

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA**

JENNER BENAVIDES, *et al.*,

Petitioners/Plaintiffs,

v.

PATRICK GARTLAND, *et al.*,

Respondents/Defendants.

Case No.: 5:20-cv-46-LGW-BWC

HEARING REQUESTED

**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY
INJUNCTION AND EMERGENCY WRIT OF HABEAS CORPUS**

Petitioners¹ are immigrants in ICE custody at Folkston ICE Processing Center (“Folkston”) in rural southeast Georgia. Petitioners have medical conditions that put them at high risk of serious illness or death if they contract COVID-19, which is almost certain to happen if they remain in detention. It is impossible for Petitioners to protect themselves from COVID-19 in a carceral setting like Folkston, where daily close contact with guards and dozens of other detained individuals is unavoidable and good personal hygiene unattainable. Petitioners fear for their lives if the Court does not emergently intervene.

Petitioners previously moved this Court for a preliminary injunction ordering Respondents to release them on April 8, 2020. *See* Dkt. 4. At the time, there were not yet any reported cases of COVID-19 at Folkston. The Court denied Petitioners emergency relief on the ground that the factual record “thus far” did not sufficiently prove release to be the only remedy that would cure

¹ Petitioners Jenner Benavides, David Fernandez, and Gerardo Arriaga are proceeding in this action using pseudonyms, as permitted by oral order of the Court on April 15, 2020. Petitioners Ajit Kumar and Winston Brown also use pseudonyms herein and have filed a motion to proceed pseudonymously. Respondents have indicated that they will not take a position on Petitioners’ motion.

the unconstitutional risk of harm that Petitioners face in detention.² Dkt. 32 at 13. In denying Petitioners' motion, the Court emphasized the "narrow reach" of its order and acknowledged the possibility that Petitioners could prove their entitlement to release with a more developed factual record. *Id.*

Petitioners now file this second motion for a preliminary injunction, urging the Court to order their release in light of additional evidence showing their imminent risk of injury in detention. A month has now passed since Petitioners' first motion for a preliminary injunction, and Respondents continue to fail to implement adequate measures to minimize the risk of a COVID-19 outbreak at Folkston. On May 4, 2020, ICE publicly confirmed the first known case of COVID-19 among the detained population at Folkston.

Petitioners also seek injunctive relief compelling Respondents to implement measures to protect Petitioners as long as they are in custody. While Petitioners contend that release remains the sole remedy to prevent irreparable harm to them, there are immediate steps this Court can and should take pursuant to the Fifth Amendment and 28 U.S.C. § 1331 to mitigate risk to Petitioners if they remain in custody, including ordering Respondents to comply with provisions of the Centers for Disease Control and Prevention ("CDC") Guidance; review the necessity of Petitioners' confinement; and report certain data to ensure compliance.

I. FACTUAL BACKGROUND

As of May 8, 2020, the COVID-19 pandemic has infected almost four million people and taken over 271,637 lives globally, including nearly 1.3 million confirmed cases and 76,942 deaths

² The Court interpreted Petitioners' claim for injunctive relief as arising under Rule 65, which provides no independent cause of action; however, the broad injunctive authority of the Court to enjoin unconstitutional action arises under the Fifth Amendment and 28 U.S.C. § 1331. See *infra*, Section II.A.5.

in the United States and 31,624 cases and 1,351 deaths in Georgia.³ COVID-19 is highly contagious and can be transmitted through respiratory droplets or aerosolized particles from coughing, sneezing, talking, breathing, or even flushing fecal matter in the toilet.⁴ Dkt. 4-4 ¶ 7; *see also* Ex. 1 ¶ 5a.⁵ It can require hospitalization and the use of a ventilator; may result in many months of recovery⁶ from long-term illness or organ damage; and can even lead to death. There is no known vaccine or cure. Dkt. 4-3 ¶¶ 5, 7; Dkt. 4-4 ¶¶ 6, 10. Diligent hand hygiene and social distancing—staying at least six feet away from all other people—are the only known ways to avoid exposure. Dkt. 4-3 ¶¶ 5, 9, 11; Dkt. 4-4 ¶ 11; Dkt. 4-5 ¶¶ 11, 22.

A. Detention Endangers Petitioners and They Must Be Released

Petitioners have chronic medical conditions—including diabetes, heart and lung disease, neurological conditions, and compromised immune systems—that put them at high risk of life-threatening cases of COVID-19. *See generally* Dkt. 4-9 to 4-11; Dkt. 37-5 to 37-7; *see also* Dkt. 4-3 ¶¶ 6, 8; Dkt. 4-4 ¶¶ 4-5; Dkt. 4-5 ¶ 5.

1. Continued Detention Puts Petitioners at High Risk

Continued detention at Folkston puts Petitioners at imminent risk of COVID-19 exposure. Detention centers are particularly susceptible to rapid spread of infectious disease due to their congregate nature. Dkt. 4-3 ¶¶ 11, 12, 21; Dkt. 4-5 ¶¶ 19-20; Dkt. 4-6 ¶ 5. As more information is revealed from detention centers nationwide, it appears more likely that COVID-19 has infected

³Worldometer: Coronavirus, <https://www.worldometers.info/coronavirus/#countries> (last visited May 8, 2020); *Georgia Department of Public Health COVID-19 Daily Status Report* (last visited May 8, 2020), <https://dph.georgia.gov/covid-19-daily-status-report>. The number of cases is likely an underestimate “due to lack of availability of testing” in the United States. Dkt. 4-3 ¶ 3.

⁴See Lisa Brosseau, *Commentary: COVID-19 transmission messages should hinge on science*, U. Minn. Ctr. for Infectious Disease Res. & Pol'y (Mar. 16, 2020), <https://bit.ly/2VOjKeg>.

⁵ Exhibit 1 to this Memorandum is the Declaration of Dr. Homer Venters, attached to the concurrently-filed Declaration of Hillary Li.

⁶ David Templeton, *Recovery from COVID-19 can take months or longer, local health experts say*, Pittsburgh Post-Gazette (Apr. 28, 2020), <https://bit.ly/3aQ646w>.

more detained people at Folkston than are currently reported.⁷ A recent study estimates that, assuming a moderate rate of transmission, approximately 77% of the detained population, or about 600 people, at Folkston will be infected within 90 days of the date the first detained person at the facility was infected. Dkt. 37-11 (data set available at www.icecovidmodel.org, which contains the source data for the report). The current situation at Otay Mesa Detention Center in California provides a chilling example. ICE reported its first case of COVID-19 at Otay Mesa Detention Center on April 4, 2020.⁸ Only one month later, the number of confirmed cases had skyrocketed to at least 132, and Otay Mesa had announced its first COVID-19-related death.⁹ Folkston reported its first case of COVID-19 on May 4, 2020.¹⁰ Respondents must act now in order to avert a similar public health crisis with irreversible consequences at Folkston. Detention center staff, ICE officers, contractors, vendors, and legal visitors continue to enter and exit on a daily basis, and ICE continues to transfer immigrants to Folkston. *See* Dkt. 30-2 ¶¶ 4-5; Dkt. 30-3 ¶¶ 4-5; Dkt. 30-4 ¶ 6; Dkt. 37-5 ¶ 9; Dkt. 37-6 ¶ 21; Dkt. 37-7 ¶ 22; Dkt. 37-8 ¶ 8; Dkt. 37-10 ¶ 11 (describing new detained people being brought into Folkston during the COVID-19 outbreak). Folkston also continues to disregard basic CDC requirements for maintaining cleanliness, limiting transfers, and

⁷ See, e.g., Janet McConnaughey, *Coronavirus: Nearly Entire Louisiana Prison Dorm Tests Positive for COVID-19*, AP (May 4, 2020), <https://bit.ly/3friVQ4> (after 39 women in a dorm at a prison first showed symptoms, universal testing was done and 192 out of 195 women in the dorm tested positive, and dozens more developed symptoms shortly); Jonathan Mattise, *1,299 inmates test positive for virus at Tennessee prison*, Associated Press (May 1, 2020), <https://apnews.com/5d0dde8eaa0385c9fd97e1545a5857da> (1,299 out of 2,444 incarcerated individuals infected with COVID-19).

⁸ Compare ICE Guidance on COVID-19 (updated Apr. 3, 2020), <https://web.archive.org/web/20200404085129/https://www.ice.gov/coronavirus#tab1> (reporting no confirmed cases at Otay Mesa) with ICE Guidance on COVID-19 (updated Apr. 4, 2020) <https://web.archive.org/web/20200407091052/https://www.ice.gov/coronavirus> (reporting one confirmed case at Otay Mesa).

⁹ Jennifer Lothspeich, *1st COVID-19 related death of Otay Mesa Detention Center detainee confirmed*, CBS8 (May 6, 2020), <https://bit.ly/2SHTVul>; ICE Guidance on COVID-19 (last updated May 7, 2020), <https://www.ice.gov/coronavirus>.

¹⁰ See ICE Guidance on COVID-19, *supra* n.9.

enforcing social distancing, *see infra* Section I.B. It is only a matter of time before COVID-19 touches Petitioners. Dkt. 4-3 ¶¶ 10, 15; Dkt. 4-4 ¶¶ 13-15; Dkt. 4-5 ¶ 6.

Folkston is ill-equipped to address this imminent threat, as demonstrated by its track record of failing to provide even basic medical care to detained people including Petitioners. Dkt. 36 ¶¶ 67-73 (collecting sources); Dkt. 4-8 ¶¶ 28-29; Dkt. 4-7 ¶¶ 15-17; Dkt. 4-9 ¶¶ 13, 15; Dkt. 4-10 ¶ 8; Dkt. 4-11 ¶¶ 13-15, 17; Dkt. 37-6 ¶¶ 4-5; Dkt. 37-7 ¶ 11; Dkt. 30-4 ¶ 4; *see also* Ex. 1 ¶¶ 13-39 (chronicling ICE's failure to respond appropriately to COVID-19 since March 2020). Making matters worse, Folkston is geographically isolated from local hospitals with the capacity to treat COVID-19. Dkt. 4-5 ¶¶ 12-14.

2. Any Custody Reviews Respondents Have Conducted for Petitioners Have Been Largely Illusory

Release from custody is both the most effective public health measure to curb transmission of COVID-19 and the only viable strategy to protect medically vulnerable people like Petitioners. If release is not possible, at a minimum detention centers must strictly adhere to CDC Guidance.¹¹ *See* Dkt. 4-3 ¶¶ 20a-g (explaining that ICE's March 27 guidelines¹² are ineffective in part because they fall short of CDC Guidance); Dkt. 4-4 ¶¶ 9, 11, 16, 20 (noting that efficacy of ameliorative measures requires strict adherence and availability of PPE and other hygiene supplies); *see generally* Ex. 1 (identifying the CDC Guidance as an appropriate baseline for best practices where detention is necessary) *cf.* Dkt. 4-5 ¶¶ 8-9 (explaining why CDC-recommended isolation can cause

¹¹ “CDC Guidance” throughout refers to the “Printer friendly version” of Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities* (Mar. 23, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf>.

¹² ICE's current COVID-19 guidance incorporates these March 27 guidelines. U.S. Immigration & Customs Enforcement, *ERO COVID-19 Pandemic Response Requirements* (Version 1.0, April 10, 2020), at 5, <https://www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities.pdf>.

additional harm). ICE recognizes the ongoing danger of detention; on April 4, 2020, it directed ICE field offices to conduct custody re-evaluations for people with some medical conditions.¹³ Under this one-time re-evaluation, ICE released fewer than 700 medically vulnerable immigrants; Respondent Albence confirmed to the House Oversight Committee that the review process “has been completed.”¹⁴ Approximately 29,000 men and women remain in immigration detention.¹⁵

Under the April 4 ICE guidance, ICE field office directors were instructed to determine on a “case-by-case” basis the need for continued detention of medically vulnerable people.¹⁶ However, this process was inherently flawed because it impermissibly considered the impact of individual custody decisions on deterring future migration generally.¹⁷ In addition, the custody re-evaluation guidance gave significant discretion to individual officers to continue custody, regardless of a person’s medical conditions, and did not require that the presence of a high risk medical condition be the “determinative” factor for assessing the appropriateness of release.¹⁸ Moreover, the guidance allowed ICE officers with no medical training to identify potentially high risk individuals without seeking medical evaluations or otherwise consulting any medical professionals as part of the screening process. See Ex. 1 ¶ 25.

¹³ *Id.* at 14; U.S. Immigration & Customs Enforcement, *Updated Guidance: COVID-19 Detained Docket Review* (Apr. 4, 2020), <https://www.ice.gov/doclib/coronavirus/attk.pdf>.

¹⁴ House Committee on Oversight & Reform, *DHS Officials Refuse to Release Asylum Seekers and Other Non-Violent Detainees Despite Spread of Coronavirus* (Apr. 17, 2020), <https://oversight.house.gov/news/press-releases/dhs-officials-refuse-to-release-asylum-seekers-and-other-non-violent-detainees>.

¹⁵ ICE, Detention Management, <https://www.ice.gov/detention-management#tab2> (last updated May 2, 2020).

¹⁶ See *ERO COVID-19 Pandemic Response Requirements*, *supra* n. 12, at 14 (referring to a directive from April 4, 2020 guidance to re-evaluate custody); see also *Updated Guidance: COVID-19 Detained Docket Review*, *supra* n. 13.

¹⁷ *DHS Officials Refuse to Release Asylum Seekers*, *supra* n. 14 (“Acting Director Albence asserted that releasing non-violent immigrants to protect them from being infected and sickened with coronavirus could give the impression that the Administration is “not enforcing our immigration laws,” which would be a “huge pull factor” and create a “rush at the borders.”).

¹⁸ *Updated Guidance: COVID-19 Detained Docket Review*, *supra* n. 13.

ICE is violating its own guidance in the case of Petitioners. Despite their high-risk status, Petitioners do not believe that they were identified for custody re-evaluation at all under this process, let alone that they received meaningful individualized custody reviews. They have not received specialized medical evaluations related to COVID-19 and were not given the opportunity to provide external records relevant to their risk of complications from COVID-19 to supplement potentially incomplete ICE medical records. *See, e.g.*, Dkt. 4-11 ¶ 19; Dkt. 37-5 ¶ 11; Dkt. 37-6 ¶ 26; Dkt. 37-7 ¶ 25; Dkt. 37-8 ¶ 3; Dkt. 37-9 ¶ 3.

B. Detention Remains Dangerous Because Respondents Have Failed to Implement CDC Guidance

Respondents are failing to take adequate steps to protect Petitioners from the risk of COVID-19 while they remain within Folkston, despite Petitioners' filing of this lawsuit one month ago warning of the risks of serious harm posed by their continued detention at Folkston. Respondents recognize the CDC Guidance as an authoritative source regarding the standard of care required of them during the COVID-19 pandemic. *See generally* Dkt. 29-1; Dkt. 29-2. ICE guidance states that ICE detention facilities "must" comply with the CDC Guidance, which emphasizes the need for social distancing, proper hygiene and cleaning practices, access to testing, individual isolation of people with the virus, and quarantine of those who are exposed.¹⁹ However, reports from detained individuals and their attorneys indicate that conditions at Folkston continue to fall short of this guidance in many respects.

1. Social distancing

The CDC Guidance directs social distancing of "6 feet between all individuals, regardless of the presence of symptoms" at all times and locations. CDC Guidance at 4, 11. The CDC also

¹⁹ *ERO COVID-19 Pandemic Response Requirements*, *supra* n. 12, at 5-6; *see generally* CDC Guidance, *supra* n. 11.

advises that after an infected person has been present in a room for more than a few minutes while coughing or sneezing, air inside the room may remain potentially infectious.²⁰ Respondent Gartland stated in his declaration to the Court, “[t]o stop the spread of COVID-19, Folkston has implemented a program of enhanced social distancing” by reducing pod unit counts “to the greatest extent possible.” Dkt. 29-1 ¶ 9. He further attested that “detainees [at Folkston] have been afforded every opportunity . . . to practice social distancing measures,” and detainees “are repeatedly advised by staff to practice social distancing measures.” *Id.*

However, Respondents cannot possibly implement social distancing at Folkston. *See, e.g.,* Dkt. 37-5 ¶ 7 (“[T]here is no social distancing inside the facility.”); Dkt. 37-6 ¶¶ 8-10 (“We must either eat in our bunks” that are “approximately 2 to 3 feet” apart, or “at tables where the chairs are close to each other”); Dkt. 37-7 ¶¶ 15-18 (“I share a bunk bed with another person who sleeps an arm’s length away,” and “It is impossible to stay six feet apart from everyone we pass because the hallways are not big enough”); Dkt. 37-9 ¶¶ 4-5, 8-9 (“The seats at the tables [in the common space] are about two feet away from each other,” and “[w]henever we leave the pod unit, . . . we line up close to each other.”); Dkt. 37-10 ¶ 13 (“It is impossible to practice social distancing in my dorm unit. I try to stay in my cell unit as much as possible, but my cell mate and I cannot realistically be six feet away from each other.”). Multiple times a day, detained people at Folkston have no opportunity to stay a safe distance away from other people. They continue to live and eat in extremely close quarters, and share showers and toilets. *See e.g.,* Dkt. 37-6 ¶¶ 8-10, 13; Dkt. 37-

²⁰ Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), *Healthcare Infection Prevention and Control FAQs for COVID-19* (last visited Apr. 23, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/infection-control-faq.html> (“[F]or a patient who was coughing and remained in the room for a longer period of time [than a few minutes] . . . the risk period” is longer than a few minutes, and advising compliance with CDC’s general guidance on clearance rates under differing ventilation conditions, found at Centers for Disease Control and Prevention, Infection Control, *Appendix B. Air* (last reviewed July 22, 2019), <https://www.cdc.gov/infectioncontrol/guidelines/environmental/appendix/air.html#tableb1>).

7 ¶¶ 15-18; Dkt. 37-9 ¶¶ 4-6, 8-9; Dkt. 37-10 ¶¶ 12-13. In some cases, they even continue to be housed in crowded, open dorms with bunk beds lined up no more than 2-3 feet apart. *See* Dkt. 37-6 ¶¶ 8-9. Petitioner Kumar reports in his May 4, 2020 declaration that he is housed in such an open dormitory with approximately 58 other detainees. *Id.*

For some detained people at Folkston, housing conditions have worsened since the TRO hearing on April 15, 2020, and Respondents have regularly shuffled detained people between housing units with no regard for the possibility that some units could be contaminated with COVID-19. For example, on Friday, May 1, 2020, Petitioner Fernandez and others in his pod unit were forced to transfer from pod unit B5 to pod unit B3, despite the concerns they voiced regarding the risk that pod unit B3 could have been contaminated with COVID-19. *See* Dkt. 37-9 ¶ 4. Before Petitioner Fernandez was moved, he was in a cell by himself. He is now sharing a bunk bed with another person, in a smaller cell than before. *Id.* ¶¶ 5-6.

In addition, the common areas shared by detained people in their housing units are too small and crowded to allow for people to remain six feet apart. *See, e.g.*, Dkt. 37-6 ¶ 9; Dkt. 37-7 ¶ 16. The people detained at Folkston also have no choice but to touch many shared items, such as microwaves, phones, door handles, water containers, and televisions. *See* Dkt. 37-7 ¶ 17; Dkt. 37-9 ¶ 8. Detained people are still required to line up close together to go to the cafeteria, recreational area, medical unit, and other places, often standing so close to one another that they are “back-to-belly” and passing within six feet of other detained people when they are walking to and from the unit. Dkt. 37-6 ¶ 10; *see also* Dkt. 37-7 ¶ 18; Dkt. 37-9 ¶ 9.

2. Cleaning

The CDC Guidance identifies “intensified cleaning and disinfecting procedures” to be used during the pandemic, including for frequently touched surfaces, and “lifting restrictions on undiluted disinfectants.” CDC Guidance at 9, 17-19. Respondents must also take recommended

precautions while using these products, such as wearing gloves and ensuring good ventilation. *Id.*

At Folkston, detained people are responsible for cleaning their living spaces and common areas, but often are not provided with adequate—or, in some cases, any—cleaning supplies or gloves. Dkt. 30-4 ¶ 11; Dkt. 37-6 ¶¶ 14-15; Dkt. 37-7 ¶¶ 19-20; Dkt. 37-8 ¶ 11; Dkt. 37-9 ¶ 6. Detainees report that the facility often runs out of cleaning supplies, Dkt. 37-7 ¶ 19, and the cleaning solutions provided are often significantly diluted or not proper disinfectants. Dkt. 37-7 ¶ 20; Dkt. 37-8 ¶ 11; Dkt. 37-10 ¶ 17 (Petitioner Arriaga describing that the only product that he received to clean his cell is a glass cleaner). Due to the inadequate provision of cleaning supplies, Petitioners Fernandez and Brown reported that they had no choice but to clean their cells with soap or shampoo provided for personal hygiene. Dkt. 37-7 ¶ 19; Dkt. 37-9 ¶ 6. Folkston also commonly fails to provide detained individuals with gloves or face masks to use while cleaning. Dkt. 37-6 ¶¶ 14-15; Dkt. 37-7 ¶ 20.

3. Transfers of Detained People

Under the CDC Guidance, transfers of detained individuals between detention facilities with confirmed cases²¹ should be “suspend[ed]” unless “necessary.” CDC Guidance at 14. If a transfer is “absolutely necessary,” detention centers must take specific measures to screen and, where needed, isolate or quarantine, new intakes. *Id; see infra* Section I.B.7.

New people continue to be moved in and out of Folkston during the COVID-19 outbreak. Folkston has received new intakes transferred from other facilities as late as the second half of

²¹ Similarly, even before a case of COVID-19 is confirmed inside a facility, the CDC Guidance requires facilities to “[r]estrict transfers of incarcerated/detained persons to and from other jurisdictions and facilities unless necessary for medical evaluation, medical isolation/quarantine, clinical care, extenuating security concerns, or to prevent overcrowding.” See CDC Guidance, *supra* n. 11, at 9.

April.²² Detained immigrants have observed new people being moved in and out of Folkston as well, throughout the last month, and based on the limited information available to Petitioners, Respondents have not been complying with CDC Guidance related to screening, isolation, and quarantine of new intakes. Dkt. 30-2 ¶¶ 4-5; Dkt. 30-3 ¶¶ 4-5; Dkt. 30-4 ¶ 6; Dkt. 37-6 ¶ 21 (Folkston is “still consistently bringing new detainees into the detention center despite the risks of disease transmission, so problems relating to overcrowding are unlikely to change anytime soon,” and reporting a “bus load of new detainees” from Florida); Dkt. 37-7 ¶ 22; Dkt. 37-8 ¶ 8; Dkt. 37-10 ¶ 11 (ten days ago guards attempted to place new transfers into Petitioner Arriaga’s dorm unit and only agreed not to after Petitioner Arriaga and his dorm-mates protested their placement, after which the new intakes were mixed in with other new detainees who had been transferred from other places). As recently as May 4, 2020, Petitioner Benavides reported that she observed new people being brought into the building she is in just a few days prior. Dkt. 37-8 ¶ 8 (Petitioner Benavides saw new intakes entering on May 2 and an officer told her that as far as he knew, Folkston was “not going to stop” transferring in new detainees).

The frequency with which Folkston has been accepting transfers, particularly in a location with limited access to nearby medical treatment facilities, suggests that Respondents have been transferring new intakes to Folkston as a routine matter, rather than when truly necessary for the reasons permitted in the CDC Guidance. See CDC Guidance at 9. When Petitioners first moved for emergency relief, asserting that Folkston’s continued acceptance of new transfers put Petitioners at increased risk of exposure, there were no identified cases among the detained

²² Monique O. Madan, ‘*It’s like a Shell game’: Immigration lawyers move to close ICE loophole in federal ruling*, Miami Herald (May 2, 2020), <https://hrl.us/35wS7td> (noting that ICE transferred people to Folkston from south Florida detention facilities, including one facility with confirmed cases of COVID-19 (Krome Detention Center) sometime after April 13, 2020).

population at Folkston. *See* Dkt. 4-1 at 3. Knowing now that transfers continue unabated, it comes as no surprise that COVID-19 has entered the facility, and it is even more concerning that the transfers continue.

4. Communication with Detained People

The CDC Guidance requires Respondents to post signage throughout Folkston regarding COVID-19 symptoms, risk mitigation practices, and instructions to report symptoms to staff. CDC Guidance at 6, 10, 13. These materials need to be accessible to non-English speakers and those with low literacy or disabilities. *Id.* The CDC also requires ongoing communication with detained people about risk reduction and COVID-19 transmission in the facilities. CDC Guidance at 5, 6.

Petitioners report that ICE has never informed them of COVID-19, advised them of recommended hygiene or social distancing practices or notified them of the number of confirmed COVID-19 cases at Folkston. Dkt. 37-6 ¶ 19 (“Folkston refuses to release this information to us.”); Dkt. 37-7 ¶ 24 (“The most the detention center staff has told me about COVID-19 is to wash my hands.”); Dkt. 37-8 ¶ 14 (“I have not observed any new signs or notices relating to COVID-19, and no one has provided me with any other information about COVID-19.”). Detained people at Folkston have reported that when they asked for explanations and information around COVID-19, or expressed their concern about the risk of COVID-19, guards and staff have responded by threatening to take away their possessions and put them in solitary confinement. *See, e.g.,* Dkt. 37-6 ¶ 28 (after a detainee approached a guard expressing concern about working in the kitchen, the guard “threatened him to not raise any more questions or issues relating to COVID-19” or the guard would “send him to Bravo, a high-security building, if he continued to ask questions”). Notices or flyers about COVID-19 are sometimes provided only in English, and some Petitioners cannot understand them. Dkt. 4-11 ¶ 12. Petitioner Fernandez also reported that while Folkston

previously put up signs about handwashing in his pod unit, many of them were taken down around April 27, 2020. Dkt. 37-9 ¶ 12.

5. Response to Symptoms of COVID-19

The CDC Guidance requires that “[a]s soon as” symptoms of COVID-19 develop, detainees should “wear a face mask (if it does not restrict breathing) and should be immediately placed under medical isolation in a separate environment from other individuals.” CDC Guidance at 15. The symptomatic individual should receive immediate “medical evaluation and treatment” including an assessment of their risk factors for severe COVID-19. *Id.* at 23. Cohorting (medically isolating or quarantining as a group) should be used only if there are “no other available options”; if cohorting is required, confirmed cases (with laboratory confirmed diagnoses), suspected cases (those who are symptomatic who have not yet been confirmed through a test), and asymptomatic close contacts (those who have come within six feet of an infected individual in the last fourteen days) should all be cohorted separately from each other. *Id.* at 15-16, 19-20.

Despite this guidance, Respondents routinely ignore reports of COVID-19 symptoms at Folkston. Detained people at Folkston report that symptomatic individuals in the general population are regularly ignored and go unseen by medical staff, and are not moved by the detention center to other units. Dkt. 4-8 ¶ 28; Dkt. 37-5 ¶¶ 9-10 (observing detained people “coughing and nothing is being done to quarantine them or even test them.”).

The CDC also prioritizes testing *any* symptomatic person in a congregate setting.²³ Testing is critical because it enables identification of those who have been exposed to the virus. See Dkt. 4-4 ¶ 9. It is likely that symptomatic people at Folkston have not been tested or even evaluated by

²³ Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), *Evaluating and Testing Persons for Coronavirus Disease 2019 (COVID-19)*, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-criteria.html> (updated April 27, 2020), cited in CDC Guidance, *supra* n. 11, at 22.

a medical provider. As of May 7, 2020, ICE had only tested 1,528 detained people in their custody across the country, 49% of whom tested positive.²⁴ Respondent Albence reported to Congress on April 17, 2020 that ICE would “certainly do more testing” if it had more test kits.²⁵ Therefore, if Folkston does have enough kits to test every symptomatic individual, then it should do so; it is likely to fail to, though, either because it lacks a sufficient number of tests or because symptomatic people are not seen by medical staff.

6. Other Failures to Implement CDC Guidance

Respondents have failed to implement other aspects of the CDC Guidance at Folkston. Dkt. 36 ¶¶ 113-119, 140-143, 152-156. *First*, detained immigrants at Folkston receive soap for personal use only about once or twice a week, and no additional soap is available in the showers or pod units. *Compare* CDC Guidance at 7-8, 10 *with* Dkt. 30-3 ¶ 11; Dkt. 30-4 ¶ 10; Dkt. 37-6 ¶ 11; Dkt. 37-7 ¶ 14. Petitioners report that facility staff are unreceptive to requests for additional soap. Dkt. 30-4 ¶ 10. They also have limited or no access to hand sanitizer. *Compare* CDC Guidance at 7-8, 10 *with* Dkt. 4-10 ¶ 16; Dkt. 37-6 ¶ 11; Dkt. 37-7 ¶ 21; Dkt. 37-8 ¶ 13. *Second*, staff use of personal protective equipment (“PPE”) is inconsistent, even during close interactions, and detained people often do not receive PPE at all. *Compare* CDC Guidance at 8-10, 13-14, 16, 18, 20, 23-26, Table 1, *with* Dkt. 30-1 ¶ 4; Dkt. 37-5 ¶ 8; Dkt. 37-6 ¶ 17; Dkt. 37-7 ¶ 13; Dkt. 37-8 ¶¶ 16-17; Dkt. 37-9 ¶ 14; Dkt. 37-10 ¶ 10. Staff failure to take proper precautions in close interactions is particularly concerning since they are the primary vector for spread of the disease to Folkston from their communities. When detained people do receive PPE, they must use the same PPE for many days or weeks and receive nothing to use to sanitize it. Dkt. 37-6 ¶ 22; Dkt. 37-7 ¶ 13; Dkt. 37-9 ¶ 14. Petitioner Benavides reported that she has been denied both a face mask and gloves when she has

²⁴ ICE Guidance on COVID-19, *supra* n. 9 (753 positives out of 1,528 total tests).

²⁵ DHS Officials Refuse to Release Asylum Seekers, *supra* n. 14.

requested them. Dkt. 37-8 ¶ 17. Even those detained people who should use PPE in the scope of their work at Folkston do not consistently receive it. *See* Dkt. 37-6 ¶ 14. *Third*, staff at Folkston are inconsistent in performing even the minimal screening of visitors that ICE purports to have implemented. *Compare* CDC Guidance at 5, 13-14, 26 with Dkt. 4-7 ¶¶ 7-8, 12; Dkt. 30-1 ¶ 3. As recently as April 10, 2020, an attorney entering Folkston reported that these screenings were not consistently conducted in full or properly – for example, a guard filled out a questionnaire on her behalf without asking her the screening questions. Dkt. 30-1 ¶ 3. *Finally*, Respondents routinely provide medically vulnerable people with incorrect medications or care and delay or ignore medical requests. *Compare* CDC Guidance at 16, 23²⁶ with Dkt. 4-10 ¶ 8; Dkt. 30-4 ¶ 4; Dkt. 37-6 ¶ 4-5; Dkt. 37-7 ¶ 11. For instance, diabetic Petitioners are not receiving the special diets they need to manage their diabetes and are not consistently provided with medically necessary insulin. *Compare* CDC Guidance at 16, 23²⁷ with Dkt. 4-10 ¶ 8; Dkt. 37-7 ¶ 11. And Petitioner Kumar, who has tuberculosis, was not provided with necessary medication for more than six months after he was brought to Folkston and, during this time, unwittingly passed tuberculosis to his cellmate. Dkt. 37-6 ¶ 5. On April 14, 2020, he stopped receiving medication for tuberculosis, even though he is still actively symptomatic. *Id.* ¶ 4. Petitioner Arriaga found the lack of medical care for his lupus at Folkston so egregious that he agreed to voluntary departure. Dkt. 37-10 ¶ 6.

7. CDC Guidance That Must Be Implemented Given Confirmed COVID-19 Within Folkston

Now that COVID-19 is confirmed within Folkston, Respondents must also comply with portions of the CDC Guidance relevant to addressing this situation—including but not limited to

²⁶ See also Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), *People Who Are at Higher Risk for Severe Illness* (last reviewed Apr. 15, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html>, cited in CDC Guidance, *supra* n. 11, at 2, 16, 23.

²⁷ See also *People Who Are at Higher Risk for Severe Illness*, *supra* n. 26.

immediately responding to reports of symptoms of COVID-19, quarantining people who have been exposed to a known or suspected case of COVID-19 and screening people in units where COVID-19 has been identified.

For example, the CDC Guidance requires that, for transfers of detained people between detention centers that are “absolutely necessary,” the facilities must conduct specific screenings for new entrants and immediately place any symptomatic intakes in medical isolation. CDC Guidance at 10, 14. Where COVID-19 is already suspected to be present, the CDC advises quarantining of all new intakes for 14 days before they enter the general population. CDC Guidance 14. CDC Guidance also requires that facilities “[i]mplement daily temperature checks in housing units where COVID-19 cases have been identified, especially if there is concern that ... detained individuals are not notifying staff of symptoms.” CDC Guidance at 22. It requires that “detained persons who are close contacts of a confirmed or suspected COVID-19 case (whether the case is another incarcerated/detained person, staff member, or visitor)” be placed under quarantine for 14 days. Facilities should “make every possible effort” to quarantine these people individually. Cohort quarantine for close contacts of a COVID-19 case “should only be practiced if there are no other available options” because it can cause COVID-19 to be transmitted to people who are not yet infected; if quarantined individuals are cohorted, they must wear face masks at all times for this reason. *Id.* at 15-16, 20.

C. Releasing Petitioners, and to a Lesser Extent, Ordering Compliance with CDC Guidance, Would Reduce the Devastating Public Health Impact of COVID-19 on Georgia

Petitioners’ continued detention not only threatens their own health but also subjects all other detained individuals and staff at Folkston to an increased risk of exposure to COVID-19. *See* Dkt. 4-3 ¶¶ 12, 25; Dkt. 4-6 ¶ 7; Dkt. 4-5 ¶¶ 15, 17. And the risks to staff are great: in the last week, two diabetic guards employed by LaSalle Corrections at a Louisiana ICE detention center

died after contracting COVID-19. The facility reportedly had failed to provide staff with PPE and “told employees they would be required to work 12-hour shifts, seven days a week due to staff shortages cause by a ‘high number of positive COVID 19 staff cases.’”²⁸ The release of vulnerable individuals mitigates the overall risk of a COVID-19 outbreak in any detention facility by reducing the total number of detained individuals, thereby permitting greater social distancing and reducing the staff’s risks and workload. Dkt. 4-6 ¶ 9; Dkt. 4-3 ¶¶ 17, 24-27; Dkt. 4-5 ¶ 22.²⁹ At a minimum, ordering strict compliance with CDC Guidance is essential to protect Petitioners, as well as other detained individuals and staff, while this Court considers the merits of the case.

An outbreak of COVID-19 at Folkston would likely overwhelm local health infrastructure. Dkt. 4-5 ¶¶ 14-15. The closest hospitals to Folkston are either critical access hospitals without the necessary facilities or regional hospitals that serve many counties and could quickly become overwhelmed in the event of a localized outbreak. *See, e.g.*, Dkt. 36 ¶¶ 85-87. If particularly vulnerable detained individuals like Petitioners fall critically ill, their need for intensive medical care would even further strain local hospitals. Dkt. 4-3 ¶ 25; Dkt. 4-4 ¶ 5 (fatality rates increase as hospitals become overburdened); Dkt. 4-5 ¶¶ 14-15.

The emergency nature of this situation cannot be overstated: because they are detained at Folkston, Petitioners are at imminent risk of exposure to a virus that will likely cause them severe illness, long-term organ damage, or death, and they are unlikely to be able to access life-saving medical treatment. Civil detention with such odds of grave harm cannot be constitutional. Petitioners implore the Court to grant an emergency writ of habeas corpus or injunctive relief ordering their immediate release or ordering Respondents to review the necessity of Petitioners’

²⁸ Nomaan Merchant, *2 guards at ICE jail die after contracting coronavirus*, AP (Apr. 29, 2020), <https://apnews.com/20a500736171a977c7aba10c1d077476>.

²⁹ Already, prisons and detention centers in other countries and many U.S. states are releasing people from custody or reducing new arrests. *See, e.g.*, Dkt. 36 ¶ 58 (collecting examples).

custody; comply immediately with CDC Guidance; and demonstrate the efficacy of these measures in eliminating the risk to Petitioners with regular reporting to the Court.

II. ARGUMENT

A preliminary injunction is warranted when the movant demonstrates: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) threatened injury that outweighs any harm to the opposing party; and (4) the injunction would not undermine the public interest. *Levi Strauss & Co. v. Sunrise Int'l Trading Inc.*, 51 F.3d 982, 985 (11th Cir. 1995). “Where, as here, the ‘balance of the equities weighs heavily in favor of granting the [injunction]’ Petitioners need only show a ‘substantial case on the merits.’” *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1289, 1298 (11th Cir. 2005) (alteration in original) (citation omitted). Petitioners easily satisfy all four factors.

A. Petitioners Are Likely to Succeed on the Merits

All individuals in immigration custody, including those with prior criminal convictions, are civilly detained and thus entitled to certain protections under the Fifth Amendment Due Process Clause. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Respondents’ continued detention of Petitioners at Folkston during the COVID-19 pandemic: (1) violates Petitioners’ right to be free from punishment; (2) constitutes deliberate indifference to a substantial risk of serious harm to Petitioners; and (3) violates the *Accardi* doctrine. To redress these constitutional injuries, Petitioners seek relief available to them, either through a writ of habeas corpus or injunctive relief under the Fifth Amendment.

1. Petitioners’ Continued Detention During the COVID-19 Pandemic Constitutes Impermissible Punishment.

The Fifth Amendment Due Process Clause, like the Fourteenth Amendment, prohibits punishment of people in civil custody. *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979); *Magluta v.*

Samples, 375 F.3d 1269, 1273 (11th Cir. 2004). Civilly detained people “are generally ‘entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.’” *Marsh v. Fla. Dep’t of Corr.*, 330 F. App’x 179, 182 (11th Cir. 2009) (quoting *Youngberg v. Romeo*, 457 U.S. 307, 322 (1982)).

To establish that a particular condition or restriction of detention constitutes impermissible punishment, a petitioner must show either (1) an expressed intent to punish; or (2) lack of a reasonable relationship to a legitimate governmental purpose, from which an intent to punish may be inferred. *See Wolfish*, 441 U.S. at 538-39. Absent explicit intent, courts must ask first “whether any ‘legitimate goal’ was served by the prison conditions” and second, “whether the conditions are ‘reasonably related’ to that goal.” *Jacoby v. Baldwin County*, 835 F.3d 1338, 1345 (11th Cir. 2016) (citation omitted). “[I]f conditions are so extreme that less harsh alternatives are easily available, those conditions constitute ‘punishment.’” *Telfair v. Gilberg*, 868 F. Supp. 1396, 1412 (S.D. Ga. 1994) (citing *Wolfish*, 441 U.S. at 539 n.20); *see also Wolfish*, 441 U.S. at 538 (punishment inferred when a restraint “appears excessive” in relation to its stated purpose).

Here, Respondents have openly admitted to an illegitimate purpose for continuing to detain immigrants during the COVID-19 pandemic: general deterrence. *Supra* n. 17 (Respondent Albence stated on April 17, 2020 that ICE declined to release more people during the pandemic to avoid the impression that it is “not enforcing our immigration laws,” which would be a “huge pull factor” for future migration). “[G]eneral deterrence [is] reserved for the criminal system alone.” *Kansas v. Hendricks*, 521 U.S. 346, 373 (1997) (Kennedy, J., concurring); *see also id.* at 361-62 (majority opinion); *Wolfish*, 441 U.S. at 539 n.20 (similar). The government has no legitimate interest in using civil immigration detention to deter future migration. *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 188-90 (D.D.C. 2015) (relying on *Hendricks* to reject government argument that deterrence of mass migration can justify civil detention, and noting the government “conced[ed] that it ha[d]

“no ‘federal cases on point’ to support” its argument).

Moreover, Petitioners’ continued detention under the current conditions at Folkston lacks a reasonable relationship to *any* legitimate governmental purpose, bolstering the inference that their detention is punitive. The threat of serious illness, life-altering complications, and death that COVID-19 poses to Petitioners is not reasonably related to, and vastly outweighs, any purported government interest in Petitioners’ civil confinement. Detention inherently increases the chance of exposure to COVID-19.³⁰ And there is no question that exposure to COVID-19 for people like Petitioners, who have certain co-morbidities identified by the CDC, is especially dangerous.³¹ “Preventing [Petitioners] from protecting their own health from a high risk of serious illness or death [by keeping them detained] does not reasonably relate to a legitimate governmental purpose and thus, violates the Fifth Amendment.” *Vazquez Barrera v. Wolf*, --- F. Supp. 3d ---, 2020 WL 1904497, at *5 (S.D. Tex. Apr. 17, 2020).

Nonetheless, Respondents continue to hold Petitioners under conditions of confinement at odds with public health guidance. As detailed above, Folkston is in widespread violation of CDC Guidance—among other things, they are completely ignoring symptoms of COVID-19 and even moving detained people to *more* crowded dorms in the middle of the pandemic as the virus enters the detention center. *Supra* Section I.B.1. As a stark illustration of the fact that detention at Folkston is punishment at this time, Petitioner Arriaga, who is married to a U.S. citizen, is “very

³⁰ CDC Guidance, *supra* n. 11, at 2 (detained people live “within congregate environments, heightening the potential for COVID-19 to spread once introduced”); *see also supra* Section I.A.1.

³¹ *Supra* Section I.A.1; *People Who Are at Higher Risk for Severe Illness*, *supra* n. 26 (“Based on what we know now, those at high-risk for severe illness from COVID-19” include people with specified medical conditions); *Basank v. Decker*, 2020 WL 1481503, at *3 (S.D.N.Y. Mar. 26, 2020) (taking “judicial notice that, for people of advanced age, with underlying health problems, or both, COVID-19 causes severe medical conditions and has increased lethality,” because this fact is “not subject to reasonable dispute” (quoting, *inter alia*, Fed. R. Evid. 201(b))).

afraid of contracting COVID-19 while in detention” because of his lupus and has given up fighting his immigration case in order to receive necessary medical care. Dkt. 37-10 ¶¶ 5-6. He “chose to do this because the medical care [he] has been receiving at Folkston is inadequate,” *id.* ¶ 6, despite CDC Guidance that people who are immunocompromised should “continue any recommended medications or treatments and follow the advice of [their] healthcare provider” in order to “[r]educe [their] risk of getting sick with COVID-19.”³² But he is stuck in limbo: his home country is not accepting any deportees due to the pandemic, but his requests for release have thus far been denied. *Id.* The conditions at Folkston are so harsh as to drive people to give up their legal rights in order to avoid serious harm from COVID-19. Under these circumstances, detaining Petitioners is excessive in relation to any countervailing government interest.

Finally, any government interest in detaining Petitioners can be easily satisfied with less harsh alternatives. *Vazquez Barrera*, 2020 WL 1904497, at *6. For fifteen years, ICE has used Alternatives to Detention (ATD), a “flight-mitigation tool that utilizes a combination of technology and strong case management” to facilitate compliance with release conditions including court appearances.³³ Given the option of using ATDs, continuing to detain Petitioners is of little to no value in furthering the underlying reason for immigration detention: ensuring appearances at immigration court hearings. *Demore v. Kim*, 538 U.S. 510, 531 (2003) (Kennedy, J., concurring) (noting the “ultimate purpose” of detention is “premised upon . . . deportability”).

³² *People Who Are at Higher Risk for Severe Illness*, *supra* n. 26.

³³ DHS, U.S. ICE Budget Overview, FY 2021 Congressional Justification, at ICE-O&S-165, https://www.dhs.gov/sites/default/files/publications/u.s._immigration_and_customs_enforcement.pdf. ATD “provides a high level of supervision,” “enhances ICE’s operational effectiveness,” and has “significant program success rates while operating at a low average daily cost.” *Id.* at 165, 171. ICE already uses ATD to monitor people “not suitable for detention” due to “significant medical issues.” *Id.* at 171. In 2014, the Government Accountability Office found that 95% of those on ATD with case management appeared at their final hearings and 99% appeared overall at all scheduled hearings. GAO-15-26, Alternatives to Detention, at 30 (Nov. 2014), <https://www.gao.gov/assets/670/666911.pdf>.

Detaining Petitioners in the context of the pandemic amounts to punishment for the following reasons: Respondent Albence expressly acknowledged an improper purpose; the conditions at Folkston evince punitive intent; continued detention is not rationally related to a legitimate government purpose; and less harsh alternatives are readily available.

2. Petitioners' Continued Detention During the COVID-19 Pandemic Amounts to Deliberate Indifference to a Substantial Risk of Serious Harm

“[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.” *DeShaney v. Winnebago Cty. Dep’t. of Soc. Servs.*, 489 U.S. 189, 199-200 (1989). To satisfy due process, the government must provide detained individuals with basic necessities, such as adequate medical care, food, clothing, and shelter. *Hamm v. Dekalb County*, 774 F.2d 1567, 1573 (11th Cir. 1985). At a minimum, the Fifth Amendment prohibits deliberate indifference to a substantial risk of serious harm that would violate the Eighth Amendment in the post-conviction criminal context.³⁴ *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244, (1983); *Hale v. Tallapoosa County*, 50 F. 3d 1579, 1582 n.4 (11th Cir. 1995).

To demonstrate deliberate indifference, Petitioners must show they are exposed to a substantial risk of serious harm and that Respondents are aware of, yet are disregarding this risk “by failing to respond to it in an (objectively) reasonable manner.” *Rodriguez v. Sec’y for Dep’t of Corr.*, 508 F.3d 611, 617 (11th Cir. 2007); *Farmer v. Brennan*, 511 U.S. 825, 834, 837-38

³⁴ Individuals in civil immigration detention should not have to satisfy the Eighth Amendment’s requirement that a prison official have subjective knowledge of a substantial risk in order to establish a Fifth Amendment violation related to conditions of confinement. See *Gordon v. County of Orange*, 888 F.3d 1118, 1124-25 (9th Cir. 2018) (requiring only objective deliberate indifference), cert. denied, 139 S. Ct. 794 (2019); *Darnell v. Pineiro*, 849 F.3d 17, 32-36 (2d Cir. 2017) (same). The Eleventh Circuit has not squarely addressed this issue, and the court need not address it here because the evidence is clear that Respondents are aware of the substantial risk of serious harm to Petitioners.

(1994). “Known noncompliance with generally accepted guidelines for inmate health strongly indicates deliberate indifference to a substantial risk of serious harm,” even if the guidelines are not mandatory. *Hernandez v. County of Monterey*, 110 F. Supp. 3d 929, 943 (N.D. Cal. 2015) (failure to comply with CDC guidelines regarding screening and monitoring for tuberculosis could indicate deliberate indifference); *see also Holland v. Hanks*, 1998 WL 93974, at *4 (7th Cir. 1998) (suggesting similar). The government may violate a detained person’s due process rights even where exercising its “best efforts,” if protective measures in place are not working. *Thakker v. Doll*, --- F. Supp. 3d ---, 2020 WL 2025384, at *6 (M.D. Pa. Apr. 27, 2020).

The government may violate the Eighth Amendment when it “ignore[s] a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year,” including “exposure of inmates to a serious, communicable disease,” even when “the complaining inmate shows no serious current symptoms.” *Helling v. McKinney*, 509 U.S. 25, 33 (1993); *see also id.* at 34 (citing *Gates v. Collier*, 501 F.2d 1291, 1300 (5th Cir. 1974), which held that prisoners were entitled to relief under the Eighth Amendment when they showed, *inter alia*, the mingling of “inmates with serious contagious diseases” with other prison inmates).

Thus, the harm that Petitioners fear—i.e., that their confinement will result in a COVID-19 infection that will seriously injure and possibly kill them—need not become a reality in order to establish a constitutional violation. Courts do not require a plaintiff to “await a tragic event” before seeking relief from a condition of confinement that unconstitutionally endangers them. *See Helling*, 509 U.S. at 33. “Nor does it matter that some inmates may not be affected by the condition, and that the harm is thus, in a sense, only potential harm. The Court has found an Eighth Amendment violation ‘even though it was not alleged that the likely harm would occur immediately and even though the possible infection might not affect all of those exposed.’” *Tittle v. Jefferson Cty. Comm’n*, 10 F.3d 1535, 1543 (11th Cir. 1994) (Kravitch, J., concurring) (quoting

Helling, 509 U.S. at 33).

a. ***Substantial Risk of Serious Harm***

Petitioners' continued detention under conditions that fail to mitigate their risk of exposure to COVID-19 subjects them a substantial risk of serious harm. As explained above, COVID-19 will be effectively impossible to control in detention centers once introduced, and if Petitioners are infected with COVID-19, they risk hospitalization requiring intensive care and use of a ventilator, long-term organ damage, and even death. *See supra* Section I.A. COVID-19 is now confirmed to be present inside Folkston, even though there were no reported cases among the detained population a month ago. One can "only assume" that positive cases are undercounted, given that Respondents are failing to respond to reports of COVID-19 symptoms among the detained population. *Hope v. Doll*, No. 20 Civ. 562, ECF. No. 11 at 7-8 (M.D. Pa. Apr. 7, 2020).

b. ***Knowing Disregard of the Substantial Risk***

Where a risk is obvious, such as the threat posed to medically vulnerable people during an infectious disease outbreak, courts can presume that government officials are aware of the risk. *See, e.g., Farmer*, 511 U.S. at 842. Moreover, there is ample evidence that Respondents have actual knowledge of the excessive risk of harm that the coronavirus presents to medically vulnerable individuals in their custody, given the February 25, 2020 DHS whistleblower report, the many letters from advocates, medical professionals, and Members of Congress, and the extensive news coverage the issue has received.³⁵ The federal government's own public health agency—the CDC—recognizes the heightened risk to people like Petitioners, and has developed guidance to

³⁵*See, e.g.*, Letter from Scott Allen & Josiah Rich, Med. Experts for DHS, to House Comm. on Homeland Sec. (Mar. 19, 2020), <https://bit.ly/2zAYTSQ>; Dkt. 4-8 ¶ 30; Letter from 763 non-governmental organizations to Matthew T. Albence, ICE Acting Director (Mar. 19, 2020), <https://bit.ly/2UUKtUG>; Abigail Hauslohner et al., *Coronavirus Could Pose Serious Concern in ICE Jails, Immigration Courts*, Wash. Post (Mar. 12, 2020), <https://wapo.st/2X5BxOY>.

address the unique challenges of managing COVID-19 within carceral institutions, where social distancing and adequate hygiene measures are practically impossible.³⁶

Having deprived Petitioners of their ability to practice the most effective defense against exposure to COVID-19—sheltering in place at home—Respondents must take reasonable precautions to reduce Petitioners’ risk of infection. Even with only a limited factual record before the Court, Respondents’ failure to implement the most crucial aspects of the CDC Guidance is clear. As explained in detail, *supra* Section I.B, Respondents are failing to ensure social distancing, proper hygiene and cleaning practices, access to testing, and communication with detained people, among other requirements. Respondents also continue to transfer new immigrants into Folkston, which not only makes social distancing more difficult by increasing the detained population, but also introduces new potential sources of disease into the facility. Worst of all, Respondents are ignoring requests for medical attention for COVID-19 symptoms, which both violates the CDC Guidance and independently evinces deliberate indifference. *See, e.g., Farrow v. West*, 320 F.3d 1235, 1246-47 (11th Cir. 2003) (denial or delay in access to needed medical care may amount to deliberate indifference); *accord McElligott v. Foley*, 182 F.3d 1248 (11th Cir. 1999); *Brown v. Hughes*, 894 F.2d 1533 (11th Cir. 1990); *Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700, 704 (11th Cir. 1985). Respondents’ widespread violations of the CDC Guidance—which are mandatory under ICE’s own policy—amount to deliberate indifference to the substantial risk of serious harm that COVID-19 poses to Petitioners.

Courts across the United States have recognized that urgent release of medically vulnerable

³⁶ *People Who Are at Higher Risk for Severe Illness*, *supra* n. 26 (recognizing heightened risk to people with medical vulnerabilities). Respondents agree that the CDC Guidance is an applicable and binding element of the standard of care during the pandemic. *See ERO COVID-19 Pandemic Response Requirements*, *supra* n. 12, at 5-6 (detention facilities “must” comply with the CDC Guidance); Dkts. 29 at 3-4, 9; 29-1 ¶¶ 5-6, 8-10; 29-2 ¶¶ 11, 15, 25.

individuals from immigration detention is the only appropriate course of action in the face of a highly contagious disease with a death toll that continues to rise daily. *See Dkt. 36 ¶ 5 n.1* (collecting cases). At a minimum, Respondents' deliberate indifference towards Petitioners warrants a court order immediately compelling Respondents to comply with CDC Guidance at Folkston.

3. Respondents' Failure to Comply with the CDC Guidance Violates Petitioners' Rights under the *Accardi* Doctrine and the Fifth Amendment Due Process Clause

When the government promulgates “[r]egulations with the force and effect of law,” those regulations “supplement the bare bones” of federal statutes. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 265 (1954) (petitioner granted new hearing after review of denial of relief revealed prejudgment, contrary to existing regulations). Agencies must follow those “existing valid regulations,” even where government officers would otherwise have broad discretion. *Id.* at 268; *see also Gonzalez v. Reno*, 212 F.3d 1338, 1349 (11th Cir. 2000) (“Agencies must respect their own procedural rules and regulations.”); *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) (“[I]t is incumbent upon agencies to follow their own procedures . . . even where [they] are possibly more rigorous than otherwise would be required.”).

A violation of the *Accardi* doctrine may constitute a violation of the Fifth Amendment Due Process Clause. *United States v. Teers*, 591 F. App'x 824, 840 (11th Cir. 2014) (recognizing that an *Accardi* violation may be a due process violation); *see also Jean v. Nelson*, 727 F.2d 957, 976 (11th Cir. 1984). *Accardi*'s rule applies with full force when “the rights or interests of the objecting party” are “affected.” *Montilla v. INS*, 926 F.2d 162, 167 (2d Cir. 1991) (citing cases). The Due Process Clause is implicated here because Petitioners are relying on CDC Guidance promulgated for their benefit during the COVID-19 pandemic.

Respondents operate Folkston pursuant to ICE's 2011 Performance-Based National

Detention Standards, as amended in 2016 (“PBNDS”),³⁷ which specify certain measures that must be taken to protect the health of detained people. The PBNDS in turn require compliance with CDC Guidance, including the CDC Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities.³⁸ Yet, as discussed *supra*, Section I.B., their efforts to do so have been woefully inadequate. Respondents have failed to follow the CDC Guidance related to social distancing, hygiene, supplies (including PPE), cleaning, medical evaluation and treatment of COVID-19 symptoms, medical isolation of suspected and confirmed COVID-19 cases, transfers and screening of new entrants to the detained population, visitor screening, communication with detained people, testing, and care and protection of medically vulnerable individuals detained at Folkston.

A court in this Circuit recently found the *Accardi* doctrine applicable to this very set of circumstances. *See Gayle v. Meade*, No. 20-21553-CIV, 2020 WL 2086482, at *6 (S.D. Fla. Apr. 30, 2020) (*Order Adopting in Part Magistrate Judge’s Report and Recommendation*) (“It is abundantly clear that ICE is required to comply with CDC’s guidelines pursuant to its own regulations and policy statements. Yet, ICE has flouted its own guidelines by, *inter alia*, failing to ensure that each detainee practices social distancing. . . . ICE’s purported “substantial compliance” does not pass muster under the *Accardi* doctrine.”). For the same reason, Respondents have violated the *Accardi* doctrine in this case.

4. Petitioners Are Entitled to a Writ of Habeas Corpus

Petitioners may challenge their unconstitutional detention under 28 U.S.C. § 2241. Habeas vests federal courts with broad, equitable authority to “dispose of the matter as law and justice

³⁷ Performance-Based National Detention Standards 2011, <https://www.ice.gov/doclib/detentionstandards/2011/pbnnds2011r2016.pdf>.

³⁸ *Id.* §§ 4.3(II)(1), (V)(C)(1).

require.” 28 U.S.C. § 2243. Habeas is not “static, narrow, [or] formalistic,” but rather is “an adaptable remedy,” *Boumediene v. Bush*, 553 U.S. 723, 779-80 (2008) (citation omitted), conferring “broad discretion” on courts to right wrongs, *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987). “The scope and flexibility of the writ—its capacity to reach all manner of illegal detention—its ability to cut through barriers of form and procedural mazes—have always been emphasized and jealously guarded by courts and lawmakers.” *Harris v. Nelson*, 394 U.S. 286, 291 (1969). Accordingly, the Court has the power to issue a writ of habeas corpus ordering either release, or alternatively, individualized custody re-determinations taking each Petitioner’s medical condition(s) into account. *See Boumediene*, 553 U.S. at 779 (courts may order release through habeas); *Sopo v. U.S. Att’y Gen.*, 825 F.3d 1199, 1221 (11th Cir. 2016) (ordering individualized custody determination through habeas), *vacated on other grounds*, 890 F.3d 952 (11th Cir. 2018).

“Habeas is at its core a remedy for unlawful executive detention.” *Munaf v. Geren*, 553 U.S. 674, 693 (2008). “[T]he traditional function of the writ is to secure release from illegal custody.” *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973). “[O]ver the years, the writ of habeas corpus [has] evolved as a remedy available to effect discharge from *any* confinement contrary to the Constitution or fundamental law” *Id.* at 485 (emphasis added). Because Petitioners have demonstrated that their detention amounts to unlawful punishment and that Respondents are acting with deliberate indifference towards the substantial risk of serious harm that COVID-19 poses to them in detention, a writ of habeas corpus is the proper remedy.

Some circuits, including the Eleventh, do not allow habeas as a remedy for run-of-the-mill challenges to conditions of confinement in criminal custody.³⁹ These courts have generally

³⁹ The purported distinction between habeas and “conditions” cases stems from the specific procedural interaction between statutory habeas for state prisoners under 28 U.S.C. § 2254, which unlike § 2241 requires state-court exhaustion, and statutory civil rights actions against

concluded that “unconstitutional conditions of confinement can be remedied through injunctions that require abusive practices be changed.” *Vazquez Barrera*, 2020 WL 1904497, at *4. *See, e.g.*, Dkt. 32 at 13 (finding the record “thus far” did not establish release only way to remedy conditions); *Gayle v. Meade*, 2020 WL 1949737, at *26 (S.D. Fla. Apr. 22, 2020) (*report and recommendation*) (the Eleventh Circuit’s rule on this point is “based on the implicit assumption that a ‘correction’ or ‘discontinuance’ of the unconstitutional practice is actually *available*” and that “[i]f no correction is feasible, then the remedy which the Eleventh Circuit relied upon would become illusory”) (emphasis in original); *Gomez v. United States*, 899 F.2d 1124, 1126 (11th Cir. 1990) (asking whether adequate treatment within prison system was possible to remediate unconstitutional condition, absent release, and concluding that such treatment was possible).

In contrast, the Eleventh Circuit has never opined on whether a person in civil immigration detention is entitled to release under the Fifth Amendment when all steps short of release would fail to ameliorate a substantial risk of harm—as is the case here. The historic event in our midst—the COVID-19 pandemic—blurs the line between claims challenging conditions of confinement and claims challenging the fact or duration of confinement because being near other people poses an outsized risk to one’s health. *See Money v. Pritzker*, 2020 WL 1820660, at *9 (N.D. Ill. Apr. 10, 2020) (both habeas and § 1983 claims by state prisoners could proceed because “the[] unprecedented circumstances” of the COVID-19 pandemic “collapse the utility and purpose of drawing distinctions between” conditions claims and fact-or-duration claims) (citation omitted); *Malam v. Adducci*, No. 2:20-cv-10829-JEL-APP (E.D. Mich. Apr. 5, 2020), ECF No. 22

state officials under 28 U.S.C. § 1983. *See Preiser*, 411 U.S. 475 (concluding § 1983 could not be used to circumvent the exhaustion requirements in § 2254); *Hutcherson v. Riley*, 468 F.3d 750, 754-55 (11th Cir. 2006) (similar). But § 1983 and § 2254 do not apply in federal detention. Indeed, the Department of Justice’s own manual recognizes that § 2241 is the proper vehicle for federal prisoners to challenge conditions of confinement. Dep’t of Justice, *Justice Manual* § 9-37.000 (2018), <https://www.justice.gov/jm/jm-9-37000-federal-habeas-corpus>.

(construing claim similar to Petitioners’ as challenge to the *fact* of detention because “no conditions of confinement . . . [could] prevent irreparable constitutional injury”). Petitioners’ only defenses against COVID-19 are stringent social distancing and hygiene measures—which are impossible in detention. The mere fact that Petitioners’ challenge “requires discussion of conditions in immigration detention does not necessarily bar such a challenge in a habeas petition.” *Vazquez Barrera*, 2020 WL 1904497, at *4. Petitioners face unreasonable harm from continued detention and should be released immediately.

Ultimately, cases such as this, seeking “immediate release from detention because there are no conditions of confinement that are sufficient to prevent irreparable constitutional injury” fall “squarely in the realm of habeas corpus.” *See Vazquez Barrera*, 2020 WL 1904497, at *4-5. When release is the only remedy that will end unlawful punishment or ameliorate a condition that violates the Fifth Amendment Due Process Clause, there must be a vehicle available for a detained person to seek release from a court. If no other cause of action allows release, habeas corpus must be available. U.S. Const. Art. I, § XI clause 2.

The “very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.” *Harris v. Nelson*, 394 U.S. 286, 291 (1969). The Court is fully empowered to remediate the particular illegality here—exposure to a highly contagious and potentially lethal virus that is substantially likely to harm Petitioners in the congregate environment where they are detained and violates their constitutional rights to be free from arbitrary and punitive detention—by ordering their release,⁴⁰ or at a minimum, individualized custody re-evaluations.

5. Petitioners Are Entitled to Injunctive Relief Under the Fifth Amendment

⁴⁰ Many other district courts around the country have ordered release from ICE detention for similar reasons. *See* Dkt. 36 ¶ 5 n.1 (collecting cases).

Because of the operation of the Suspension Clause, if this Court determines that it does not have jurisdiction to consider release or individualized custody re-evaluations under habeas, it must be because it finds jurisdiction to do so under its broad implied injunctive authority. “[T]he Fifth Amendment provides Petitioner[s] with an implied cause of action,” and 28 U.S.C. § 1331 provides jurisdiction. *Malam v. Adducci*, 2020 WL 1672662, at *4 (E.D. Mich. Apr. 5, 2020). Petitioners may seek equitable relief for violation of their rights through an implied cause of action against Respondents in their official capacities that arises directly under the Fifth Amendment. *Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1230-33 (10th Cir. 2005) (implied cause of action against officials in their official capacity under Eighth Amendment to enjoin unconstitutional prison conditions, as distinct from *Bivens* constitutional tort claims). Federal courts have long recognized an implicit private right of action under the Constitution for injunctive relief barring unlawful government action. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010); *see also Bell v. Hood*, 327 U.S. 678, 684 (1946) (“[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution.”); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001).

Courts’ broad power to fashion equitable remedies to constitutional violations extends to custodial settings and includes the power to release or order injunctive measures short of release—such as CDC Guidance compliance and adequate feeding—as required to remedy the violations. *See Hutto v. Finney*, 437 U.S. 678, 687 n.9 (1978); *Simmat*, 413 F.3d at 1230-33; *Stone v. City & County of San Francisco*, 968 F.2d 850, 861 (9th Cir. 1992). “When necessary to ensure compliance with a constitutional mandate, courts may enter orders placing limits on a prison’s population.” *Brown v. Plata*, 563 U.S. 493, 511 (2011); *Duran v. Elrod*, 713 F.2d 292, 297-98 (7th Cir. 1983) (court had authority to order release of low-bond pretrial detainees to reach a population

cap), *cert. denied*, 465 U.S. 1108 (1984). *Gomez* poses no barrier because it does not constrain courts from ordering injunctive relief—including release—when measures short of release will not remedy the constitutional violation. *Supra* at 28-29.

B. Petitioners Face an Imminent and Substantial Threat of Irreparable Harm from COVID-19

An injury is irreparable when a plaintiff cannot obtain adequate compensatory or corrective relief through the ordinary course of litigation. *Cunningham v. Adams*, 808 F.2d 815, 821 (11th Cir. 1987). The injury must be “actual and imminent, not remote or speculative.” *Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1288 (11th Cir. 2013). A harm need not be inevitable or have already happened to be irreparable. *See Helling*, 509 U.S. at 33; *Ball v. LeBlanc*, 792 F.3d 584, 593-94 (5th Cir. 2015) (lack of prior heat-related incidents at prison or signs of heat-related illness among plaintiffs did not preclude finding that prisoners had substantial risk of serious harm from excessive heat). Due to their medical conditions, Petitioners face the most fundamental kind of irreparable harm—imminent and substantial risk of serious illness, organ damage, or death—if they contract COVID-19. *See J.M. v. Crittendon*, 2018 WL 7079177, at *7 (N.D. Ga. May 21, 2018); *Vasquez Barrera*, 2020 WL 1904497, at *6 (alleged harm to medically vulnerable detained immigrants as a result of COVID-19 is “both imminent and irreparable”).

Petitioners are highly likely to contract COVID-19 if they remain in ICE detention. *See supra* Section I.A, B, C. The first case of COVID-19 at Folkston was publicly reported on May 4, 2020. Given that the virus is highly contagious and that infected individuals can remain asymptomatic, the actual numbers of confirmed cases at Folkston is likely to be much higher. The daily flow of people into and out of Folkston, as well as ICE’s continuing transfers of detained people between facilities, only increase the probability that the virus will spread more rapidly. Further exacerbating the risk of injury to Petitioners are Respondents’ failure to comply with

applicable CDC guidance for reducing the transmission of COVID-19, *see supra* Section I.B. and Petitioners’ lack of access to life-saving medical treatment in the event of a serious COVID-19 infection, *see supra* Section I.A.1.

Continuing to detain Petitioners also violates the Fifth Amendment Due Process Clause. *Supra* Section II.A. Deprivations of constitutional rights that cannot be compensated monetarily generally amount to irreparable injury as a matter of law. *See Cunningham*, 808 F.2d at 822. Petitioners’ predicament is particularly dire given ICE’s failure to comply with applicable CDC Guidance. Where detention is necessary, the CDC Guidance represents the most comprehensive set of standards for risk mitigation. However, as public health experts make clear, Respondents cannot ameliorate the life-threatening risk to Petitioners or the violations of their rights through any means other than immediate release.

C. The Balance of Equities and Public Interest Weigh Heavily in Petitioners’ Favor.

The final two factors of the preliminary injunction inquiry “merge when the Government is the opposing party.” *Nken v. Holder*, 556 U.S. 418, 435 (2009). In contrast to Petitioners’ significant risk of serious illness, organ failure, or death, an injunction will not harm Respondents. Indeed, it is in both the Respondents’ and the broader public interest to release medically vulnerable individuals from custody—or, at a minimum, comply with CDC Guidance—rather than needlessly jeopardizing their health and lives. Moreover, “the public interest is served when constitutional rights are protected.” *Jones v. Governor of Fla.*, 950 F.3d 795, 830 (11th Cir. 2020) (citation omitted); *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006). Here, continued detention violates Petitioners’ constitutional rights.

The equities weigh in favor of granting relief. Petitioners’ detention—especially under the existing conditions—threatens their own health and also subjects all other detained individuals, staff, and everyone else who has contact with Folkston to an increased risk of harm. *See* Dkt. 4-3

¶¶ 24-27; Dkt. 4-6 ¶ 7; Dkt. 4-5 ¶¶ 19, 21, 23. Far from injuring the government, releasing Petitioners and complying with the CDC Guidance would further Respondents' interests in maintaining a healthy and orderly environment.

These measures are also unquestionably in the public interest. Ex. 4 ¶ 6. *See, e.g., Grand River Enters. Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 169 (2d Cir. 2005) (referring to "public health" as a "significant public interest[]"); *see also* Allen & Rich Ltr., *supra* n. 35 ("[I]t is essential to consider releasing all detainees who do not pose an immediate risk to public safety"). In the unprecedented and rapidly evolving circumstances of the COVID-19 crisis, continued civil detention of aging or ill individuals—especially under conditions that fall far short of CDC Guidance—does not serve the public's interest. An outbreak of COVID-19 at Folkston would likely overwhelm the local health infrastructure in the surrounding communities. Dkt. 36 ¶¶ 85-87; Dkt. 4-3 ¶ 25; Dkt. 4-4 ¶ 5; Dkt. 4-5 ¶¶ 14-15 and contribute to more massive community spread and more deaths. According to a recent study:

[D]ecisive action on the part of ICE will not only reduce morbidity and mortality outcomes in its population of detained immigrants, but minimize negative health outcomes in the communities that support ICE's detention facilities with health care resources. If hesitation prevails instead, and more limited measures on the part of ICE prove ineffective, then 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.

Dkt. 37-11 at 10. The health and safety of the public would thus be best served by requiring Respondents to comply immediately with CDC Guidance and rapidly decrease the number of individuals detained at Folkston. Dkt. 4-6 ¶ 9; *see also id.* at 7. Through these measures, ICE would reduce the spread and severity of infection inside Folkston. This, in turn, would reduce the number of people who will become ill enough to require hospitalization and thereby decrease the health and economic burden on local communities. Dkt. 4-3 ¶ 25.

To the extent the equities weigh in favor of some restraint of Petitioners' liberty, that can

be achieved by fashioning reasonable release conditions that ICE already uses and that have demonstrated success. *See supra* Section II.A.1; Brief of Amicus Curiae at 36-37, *Jennings v. Rodriguez*, No. 15-1204, 2016 WL 6276890 (Oct. 24, 2016); *Vasquez Barrera*, 2020 WL 1904497, at *7. Because the Respondents' interests can be served through alternatives to detention and the Petitioners' interests will be irreparably harmed if they remain detained, particularly under current conditions, both the balance of equities and the public interest favor Petitioners.

D. The Court Should Not Require Petitioners to Provide Security Prior to Issuing a Preliminary Injunction.

Courts have discretion to waive the requirement in Federal Rule of Civil Procedure 65(c) that a movant provide a security upon the issuance of a preliminary injunction or TRO. *BellSouth Telecomm., Inc. v. MCImetro Access Transmission Servs., LLC*, 425 F.3d 964, 971 (11th Cir. 2005). District courts in this Circuit often exercise this discretion to require no security in cases brought by indigent and/or incarcerated people. *See, e.g., Schultz v. Alabama*, 330 F. Supp. 3d 1344, 1376 (N.D. Ala. 2018) (county prisoners); *Campos v. I.N.S.*, 70 F. Supp. 2d 1296, 1310 (S.D. Fla. 1998) (indigent immigrants). This Court should do the same here.

III. CONCLUSION

For the foregoing reasons, Petitioners' requested preliminary injunction should be granted.

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Respectfully submitted,

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