

**IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS**

JOAQUIN HERRERA-HERRERA,

Petitioner-Plaintiff,

v.

MICHAEL DOWNEY, in his individual capacity and official capacity as Sheriff of Kankakee County; CHAD KOLITWENZEW, Chief of Corrections of the Jerome Combs Detention Center; ROBERT GUADIAN, Field Office Director, Enforcement and Removal Operations, U.S. Immigration and Customs Enforcement; MATTHEW ALBENCE, Acting Director, U.S. Immigration and Customs Enforcement; and CHAD WOLF, Acting Secretary, U.S. Department of Homeland Security,

Respondents-Defendants.

Case No. _____

**MEMORANDUM OF LAW
IN SUPPORT OF PETITIONER’S
EMERGENCY PETITION
FOR A WRIT OF HABEAS CORPUS
AND MOTION FOR A TEMPORARY
RESTRAINING ORDER AND/OR
PRELIMINARY INJUNCTION**

COVID-19, the disease caused by a novel coronavirus, is ravaging 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 May 12, 2020, more than 4 million people have tested positive for the virus, and 283,271 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

¹ World Health Org., *WHO Coronavirus Disease (COVID-19) Dashboard*, <https://covid19.who.int/> (last visited May 12, 2020), attached as Ex. 1 to the Declaration of Nusrat J. Choudhury (hereafter “the Choudhury Decl.”).

² Ctrs. for Disease Control & Prevention, *Coronavirus Disease 2019 (COVID-19): Cases in the U.S.*, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last visited May 12, 2020), attached as Ex. 20 to the Choudhury Decl.

question now is what we can do to protect the most vulnerable individuals from contracting COVID-19, fanning 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 in order to reduce infections and ease the strain on overwhelmed local health systems.

Petitioner-Plaintiff Joaquin Herrera-Herrera (“Petitioner”) is a civil detainee of U.S. Immigration and Customs Enforcement (“ICE”) in the Jerome Combs Detention Center (“JCDC”), where jail conditions put him right in the path of the fire. He has hypertension, a condition that makes him vulnerable to serious complications or death from COVID-19. Because he is 60 years old, he also faces increased risk of serious complications or death from COVID-19 due to his age. Furthermore, Mr. Herrera-Herrera has a history of cancer and an untreated lump on his head for which he was referred to a specialist before detention forestalled the appointment.

As two courts in this District recently recognized, “[d]etention facilities, and other congregate settings, present an increased danger for the spread of COVID-19 if it is introduced into the facility.” *Hernandez v. Kolitwenzew*, No. 20-cv-2088-SLD, Dkt. 12 at 5 (C.D. Ill. April 23, 2020). “[I]nfectious diseases communicated by air or touch are more likely to spread in these environments.” *Id.* And “[m]aintaining social distancing is often not possible in a detention center without drastic population reductions where detainees inevitably share cells and common areas.” *Favi v. Kolitwenzew*, No. 20-cv-2087, 2020 WL 2114566, at *2 (C.D. Ill. May 4, 2020). As a result, in both cases, courts held that JCDC conditions violated the Fifth Amendment and required immediate release of medically vulnerable detainees.

Conditions in the jail have not meaningfully improved since the *Hernandez* and *Favi* opinions were issued, and still create an “objectively unreasonable” risk of severe illness and

death for a medically vulnerable detainee, in violation of the Due Process Clause of the Fifth Amendment. Like the *Hernandez* and *Favi* petitioners, Mr. Herrera-Herrera is at high risk of serious illness or death from COVID-19 due to his medical condition and age. Petitioner filed an Emergency Petition for a Writ of Habeas Corpus and Complaint for Injunctive and Declaratory Relief (Dkt. 1) (“Emergency Petition”) and a Motion for Temporary Restraining Order and/or Preliminary Injunction (“TRO Motion”) to enforce his rights. This brief supports Petitioner’s request for immediate 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.

NOTICE TO RESPONDENTS

On the morning of May 14, 2020, counsel for Petitioner emailed the offices of the U.S. Attorney for the Central District of Illinois and the Kankakee County State’s Attorney to advise them of the reasons requiring a temporary restraining order and preliminary injunction. Later that day, Petitioner’s Counsel emailed copies of the Emergency Petition, TRO Motion, this brief, and attached exhibits to Assistant U.S. Attorneys Hilary W. Frooman and John David Hoelzer and Kankakee County State’s Attorneys Jim Rowe and Nancy Ann Nicholson.

FACTUAL BACKGROUND

This Motion relies on facts set forth in the Emergency Petition and summarized here. The Emergency Petition is supported by attached declarations, including three expert declarations:

- The declaration of Dr. Jonathan Louis Golob (“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 currently is “actively involved in the planning and care for patients with COVID-19.” *Id.*
- The declaration of Dr. Homer Venters (“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 led

health services for New York City jails for nine years and analyzed detainee health policies for the U.S. Department of Homeland Security (“DHS”) for two years. *Id.* ¶¶ 1, 2 & Ex. A. He has visited immigration detention centers, worked with ICE on medical release cases and health policies, and testified before the U.S. Congress on mortality in ICE detention facilities. *Id.* ¶ 1.

- The declaration of Dr. Dora Schriro (“Schriro Decl.”), a corrections expert with extensive experience running prisons and jails and establishing policies for ICE detainees. Dr. Schriro was a Senior Advisor to former DHS Secretary Janet Napolitano and the founding Director of the ICE Office of Detention Policy and Planning. Schriro Decl. ¶ 3. She 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. She has helped develop professional standards for correctional systems and ICE detention facilities. *Id.* ¶ 8.

I. Petitioner’s Age and Medical Condition Render Him Highly Vulnerable to Serious Illness or Death from COVID-19.

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. *Id.* ¶ 4. Even when it is not fatal, COVID-19 can severely damage lung tissue, cause permanent loss of respiratory capacity, and damage the heart and other organs. *Id.* ¶ 9. People age 50 and older and those of any age with underlying medical conditions are at high risk of severe illness and death from COVID-19. *Id.* ¶ 3; Venters Decl. ¶ 22.

Mr. Herrera-Herrera is 60 years old, has hypertension and a recent history of cancer, and has daily symptoms of fatigue, chest pain, and difficulty breathing. Herrera-Herrera Decl. ¶¶ 2, 6, 12, 15. His age and medical conditions place him at heightened risk of serious illness and death should he contract COVID-19. Venters Decl. ¶ 44.

II. Conditions for ICE Detainees in JCDC Increase the Risk of Coronavirus Infection.

COVID-19 is at the doors of JCDC, if it has not already entered. As of May 11, 2020, Kankakee County had 753 confirmed cases and 33 deaths related to COVID-19.³ The disease has already hit the Pulaski County Detention Center, an Illinois jail that, like JCDC, houses both ICE detainees and pre-trial detainees. Venters Decl. ¶ 13. Nationwide, the disease has torn through jails, prisons and detention facilities. *See* Venters Decl. ¶¶ 10–15.

Respondents have not taken sufficient steps to prevent the entry or spread of COVID-19 in JCDC. Based on the Declaration of Chad Kolitwenzew filed in *Favi*, No. 20-cv-2087, Dkt. 20-2 (C.D. Ill. Apr. 24, 2020), Dr. Venters found that there is inadequate medical staffing and no policy to ensure prompt clinical evaluation or tracking of COVID-19 symptoms reported in sick call requests. Venters Decl. ¶ 41(b), (c). Nor does JCDC appear to have followed ICE policy and Centers for Disease Control and Prevention (“CDC”) recommendations for detention facilities to develop COVID-19 mitigation plans to prepare for the eventual entry of the coronavirus. *Id.* ¶¶ 39–40, 41(a). Dr. Venters further observed that Mr. Herrera-Herrera’s declaration reflects “a lack of social distancing and basic infection control measures within JCDC,” due to close sleeping and living quarters, close contact among detainees in medication lines, failure to provide masks to detainees, and “a basic failure of JCDC health and security staff to communicate with detained people about the status of the COVID-19 outbreak and the facility plan for response.” *Id.* ¶ 44(e), (f). Many of Mr. Herrera-Herrera’s observations contradict Respondent Kolitwenzew’s claims that certain measures have been in place since March, including nurses’ rounds to distribute medication in cells, disinfection of tables and showers three times a day, and reminders to

³ *See* Kankakee Cty. Health Dep’t., *Daily COVID-19 Update for Kankakee County* (May 11, 2020), https://www.kankakeehealth.org/images/COVID-19_Daily_update_5.11.pdf, attached as Ex. 17 to the Choudhury Decl.

detainees about social distancing. *Id.* ¶ 46. In any case, Dr. Venters concludes that the steps described by Respondent Kolitwenzew would be inadequate even if fully implemented. *Id.* ¶ 42.

III. The Unsafe Conditions at JCDC Endanger the Surrounding Community.

The longer that JCDC continues detaining medically vulnerable people like Mr. Herrera-Herrera without sufficient procedures to prevent entry and spread of COVID-19 in the facility, the greater the threat that the jail poses to Kankakee County at large, as a recent study illustrates.⁴ The study, conducted by a consortium of experts, including DHS medical experts, concludes that ICE facilities will quickly contribute to the depletion of local hospital resources and that action is required “not only [to] reduce morbidity and mortality outcomes in its population of detained immigrants, but [to] minimize negative health outcomes in the communities that support ICE’s detention facilities with health care resources.”⁵ Otherwise, “the successful social distancing strategies implemented in a community may be undone by the large number of detainee infectious disease cases that its hospitals must care for.”⁶ Similarly, Dr. Schriro concludes that medically vulnerable ICE detainees should be released as quickly as possible.... to protect themselves, other detainees, correctional and medical staff, and the general public.” Schriro Decl. ¶¶ 55–56; *see also id.* ¶¶ 42, 50.

IV. Petitioner’s Immediate Release is the Only Means of Protecting Him from Serious Illness and Death.

Because Respondents have shown themselves unable to protect medically vulnerable detainees from COVID-19, Petitioner “is in peril of serious illness or death if he remains in

⁴ See Daniel Coombs & Michael Irvine, *Modeling COVID-19 and Impacts on U.S. Immigration and Enforcement (ICE) Detention Facilities, 2020* [“ICE Facilities Study”], J. Urb. Health 2020, at 1, https://whistleblower.org/wp-content/uploads/2020/04/Irvine_JUH_ICE_COVID19_model.pdf, attached as Ex. 15 to the Choudhury Decl.

⁵ *Id.* at 9.

⁶ *Id.*

detention.” Venters Decl. ¶ 48. Accordingly, ICE and JCDC must immediately “release Mr. Herrera-Herrera to prevent his serious illness and/or death.” *Id.*

There is no reason to believe that Mr. Herrera-Herrera poses a danger to the community or a flight risk. He has been a lawful permanent resident of the United States since age six and has lived in the Chicago area almost all of his life. Herrera-Herrera Decl. ¶¶ 19, 22. He has U.S. citizen children and has been a small business owner for 37 years. *Id.* ¶¶ 3–4. He was his grandson’s primary caregiver for more than six years. *Id.* ¶ 3. Mr. Herrera-Herrera is now detained after being directly transferred to ICE custody following a sentence for driving under the influence. *Id.* ¶ 26. He has two prior DUI convictions and two minor drug possession convictions—none more recent than 2007. *Id.* ¶ 24. He has never been charged with any violent crime. *Id.* ¶ 25.

Even if there were legitimate concerns about Mr. Herrera-Herrera’s release, they could be addressed with the many alternatives to detention at ICE’s disposal. Schriro Decl. ¶¶ 44–49. “Alternatives to detention are effective because they are tailored to an individual depending on their levels of need and risk in the community [while] maximiz[ing] medically vulnerable and low-risk people’s ability to remain healthy in the community while protecting public safety and the integrity of court proceedings and other legal requirements.” *Id.* ¶ 49.

Due to COVID-19, immigration matters are proceeding glacially through the courts,⁷ raising the prospect of indefinite detention for Mr. Herrera-Herrera, a lawful permanent resident

⁷ As of March 2020, there were over 1.1 million cases pending in the immigration court system, and the average wait for a disposition in Chicago was 859 days. See *Immigration Court Backlog Tool*, TRAC Reports, Inc., https://trac.syr.edu/phptools/immigration/court_backlog/ (last visited May 11, 2020), attached as Ex. 32 to the Choudhury Decl.

in the United States for over 50 years. Given the severe risk to his life and health, the risk to the community, and the availability of alternatives to detention, this must not happen.

LEGAL STANDARD

A plaintiff seeking a preliminary injunction or temporary restraining order must show “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 Cumulus Radio Corp. v. Olson*, 80 F. Supp. 3d 900, 904 (C.D. Ill. 2015) (TRO requires showing “some likelihood of success on the merits,” a lack of “adequate remedy at law,” and “irreparable harm,” and “balanc[ing] the relative harms of the parties and the public.”). “[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).

ARGUMENT

I. Petitioner is Entitled to a Temporary Restraining Order and Preliminary Injunction Ordering His Immediate Release.

Immediate injunctive relief is necessary because the danger here—prolonged illness, permanent organ damage, and potential death—is the quintessential irreparable harm. There is also an overwhelming public interest in limiting the spread of COVID-19 to minimize further infections and to reduce strain on overwhelmed health systems. The balance of equities therefore weighs heavily in favor of Petitioner, an older and medically vulnerable person who must be released in order to self-isolate, and against Respondents’ interest in confining Petitioner in life-threatening conditions. The Court should order the Petitioner released from custody.

A. Petitioner is Likely to Succeed on the Merits of His Due Process Claim.

“[W]hen the State takes a person into its custody and holds him there against his will. . . . when [it] so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—[including] reasonable safety—it transgresses the substantive limits on state action set by . . . the Due Process Clause.” *DeShaney v. Winnebago County Dept. of Soc. Services*, 489 U.S. 189, 199–200 (1989); *see also Hernandez v. Kolitwenzew*, No. 20-cv-2088-SLD, Dkt. 12 at 14 (C.D. Ill. April 23, 2020). This is the state of affairs at JCDC, as demonstrated by the record evidence and the previous rulings of courts in this District. As millions of Americans take extreme measures to guard against the coronavirus, Respondents are failing to protect Petitioner while depriving him of the ability to protect himself.

Petitioner must show only that the challenged conditions are *objectively* unreasonable in order to prevail on his due process claim. A civil detainee’s due process claim is “subject *only* to the objective unreasonableness inquiry,” which is less exacting than the “Eighth Amendment deliberate-indifference standard.” *Hardeman v. Curran*, 933 F.3d 816, 822–24 (7th Cir, 2019) (emphasis supplied). Reasonableness is measured by the cumulative effect of 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); *see also Favi v. Kolitwenzew*, No. 20-cv-2087, 2020 WL 2114566, at *9 (C.D. Ill. May 4, 2020) (using “objectively unreasonable” standard); *Hernandez*, No. 2:20-cv-2088-SLD, Dkt. 12 at 15 (same).

Like the petitioners in both *Hernandez* and *Favi*, “Mr. Herrera-Herrera has pre-existing medical conditions—notably, hypertension—which place him at heightened risk of serious illness or death should he contract COVID-19 infection.” Venters Decl. ¶ 44. At 60 years old, Mr. Herrera-Herrera’s age is also a risk factor. *Id.* The risk is aggravated by medical staff’s

infrequent blood pressure checks and apparent misunderstanding of hypertension care, as well as their failure to investigate symptoms of fatigue, light-headedness, and shortness of breath. *Id.*

Two judges of this District have already found that the measures taken by JCDC to prevent the spread of the coronavirus were “[i]n light of the seriousness of the pandemic . . . insufficient [to] address Petitioner’s medical needs and conditions of confinement.” *Hernandez*, No. 2:20-cv-2088-SLD, Dkt. 12 at 17; *Favi*, 2020 WL 2114566, at *10 (finding JCDC measures “insufficient to minimize [detainee’s] risk of harm given the Government’s limited continued interest in . . . detention”). Given “the totality of the circumstances—which include Petitioner’s heightened risk of serious illness or death from COVID-19, the inability of other jails and detention centers to control the spread of the virus once it enters the facility, and the limits of the precautionary measures taken by the facility that could conceivably be taken at the facility in light of the potential for asymptomatic spread,” the *Hernandez* court found that “Petitioner’s continued detention under these conditions is objectively unreasonable and violates his substantive due process rights under the Fifth Amendment.” *Id.* at 19–20. Likewise, in *Favi*, the Court found that “Petitioner’s continued detention [at JCDC] under these conditions is not objectively reasonable,” given his serious medical conditions. 2020 WL 2114566, at *12.

Both *Hernandez* and *Favi* addressed measures JCDC claims to have taken, including “a disinfection routine three times a day, which includes door handles, toilets, showers, and tables”; “temperature checks of each detainee twice a day”; “temperature checks of each detainee twice a day”; “staff wear[ing] gloves, a hair net, and face mask” during meal distribution; and “verbally remind[ing] the detainees to maintain a distance of six feet from the detainee in front of them.” *Favi*, 2020 WL 2114566, at *3–4. The *Favi* court noted, however, that “[d]espite Respondent’s

declaration that these policies were in place as of March 9, 2020, Petitioner reports that, at least as of his release on April 10, 2020, many of these measures were not practiced.” *Id.* at *4.

The same is true a month later. Mr. Herrera-Herrera observes that the only information the jail has provided to detainees about COVID-19 are posters advising handwashing and social distancing, with no explanation of how to achieve this in jail. Herrera-Herrera Decl. ¶¶ 38–39. Detainees must stand close together in line in order to receive their medication and meals, and jail staff do not instruct them to stay six feet apart. *Id.* ¶¶ 40, 42, 44. Most detainees still spend their days seated close together at tables in the dayroom, playing cards and board games at the same tables where they will later eat and sort laundry. *Id.* ¶¶ 31–32, 45, 57. Detainees are not given masks, gloves, or hand sanitizer. *Id.* ¶¶ 41, 52, 61.

Dr. Venters reviewed the April 24, 2020 declaration submitted by Respondent Chad Kolitwenzew in *Favi*, and notes that Petitioner’s declaration refutes many of the claims made about JCDC’s COVID-19 response. Venters Decl. ¶ 41.⁸ In any case, Dr. Venters found that the measures set forth in the “declaration would be inadequate even if fully implemented.” *Id.* ¶ 39. This confirms the finding in *Favi* that even if actually practiced, the “JCDC measures are insufficient to minimize Petitioner’s risk of harm.” *Favi*, 2020 WL 2114566, at *10.

Because JCDC conditions are objectively unreasonable for a detainee at high risk for severe COVID-19, Petitioner is likely to succeed on his Fifth Amendment claim.

⁸ See Declaration of Chad Kolitwenzew, Chief of Corrections for the Kankakee County Sheriff’s Office, *Favi v. Kolitwenzew*, No. 20-cv-2087 (C.D. Ill. April 24, 2020), Dkt. 20-2 (“Kolitwenzew Declaration”), attached as Exhibit H to the Venters Decl.

B. The Imminent and Severe Threat to Petitioner’s Life and Well-being Constitutes Irreparable Harm.

“Courts across the United States have found that [certain] underlying health conditions coupled with the lack of hygiene and overcrowding present at detention facilities pose a risk of irreparable harm . . . that supports the grant of a TRO.” *Perez v. Wolf*, No. 5:19-cv-05191-EJD, 2020 WL 1865303, at *13 (N.D. Cal. Apr. 14, 2020); *see also Basank v. Decker*, 20 Civ. 2518 (AT), 2020 WL 1481503, at *4 (S.D.N.Y. Mar. 26, 2020) (“The risk that Petitioners will face a severe, and quite possibly fatal, infection if they remain in immigration detention constitutes irreparable harm warranting a TRO.”). As the *Hernandez* and *Favi* courts recognized, the risk is severe even if COVID-19 has not yet been detected at the facility, because “any amount of exposure to COVID-19 would pose an unreasonable risk of serious damage to Petitioner’s health.” *Hernandez* at 18; *see also Favi*, 2020 WL 2114566, at *11 (rejecting the notion that petitioner is not at risk because there are no known cases of COVID-19 at JCDC).

Moreover, by the time COVID-19 is detected in JCDC, it will be too late to prevent harm to Petitioner. The disease “has spread rapidly in immigration detention centers.” Venters Decl. ¶ 12. The ICE Facilities Study confirms the “fast pace” of coronavirus transmission in detention settings and concludes that coronavirus will “inevitably” enter ICE facilities.⁹ Even under the most optimistic scenario, it concludes that once inside a 500-person facility, coronavirus will infect between **12%** and **81%** of detainees within 30 days, between **52%** and **97%** of detainees within 60 days, and between **77%** and **99%** of detainees within 90 days.¹⁰ The study concludes that ICE facilities can quickly deplete local hospital resources and that action is required “not

⁹ ICE Facilities Study, Ex. 15 to the Choudhury Decl., at 3.

¹⁰ As of April 22, 2020, JCDC had a population of 344 detainees, including 63 separately housed male ICE detainees. *Favi*, 2020 WL 2114566 at *4.

only [to] reduce morbidity and mortality outcomes in its population of detained immigrants, but [to] minimize negative health outcomes” in surrounding areas.¹¹

Under these circumstances, and given the Petitioner’s age and medical conditions, the risk to his health and life is severe, imminent, and irreparable.

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

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 COVID-19 is overwhelming.

First, because jail staff move between the facility and the county at large, the conditions at JCDC “do not merely threaten detainees; they also threaten facility staff, not to mention the greater community whose health is put at risk by the congregation of large groups in cramped spaces.” *Zepeda Rivas v. Jennings*, 20-CV-02731-VC, 2020 WL 2059848, at *3 (N.D. Cal. Apr. 29, 2020). Moreover, as described above, the spread of COVID-19 in Kankakee County—which already has at least 753 cases and 33 deaths as of May 11, 2020—risks overwhelming the county’s health system. *See* Part II of the Factual Background.

D. The Balance of Equities Decisively Favors Petitioner’s Release.

Measured against the irreparable injury the Petitioner faces if he remains detained, and the strong public interest in his release, the Respondents have little to no interest in continuing to detain him. He is a 60-year-old grandfather, a lawful permanent resident of the United States

¹¹ *Id.* at 6 and Table 1.

since the age of 6, and a small business owner in Calumet City for 37 years. Herrera-Herrera Decl. ¶¶ 1–4. There is no reason to believe that he is a danger to others or a flight risk, but even if he were, ICE has plenty of alternatives to detention. *See* Part IV of Factual Background.

II. This Court May Grant Relief Through Habeas or Through Its Inherent Equitable Powers to Remedy Constitutional Harms.

Relief is appropriate in this case whether as a grant of 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 its inherent equitable powers. Under either authority, the Court may order Petitioner’s immediate release by issuing a temporary restraining order or preliminary injunction.

Claims for “immediate discharge from . . . confinement” fall within the “core of habeas corpus[.]” *Preiser v. Rodriguez*, 411 U.S. 475, 487 (1973). Petitioner seeks immediate release because it is the only remedy that would redress the constitutional violations at issue here. Both *Henandez* and *Favi* recognized that such a remedy is available in habeas. “While a ‘run-of-the-mill’ condition of confinement claim may not touch upon the fact or duration of confinement, here, Petitioner is seeking immediate release based upon the claim that there are essentially no conditions of confinement that are constitutionally sufficient given the facts of the case.” *Hernandez*, at 12–13. Accordingly, “[c]ourts across the country addressing similar claims of civil immigration detainees during the COVID-19 pandemic have found that such a claim can proceed in a habeas corpus petition.” *Favi*, 2020 WL 2114566, at *6 (listing cases).

Petitioner also has an implicit private right of action to secure prospective injunctive relief against government conduct that violates his due process rights. *Free Enterprise 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). This Court has “broad” equitable powers and “substantial flexibility” to

fashion a remedy for this ongoing constitutional violation, including release from detention “[w]hen necessary to ensure compliance with a constitutional mandate.” *Brown v. Plata*, 563 U.S. 493, 511, 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 an order requiring the Cook County Sheriff to release pretrial detainees to remedy poor jail conditions. 713 F.2d 292, 297–98 (7th Cir. 1983), *cert denied*, 465 U.S. 1108 (1984). And in *Brown v. Plata*, the Supreme Court held that a district court could require California to reduce its prison population to remedy the persistent failure to provide constitutionally adequate medical and mental health care. 563 U.S. 493. “The 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.” 563 U.S. at 533–34.¹²

CONCLUSION

Respondents’ ongoing violation of Petitioner’s Fifth Amendment right to due process puts him at imminent risk of irreparable harm and endangers the community surrounding JCDC. Since the Respondents have little if any interest in continuing to detain him, Petitioner respectfully requests the Court to exercise its habeas corpus authority or its inherent equitable powers to order his immediate release.

¹² 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).

Dated: May 14, 2020

Respectfully Submitted,

/s/ Rebecca K. Glenberg
Counsel for Petitioner-Plaintiff.

Michael Tan*
Malita Picasso
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500
mtan@aclu.org
mpicasso@aclu.org
dladin@aclu.org

David Fathi*
Eunice H. Cho*
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
915 15th St. N.W., 7th Floor
Washington, DC 20005
(202) 548-6616
dfathi@aclu.org
echo@aclu.org

Nusrat J. Choudhury*
Rebecca Glenberg
Juan Caballero*
Aarón Siebert-Llera
Ana Torres*
ROGER BALDWIN FOUNDATION OF
ACLU, INC.
150 North Michigan Avenue,
Suite 600
Chicago, IL 60601
(312) 207-9740
nchoudhury@aclu-il.org
rglenberg@aclu-il.org
jcaballero@aclu-il.org
asiebert-llera@aclu-il.org
atorres@aclu-il.org

Colby A. Kingsbury
David Sudzus
Catherine M. Masters
Ehren M. Fournier
FAEGRE DRINKER BIDDLE
& REATH LLP
311 S. Wacker, Suite 4300
Chicago, IL 60606
(312) 212-6500
colby.kingsbury@faegredrinker.com
david.sudzus@faegredrinker.com
catherine.masters@faegredrinker.com
ehren.fournier@faegredrinker.com

Counsel for Petitioner-Plaintiff
** Admission pending.*

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that on May 14, 2020, she caused a copy of the above and foregoing MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S EMERGENCY PETITION FOR A WRIT OF HABEAS CORPUS AND MOTION FOR A TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION to be served on the following:

By Summons Process Service:

Michael Downey, Sheriff
Sheriff of Kankakee County
3000 Justice Way
Kankakee, IL 60901

Chad Kolutwenzew
Chief of Corrections of the Jerome Combs Detention Center
3050 Justice Way
Kankakee, IL 60901

By US Certified Mail:

Robert Guadian
Enforcement and Removal Operations
U.S. Immigration and Customs Enforcement
101 W Ida B Walls Drive, Suite 4000
Chicago, IL 60605

Matthew Albence
Deputy Director and Senior Official Performing the Duties of the Director
of U.S. Immigration and Customs Enforcement
500 12th St., SW
Washington, DC 20536

Chad Wolf
Acting Secretary of Homeland Security
Office of Executive Secretary, MS 0525
2707 Martin Luther King Jr. Ave SE
Washington, DC 20528

Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Office of the United States Attorney
ATTENTION: Tami Richmond
Secretary to the United States Attorney
318 S. Sixth Street
Springfield, IL 62701

By Email:

Jim Rowe
Kankakee County State's Attorney
JROWE@k3county.net

Nancy Ann Nicholson
Kankakee County State's Attorney
nnicholson@k3county.net

Hilary W. Frooman
Assistant U.S. Attorney
U.S. Attorney's Office for the Central District of Illinois
Courteilary.frooman@usdoj.gov

John David Hoelzer
Assistant U.S. Attorney
U.S. Attorney's Office for the Central District of Illinois
john.hoelzer@usdoj.gov

/s/ Rebecca K. Glenberg_____