Jaimes v. Barr*, No. 18-71460, 2020 WL 1429877 (9th Cir. Mar. 24, 2020) ("[T]the rapidly escalating public health crisis . . . will especially impact immigration detention centers"); *Basank v. Decker*, -- F. Supp. 3d ----, 2020 WL 1481503, at *3 (S.D.N.Y. Mar. 26, 2020) ("The nature of detention facilities makes exposure and spread of the [coronavirus] particularly harmful").

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 are 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-mj-71055-MAG-1

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[22] John Sandweg, *I Used to Run ICE. We Need to Release the Nonviolent Detainees*, The Atlantic (Mar. 22, 2020), https://www.theatlantic.com/ ideas/archive/2020/03/release-ice-detainees/608536/, Dkt. 1-7 at pageID 568–73 (Ex. AE to the Choudhury Decl.); *see also* J. David McSwane, *ICE Has Repeatedly Failed to Contain Contagious Diseases, Our Analysis Shows. It's a Danger to the Public*, Pro Publica (Mar. 20, 2020), https://www.propublica.org/article/ice-has-repeatedly-failed-to-contain-contagious-diseases-our-analysis-shows-its-a-danger-to-the-public, attached as Ex. AK to the Supp. Choudhury Decl.

(TSH), 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:

> 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 (AJN), 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 a heightened risk of contracting COVID-19 should an outbreak develop.").

Some courts and local leaders have taken even more sweeping action to protect people in detention facilities from COVID-19. The New Jersey Supreme Court has ordered the release of many county jail detainees.[23] Similarly, the Chief Justice of the Montana Supreme Court has urged Montana judges to "review your jail rosters and release, without bond, as many prisoners as you are able, especially those being held for non-violent offenses."[24] Dr. Schriro details the actions of prosecutors, law enforcement, courts, and state correctional systems across the country to release people from jails and prisons and to reduce the flow of people into detention facilities in order to mitigate the spread of coronavirus and risks of serious illness and death from COVID-19. *See* Schriro Decl. ¶¶ 50–52 (describing measures taken in Texas, Ohio, California, Colorado,

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[23] Order, Supreme Court of New Jersey, Docket No. 084230 (March 22, 2020), *available at* https://njcourts.gov/notices/2020/n200323a.pdf?c=4EF, Dkt. 1-7 at pageID 553–67 (Ex. AD to the Choudhury Decl.).

[24] Chief Justice Mike McGrath, Letter to Montana Courts of Limited Jurisdiction (Mar. 20, 2020), *available at* https://courts.mt.gov/Portals/189/virus/ Ltr%20to%20COLJ%20Judges%20re%20COVID-19%20032020.pdf, attached as Ex. AL to the Supp. Choudhury Decl.

Washington, Florida, Arizona, Utah, New Jersey, New York, North Dakota, Iowa, Illinois, Kentucky, Oklahoma, Pennsylvania, Maine, and Connecticut).

V. Petitioners Must Be Released from Custody Because They are Vulnerable to Serious Illness or Death If Infected by COVID-19.

Petitioners have underlying medical conditions that increase their risk of serious illness or death if exposed to COVID-19, and Mr. Butt has an additional factor of age-related risk of severe illness or death from this disease. Venters Decl. ¶ 38(a). Respondents nonetheless continue to detain them at the McHenry County Jail while they await disposition of their immigration cases or deportation.

Mr. Dembele, a 43-year-old father of three U.S. citizens suffers from hypertension, prediabetes, and sciatic nerve damage. Dembele Decl. ¶¶ 2–3, 7. He was diagnosed with prediabetes and hypertension in February 2018, when he arrived at Dodge County Detention Facility with blood pressure of 164/119. *Id*. ¶ 8. Mr. Dembele has been taking medication for hypertension since his diagnosis. *Id*. Decl. ¶¶ 8–10. He suffers from fatigue, nausea, and periodic dizzy spells during which he can do nothing but sit and wait for them to pass. *Id*. ¶ 11. His most recent dizzy spell was in early April 2020. *Id*. ¶¶ 11–12. 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.* ¶ 11. Petitioners' medical expert finds that his fatigue, nausea, and dizzy spells, may lead him to experience more rapid dehydration than normal if ill with COVID-19. Venters Decl. ¶ 38(a). Dr. Venters also finds that Mr. Dembele may have difficulty walking to a location to notify jail staff that he is ill as a result of these conditions and his pain from sciatic nerve pain. *Id*.

Mr. Butt, a sixty-five-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. *Id.* ¶¶ 10–11. Mr. Butt's sleep apnea is untreated in detention. *Id.* ¶ 11. He also has a history of smoking. Butt Decl. ¶ 13. Dr. Venters finds that Mr. Butt's age and "medical problems place him at high risk of severe illness or death" from COVID-19. Venters Decl. ¶ 38(a).

VI. Respondents are Aware that Releasing Detainees is the only Viable Option to Protect Vulnerable Individuals from COVID-19.

In addition to the chorus of public health experts, Respondents have been explicitly informed by their own medical advisors of the dangers of continuing to detain vulnerable immigrants in light of COVID-19. As early as February 25, 2020, Dr. Scott Allen and Dr. Josiah Rich, medical experts to DHS, shared concerns with the agency about the specific risk to immigrant detainees as a result of COVID-19. In a whistleblower letter to Congress, these experts warned of the danger of COVID-19 in immigration detention facilities and recommended that "[m]inimally, DHS should consider releasing all detainees in high risk medical groups such as older people and those with chronic diseases."[25] They concluded that "acting immediately will save lives not of only those detained, but also detention staff and their families, and the community-at-large." *Id.*

Advocates have also placed Respondents on notice of the risk of serious illness and death for vulnerable detainees in McHenry County Jail. On March 17, 2020, the National Immigrant Justice Center sent a letter to Respondents Matthew Albence, Robert Guadian, and Daniel Sitkie, alerting them to the high risk of coronavirus infection in detention facilities and the dangerous

[25] Scott A. Allen, MD, FACP and Josiah Rich, MD, MPH, Letter to House and Senate Committees on Homeland Security (Mar. 19, 2020), *available at* https://whistleblower.org/wp-content/uploads/2020/03/Drs.-Allen-and-Rich-3.20.2020-Letter-to-Congress.pdf, Dkt. 1-7 at pageID 354–61 (Ex. R to the Choudhury Decl.).

health outcomes for vulnerable individuals with COVID-19.[26] Respondents have not responded to the letter, and there is no indication that vulnerable ICE detainees are being released from the McHenry County Jail. To the contrary, on April 17, 2020—the day Petitioners' filed the Emergency Petition—Respondent Albence told members of Congress, "[O]ur review of our existing population has been completed" and that ICE does not plan to release any other detainees to slow the spread of coronavirus in detention facilities."[27]

VII. Numerous Alternatives are Available to Release ICE Detainees Vulnerable to COVID-19.

Petitioners' detention is not required for ICE to achieve its goals. Dr. Schriro finds, in her expert opinion, that "alternatives to detention can be used effectively and safely to ensure that immigrant detainees are not subjected to unnecessary risk from COVID-19 while ensuring public safety and appearance for court hearings." Schriro Decl. ¶ 44. 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. *Id.* ¶ 47. A government-contracted evaluation of this program reported a 99% attendance rate at all immigration court hearings. *See id.* ¶ 45.

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[26] 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), Dkt. 1-7 at pageID 354–61 (Ex. Q to the Choudhury Decl.).

[27] *DHS Officials Refuse to Release Asylum Seekers and Other Non-Violent Detainees Despite Spread of Coronavirus*, House Committee on Oversight and Reform (April 17, 2020), https://oversight.house.gov/news/press-releases/dhs-officials-refuse-to-release-asylum-seekers-and-other-non-violent-detainees, attached as Ex. AM to the Supp. Choudhury Decl.

LEGAL STANDARD

On a motion for a preliminary injunction or temporary restraining order, the plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see Aon Risk Services Cos. v. Alliant Ins. Servs.,* 415 F. Supp. 3d 843, 847 (N.D. Ill. 2019) (a TRO requires showing "a likelihood of success on the merits," a lack of "adequate remedy at law" and "irreparable harm," and balancing the harm to the movant without relief against any harm to other parties and the public from issuing the TRO). "[T]he more likely it is the plaintiff will succeed on the merits, the less the balance of irreparable harms need weigh towards its side; the less likely it is the plaintiff will succeed, the more the balance need weigh toward its side." *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 12 (7th Cir. 1992).

The Due Process Clause of the Fifth Amendment to the U.S. Constitution forbids the government from depriving a person or life or liberty without due process of law. The protection applies to "all persons within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). Immigrant detainees, even those with prior criminal convictions, are civil detainees entitled to the same Fifth Amendment due process protections as any other pretrial detainee. *See id.* at 690; *Belbachir v. County of McHenry*, 726 F.3d 975, 979 (7th Cir. 2013) (immigrants in civil detention are entitled to due process). Civil detainees thus have a right "to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." *Youngberg v. Romeo*, 457 U.S. 307, 321–22 (1982); *see also Belbachir*, 726 F.3d at 979 (same); *see also Bell v. Wolfish,* 441 U.S. 520, 535 n.16 (1979) ("Due process requires that a pretrial detainee not be punished."). As a result, conditions that would violate the

Eighth Amendment are more than enough to also violate a civil detainee's due process rights. *See Belbachir*, 726 F.3d at 979 (civil detainees right to due process requires "at least as much protection as convicted criminals are entitled to under the Eighth Amendment") (citing *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983)).

ARGUMENT

I. Petitioners Meet their Burden to Show the Need For A Temporary Restraining Order and Preliminary Injunction.

Because there is no vaccine or cure for COVID-19, the only way to protect Petitioners' due process rights is to immediately release them from detention so they can escape the onslaught of COVID-19 ***before*** it strikes. Detention conditions that expose people to infectious disease are constitutionally intolerable even for convicted persons, let alone civil detainees whom the Due Process Clause mandates must "***not*** be punished." *Bell*, 441 U.S. at 535 n.16 (emphasis added); *see Helling v. McKinney*, 509 U.S. 25, 33 (1993) (recognizing that the Eighth Amendment prohibits prison authorities from "ignor[ing] a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year," such as "exposure of inmates to a serious, communicable disease").

Immediate injunctive relief is necessary because the danger here—vulnerable people with underlying health conditions condemned to prolonged illness and potentially death—is the quintessential irreparable harm. There is also an overwhelming public interest in limiting the spread of COVID-19, both to minimize further infections and to reduce strain on overwhelmed health systems. And, in light of the global COVID-19 pandemic, the balance of equities weighs heavily in favor of these older, vulnerable detainees, who must be released to self-isolate, and

against Respondents' interest in indefinite confinement of Petitioners in life-threatening conditions. The Court should order the Petitioners released from custody.

A. Petitioners Are Likely to Succeed on the Merits of Establishing a Constitutional Violation.

1. Petitioners' Continued Detention at the ICE Facilities Violates Their Due Process Rights.

Petitioners are likely to establish a violation of their right to due process because conditions at the McHenry County Jail expose them to the risk of serious illness or death from COVID-19. Conditions of confinement for civil detainees violate due process if they are expressly intended to punish, or they otherwise "are not 'rationally related to a legitimate nonpunitive governmental purpose'" or "'appear excessive in relation to that purpose.'" *Davis v. Wessel*, 792 F.3d 793, 800 (7th Cir. 2015) (citing *Bell*, 441 US. at 561). "[I]f a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees." *Hardeman v. Curran*, 933 F.3d 816, 823 (7th Cir. 2019) (quoting *Bell*, 441 U.S. at 539).

Petitioners' due process claim must be resolved by determining whether the challenged conditions are *objectively* unreasonable. A civil detainee's due process conditions-of-confinement claims "are subject *only* to the objective unreasonableness inquiry," which is *less exacting* than the "Eighth Amendment deliberate-indifference standard." *Hardeman*, 933 F.3d at 822–24 (emphasis supplied); *see Miranda v. County of Lake*, 900 F.3d 335, 352 (7th Cir. 2018) (same). This analysis requires considering the cumulative effect of the challenged conditions because, "[s]ome conditions of confinement may establish a [constitutional] violation in combination when each alone would not do so." *Gray v. Hardy*, 826 F.3d 1000, 1005 (7th Cir.

2016) (addressing Eighth Amendment claim) (quoting *Gillis v. Litscher*, 468 F.3d 488, 493 (7th Cir. 2006)).

Here, Petitioners are detained in conditions that preclude compliance with CDC-mandated practices for detention facilities, including social distancing, frequent cleaning of high-touch surfaces, and wearing face covers when around others, which dramatically increases their likelihood of contract COVID-19 and falling ill. Petitioners describe two-person cells in which it is physically impossible for cellmates to be six feet apart and where detainees sleep on top of one another on bunk beds. Dembele Decl. ¶¶ 31, 61; Butt Decl. ¶¶ 28–29. Detainees spend most of the day in a dayroom that is also too small for social distancing. Dembele Decl. ¶ 48; Butt Decl. ¶ 30. Meals are delivered to the dayroom and served by officers or detainees who do not wear masks. Dembele Decl. ¶ 46; Butt Decl. ¶¶ 41–42. Detainees eat at small tables meant for four people but are often jammed with five or six people sitting inches apart. Dembele Decl. ¶ 47. They have no masks or gloves to protect themselves. Dembele ¶ 41; Butt Decl. ¶ 40.

Petitioners also are detained in unhygienic conditions that fail to meet CDC-mandated practices. Mr. Dembele reports that he is issued one small bar of soap per week that lasts for no more than two hand washings. Dembele Decl. ¶ 52. Slightly larger bars of soap must be purchased at $2.11 apiece. *Id.* Detainees have no access to hand sanitizer and sometimes are unable to shower for days on end. Dembele Decl. ¶¶ 54–55. Some correctional officers wear gloves or masks, and some do not. Dembele Decl. ¶ 39; Butt Decl.¶ 39. Even medical staff do not consistently wear masks. Butt Decl. ¶ 38. Rotating squads of detainees clean the dayroom once a day, but are not issued any masks or gloves. Dembele Decl. ¶¶ 41, 57–58. Detainees touch the same tables and other surfaces multiple times per day, but they are not sanitized more

than once a day. Butt Decl. ¶ 46. This is just the tip of the iceberg of the unsanitary conditions Petitioners face on a daily basis.

Unquestionably, in the face of ample medical evidence that social distancing is the only way to avoid COVID-19, Venters Decl. ¶ 25, keeping medically vulnerable Petitioners detained in such close proximity to one another and without face coverings and the sanitation necessary to combat the spread of coronavirus serves ***no*** legitimate purpose. Nor is detention under these circumstances rationally related to the enforcement of immigration laws.[28] *See Hardeman*, 933 F.3d at 824–25 (finding water deprivation and unsanitary conditions for detainees "objectively unreasonable and excessive in relation to any legitimate non-punitive purpose") (internal quotation marks omitted).

Courts in this Circuit have repeatedly found "unsanitary, unsafe, or otherwise inadequate conditions" sufficient to state a due process conditions-of-confinement claim. *See, e.g.*, *Hardeman*, 933 F.3d at 825 (due process claim where warden alleged to have deprived jail detainees of water causing physical illness and unsanitary conditions); *Smith v. Dart*, 803 F.3d 304, 312–13 (7th Cir. 2015) (due process claim where jail alleged to have provided nutritionally-deficient food and contaminated water); *Freeman v. Lawson*, 3:19-CV-170 DRL-MGG, 2019 WL 3890191, at *2–3 (N.D. Ind., Aug. 16, 2019) (due process claim where warden was alleged to have a policy of ordering pre-trial detainee to "walk[] down wet, steel stairs in foam flip-flops with an armful of heavy trays," placing detainee at risk of harm). Even in circumstances presenting far less immediate danger than that posed by an urgent pandemic that has resulted in widespread illness and significant loss of life across the globe, courts have recognized that due

[28] Dr. Schriro details numerous methods short of detention that are available to ICE "to ensure that immigrant detainees are not subjected to unnecessary risk from COVID-19 while ensuring public safety and appearance for court hearings," including supervised release. Schriro Decl. ¶ 44–45.

process may be violated by unsafe or unsanitary conditions of detention. *See*, *e.g.*, *Coleman v. Dart*, No. 17 C 2460, 2019 WL 670248, at *9, 10 (N.D. Ill. Feb. 19, 2019) (finding triable issues of fact as to whether the jail's "extremely dirty, dusty vents, excessive mold and mildew . . . , and rusty, mildew-covered sinks" violate due process). Under these circumstances, Petitioners have demonstrated conditions of confinement that violate their due process rights.

2. Respondents' Deliberate Indifference to Petitioners' Health and Safety Violates Even the Stricter Eighth Amendment Standard.

As noted above, civil detainees can establish a due process violation by demonstrating that the challenged conditions violate the Eighth Amendment's prohibition on cruel and unusual punishment. *See Belbachir*, 726 F.3d at 979. Here, Petitioners are likely to meet this standard by showing that conditions of confinement at the McHenry County Jail unconstitutionally expose them to infectious disease with potential life-threatening complications.

The government has an affirmative duty to provide conditions of reasonable health and safety to the people it holds in its custody. *See DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 199–200 (1989) (requiring the government "to provide for . . . basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety" for those in custody). The Constitution "protects a detainee not only from deliberate indifference to his or her current serious health problems, but also from deliberate indifference to conditions posing an unreasonable risk of serious damage to *future* health." *Board v. Farnham*, 394 F.3d 469, 479 (7th Cir. 2005).

To prevail on an Eighth Amendment conditions-of-confinement claim, a plaintiff must show (1) a deprivation that is "objectively, sufficiently serious," and (2) that "the mental state of the [jail] official must have been one of deliberate indifference to inmate health or safety." *Haywood v. Hathaway*, 842 F.3d 1026, 1031 (7th Cir. 2016). The first element is

satisfied when the plaintiff shows "conditions posing a substantial risk of serious harm." *Id.* (quoting *Sanville v. McCaughtry*, 266 F.3d 724, 733 (7th Cir. 2001)). The second element is met when a plaintiff demonstrates that "the official knows of and disregards an excessive risk to inmate health or safety." *Id.* (quoting *Estate of Miller, ex rel. Bertram v. Tobiasz*, 680 F.3d 984, 989 (7th Cir. 2012)).

Leaving those in custody directly in the path of an infectious disease that may cause them serious illness or death violates the Eighth Amendment. The Supreme Court has recognized an Eighth Amendment violation when the government crowds prisoners into cells with others who have "infectious maladies," "even though the possible infection might not affect all of those exposed." *Helling,* 509 U.S. at 33 (citing *Hutto v. Finney,* 437 U.S. 678, 682 (1978)). The Seventh Circuit has likewise recognized that "knowingly exposing a prisoner to hepatitis or other serious diseases" may constitute cruel and unusual punishment, *Powers v. Snyder*, 484 F.3d 929, 931 (7th Cir. 2007), and that creating a health hazard increasing the risk of infectious disease may violate the Eighth Amendment, even if the plaintiff has not yet "contracted [the] disease or suffered any physical pain." *Thomas v. Illinois*, 697 F.3d 612, 614 (7th Cir. 2012); *see also Helling*, 509 U.S. at 35 (recognizing Eighth Amendment claim against officials' deliberate indifference in exposing prisoners to tobacco smoke posing risk of harm to future health).

Here, there is no question that the risk posed by COVID-19 is "serious" and that Respondents are deliberately indifferent to that risk. The "seriousness" of a medical need may be supported by a physician's diagnoses or may be "so obvious that even a lay person would perceive the need for a doctor's attention." *Greeno v. Daley*, 414 F.3d 645, 653 (7th Cir. 2005). While a layperson would surely recognize the risks posed by COVID-19 under the circumstances, Petitioners have submitted expert evidence showing that they face a potentially

lethal risk of coronavirus exposure if they remain detained in the McHenry County Jail. COVID-19 is highly contagious and can cause severe health problems and death, especially in vulnerable persons. *See supra* Factual Background, Part I; Golob Decl. ¶ 3; Venters ¶ 22. Moreover, there is already explosive spread of coronavirus in detention facilities around the country and Illinois, including the Cook County Jail. *See supra* Factual Background, Part III. Petitioners are at specific and heightened risk because of underlying medical conditions and, in the case of Mr. Butt, age. *See supra* Factual Background, Part V.

Respondents are also aware of the serious risks that COVID-19 poses to detained populations. An advocacy group notified Respondents about the threat posed by COVID-19 in the McHenry County Jail and the need for "proactive plans for the prevention and management of COVID-19."[29] Nevertheless, practices in the McHenry County Jail suggest that the facility appears to have no COVID-19 mitigation plan. Venters Decl. ¶ 36. ICE has also released protocols and guidance showing that it is aware of the spread of COVID-19, even if its procedures plainly fail to address the threat that it poses. *See* Venters Decl. ¶¶ 23–33; Schriro Decl. ¶ 16–25.

In addition to Respondents' actual knowledge of the risk, Petitioners can establish that Respondents are aware of and deliberately indifferent to the risk of COVID-19 through circumstantial evidence that the risk is obvious. The obviousness of the risk Petitioners face, by itself, is enough to allow a factfinder to conclude that Respondents know of the risk. *See Farmer v. Brennan*, 511 U.S. 825, 841–42 (1994) ("[A] prison official who was unaware of a substantial risk of harm to an inmate may nevertheless be held liable . . . if the risk was obvious and a reasonable prison official would have noticed it."); *Petties v. Cartier*, 836 F.3d 722, 729 (7th Cir.

[29] Ex. Q to the Choudhury Decl.

2016) ("If a risk . . . is obvious enough, a factfinder can infer that a prison official knew about it and disregarded it."). Put another way, deliberate indifference may be shown through circumstantial evidence. *Farmer*, 511 U.S. at 842 (explaining that "[w]hether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence").

Here, there is overwhelming evidence that Respondents are aware of this obvious risk. Medical experts for DHS have specifically identified the risk of COVID-19 spreading in ICE detention centers.[30] COVID-19 has raced through the Cook County Jail—the nation's largest hotspot for coronavirus transmission—and has already entered at least one jail holding ICE detainees in Illinois (the Pulaski County Detention Center). Venters Decl. ¶¶ 14–15.[31] Immigration courts in both New York and New Jersey were closed due to confirmed cases.[32] 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."[33] Prisons and jails around the country are ***already*** releasing non-violent detainees because the risk of contagion is overwhelming.[34] Increasingly, the risk to detainees is obvious to courts as well. *See supra* 3–4, 17–18 (collecting cases). As noted above, Respondent Albence told members of Congress on April 17, 2020 (the date Petitioners filed this action) that the

[30] Ex. R. to the Choudhury Decl.
[31] *See also* Exs. M and AA to the Choudhury Decl.
[32] Priscilla DeGregory, *Coronavirus shuts down some NYC and NJ immigration courts*, N.Y. Post (Mar. 24, 2020), https://nypost.com/2020/03/24/coronavirus-shuts-down-some-nyc-and-nj-immigration-courts/, attached as Ex. AN to Supp. Choudhury Decl.
[33] Ex. AE to the Choudhury Decl.
[34] *See* Ex. AD to the Choudhury Decl.

federal government completed its review of detainees for medical release, and that ICE did not plan to release any additional detainees to slow the spread of coronavirus.[35]

In short, the evidence shows that COVID-19 poses a serious risk of medical complications or death to vulnerable detainees and that Respondents are aware of the risk through direct notice and circumstantial evidence that the risk is entirely obvious. The record shows, nevertheless, that Respondents' failure to implement numerous CDC recommendations, failure to establish protections for high-risk patients, Venters Dec. ¶ 40, and failure to ensure that high-risk detainees do not come into contact with infected people, Schriro Decl. ¶ 42, place medically vulnerable people at greater risk of harm. *See Christian A.R. v. Decker*, No. 20-3600, at *25 (D.N.J. Apr. 12, 2020), Dkt. 1-7 at pageID 548 (Ex. AC to the Choudhury Decl.) ("By failing to implement the CDC's instructions for the most vulnerable individuals, and by detaining those persons in a jail setting during a rapidly accelerating COVID-19 pandemic without providing them with adequate means to follow hygiene and other health protocols, Respondents have placed Petitioners at a substantially enhanced risk for severe illness or death. There can be no greater punishment."). Respondents' failure to release Petitioners from these intolerable conditions is deliberate indifference to the substantial risk of serious harm to Petitioners, in violation of the Petitioners' constitutional rights. *See Farmer*, 511 U.S. at 847 (recognizing that deliberate indifference is shown where the official is aware of facts giving rise to inference that prisoners face a substantial risk of serious harm, yet "disregards that risk by failing to take reasonable measures to abate it").

The evidence is overwhelming that the ***only*** way to abate the substantial risk of serious harm to Petitioners is immediate release from detention. Public health authorities agree that the

[35] Ex. AM to the Supp. Choudhury Decl.

only way to protect vulnerable individuals from COVID-19 is to practice “social distancing”—i.e., generally self-isolating and keeping a minimum distance of six feet from others—and improved hygiene practices that are utterly impossible in the McHenry County Jail. *See* Venters. Decl. ¶ 38; Schriro Decl. ¶ 27–28, 33–37. Against the mountain of evidence that social distancing is the only way to stem the tide of COVID-19, Respondents have failed to take the steps necessary to remove barriers that prevent Petitioners from proactively engaging in social distancing, self-isolation, and appropriate hygiene.

The deliberate indifference of Respondents is therefore “manifest,” for the refusal to protect Petitioners exposes them to “undue suffering or the threat of tangible residual injury.” *Monmouth Cty. Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 346–47 (3d Cir. 1987) (internal quotation marks omitted); *see also Steading v. Thompson*, 941 F.2d 498, 500 (7th Cir. 1991) (“[P]rison officials may not disregard a prisoner’s serious medical needs and thereby inflict as “punishment” the pain and preventable consequences of the condition.”); *Brigaerts v. Cardoza*, 952 F.2d 1399 (9th Cir. 1992) (“Repeated exposure to contagious diseases may violate the Eighth Amendment if prison officials show deliberate indifference to serious medical needs.”).

B. Infection With a Potentially Lethal Virus That Lacks Any Vaccine or Cure Constitutes Irreparable Harm.

Petitioners have moved for a temporary restraining order and preliminary injunction because the difference of even just a few days may be the difference between life and death. Cases of COVID-19 have increased exponentially in a matter of weeks, including in detention facilities around the country and in Illinois. *See supra* Factual Background, Part I.

Given the deadliness of the disease and the country’s over-taxed medical system, there is a real possibility that absent immediate relief from the Court, Petitioners will be infected with the virus that causes COVID-19 while in the McHenry County Jail and will possibly die or suffer

long-term health consequences as a result. *See supra* Factual Background, Parts I, III. Petitioners have pre-existing medical conditions that increase the likelihood of severe illness or death if they contract COVID-19, and Mr. Butt is also an older adult with increased age-related risk of complications or death from the disease. *See supra* Factual Background, Part V. Even for those infected who survive, there may be a prolonged recovery, including the need for extensive rehabilitation for profound deconditioning, loss of digits, neurologic damage, and the loss of respiratory capacity. *See supra* Factual Background, Part I.

These life-and-death stakes are sufficient to establish a likelihood of irreparable harm in support of injunctive relief. Even the failure to ***test*** for a disease has been sufficient to support a finding of irreparable harm. *See Boone v. Brown*, No. 05-750(AET), 2005 WL 2006997, at *14 (D.N.J. Aug. 22, 2005) (finding an allegation of refusal to provide adequate testing for highly contagious infectious disease sufficient to demonstrate irreparable harm); *Austin v. Pa. Dep't of Corr.*, No. 90-7497, 1992 WL 277511, at *7–8 (E.D. Pa. Sept. 29, 1992) (granting preliminary injunction for prison to develop testing and protocol for tuberculosis); *see also Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) (holding that "correctional officials have an affirmative obligation to protect inmates from infectious disease").

The risks here are even more extreme, and the McHenry County Jail's ongoing failure to provide conditions of basic health and safety risks irreparable harm to Petitioners. *See Padilla v. U.S. Immigration & Customs Enforcement*, 387 F. Supp. 3d 1219, 1231 (W.D. Wash. 2019) (recognizing that "substandard physical conditions, [and] low standards of medical care" in immigration detention constitute irreparable harm justifying injunctive relief), *aff'd in relevant part*, 953 F.3d 1134 (9th Cir. 2020).

The Constitution does not limit relief only to those who have been exposed to coronavirus, developed COVID-19, and suffered its grave consequences. As the Supreme Court has explained, "a prison inmate also could successfully complain about demonstrably unsafe drinking water without waiting for an attack of dysentery." *Helling*, 509 U.S. at 33.

C. There is a Strong Public Interest in Minimizing the Spread of COVID-19 through Social Distancing and Hygiene Practices that are Impossible at the McHenry County Jail.

It is well established that the vindication of constitutional rights serves the public interest. *See Preston v. Thompson*, 589 F.2d 300, 303 n.3 (7th Cir. 1978) ("The existence of a continuing constitutional violation constitutes proof of an irreparable harm, and its remedy certainly would serve the public interest."). In this case, however, the public interest in minimizing the spread of coronavirus and resulting cases of COVID-19 is overwhelming and nearly impossible to overstate.

First, the coronavirus is highly contagious and has no vaccine or cure, meaning that each new infection may result in still more individuals becoming infected. *See supra* Factual Background, Part I. Healthcare professionals have accordingly—and nearly unanimously—agreed that the most critical actions that can be taken are preventive measures such as self-isolation, maintaining a distance of six feet from other people, and frequent disinfection. *See id.*; Golob Decl. ¶ 10; Venters Decl. ¶ 25.[36] These measures are simply not possible in the McHenry County Jail, as detailed above. Schriro Decl. ¶ 48. Even with the best-laid plans to address the spread of COVID-19 in detention facilities, the release of high-risk individuals is a key part of a risk mitigation strategy. Venters. Decl. ¶ 38; Schriro Decl. ¶¶ 48, 54. This is true particularly because transfer to a different facility would not resolve the threat to medically vulnerable people

[36] *See also* Exs. H and I to the Choudhury Decl.

due to the barriers to controlling coronavirus in detention facilities as a result of crowding, the proportion of vulnerable people detained, security-related restrictions, insufficient sanitation, and inadequate medical care resources. *See also* Venters Decl. ¶¶ 16–17, 40; Schriro Decl. ¶¶ 18, 25–28, 32–34. And because McHenry County Jail staff continue to move between the facility and the county at large, where there are already 343 confirmed cases and where 16 people have died from COVID-19,[37] contagion in the jail will almost certainly spread, via staff, to the surrounding communities.

Second, there is a strong public interest in minimizing the spread of COVID-19 to help address the overwhelmed state of the U.S. and Illinois medical systems. A serious outbreak of coronavirus at Stateville Correctional Center, located thirty miles outside of Chicago, has led to the infection of 119 prisoners and 69 staff[38] and the death of 5 prisoners.[39] The outbreak poses such a severe threat to the region's hospital system that Illinois Governor J.B. Pritzker deployed medics from the Illinois Army National Guard to the prison to set up medical tents and provide medical care to prisoners.[40] It is accordingly in the public interest to minimize the number of infections, or at the very least slow the spread of the virus to help allow the medical system time to treat current patients and expand its capacity. *See supra* Factual Background, Parts I-II.

Third, it is also in the public interest to release detainees with particular medical vulnerabilities. The release of people most vulnerable to COVID-19 reduces the overall health

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[37] Ex. AJ to the Supp. Choudhury Decl.
[38] Chuck Goudie, et. al., *Coronavirus Danger Escalating Behind Bars at Some Illinois Prisons, Jails*, ABC 7 (Apr. 10, 2020) https://abc7chicago.com/health/coronavirus-danger-escalating-behind-bars-at-some-illinois-prisons-jails/6093868/, attached as Ex. AO to the Supp. Choudhury Decl.
[39] *306 Cook County Jail Inmates Have Tested Positive, 5 Stateville Prison Inmates Have Died of COVID-19,* CBS Chicago (Apr. 13, 2020), https://chicago.cbslocal.com/2020/04/13/306-cook-county-jail-inmates-have-tested-positive-5-stateville-prison-inmates-have-died-of-covid-19/, attached as Ex. AP to the Supp. Choudhury Decl.
[40] Ex. O to the Choudhury Decl.

risk for detainees and facility staff alike at the McHenry County Jail. Dr. Schriro concludes, in her expert opinion, that vulnerable detainees must be released to mitigate harm not only to vulnerable detainees, but also to "other detainees, correctional and medical staff, and the general public." Schriro Decl. ¶ 54; *see also id.* ¶ 48 (finding that "'flattening the curve' requires focusing on densely populated places in which its inhabitants cannot isolate themselves," including jails and prisons). Respondents have an interest in preventing any potential spread of COVID-19 in the McHenry County Jail, particularly because detainees face great difficulty engaging in proper hygiene and social distancing in a detention environment, placing detainees and staff at risk of contracting COVID-19. *See supra* Factual Background, Part III. Immigration detention facilities face greater risk of infectious spread because of crowding, the proportion of vulnerable people detained, security-related restrictions, insufficient sanitation, and inadequate medical care resources. Venters Decl. ¶¶ 16–21, 40; Schriro Decl. ¶¶ 17, 18, 27–28, 32–36. Public health officials have testified that the release of vulnerable individuals is key to the risk mitigation strategy of any detention facility because it reduces the total number of detainees, allows for greater social distancing, and prevents overloading the work of detention staff. *See supra* Factual Background, Part IV.

D. The Balance of Equities Favors Releasing the Petitioners over Continued Detention In the Midst of this Public Health Crisis.

The balance of equities weighs heavily in favor of releasing Mr. Dembele and Mr. Butt—two civil detainees whose medical conditions place them at heightened risk from COVID-19—from ICE custody. Petitioners have no criminal records, and are civil detainees. Mr. Dembele awaits his day in immigration court, where a motion to reopen his case is pending. Dembele Decl. ¶ 22–25. Mr. Butt awaits deportation and his son's completion of the process of

naturalization to U.S. citizenship, which would offer him the opportunity to file a motion to reopen his immigration case. Butt Decl. ¶ 22–24.

Respondents' countervailing interest in indefinitely detaining the Petitioners in dangerous conditions is weak at best. To the contrary, ICE has many methods to keep track of individuals other than keeping them in indefinite detention. Schriro Decl. ¶¶ 44–45, 47. These methods are more than adequate to accomplish ICE's goals. Moreover, Petitioners' release not only imposes minimal harm to the government, but also ***furthers*** Respondents' interests in maintaining a healthy environment at the McHenry County Jail and minimizing illness and overload on jail staff.

II. This Court May Grant Relief Both Through Habeas and its Inherent Equitable Powers to Remedy Constitutional Harms.

Relief is appropriate in this case whether as a grant of Petitioners' petition for a writ of habeas corpus pursuant to this court's authority under 28 U.S.C. § 2241 ("Section 2241"), or an exercise of the Court's jurisdiction under 28 U.S.C. § 1331 to remedy due process claims through inherent equitable powers. Under either authority, the Court may order Petitioners' immediate release through issuance of a temporary restraining order or preliminary injunction.

Section 2241(d) provides habeas jurisdiction over an individual held "in custody in violation of the Constitution or laws or treaties of the United States." Claims for "immediate discharge from . . . confinement" fall within the "core of habeas corpus," *Preiser v. Rodriguez*, 411 U.S. 475, 487 (1973). Petitioners seek immediate release because it is the only remedy that would redress the constitutional violations at issue here. The U.S. Court of Appeals for the Seventh Circuit has repeatedly held that "if the prisoner is seeking to 'get out' of custody in a meaningful sense," then "the proper vehicle for presenting the claim is habeas corpus . . . ." *Pischke v. Litscher*, 178 F.3d 497, 499 (7th Cir. 1999). Claims falling within the "core" of

habeas include those seeking conditional release from custody, such as release with GPS monitoring, reporting requirements, or bond: "If the prisoner is seeking what can fairly be described as a quantum change in the level of custody—whether outright freedom, or freedom subject to the limited reporting and financial constraints of bond or parole or probation, or the run of the prison in contrast to the approximation to solitary confinement that is disciplinary segregation—then habeas corpus is his remedy." *Graham v. Broglin*, 922 F.2d 379, 381 (7th Cir. 1991). *Cf. Glaus v. Anderson*, 408 F.3d 382, 387 (7th Cir. 2005) (habeas unavailable where "the appropriate remedy would be to call for proper treatment, or to award him damages; release from custody is not an option); *Robinson v. Sherrod*, 631 F.3d 839, 840 (7th Cir. 2011) (habeas unavailable where plaintiff sought MRI and "the challenge could not affect the duration of [the petitioner's] confinement even indirectly"). Petitioners' claim—a due process challenge to the fact of their civil immigration detention—is regularly reviewed in habeas proceedings. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 684–85, 690 (2001) (due process challenge to detention brought in habeas).

Federal courts across the circuits have found habeas jurisdiction proper to order immediate and temporary release to remedy the same injury faced by Petitioners here. "Severe health issues have been the 'prototypical but rare case of extraordinary circumstances that justify release pending adjudication of habeas.'" *Barbecho v. Decker*, No. 20-CV-2821 (AJN), 2020 WL 1876328, at *8 (S.D.N.Y. Apr. 15, 2020) (quoting *Coronel*, 2020 WL 1487274, at *9 (collecting cases)). "If these Petitioners—whose medical conditions place them at a higher risk of severe illness, or death, from COVID-19—were to remain detained, they would face a significant risk that they would contract COVID-19—the very outcome they seek to avoid. Release is therefore necessary to make the habeas remedy effective." *Id.* (quotation

omitted); *see also Calderon Jimenez v. Wolf*, No. 18-cv-10225 (MLW), Dkt. No. 507-1, at 3–4 (D. Mass. Mar. 26, 2020) (granting release where the risk of a COVID-19 outbreak in the relevant prison constituted an extraordinary circumstance).

Given Petitioners' vulnerabilities and the structures that promote explosive spread of COVID-19 in jails, *see supra* 12–16, there are *no* conditions in the McHenry County Jail that can adequately or constitutionally house them, and release is the necessary relief. *See Malam*, 2020 WL 1672662 at *4 (habeas jurisdiction appropriate where immigrant detainee argued "that no matter what steps [were] taken [to mitigate the risk of infection], due to her underlying serious health conditions, there [was] no communal holding facility where she could be incarcerated during the Covid-19 pandemic that would be constitutional"); *see also* Venters Decl. ¶ 40 (concluding that conditions in the McHenry County Jail cannot be altered to protect Petitioners); Schriro Decl. ¶ 42 (same).

As one court recently explained in upholding the right to habeas relief in the COVID-19 context, "[i]n cases involving medical decisions, sometimes fine distinctions must be drawn. . . . But section 2241 has been pressed into service in medical condition cases where the line of demarcation is fuzzy." *Awshana v. Adducci*, No. 20-10699, 2020 WL 1808906, at *2 (E.D. Mich. Apr. 9, 2020). Where petitioners "are not seeking to change the conditions of their confinement or to obtain damages for past constitutional violations," but instead "describe the close living conditions typical of custodial confinement," "recount the current commands for social distancing necessary to inhibit the spread of the novel coronavirus," and "argue that no custodial condition will protect them from infection," then "relief falls squarely within the prevue of section 2241." *Id.* In short, when petitioners, as here, "contend that their continued

detention will compromise their health and may kill them. They are entitled to advance their claim — and seek release from custody — under section 2241." *Id.*

Petitioners also have an independent cause of action in equity under the Fifth Amendment. Federal courts have long recognized an implicit private right of action under the Constitution "as a general matter" to secure prospective injunctive relief against unconstitutional government conduct. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010); *see also Bolling v. Sharpe*, 347 U.S. 497 (1954). Thus, this Court has jurisdiction under 28 U.S.C. § 1331 to enjoin the Respondents' unconstitutional actions. *See Malam*, 2020 WL 1672662, at *4 ("Should Petitioner's habeas petition fail on jurisdictional grounds, the Fifth Amendment provides Petitioner with an implied cause of action, and accordingly 28 U.S.C. 1331 would vest the Court with jurisdiction.").

This Court has "broad" equitable powers and "substantial flexibility" to fashion a remedy for the ongoing violation of Petitioners' rights, including release from detention "[w]hen necessary to ensure compliance with a constitutional mandate." *Brown v. Plata*, 563 U.S. 493, 538 (2011); *see also Hutto v. Finney*, 437 U.S. 678, 687 n.9 (1978). For example, in *Duran v. Elrod*, the Seventh Circuit upheld a district court's order requiring the Cook County Sheriff to release pretrial detainees in order to remedy the poor conditions at the county jail. 713 F.2d 292, 297–98 (7th Cir. 1983), *cert denied*, 465 U.S. 1108 (1984). More recently, in *Brown v. Plata*, the Supreme Court held that a district court had the authority to require California to reduce its prison population to remedy its persistent failure to provide constitutionally adequate medical and mental health care. 563 U.S. 493. The Court found that "[t]he State's desire to avoid a population limit . . . creates a certain and unacceptable risk of continuing violations of the rights of sick and mentally ill prisoners, with the result that many more will die or needlessly suffer.

The Constitution does not permit this wrong." 563 U.S. at 533–34.[41] Thus, courts "must not shrink from their obligation to enforce the constitutional rights of all persons, including prisoners [and] . . . . may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration." *Id.* at 511 (internal citations and quotations omitted).

III. The Court Should Not Require Petitioners to Provide Security Prior to Issuing a Temporary Restraining Order.

Federal Rule of Civil Procedure 65(c) provides that "[t]he court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Rule 65(c), however, invests the district court with discretion as to the amount of security required and whether to waive the requirement altogether. *See Wayne Chem., Inc. v. Columbus Agency Serv. Corp.*, 567 F.2d 692, 701 (7th Cir. 1977) ("Under appropriate circumstances bond may be excused, notwithstanding the literal language of Rule 65(c)"); *Scherr v. Volpe,* 466 F.2d 1027, 1035 (7th Cir.1972) (the district court retains discretion to determine if a bond must be posted despite the mandatory language in Rule 65(c)).

The decision of whether to waive the security requirement in noncommercial cases involves consideration of the applicant's ability to pay, the amount of bond that would absolutely insure the opponent from loss due to the injunction, and an "often implicit[]" balancing "of the relative cost to the opponent of a smaller bond against the cost to the applicant of having to do

[41] Much of the discussion in *Brown* concerned whether the district court's order requiring depopulation of prisons complied with the necessity and narrow tailoring requirements of the Prison Litigation Reform Act ("PLRA"). Such statutory constraints do not apply here because "the [PLRA] does not apply to immigration detainees." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1878 (2017).

without a preliminary injunction that he may need desperately." *Habitat Educ. Center v. U.S. Forest Serv.*, 607 F.3d 453, 458 (7th Cir. 2010). In balancing these factors, courts routinely exercise the discretion to excuse payment of any security before granting of a preliminary injunction in cases brought by indigent and/or incarcerated people. *See, e.g.*, *Wayne Chem., Inc.*, 567 F. Supp. at 701 (indigent plaintiff enforcing rights under group medical policy); *Denny v. Health and Social Services Board*, 285 F. Supp. 526, 527 (E.D. Wis. 1968) (three-judge court) (indigent Petitioners enforcing constitutional rights); *S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot.*, 145 F. Supp. 2d 446, 504 (D.N.J. 2001) (indigent and non-profit Petitioners enforcing civil rights); *Simcox v. Delaware County*, No. 91-6874, 1992 WL 97896, at *6 (E.D. Pa. May 5, 1992) (incarcerated plaintiff enforcing constitutional rights). This Court should do the same here.

CONCLUSION

The country faces a public health crisis of epic proportions. COVID-19 presents risks to all of us, and has forced us to come together as a country, and do what is right for the community and the public health. We must allow and encourage everyone to engage in the only practices known to flatten the curve—social distancing and vigorous hygiene. This protects the most vulnerable among us and hopefully gives our overtaxed healthcare system the chance to treat those most gravely affected by COVID-19. Petitioners are among the most vulnerable, who have no choice but to wait for this deadly virus to rip through the McHenry County Jail and leave havoc in its wake. The only humanitarian and constitutional solution is to order the immediate release of these Petitioners so they can protect themselves to the greatest extent possible. Petitioners ask this Court to join the growing chorus of courts who have decided to act in an

effort to save lives. The time to act is now. Petitioners' emergency habeas petition and motion for a temporary restraining order and preliminary injunction should be granted.

Dated: April 22, 2020

Respectfully Submitted,

/s/ Nusrat J. Choudhury
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CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2020, I electronically filed the foregoing MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' EMERGENCY PETITION FOR A WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2241 AND MOTION FOR A TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION with the Clerk of the Court using the CM/ECF system, which will send notification of said filing to counsel of record for all parties.

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