

3801 Nebraska Avenue, NW
Washington, D.C. 20016;

and

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT
500 12th Street, SW
Washington, D.C. 20536;

Respondents/Defendants.

**AMENDED PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C.
§ 2241 AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	PARTIES	3
III.	JURISDICTION AND VENUE	7
IV.	EXHAUSTION OF ADMINISTRATIVE REMEDIES	7
V.		

e.	Respondents Are Violating the CDC Guidance by Ignoring Symptoms Among the Detained Population and Failing to Place Sick People in Medical Isolation	42
f.	Respondents Are Violating the CDC Guidance Related to Transfers and Screening of New Entrants to the Detained Population.....	44
g.	Respondents Are Violating CDC Guidance on Screening of Visitors	45
h.	Respondents Are Violating the CDC Guidance Related to Communication with Detained People	47
i.	Respondents Are Violating the CDC Guidance Related to Testing...	48
j.	Respondents Are Violating CDC Guidance Related to Care and Protection of Medically Vulnerable Individuals in Their Custody.....	48
k.	Respondents Must Follow Other CDC Guidance on COVID-19	50
F.	Petitioners Are Particularly Vulnerable to Serious Illness or Death if Infected by COVID-19 and Should Be Released from Detention	51
G.	ICE’s Alternatives to Detention Program	54
VI.	LEGAL FRAMEWORK	56
A.	Petitioners Have a Constitutional Right to Be Free from Punishment...	56
B.	Petitioners Have a Constitutional Right to Reasonable Safety in Custody	58
C.	The Court May Grant Petitioners’ Release Through a Writ of Habeas Corpus	60
D.	The Court May Grant Petitioners’ Release and Other Equitable Relief Under 28 U.S.C. § 1331 and the Fifth Amendment.....	63
E.	ICE’s Failure to Comply with CDC Guidance Violates the <i>Accardi</i> Doctrine.....	65
VII.	CLAIMS FOR RELIEF	67
FIRST CLAIM FOR RELIEF.....		67
Violation of Fifth Amendment Right to Substantive Due Process		67
Detention Constituting Unlawful Punishment		67
SECOND CLAIM FOR RELIEF.....		69
Violation of Fifth Amendment Right to Substantive Due Process		69
Detention Amounting to Deliberate Indifference to a Substantial Risk of Harm.....		69
THIRD CLAIM FOR RELIEF		69
<i>Accardi</i> Doctrine (Fifth Amendment) Violation of Detention Standards		69
VIII.	PRAYER FOR RELIEF	71

I. INTRODUCTION

1. The COVID-19 pandemic is wreaking havoc throughout the world. The United States has more confirmed cases than any other country

5. Since the pandemic began, numerous judges across the country have ordered the urgent release of individuals from ICE detention facilities, jails, and prisons, explaining the pressing health risks created by ICE detention and other types of imprisonment.¹

6. Petitioners, who are detained at Folkston ICE Processing Center (“Folkston”), now seek the same relief from this Court. COVID-19 is already present inside of Folkston, and rapid

¹See, e.g., *Xochihua-Jaimes v. Barr*, 2020 WL 1429877 (9th Cir. Mar. 24, 2020); *Roman v. Wolf*, No. 5:20-cv-00768-TJH-PVC, 2020 WL 1952656 (C.D. Cal. Apr. 23, 2020) (Findings of Fact and Conclusions of Law), and ECF No. 55 (Preliminary Injunction Order); *Vazquez Barrera v. Wolf*, Case No. 4:20-cv-01241 (S.D. T.X. Apr. 17, 2020), ECF No. 41; *Barbecho v. Decker*, Case No. 1:20-cv-02821 (S.D. N.Y. Apr. 15, 2020), ECF No. 20; *Hope v. Doll*, Case No. 1:20-cv-00562-JEJ (M.D. Pa. Apr. 7, 2020), ECF No. 11; *Martin Munoz v. Wolf*, Case No. 20-cv-00625-TJH-SHK (C.D. Cal. Apr. 2, 2020), ECF No. 14; *Robles Rodriguez v. Wolf*, 20-cv-00627-TJH-GJS (C.D. Cal. Apr. 2, 2020), ECF No. 37; *Hernandez v. Wolf*, CV 20-60017-TJH (KSx)(C.D. Cal. Apr. 1, 2020), ECF No. 17; *Arana v. Barr*, 2020 WL 1502039 (S.D.N.Y. Mar. 27, 2020); *Xuyue Zhang v. Barr*, 2020 WL 1502607 (C.D. Cal. March 27, 2020); *Basank v. Decker*, 2020 WL 1481503 (S.D.N.Y. Mar. 26, 2020); *Castillo v. Barr*, 2020 WL 1502864 (C.D. Cal. March 27, 2020); *Coronel v. Decker*, 2020 WL 1487274 (S.D.N.Y. Mar. 27, 2020); *Fraihat v. Wolf*, No. ED CV 20-00590 TJH (KSx) (C.D. Cal. Mar. 30, 2020); *Calderon Jimenez v. Wolf*, No. 18 Civ. 10225 (D. Mass. Mar. 26, 2020), ECF No. 507; *United States v. Stephens*, 2020 WL 1295155 (S.D. N.Y. Mar. 19, 2020); *Matter of Extradition of Toledo Manrique*, 2020 WL 1307109 (N.D. Cal. Mar. 19, 2020); *Alcantara v. Archambeault*, No. 3:20-cv-00756-DMS-AHG (S.D. Cal. Apr. 30, 2020), ECF No. 38; *Dada v. Witte*, No. 1:20-cv-00458-DDD-JPM (W.D. La. April 30, 2020), ECF No. 17; *Gayle v. Meade*, 2020 WL 2086482 (S.D. Fl. Apr. 30, 2020); *Favi v. Kolitwenzew*, No. 2:20-CV-02087 2020 U.S. Dist. LEXIS 77772 (C.D. Ill. May 4, 2020); *Hernandez v. Kolitwenzew*, No. 2:20-cv-

spread is inevitable. At Folkston, hundreds of people live, eat, and sleep together in

Mexico, as well as her gender identity and sexual orientation. She is currently appealing the denial of this relief to the BIA and applying for a U-visa. Ms. Benavides' immigration attorney submitted a humanitarian parole request on her behalf on April 2, 2020, which ICE denied on April 5, 2020. On April 24, 2020, Ms. Benavides' immigration attorney submitted a request for re-consideration of the parole request and custody re-determination under *Frailhat v. ICE*, No. 5:19-cv-01546-JGB-SHK, at 21 (C.D. Cal. Apr. 20, 2020), ECF No. 132. On May 1, 2020, this request was denied as well. Ms. Benavides is HIV positive and suffers from bipolar disorder and severe depression and anxiety. As a consequence of her health conditions, she is at high risk for severe illness or death if she contracts COVID-19.

10. Petitioner David Fernandez is a 45-year-old citizen of Mexico who has been detained by ICE at Folkston since December 2019. He has lived in the United States for nearly 18 years and has worked consistently in labor jobs, including farming, construction, and roofing. He is currently seeking asylum. Mr. Fernandez suffers from diabetes and has a history of tuberculosis. ICE has not consistently provided him with his necessary insulin injections, so his health has deteriorated while in detention. As a consequence of his health conditions, he is at high risk for severe illness or death if he contracts COVID-19.

11. Petitioner Gerardo Arriaga is a 24-year-old citizen of Peru who is detained at Folkston and has been in ICE custody since March 2020. He is married to a U.S. citizen and was living in Atlanta, Georgia before ICE detained him. Mr. Arriaga suffers from lupus, an autoimmune disease that causes him to be immunocompromised and causes inflammation and damage to his joints, skin, kidneys, blood, heart, and lungs. He has not been receiving adequate medical care at Folkston for his lupus, and on May 5, 2020, he signed a voluntary departure order, choosing to be deported to Peru to obtain medical care for his lupus instead of remaining at

Folkston. However, he was informed by the Peruvian Consulate that Peru is not currently accepting deported people back into the country. Mr. Arriaga's previous requests for release on parole and bond were denied. As a consequence of his health conditions, he is at high risk for severe illness or death if he contracts COVID-19.

12. Petitioner Ajit Kumar is a 29-year-old citizen of Sri Lanka who has been detained by ICE at Folkston since January 2019. He fled Sri Lanka to escape persecution and sought asylum in the U.S. but was denied protection. However, he does not have a passport or travel document and cannot be deported without them. Mr. Kumar currently suffers from tuberculosis, which causes coughing and fatigue, but Folkston recently stopped providing him medication for his tuberculosis. He also suffers from severe headaches, depression, and anxiety; he previously attempted suicide due to the effects of detention on his mental health. As a consequence of his health conditions, Mr. Kumar is at high risk for severe illness or death if he contracts COVID-19.

13. Petitioner Scott James is a 58-year-old citizen of Belize who is detained at Folkston and has been in ICE custody since October 2018. He is married to a U.S. citizen, and he and his wife have four U.S. citizen children. He has lived in the U.S. since 1978; prior to his detention,

He sought asylum based on violence committed against him in Jamaica by the police, but his application was denied. He is appealing the denial to the BIA. Mr. Brown suffers from diabetes and hypertension, and he has prostate issues as well. For a few weeks, he has also been

III. JURISDICTION AND VENUE

20. This Court has subject matter jurisdiction over this matter under 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1346 (United States as defendant), 28 U.S.C. § 2241 (habeas jurisdiction), 28 U.S.C. § 1651 (All Writs Act), Article I, Section 9, clause 2 of the U.S. Constitution (the Suspension Clause), and the Due Process Clause of the Fifth Amendment to the

the only contested issue is constitutional, collateral to the consideration of [the] claim [before the agency], and its resolution therefore falls outside the agency's authority. . . .”).

25. Exhaustion of administrative remedies is also not required where it would be futile; where administrative remedies are inadequate; or where irreparable harm would result from requiring exhaustion. *See Nierenberg v. Heart Ctr. of Sw. Fla., P.A.*, 835 F. Supp. 1404, 1407 (M.D. Fla. 1993); *see also Curry v. Contract Fabricators, Inc. Profit Sharing Plan*, 891 F.2d 842, 846 (11th Cir. 1990) (exceptions to exhaustion requirement exist when resort to the administrative route is futile or the remedy inadequate). Under the exigent circumstances here, requiring exhaustion would cause irreparable injury.

V. STATEMENT OF FACTS

A. COVID-19 Is a Global Pandemic that Poses a Significant Risk of Death or Serious Illness to Petitioners

26. COVID-19 is a highly contagious respiratory disease caused by a newly discovered coronavirus. Since the first case was reported in December 2019, the transmission of COVID

planet.⁵ As of May 7, 2020, the number of confirmed cases worldwide has surpassed 3.8 million, including over 1.2 million people in the United States. At least 265,877 people have died as a result of COVID-19 worldwide, including 74,810 in the United States.⁶

28. Nationally, projections by the Centers for Disease Control and Prevention (“CDC”) indicate that over 200 million people in the United States could be infected with COVID-19 over the course of the pandemic without effective public health intervention, with as many as 1.7 million deaths in the most severe projections.⁷ On March 23, 2020, the WHO warned that the United States could become the next epicenter of the pandemic.⁸ And indeed on March 26, 2020, the United States surpassed every other country in the world in number of confirmed COVID-19 cases.⁹

29. In the state of Georgia, transmission of COVID-19 has been rampant. On March 14, 2020, Governor Brian Kemp declared a public health state of emergency, describing the spread

⁵ *Coronavirus Disease 2019 (COVID-19) Situation Report – 73*, World Health Organization (April 2, 2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200402-sitrep-73-covid-19.pdf?sfvrsn=5ae25bc7_4https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200330-sitrep-70-covid-19.pdf?sfvrsn=7e0fe3f8_2.

⁶ Worldometer: Coronavirus, <https://www.worldometers.info/coronavirus/#countries> (last accessed May 7, 2020).

⁷ Sheri Fink, *Worst-Case Estimates for U.S. Coronavirus Deaths*, *The New York Times* (May 7, 2020), <https://www.nytimes.com/2020/05/07/us/coronavirus-deaths.html>.

high poverty rates.¹⁷ It is also in the top three states with the largest number of rural hospital closures in the last ten years.¹⁸

31. Moreover, elected leaders, medical professionals, and other public health experts have expressed concern over Governor Kemp's recent decision to lift the statewide shelter-in-place order and permit the reopening of certain businesses.¹⁹ Indeed, early data shows that the incidence rate of COVID-19 (*i.e.*, the number of cases for every 100,000 people) has increased by more than 40% since the reopening of the state.²⁰

32. Due to the lack of widespread testing available in the United States, including in Georgia, the number of confirmed cases is likely but a fraction of the true number of COVID-19 cases. A new Harvard analysis shows that several states—and the United States as a whole—still

¹⁷ Alan Judd, *In hard-hit Georgia, virus expected to linger*, The Atlanta Journal-Constitution (Mar. 26, 2020), <https://www.ajc.com/news/hard-hit-georgia-virus-expected-linger/AYMvVN9SIq8A0RUgUzIt5O/>.

¹⁸ Ayla Ellison. *State-by-state breakdown of 113 rural hospital closures*, Becker's Hospital Review (August 26, 2019), <https://www.beckershospitalreview.com/finance/state-by-state-breakdown-of-113-rural-hospital-closures-082619.html>.

¹⁹ Ryan Kruger, *Health officials worry Gov. Kemp reopening Georgia too soon*, 11 Alive (April 21, 2020), <https://www.11alive.com/article/news/health/coronavirus/georgia-reopening-too-soon-some-health-officials-worry/85-c19f2070-2d3e-4ed3-96f2-657d7a8f6c0f>; Eric Bradner, *Georgia Gov. Brian Kemp faces resistance over move to reopen economy*, CNN (April 21, 2020), <https://www.cnn.com/2020/04/21/politics/georgia-governor-coronavirus-backlash/index.html>

²⁰ Kevin Murnane, *The Risk Of Exposure To Covid-19 In Georgia Has Increased By More Than governorie 1*

fall far short of the level of testing needed to safely relax shelter-in-place orders.²¹ According to the study, Georgia should be performing 9,600 to 10,000 tests daily but currently averages only 4,000 tests per day.²² Because of the shortage of tests in the United States—admitted to be a “failing” by top infectious disease expert Dr. Anthony Fauci²³—the CDC currently recommends prioritizing testing for symptomatic healthcare providers and hospitalized patients²⁴—which means that the number of diagnosed COVID-19 cases may be only the tip of a very large iceberg.²⁵

i. Transmission of COVID-19

33. COVID-19 easily spreads through respiratory droplets that an infected person expels when they cough, sneeze, speak, or breathe. Transmission occurs if these virus-carrying droplets land directly on a nearby person’s nose or mouth. It can also occur when a person inhales these droplets.

The coronavirus can survive up to four hours on copper, 24 hours on cardboard, and two to three days on plastic and stainless steel.²⁷

34. COVID-19 can also be transmitted through inhalation of smaller virus-carrying particles an infected person emits when they breathe.²⁸ Compared with droplets, which are heavier and thought to travel only a short distance before falling to the floor or onto other surfaces, these particles can linger in the air for much longer (*i.e.*, become aerosolized), travel farther, and build up over time in enclosed spaces.²⁹ Coronavirus may also be spread through viral shedding in stool.³⁰ New studies on the potential transmission of COVID-19 through aerosolized viral particles emphasize the importance of good ventilation, limiting crowds, and careful sanitation efforts.³¹

35. Many people with COVID-19 remain completely asymptomatic but can still spread the disease. Likewise, infected people who eventually develop symptoms are contagious even when they are pre-

isolate or quarantine only symptomatic individuals, therefore, cannot effectively contain transmission.

ii. Symptoms of COVID-19, Underlying Risks Factors, and Long-Term Effects

36. Even though it causes only mild symptoms or no symptoms at all for some, COVID-19 can, for others, result in more serious injury, including respiratory failure, kidney failure, other long-term organ damage, and even death.

37. Older individuals and those with certain medical conditions are at particularly high risk for serious illness or death from COVID-19. Medical conditions that increase the risk of severe illness or death from COVID-19 for individuals of any age include blood disorders, chronic kidney or liver disease, diseases that compromise the immune system (*e.g.*, HIV), diabetes and other endocrine disorders, metabolic disorders, heart and lung disease, neurological and neurodevelopmental conditions, and current or recent pregnancy.

38. Infected individuals can face prolonged treatment and recovery periods, requiring intensive hospital care and ventilators that are in increasingly short supply. Those who do not die can suffer serious damage to the lungs, heart, liver, or other organs.³² Preliminary data from the United States shows a high prevalence of one or more underlying med

39. Complications from COVID-19 can manifest at an alarming pace. Patients can go from being medically stable with no need for supplemental oxygen to requiring intubation and ventilator-

42. The CDC also advises that after an infected person has been present in a room for more than a few minutes while coughing or sneezing, it is possible that air inside the room could remain potentially infectious.³⁷ Thus, for a room to be safe for someone not wearing personal protective equipment (“PPE”), the CDC advises following its general guidance on airborne pathogen clearance rates under differing ventilation conditions.³⁸

43. The high incidence of asymptomatic transmission, alongside the nationwide dearth of diagnostic tests to identify and isolate infected individuals, necessitate strict social distancing measures to interrupt transmission.

44. Social distancing reduces the average number of contacts between people, which lowers every individual’s

48. Dr. Scott Allen and Dr. Josiah Rich, experts in the fields of detention health, infectious disease, and public health who advise DHS’s Office of Civil Rights and Civil Liberties, have urged Congress to take immediate actions to slow the spread of COVID-19 in ICE detention centers, including releasing immigrants to facilitate social distancing—which, they say, is an “oxymoron” in congregate settings.⁴⁴

49. In March 2020, over 3,000 medical professionals across the United States also urged ICE to release individuals and families from detention “to prevent the spread of COVID-19 and mitigate the harm of an outbreak” to detained individuals, as well as to facility staff.⁴⁵ They warned that social distancing measures recommended by the CDC are nearly impossible in immigration detention and that large-scale quarantines may be unfeasible at ICE facilities. They also expressed concern that “isolation may be misused and place individuals at higher risk of neglect and death.”

50. Like these and other experts,⁴⁶ Drs. Allen and Rich also warned of the dire consequences that a COVID-19 outbreak within an ICE detention facility would have on the community outside the facility. They describe a “tinderbox” scenario where a rapid outbreak inside a facility would result in the hospitalization of multiple detained people in a short period of time,

⁴⁴ Scott A. Allen, MD, FACP and Josiah Rich, MD, MPH Letter to Congress (Mar. 19, 2020)

contracted inside the facilities⁴⁸ before the outbreak spread to surrounding communities.⁴⁹ ICE and CBP facilities have also been sites of other infectious outbreaks in recent years,⁵⁰ as have other prisons and jails.⁵¹

54. COVID-19 is indeed already spreading rapidly inside prisons and jails across the United States,⁵² including in Georgia.⁵³ A jail in Chicago exploded from two confirmed cases to more than 350 in the course of two weeks—despite isolation of the first two confirmed cases.⁵⁴ A

⁴⁸ Leung J, Elson D, Sanders K, et al. *Notes from the Field: Mumps in Detention Facilities that House Detained Migrants—United States, September 2018–August 2019*, MMWR Morb Mortal Wkly, 749–50 (Aug. 30, 2019), <https://www.cdc.gov/mmwr/volumes/68/wr/pdfs/mm6834a4-H.pdf>; Roxanne Scott,

single prison in Ohio has reported that nearly 2,000 imprisoned individuals—approximately 80% of the total incarcerated population—have tested positive for COVID-19; so far, five prisoners and one correctional officer have died from this outbreak.⁵⁵ In Louisiana, nearly every woman in a prison dormitory—approximately 200 in total—recently tested positive for COVID-19.⁵⁶ At a

its entire state prison population and all state prison staff. The significant spread through asymptomatic people in each of these cases suggests that the true number of cases is grossly underreported in congregate settings where aggressive testing is not done.⁵⁹

56. Even with insufficient testing and other known gaps in ICE's data collection, the numbers show significant spread in ICE detention facilities. As of May 7, 2020, ICE had publicly reported that 705 detained individuals and

Louisiana,⁷¹ have all released people to mitigate the harm that the spread of COVID-19 will cause. Some jails in Georgia have done the same,⁷² including Dougherty County Detention Center in Albany, which is suffering from one of the most severe outbreaks in the state.⁷³ The Federal Bureau of Prisons has also instructed prison directors to prio

outrage at being housed with newly arriving individuals who may have been exposed to COVID-19.⁷⁶ The transference of detained people between different facilities is particularly risky because ICE often transports people over vast distances across multiple states.⁷⁷ According

61. At the same time, infection will also flow in the opposite direction, from within a detention facility to the outside community. COVID-19 can spread from a detained individual to facility staff to family members of staff and, ultimately, to nearby cities and towns. An outbreak of COVID-19 within an ICE facility thus poses grave danger not only to the incarcerated population but also to guards, other facility staff, and everyone who lives and works in the surrounding local communities. Detention facility workers have expressed fear that ICE's detention practices during the COVID-19 pandemic will endanger them and their families.⁸⁰ In late April, two guards at an ICE detention facility in Louisiana died after contracting COVID-19.⁸¹

C. Folkston Detention Center Is Primed for COVID-19 Exposure and Severe Outbreaks

i. Existing Conditions at Folkston Will Further Enable COVID-19 Transmission

62. The ICE Atlanta Field Office currently detains an estimated 1,000 noncitizens at Folkston.

63. ICE cannot prevent the spread of COVID-19 inside Folkston. The design of immigration detention facilities generally, and Folkston in particular, requires detained individuals to remain in close contact with one another.

64. Folkston houses people in very close quarters, making social distancing and the recommended hygiene measures effectively impossible. Most people sleep in bunk rooms housing dozens of immigrants—where beds are only a few feet apart from each other—and use shared

⁸⁰ *Id.*

⁸¹ Nomann Merchant, *2 guards at ICE jail die after contracting coronavirus* (April 29, 2020), <https://abcnews.go.com/Health/wireStory/guards-ice-jail-die-contracting-coronavirus-70412840>.

toilets and showers. Folkston also has some smaller cells housing multiple people with shared bathrooms. People regularly congregate in common areas of their housing units.⁸²

65. The conditions at Folkston are also flagrantly unsanitary and dangerous to the health of detained individuals. Private contractors operate Folkston, and the DHS Office of Inspector General has repeatedly concluded that ICE fails to hold detention facility contractors accountable for meeting performance standards required to ensure humane conditions.⁸³

66. At Folkston, food preparation and service are communal with little opportunity for surface disinfection. Detained people, overseen by food service contractors, staff the kitchens. People detained in Folkston have reported being served food that is undercooked or spoiled.

ii. Folkston Has a Dismal Medical Care Track Record and Are Currently Ignoring Reported COVID-19 Symptoms Among the Detained Population

67. Respondents have consistently failed to provide even minimally adequate medical care to individuals detained at Folkston. They cannot possibly be trusted to protect those in their custody from a potentially lethal infectious disease outbreak that has overwhelmed healthcare systems around the world.

68. Critical medical care is routinely delayed—sometimes for months—or denied outright.

⁸² Keith Gardner, dvids.net, Folkston Processing Center B-Roll (Apr. 4, 2017), <https://www.dvidshub.net/video/529423/folkston-processing-center-b-roll>

⁸³ See U.S. Department of Homeland Security,

69. Detained people at Folkston have reported to advocates that medical staff regularly dismiss detained people’s medical concerns or ridicule them as “dramatic.” On one occasion, other detained individuals had to stage a protest to demand a response to a person exhibiting signs of severe medical distress. In another case, Folkston staff ignored a man and his attorney’s repeated requests to go to the emergency room due to excruciating abdominal pain. His appendix later ruptured.

70. When detained people at Folkston do manage to get the attention of a medical provider, they are often given substandard care or are not provided with the proper medications.

71. Detained individuals with diabetes—a condition that the CDC considers a risk factor for severe COVID-19, “particularly if not well controlled”⁸⁴—have reported diets that are inadequate given their medical needs. Petitioner David Fernandez has received as few as three out of the fourteen insulin injections per week he requires to manage his diabetes, which has left him so weak and tired that he could not stand up.

72. The history of inadequate medical care at Folkston is consistent with an alarming pattern of medical neglect among ICE detention facilities generally. Government records recently obtained through the Freedom of Information Act reveal several instances where investigators found that ICE’s medical negligence contributed to the death of an individual in its custody.⁸⁵

⁸⁴ Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), *People who are at higher risk for severe illness* (last reviewed Mar. 31, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/people-at-higher-risk.html>

⁸⁵ Katherine Hawkins and Emma Stodder, *Past Deaths in Custody Highlight Dire Risks for Immigration Detainees During Coronavirus Outbreak* (April 29, 2020), <https://www.pogo.org/investigation/2020/04/past-deaths-in-custody-highlight-dire-risks-for-immigration-detainees-during-coronavirus-outbreak/>

73. In the context of the COVID-19 pandemic, early reports indicate that ICE is using the same playbook—ignoring pleas for help, threatening those who seek medical care with punishment, and waiting until it may be too late.

74. Preliminary data suggests that a person with COVID-19 is most infectious during the early stage of the disease.⁸⁶ Early, proactive action is necessary to prevent the virus's spread. The well-documented failure to provide adequate and timely

76. Given the evidence of community spread in Folkston and other surrounding communities, the frequent comings and goings of people at the detention center increase Petitioners' risk of exposure to COVID-19.

77. In particular, staff at Folkston arrive and leave on a shift basis, and there is limited ability to adequately screen incoming staff for new, asymptomatic infections.

78. Attorneys also continue to visit their detained clients in Folkston because most immigration court hearings are still proceeding. Filing deadlines still apply and must be met.

79. Detained people at Folkston have reported that transfers of new immigrants into Folkston have continued throughout the COVID-19 pandemic.

80. There are myriad ways in which COVID-19 is likely to enter or has already entered

19 may require supportive care.⁹⁰ The disease requires an intensive care unit with specialized medical equipment and medical staff trained to care for critically ill patients. This level of support is especially difficult to provide to detained individuals because ICE detention facilities lack adequate medical care infrastructure.

85. Folkston is geographically isolated from appropriate levels of medical care to treat COVID-19. The closest hospitals to Folkston are either critical access hospitals without the necessary facilities or regional hospitals that serve many counties and will quickly become overwhelmed if there is an outbreak within Folkston Detention Center.

86. Critical access hospitals, which are common in rural areas, generally have fewer than 25 beds and are designed to care for patients who will require fewer than 96 hours of

E. Respondents' Actions to Address the Pandemic Thus Far Have Been Woefully Inadequate, and Release is the Only Adequate Response to Protect Petitioners

88. Respondents' failure to recognize the inevitability of an outbreak at Folkston and to take adequate precautions, including releasing people and following CDC Guidance related to COVID-19, demonstrates its complete disregard for the lives of detained immigrant, including Petitioners.

i. Respondents' Custody Review of High-Risk Individuals Has Been Largely Illusory

89. ICE has engaged in extremely limited efforts to re-evaluate the necessity of detaining medically vulnerable people. The current ICE guidance governing custody re-evaluation does not mandate or meaningfully encourage the release of Petitioners or other medically vulnerable individuals from ICE custody.⁹¹ Indeed, no Petitioner in this action has, to their knowledge, received an individualized or specialized medical evaluation related to COVID-19.

90. Instead, the policy merely directs ICE field office directors to review the custody of detained individuals with certain underlying medical conditions to determine on a "case-by-case" basis whether their continued detention is appropriate. For these custody reviews, the medical condition that puts an individual at high risk for a serious COVID-

and their staff, requiring only after-the-fact consultation with any medical professionals, and failing to include all risk factors ident

conditions but also creates significant, life-threatening risks. This is particularly true given the rapid and severe progression of COVID-19 and the need for responsive medical observation. Folkston does not have the space or staff to safely care for patients for this period of time.

95. Locking any detained person, with or without underlying medical conditions, in a jail cell for extended periods of time is psychologically damaging and could lead to a spike in severe depression, suicides, and other medical emergencies. In the context of an infectious disease outbreak, where onsite medical staff are operating at or over capacity, these problems will only accelerate. Isolation also increases the amount of physical contact between detention center staff and detained people due to increased handcuffing, escorting individuals to and from the showers, and increased use of force due to the increased psychological stress of isolation.

96. ICE's response to the COVID-19 pandemic, as reflected by its half-hearted custody re-evaluation process, makes clear that it is not committed to establishing special protections for high-risk patients and is instead waiting until people become symptomatic before taking action. This puts not only Petitioners but ICE's own personnel and the community at large at risk of a preventable disaster.

ii. Respondents Are Failing to Adhere to CDC Guidance

97. The CDC has issued Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities ("CDC Guidance") which incorporates a variety of other CDC materials on specific topics, such as recommendations for protecting people with underlying medical vulnerabilities, recommendations for healthcare providers (including

providers within detention centers), and recommendations for employers of essential workers (including law enforcement and workers at government facilities).⁹⁷

98. The CDC Guidance stresses the vital importance of ensuring social distancing, proper hygiene, access to testing, individual isolation of people who have the virus, and quarantine of people exposed to the virus.

99. The CDC Guidance states that it is intended for ICE, as a law enforcement agency with custodial authority of detained populations.

100. Respondents recognize the CDC Guidance as an authoritative source regarding the standard of care required of them during the COVID-19 pandemic. ICE has released agency guidance stating that both dedicated and non-dedicated ICE detention facilities “must” comply with the CDC Guidance.⁹⁸ In a written declaration submitted to this Court, Respondent Gartland

⁹⁷ See *supra* n.44; 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>; Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), *Interim Infection Prevention and Control Recommendations for Patients with Suspected or Confirmed Coronavirus Disease 2019 (COVID-19) in Healthcare Settings* (last updated Apr. 13, 2020), https://www.cdc.gov/coronavirus/2019-ncov/hcp/infection-control-recommendations.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Finfection-control%2Fcontrol-recommendations.html; Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), *Implementing Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19* (last reviewed Apr. 20, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/critical-workers/implementing-safety-practices.html>. The CDC defines “critical infrastructure workers” to include federal law enforcement and workers, including contractors, at government facilities.

⁹⁸ See U.S. Immigration and Customs Enforcement, *ERO COVID-19 Pandemic Response Requirements* (Version 1.0, April 10, 2020). ICE’s contract with Geo Group also requires compliance with federal guidelines related to communicable diseases. See Performance-Based National Detention Standards 2011 Section 4.3(II)(10), <https://www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf> (“Centers for Disease Control and Prevention (CDC)

confirmed that “Folkston has implemented a number of procedures in accordance with the guidelines published by the [CDC],” and repeatedly referenced the CDC Guidance as the authority guiding their practices.⁹⁹ Respondent Gartland generally asserted that Folkston is in compliance with measures outlined by the CDC.¹⁰⁰ ICE also provided to the Court a written declaration from Brian Allen, Acting ICE Assistant Field Office Director, asserting that ICE applies the CDC Guidance at Folkston and that Folkston is generally in compliance with the CDC Guidance.¹⁰¹

101. But reports from detained individuals and their attorneys indicate that, contrary to Respondents’ testimony, conditions at Folkston fall short of the CDC Guidance in many respects.

102. Respondents’ failure to comply with the CDC Guidance is unsurprising. ICE is unlikely to be able to ensure compliance with the CDC Guidance due to longstanding lack of information systems, quality assurance, and oversight mechanisms that are standard in other carceral settings.

a. Respondents Are Violating the CDC Guidance Regarding Social Distancing and Air Regulation

103. The CDC Guidance instructs detention facilities to “[i]mplement social distancing strategies to increase the physical space between detained/incarcerated persons (ideally 6 feet between all individuals, regardless of the presence of symptoms).”¹⁰² Under the CDC Guidance, Respondents must enforce social distancing between individuals in all locations and at all times,

guidelines for the prevention and control of infectious and communicable diseases shall be followed.”) [hereinafter “2011 PBNDS”].

⁹⁹ See generally Dkt. 29-1.

¹⁰⁰ *Id.*

¹⁰¹ Dkt. 29-2.

¹⁰² All quoted language in Section V.E.ii. is from the CDC Guidance, *supra* n.44, unless otherwise indicated.

including in holding cells, in lines and waiting areas, in recreation spaces, in housing spaces, and during meal times.

104. The CDC Guidance also recognizes that exposure to COVID-19 may occur through “contaminated air” and that, therefore, air circulation, air exchange, and ventilation all impact

and six working showers. In both pod units with shared cells and dormitory housing, the toilets and showers are not cleaned between uses and the toilets do not have lids. In either situation, detained individuals are not able to shower or use the bathroom while maintaining six feet of distance from other people.

111. In addition to when they sleep, eat, shower, and use the toilet, there are numerous other times throughout the day when detained people cannot avoid close contact with each other. For example, at least three times a day, detained people are required to line up close together to go to the cafeteria or other places, often standing so close to one another that they are “back-to-belly.” When walking from their pod units to the cafeteria, yard, or medical unit, detained people not only come in contact with people from their own units, but also with individuals from other units they pass on their way.

112. Finally, contrary to directives in the CDC Guidance, the minimal social distancing practices implemented by Respondents are not enforced.

b. Respondents Are Violat

that ICE periodically passed out. Some petitioners report that they started receiving one bar of soap per week in April or May 2020.

115. No additional soap is available in the showers or pod units. Petitioner Brown reports having seen soap and paper towel dispensers in the bathroom in the medical unit, which are often empty. Petitioners report that facility staff have been unreceptive to requests for additional soap.

116. Detained people at Folkston have no access to hand sanitizer, which is not even available for purchase at the commissary.

c. Respondents Are Violating the CDC Guidance Related to Supplies, Including PPE

117. The CDC Guidance requires Respondents to “[e]nsure that sufficient stocks of hygiene supplies,

d.

123. Folkston also commonly fails to provide detained individuals with gloves or face masks to use while cleaning.¹⁰⁶

124. Detained people at Folkston who have respiratory issues, like asthma, find that their health is negatively affected by some of the cleaning sprays provided. Petitioner James, who has asthma and COPD, for example, stated that “[o]n a daily basis [he has] issues breathing while at the detention center,” but those issues are only “aggravated by the fact that they . . . use certain cleaning sprays that affect my breathing.”

e. Respondents Are Violating the CDC Guidance by Ignoring Symptoms Among the Detained Population and Failing to Place Sick People in Medical Isolation

125. The CDC Guidance requires immediate action in response to symptoms of COVID-19, even if the person has not yet been tested. “As soon as an individual develops symptoms . . . , they 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.” While under medical isolation, a detained person should wear a face mask “at all times when outside of the medical isolation space and whenever another person enters that space,” and be provided with a clean mask “at least daily, and when visibly soiled or wet.”

126. The CDC Guidance directs facilities to provide “medical evaluation and treatment at the first signs of COVID-19 symptoms,” including an initial evaluation as to whether the “symptomatic individual is at higher risk for severe illness from COVID-19” due to an underlying condition. “If a facility is not able to provide such evaluation and treatment, a plan should be in place to safely transfer the individual to another facility or local hospital.”

¹⁰⁶ Dkt. 29-1 ¶ 8.

127.

location. Petitioner James observed that Folkston was not taking steps to evaluate detained people who had coughs.

f. Respondents Are Violating the CDC Guidance Related to Transfers and Screening of New Entrants to the Detained Population

132. CDC Guidance states that transfers of detained individuals between detention facilities should be “restricted” unless “absolutely necessary” (if COVID-19 is not already present in either facility) and transfers should be “suspended” unless “absolutely necessary” (if there has been a suspected or confirmed case of COVID-19 inside either facility). The Guidance further states that receiving facilities must have capacity to isolate symptomatic patients upon arrival.

133. The Guidance sets out required infection control measures for the transportation of detained people. These measures demand far more staffing and training than ICE has available for large scale transfers:

If a transfer is absolutely necessary, perform verbal screening and a temperature check as outlined in the Screening section below, before the individual leaves the facility. If an individual does not clear the screening process, delay the transfer and follow the protocol for a suspected COVID-19 case – including putting a face mask on the individual, immediately placing them under medical isolation, and evaluating them for possible COVID-19 testing. If the trans() -87.2 ar the q 0.24 0 h50 0 0 5Yedin

136. As symptoms of COVID-19 can present anywhere from 2 to 14 days after exposure, individuals can expose other detained individuals, as well as detention center staff, if the CDC's new intake quarantining protocols are not followed.

137. On information and belief, Respondents are not complying with the CDC Guidance regarding transfers, including by failing to sufficiently screen all transfers out of and into Folkston and failing to consistently impose adequate intake quarantining.¹⁰⁷ On information and belief, Respondents also continue to engage in transfers that are not "absolutely necessary."

138. Folkston received new intakes transferred from other facilities as late as the second half of April.¹⁰⁸ Detained immigrants have observed new people being moved in and out of the facility as well, throughout the last month. 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.

139. On information and belief, Respondents have been placing new intakes with other detained individuals without first taking appropriate screening, isolation, or quarantining measures.

g. Respondents Are Violating CDC Guidance on Screening of Visitors

140. The CDC Guidance requires that visitors, like staff, have their temperatures taken and be screened before entering Folkston. Staff performing this screening should wear PPE

¹⁰⁷ Dkt. 29-1 ¶ 7.

¹⁰⁸ 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://hrlid.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).

including a face mask, eye protection, gloves, and a hospital gown or disposable coveralls. Visitors who do not clear the screening process should not be permitted to enter Folkston.

141. Attorneys continue to visit their detained clients in Folkston because most immigration court hearings for detained individuals are still proceeding and many filing deadlines still apply.

h. Respondents Are Violating the CDC Guidance Related to Communication with Detained People

144.

148. Notices or flyers about COVID-19 are sometimes provided only in English, and

recommending medical isolation of confirmed or suspected COVID-19 cases and quarantine of close contacts of COVID-

155. Respondents routinely provide medically vulnerable people with incorrect medications or care, and delay or ignore medical requests. Diabetic Petitioners are not receiving the special diets they need to manage their diabetes and are not consistently provided with medically necessary insulin. Petitioner Kumar, who suffers from tuberculosis, was not provided medication for more than six months after he was brought to Folkston. He passed tuberculosis to his cellmate before Folkston started providing medication. On April 14, 2020, he stopped receiving medication for tuberculosis, even though he is still actively symptomatic. Moreover, Respondents' cleaning methods, *supra* ¶¶124, exacerbate breathing issues for Petitioners with asthma and other respiratory conditions. Petitioner Arriaga found the lack of medical care at Folkston for his lupus so egregious that he agreed to voluntary departure.

156. In addition, Respondents' numerous violations of the CDC Guidance discussed above, *supra* ¶¶ 97-155, all increase the risk that COVID-19 will continue to spread within Folkston, magnifying the risk of infection to medically vulnerable people. Given the realities of detention at Folkston, no conditions of confinement can possibly protect Petitioners from the heightened risk of COVID-19 posed by their detention. As long as Petitioners remain detained, they are at greater risk of exposure than they would be if permitted to comply with state stay-

159. The CDC Guidance 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, the CDC Guidance requires them to wear face masks at all times to prevent transmission from infected to uninfected individuals.

160. The CDC Guidance also requires that facilities must “[i]mplement daily temperature checks in housing units where COVID-

inadequate that, on May 5, 2020, he agreed to voluntary departure to Peru to get medical care there instead of remaining at Folkston.

167. Mr. Arriaga is critically vulnerable to COVID-19 because of his significant health problems. Upon his release, he plans to self-quarantine with his wife in Atlanta, Georgia before they both return to Peru.

168. Ajit Kumar. Mr. Kumar has been detained at Folkston since January 2019. He is currently suffering from tuberculosis, which causes him to cough and experience general fatigue. He also has severe headaches, depression, and anxiety. When Mr. Kumar was first transferred to Folkston, he informed staff that he had tuberculosis, but was not tested for it for over six months. This delay not only caused Mr. Kumar to suffer without medication, but also caused his cellmate to contract tuberculosis. Folkston then began providing Mr. Kumar with medication for his tuberculosis and his headaches, but recently stopped. The only medication he receives now is an antidepressant. Mr. Kumar continues to be detained in a crowded open dormitory at Folkston.

169. Mr. Kumar is critically vulnerable to COVID-19 because of his significant health problems. Upon his release, he plans to self-quarantine at his home with his brother-in-law in Baltimore, Maryland.

170. Scott James. Mr. James is currently detained at Folkston, and has been in ICE custody since October 2018. He suffers from severe asthma and chronic obstructive pulmonary disease (COPD), and needs to have an inhaler at all times. The conditions under which Mr. James is detained aggravate his respiratory conditions. He also has hypertension and a history of pre-diabetes. Many of his health issues are related to being shot in 2002 and a resultant surgery.

171. Mr. James is critically vulnerable to COVID-19 because of his age and significant health problems. Upon his release, he plans to self-quarantine with his wife and four children in Atlanta, Georgia.

172. **Winston Brown.** Mr. Brown is currently detained at Folkston and has been in ICE custody since March 2019. About a year ago, he was diagnosed with diabetes and high blood pressure. He also has problems with his prostate. For the last few weeks, he has been experiencing shortness of breath and chest pain as well. He has been taking medications for all of these conditions. At Folkston, he does not receive the proper diet he needs to manage his diabetes effectively. The stress of detention and the risk of COVID-19 also causes his blood pressure to fluctuate dangerously.

173. Mr. Brown is critically vulnerable to COVID-19 because of his age and significant health problems. Upon his release, he plans to return to his home and self-quarantine with his family in Boynton Beach, Florida.

G. ICE's Alternatives to Detention Program

174. ICE has a longstanding practice of exercising its authority to release from custody particularly vulnerable immigrants with significant medical or humanitarian needs, including on bond, parol.7 (c) 04

175. For over 15 years, DHS/ICE has sought and obtained congressional funding for its ATD program, which uses supervised release, case management, and monitoring of individuals instead of detention.¹¹⁶ ICE has repeatedly told Congress that the ATD program increases ICE's operational effectiveness and individual compliance with release conditions.

176. The DHS FY2021 Congressional Budget Justification for ICE states that it costs \$125.06 per day to jail an adult immigrant in ICE custody. The average cost per ATD participant is \$4.43 per day. The DHS FY2021 funding request seeks to support 120,000 daily participants in the ATD program.¹¹⁷

177. A 2014 GAO Report found that 95% of those on full-service ATD (

supervision coupled with some case management results in a more than 99% appearance rate for all immigration court hearings, and a more than 91% appearance rate for final hearings.¹¹⁹

178. As of April 25, 2020, ICE has 89,490 individuals enrolled in ATD, including 3,078 in the Atlanta area.¹²⁰

VI. LEGAL FRAMEWORK

179. By continuing to detain Petitioners at Folkston at this time, Respondents are in violation of two different substantive standards flowing from the Fifth Amendment Due Process Clause: (1) the right to be free from punishment; and (2) the right to reasonable safety. The Court has the power to remedy constitutional violations by ordering Petitioners' release or other available remedial actions short of release, either by issuing a writ of habeas corpus under 28 U.S.C. § 2241 and Art. I, § 9, cl. 2 of the U.S. Constitution, or alternatively, through the court's longstanding equitable power to enjoin unconstitutional conduct in suits brought under 28 U.S.C. § 1331 seeking injunctive or declaratory relief against federal actors acting in their official capacity.

A. Petitioners Have a Constitutional Right to Be Free from Punishment

180.

n.16 (1979); *Magluta v. Samples*, 375 F.3d 1269, 1273 (11th Cir. 2004); *Hamm v. Dekalb County*, 774 F.2d 1567, 1572 (11th Cir. 1985) (citing *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977)). (1989).

182. 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 Corrections*, 330 F. App’x 179 (11th Cir. 2009) (quoting *Youngberg v. Romeo*, 457 U.S. 307, 322 (1982)); accord *Heyer v. U.S. Bureau of Prisons*, 849 F.3d 202, 209 n.5 (4th Cir. 2017).

183. The government must provide detained individuals with basic necessities, such as adequate medical care, food, clothing, and shelter; the failure to provide these necessities violates due process. *Hamm*, 774 F.2d at 1573;

185. There is no legitimate interest in civil immigration detention of an individual for the purpose of deterring migration of others. *See Bell*, 441 U.S. at 539 n.20 (“Retribution and deterrence are not legitimate nonpunitive governmental objectives.”); *see also R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 188-90 (D.D.C. 2015) (observing that deterring future mass migration is a “novel” justification for detention that is “out of line” with those endorsed by the Supreme Court, and ultimately holding that it is not a legitimate purpose for immigration detention).

B. Petitioners Have a Constitutional Right to Reasonable Safety in Custody

186. “[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
al] 2 (e) 0.2 (i) 0.TJ ET Q q 0.24 0 0 0.24 321.7 9038 6.48cm BT 50 0 0 50 0 0 Tm /TT2 1 Tf [

189. The government may violate the Eighth Amendment, and by extension the Fifth 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*, 509 U.S. at 33; *see also id.* at 34 (citing with approval *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).

190. 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 to establish a violation of their constitutional rights. Courts do not require a plaintiff to “await a tragic event” before seeking relief from a condition of confinement that unconstitutionally endangers them. *See Seonsm Seonsm Helling*

Hope v. Doll, No. 20 Civ. 562, ECF. No. 11 at 13–14 (M.D. Pa. Apr. 7, 2020) (ordering release of medically vulnerable detainees, noting the increase in positive cases of COVID-19 in the detention centers at issue).

C. The Court May Grant Petitioners’ Release Through a Writ of Habeas Corpus

193. Petitioners may challenge t

often referred to as the historical core of habeas. Cases 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*, Case No. 4:20-cv-01241, ECF No. 41 at 7-9.

197. Some circuit courts have drawn a distinction between *prisoners*

to a highly contagious and potentially lethal virus that is substantially likely to harm Petitioners in the congregate environment where they are detained and that violates their constitutional rights to be free from arbitrary and punitive detention—by ordering their release.

D. The Court May Grant Petitioners' Release and Other Equitable Relief Under 28 U.S.C. § 1331 and the Fifth Amendment

202. Because of the operation of the Suspension Clause, if this Court determines that it does not have jurisdiction to consider release under habeas, it must be because it finds jurisdiction to do so under its broad implied injunctive authority. Petitioners may seek equitable relief for

Gibson v. Firestone, 741 F.2d 1268, 1273 (11th Cir. 1984); *see also Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15-

condition. 899 F.2d 1124, 1126 (11th Cir. 1990). But “the *Gomez* rule is based on the implicit assumption that a ‘correction’ or [‘]discontinuance’ of the unconstitutional practice is actually *available*. If no correction is feasible, then the remedy which the Eleventh Circuit relied upon would become illusory.” *Gayle*, 2020 WL 1949737 at *25-26 (S.D. Fla. Apr. 22, 2020); *see also id.* at 25 similarly distinguishing *Vaz v. Skinner*

Accardi v. Shaughnessy, 347 U.S. 260, 265 (1954) (petitioner granted new hearing after review of denial of relief revealed prejudice, contrary to existing regulations). Agencies must follow their own “existing valid regulations,” even where government officers have broad discretion, such as in the area of immigration. *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

212. Section 4.3(II)(10) of the PBNDS requires that “Centers for Disease Control and Prevention (CDC) guidelines for the prevention and control of infectious and communicable diseases shall be followed.” PBNDS at 258.

213. Section 4.3(V)(C)(1) of the PBNDS also provides that “[f]acilities shall comply with current and future plans implemented by federal, state or local authorities addressing specific public health issues including communicable disease reporting requirements.” PBNDS at 261-262.

214. Respondents are required to comply with the PBNDS, which in turn requires compliance with the CDC Guidance, pursuant to their own regulations and policy statements. Yet, as discussed *supra*, Section V.E.ii, their efforts to do so have been woefully inadequate.

215. 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.”). The same is true here.

VII. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

Violation of Fifth Amendment Right to Substantive Due Process

Detention Constituting Unlawful Punishment

216. Petitioners reallege and incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

217. The Due Process Clause of the Fifth Amendment guarantees individuals in immigration detention the right to be free from punishment. The government violates this

guarantee when conditions of confinement lack a reasonable relationship to any legitimate governmental purpose, *i.e.* when a custodian's actions are excessive in relation to their purpose.

218. Petitioners have chronic medical conditions that put them at high risk for serious injury or death if they contract COVID-19, which is significantly likely if they remain in detention.

219. Respondents' continued detention of Petitioners at Folkston during the COVID-19 pandemic, especially without consistent adherence to CDC Guidance, is excessive in relation to any legitimate governmental purpose. Less harsh measures are available to satisfy any government interest in continuing to detain Petitioners, including release with conditions.

220. Respondents' continued detention at Folkston, especially without consistent adherence to CDC Guidance, subjects them to conditions tantamount to punishment.

221. The government does not have a legitimate interest in continuing civil detention of Petitioners. Deterrence of migration to the United States—which Respondents state as a justification for refusing to release individuals in response to the COVID-19 pandemic—is not a proper justification for Petitioners' continued detention. Under these circumstances, Respondents' detention of Petitioners amounts to impermissible punishment.

222.

SECOND CLAIM FOR RELIEF

Violation of Fifth Amendment Right to Substantive Due Process

Detention Amounting to Deliberate Indifference to a Substantial Risk of Harm

224. Petitioners reallege and incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

225. Conditions of confinement for individuals in immigration detention also violate the Fifth Amendment when the government fails, with deliberate indifference, to safeguard the health and safety of those in custody. The government acts with deliberate indifference when it knowingly exposes an individual in its custody to a substantial risk of serious harm.

226. Respondents have subjected Petitioners to conditions of confinement that fail to
co

230. Under the *Accardi* doctrine, due process and4

235. Respondents have violated the *Accardi* doctrine and the Fifth Amendment Due Process Clause by failing to comply with their obligations under the PBNDS and failing to protect Petitioners.

VIII. PRAYER FOR RELIEF

WHEREFORE Petitioners request that the Court grant the following relief:

a. Issue a Writ of Habeas Corpus ordering Petitioners' immediate release, with appropriate precautionary public health measures, on the ground that Respondents' continued detention of Petitioners violates Petitioners' constitutional due process rights;

b. In the alternative, issue injunctive relief ordering Respondents to immediately release Petitioners, with appropriate precautionary public health measures, on the ground that continued detention violates Petitioners' constitutional due process rights;

c. In the a

- iv. Provision of appropriate PPE to all staff and detained people required to use them, training on use of the PPE, and enforcement of the use of the PPE;
- v. Intensified cleaning and disinfecting practices, including: (1) cleaning, several times per day, of all frequently touched surfaces with household cleaners and EPA-registered disinfectants that are effective against COVID-19 and appropriate for the surface, (2) taking relevant precautions needed when using these products, particularly around detained people with underlying respiratory conditions, and (3) adapting cleaning and disinfecting practices when suspected or confirmed COVID-19 cases have been identified;
- vi. Implementation of daily temperature checks in housing units where suspected, presumed, or positive COVID-19 cases have been identified, extending for fourteen days after the infected individual has been removed from the housing unit;
- vii. Immediate response to symptoms of COVID-19, i 322.56 cm BT 50 0 0 50 0 0T 0 Tn

possible, and provision of PPE as required by the Guidance;

- ix. Halting of transfers of detained people to and from Folkston unless
“absolutely

ICE custody; if such transfer is absolutely necessary, this Court to retain jurisdiction over their claims at those detention centers;

- d. Respondents to absolutely cease all transfers into Folkston until this Court is satisfied that Folkston is fully compliant with CDC Guidance as outlined above;
- e. Respondents to immediately conduct custody redeterminations for all Petitioners, with specific consideration of the medical conditions that make Petitioners especially vulnerable to severe illness, long-term organ damage, or death from COVID-19;
- f. Respondents to provide weekly reports to this Court and Petitioners' Counsel

Dated: May 7, 2020
S

Respectfully submitted,