

No. 20-1784

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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AARON HOPE, et al.,

Petitioners-Appellees,

v.

CLAIR DOLL, et al.,

Respondents-Appellants.

On Appeal from the United States District Court  
For the Middle District of Pennsylvania  
D.C. No. 1:20-cv-000562  
District Judge: Hon. John E. Jones III

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OPPOSITION TO APPELLANTS' MOTION TO STAY

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## TABLE OF CONTENTS

	<b>Page</b>
INTRODUCTION .....	1
JURISDICTION.....	4
BACKGROUND.....	5
A.    Procedural History.....	5
B.    The Record Before the District Court .....	8
ARGUMENT.....	13
I.    THE GOVERNMENT FAILS TO ESTABLISH A LIKELIHOOD OF SUCCESS ON THE MERITS.....	14
A.    The District Court Correctly Applied Fifth and Eighth Amendment Standards.....	14
II.   PETITIONERS WILL SUFFER AN IRREPARABLE INJURY— DEATH OR SERIOUS COVID-19 ILLNESS—IF THE STAY IS GRANTED.....	23
III.  THE BALANCE OF EQUITIES AND PUBLIC INTEREST WEIGH AGAINST A STAY.....	26
CONCLUSION.....	28
CERTIFICATE OF COMPLIANCE.....	31

## **TABLE OF AUTHORITIES**

### **CASES**

<i>Arriaga Reyes v. Decker</i> , 2:20-cv-03600-MCA, ECF No. 26 (D.N.J. Apr. 12, 2020) .....	3
<i>Aruanno v. Johnson</i> , 683 F. App'x 172 (3d Cir. 2017) .....	15
<i>Bahena Ortuno v. Jennings</i> , No. 3:20-cv-02064, ECF Nos. 38 & 51 (N.D. Cal. Apr. 8 & Apr. 14, 2020).....	3
<i>Basank v. Decker</i> , -- F. Supp. 3d ----, 2020 WL 1481503 (S.D.N.Y. Mar. 26, 2020).....	4, 20
<i>Bent v. Barr</i> , No. 4:19-cv-06123, ECF No. 26 (N.D. Cal. Apr. 9, 2020).....	3
<i>Borbot v. Warden Hudson Cty. Corr. Facility</i> , 906 F.3d 274 (3d Cir. 2018).....	17
<i>Brown v. Plata</i> , 563 U.S. 493 (2011) .....	21
<i>Coronel v. Decker</i> , -- F. Supp. 3d ----, 2020 WL 1487274 (S.D.N.Y. Mar. 27, 2020).....	4
<i>Crawford v. Bell</i> , 599 F.2d 890 (9th Cir.1979).....	21
<i>Davis v. Pa. Dep't of Corr.</i> , No. 15-587, 2015 WL 5918909 (W.D. Pa. Oct. 7, 2015).....	21
<i>Demore v. Kim</i> , 538 U.S. 510 (2003) .....	16
<i>Diop v. ICE</i> , 656 F.3d 221 (3d Cir. 2011).....	16, 17
<i>E. D. v. Sharkey</i> , 928 F.3d 299 (3d Cir. 2019).....	15, 16

<i>Farmer v. Brennan</i> , 511 U.S. 825 (1994) .....	20, 21
<i>Helling v. McKinney</i> , 509 U.S. 25 (1993) .....	19
<i>In re Revel AC, Inc.</i> , 802 F.3d 558 (3d Cir. 2015) .....	13, 23
<i>Ixchop Perez v. Wolf</i> , 5:19-cv-05191, ECF No. 29 (N.D. Cal. Apr. 14, 2020) .....	3
<i>Jennings v. Rodriguez</i> , 138 S. Ct. 830 (2018) .....	17
<i>Liriano Olivo v. Tsoukaris</i> , No. 2:20-cv-03481-JMV, ECF No. 24 (D.N.J. Apr. 9, 2020) .....	3
<i>Malam v. Adducci</i> , No. 2:20-cv-10829, ECF No. 23 (E.D. Mich. Apr. 6, 2020) .....	3
<i>Monmouth Cty. Corr. Inst. Inmates v. Lanzaro</i> , 595 F. Supp. 1417 (D.N.J. 1984), <i>as amended</i> , 717 F. Supp. 268 (D.N.J. 1989) .....	19
<i>Natale v. Camden Cty. Corr. Facility</i> , 318 F.3d 575 (3d Cir. 2003) .....	18
<i>Nken v. Holder</i> , 556 U.S. 418 (2009) .....	13
<i>Doe v. Barr</i> , 3:20-cv-02141, ECF No. 27 (N.D. Cal. Apr. 12, 2020) .....	3
<i>Phillips v. Superintendent Chester SCI</i> , 739 F. App'x 125 (3d Cir. 2018) .....	20
<i>Reilly v. City of Harrisburg</i> , 858 F.3d 173 (3d Cir. 2017) .....	23
<i>Robles Rodriguez v. Wolf</i> , No. 5:20-cv-00627, ECF Nos. 32, 35-39 (C.D. Cal. Apr. 2, 2020) .....	4

<i>Thakker v. Doll</i> , -- F. Supp. 3d ----, No. 1:20-cv-00480-JEJ, 2020 WL 1671563 (M.D. Pa. Mar. 31, 2020) .....	<i>passim</i>
<i>Thomas v. Tice</i> , 948 F.3d 133 (3d Cir. 2020).....	19
<i>Toma v. Adducci</i> , No. 2:20-cv-10829-JEL-APP, Dkt. No. 29 (E.D. Mich. Apr. 9, 2020).....	3
<i>United States v. Salerno</i> , 481 U.S. 739 (1987) .....	15
<i>Zadvydas v. Davis</i> , 533 U.S. 678 (2001) .....	15, 17
<b>STATUTES</b>	
8 U.S.C. § 1226(a) .....	16
8 U.S.C. § 1226(c) .....	16, 17, 27
28 U.S.C. § 1292 .....	2, 4, 13
28 U.S.C. § 1651 .....	4
<b>OTHER AUTHORITIES</b>	
Fed. R. App. P. 32(a)(5).....	30
Fed. R. App. P. 32(a)(6).....	30
Fed. R. App. P. 32(a)(7)(B).....	30
SCOTT A. ALLEN, MD, FACP AND JOSIAH RICH, MD, MPH TO HOUSE AND SENATE COMMITTEES ON HOMELAND SECURITY, AVAILABLE AT HTTPS://WHISTLEBLOWER.ORG/WP- CONTENT/UPLOADS/2020/03/DRS.-ALLEN-AND-RICH- 3.20.2020LETTER-TO-CONGRESS.PDF.....	20

## INTRODUCTION

Respondents-Appellants’ (“government” or “Respondents”) emergency motion seeks to stay the District Court’s temporary restraining order, thereby allowing them to return nineteen elderly and medically-vulnerable Petitioners-Appellees (“Petitioners”) to ICE detention facilities plagued by documented COVID-19 virus infection where they will face a severe risk of serious illness and death.<sup>1</sup> Dkt. No. 10, Mot. Stay.<sup>2</sup> All Petitioners in this case are at extreme risk of severe illness or death if they contract COVID-19 because they are over age 65 and/or have a pre-existing medical condition that makes them especially vulnerable to serious and irreparable injury. Indeed, according to epidemiological studies, their risk of death if they contract COVID-19 is about 15%—approximately one in seven—and chances of severe illness, including the need for intensive-care hospital services and resulting permanent disability, are even higher. ECF No. 3-2, Golob Decl. ¶ 4. Expert testimony and extensive record evidence presented to the District Court during a 17-day period over the course of two related cases—this one and

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<sup>1</sup> The District Court’s April 10 decision affected twenty petitioners, as Respondents voluntarily released two beforehand. Prior to this Court’s 7:00 p.m. stay order on April 10, Respondents issued release orders for eighteen Petitioners. Of the two remaining Petitioners, Respondents transferred one over the weekend to a Texas detention facility and the last one remained at Pike pursuant to a New York state detainer, but that detainer was lifted on April 14 and he has been released.

<sup>2</sup> Citations to filings in this appeal are cited hereafter as “Dkt. No. \_\_\_\_.”

*Thakker v. Doll*—demonstrated that conditions inside the two jails did not and could not meet CDC-recommended social distancing and quarantining requirements. *See, e.g.*, ECF Nos. 2, 3-1, 3-3 through 3-24, 3-26, 15-2 through 15-12; *see also Thakker v. Doll*, -- F. Supp. 3d ----, No. 1:20-cv-00480-JEJ, 2020 WL 1671563, at \*3-6 (M.D. Pa. Mar. 31, 2020). The outbreak of coronavirus and confirmed COVID-19 cases in the two ICE detention facilities, and two deaths at Pike, in early April significantly heightened the risk to Petitioners and fully justified the District Court’s April 10 release order. The nineteen petitioners are all sheltering at home with their families, subject to release conditions. Contrary to Respondents’ representation, half were released with ankle monitors. In short, the government is asking this Court to return nineteen men and women, all of whom are especially vulnerable due to their age and/or a pre-existing medical condition, to COVID-19-infested jails where there is a more than a one-in-seven chance they will die and an even greater chance they will need life-sustaining hospitalization. *See generally* ECF No. 3-2, Golob Decl.

For the reasons set forth in Petitioners’ Jurisdictional Letter, Dkt. No. 13, Petr’s’ Jurisdictional Ltr, this Court should dismiss the government’s appeal under 28 U.S.C. § 1292 for lack of jurisdiction to review a temporary restraining order, and it should reject the government’s alternative request that the Court exercise its mandamus jurisdiction to overturn the District Court’s carefully reasoned opinion and factual findings, which are supported by ample record evidence. If this Court



does not dismiss based on a jurisdictional defect, it should deny the requested stay because Respondents have failed to satisfy the heavy burden to justify it, especially given the gravity of the harm to Petitioners.

The District Court did not abuse its discretion in determining that Petitioners are likely to succeed on the merits of their Fifth Amendment due process claims, or in ordering release based on the extreme and irreparable injury threatening Petitioners' lives. In balancing the equities, the District Court plainly confronted the government's public-safety arguments and imposed many of their requested release conditions. The government's appeals to public safety are belied by their failure to seek similar relief in other cases around the country that also ordered release of elderly and sick ICE detainees,<sup>3</sup> including the same District Court's March 31 Order

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<sup>3</sup> The following courts have ordered release of medically vulnerable people from ICE detention due to irreparable harm posed by COVID-19 contagion, and as of April 14 the government had not filed a notice of appeal in any of them. *See, e.g., Bahena Ortuno v. Jennings*, No. 3:20-cv-02064, ECF Nos. 38 & 51 (N.D. Cal. Apr. 8 & Apr. 14, 2020) (ordering release of total of six medically vulnerable immigrant detainees in light of the risk of COVID-19); *Ixchop Perez v. Wolf*, 5:19-cv-05191, ECF No. 29 (N.D. Cal. Apr. 14, 2020) (ordering immediate release of medically vulnerable immigrant detainee due to risk of COVID-19); *Doe v. Barr*, 3:20-cv-02141, ECF No. 27 (N.D. Cal. Apr. 12, 2020) (same); *Arriaga Reyes v. Decker*, 2:20-cv-03600-MCA, ECF No. 26 (D.N.J. Apr. 12, 2020) (same for five detainees); *Bent v. Barr*, No. 4:19-cv-06123, ECF No. 26 (N.D. Cal. Apr. 9, 2020) (granting TRO releasing medically vulnerable immigrant detainee because of the risk of COVID-19); *Toma v. Adducci*, No. 2:20-cv-10829-JEL-APP, ECF No. 29 (E.D. Mich. Apr. 9, 2020) (same for one detainee); *Liriano Olivo v. Tsoukaris*, No. 2:20-cv-03481-JMV, ECF No. 24 (D.N.J. Apr. 9, 2020) (same for three detainees); *Malam v. Adducci*, No. 2:20-cv-10829, ECF No. 23 (E.D. Mich. Apr. 6, 2020) (same for one detainee); *Thakker v. Doll*, -- F. Supp. 3d ----, 2020 WL 1671563 (M.D. Pa.

directing the release of 13 different men and women from the very ICE facilities at issue here. *See Thakker*, 2020 WL 1671563. Petitioners are complying with their release conditions by sheltering at home where they are protected from the high risk of death from COVID-19 in infected ICE jails. The government's current stay application utterly fails to meet this Court's standard for a stay and it should be denied. In this unprecedented time, sending Petitioners back into a high-risk environment would be unconscionable. If Respondents insist that some Petitioners need additional control measures, they can and should seek relief in the District Court on an individualized basis.

### JURISDICTION

For the reasons set forth in Petitioners' response to the Court's April 10, 2020 order requesting briefing on jurisdictional issues, which is incorporated herein by reference, this Court does not have jurisdiction under 28 U.S.C. § 1292 to review the District Court's temporary restraining order, and the Court should reject Respondents' alternative argument that this Court should exercise its mandamus jurisdiction under 28 U.S.C. § 1651. *See* Petitioners' Jurisdictional Letter at Dkt. No.

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Mar. 31, 2020) (same for eleven detainees); *Basank v. Decker*, -- F. Supp. 3d ----, 2020 WL 1481503, at \*3 (S.D.N.Y. Mar. 26, 2020) (same, because "[t]he nature of detention facilities makes exposure and spread of the [coronavirus] particularly harmful"); *Coronel v. Decker*, -- F. Supp. 3d ----, 2020 WL 1487274, at \*9-10 (S.D.N.Y. Mar. 27, 2020) (same for four detainees); *Robles Rodriguez v. Wolf*, No. 5:20-cv-00627, ECF Nos. 32, 35-39 (C.D. Cal. Apr. 2, 2020) (same for six detainees).

13, Petr’s’ Jurisdictional Ltr. Consequently, in addition to the merits arguments set forth below, Petitioners urge the Court to dismiss the government’s appeal and deny the stay application for lack of jurisdiction.

## **BACKGROUND**

### **A. Procedural History**

Petitioners are twenty-two men and women who were detained by U.S. Immigration and Customs Enforcement (“ICE”) at the Pike County Correctional Facility and York County Prison while they defend themselves in removal proceedings. Each of the Petitioners meets the CDC’s guidelines describing people who are at an elevated risk of death or severe illness from COVID-19—they are over the age of 65, suffer from one or more listed medical conditions, or both. ECF No. 3-1, Amon Decl. ¶¶ 8, 11-22. On April 3, 2020, Petitioners filed an action for potentially life-saving injunctive and declaratory relief as COVID-19 infection began to spread rampantly in the United States, including in ICE detention facilities. ECF No. 1, Pet. & Compl. This lawsuit was a successor to one pending before the same District Court, which resulted in an order directing the release of thirteen other medically vulnerable ICE detainees. *See Thakker*, 2020 WL 1671563.

On April 7, the District Court issued a temporary restraining order directing Petitioners’ release on their own recognizance. ECF No. 11, *Hope* Apr. 7 TRO. The court was “guided by [its] previous findings” in *Thakker*, noting that, “[w]e had

occasion to consider the substantially same set of circumstances less than a week ago in our opinion [in] *Thakker v. Doll*.” *Id.* at 4 (citation omitted). The *Hope* court found that the record before it did not demonstrate “an improvement in conditions at the Facilities” during the preceding week, but that in fact, “all indications point towards the contrary.” *Id.* at 10. The court then concluded that there was “no rational relationship between a legitimate government objective and keeping Petitioners detained in unsanitary, tightly-packed environments—doing so would constitute a punishment to Petitioners.” *Id.* (citation omitted).

Later that same day, in response to the government’s motion for reconsideration and stay, ECF No. 12, the District Court quickly stayed its order, ECF No. 13, Order Granting Mot. Recons. The government motion included a 34-page declaration from Philadelphia Assistant Field Office Director Joseph Dunn, purporting to describe ICE treatment protocols and conditions at the York and Pike facilities, and exhaustively cataloguing—in over 30 pages—each Petitioner’s record. ECF No. 12-1, Dunn Decl. 1. The next day, Petitioners filed a legal memorandum responding to the motion for reconsideration, supported by, among other things, eight supplemental declarations from Petitioners to update the court on rapidly deteriorating conditions inside the jails. *See* ECF No. 16. The government replied with a second legal memorandum, ECF No. 17, and, subsequently, two notices of supplemental authority, ECF Nos. 19 and 20, and a status letter

accompanied by yet another declaration from Mr. Dunn, ECF No. 21-1, Supp. Dunn Decl. Additionally, on Thursday afternoon, April 9, the court held an off-the-record telephone conference that largely focused on the government's insistence that if the court were to order Petitioners released, it should do so with conditions. *See* ECF No. 14 (setting telephone status conference for Apr. 9, 2020).

On April 10, 2020, the District Court denied the reconsideration motion and lifted the stay on its temporary restraining order requiring the government to release the remaining twenty Petitioners, but this time, the court *added* conditions to ensure their appearance at future proceedings. ECF No. 22, *Hope* Apr. 10 TRO. Contrary to Respondents' contention that the District Court failed to consider their evidence, Dkt. No. 10 at 3 ("District Court by all indications effectively ignored [Respondents'] brief") and 17 ("The court thus ordered injunctive relief without analyzing the government's arguments and evidence"), the District Court wrote that it was "unmoved by AFOD Dunn's assertions that the facilities are equipped to stop the spread of COVID-19 . . . [because of] the simple fact that inmates are incapable of social distancing in the facilities remains." ECF No. 22, *Hope* Apr. 10 TRO at 4. The District Court, therefore, found that Petitioners were likely to prevail on the merits and suffer an irreparable injury—death or serious illness—in the absence of relief. ECF No. 11, *Hope* Apr. 7 TRO, at 7-11. Finally, the District Court also pointedly addressed Respondents' claims that releasing Petitioners posed a risk: "the

Court respects the Respondents' position that certain Petitioners pose a flight risk or danger to the community. However, it is the Court's view that attaching conditions to the Petitioners' release, which we shall do herein, quells that concern." ECF No. 22, *Hope* Apr. 10 TRO at 3.<sup>4</sup>

Later on April 10, before counsel for the government filed a request for emergency stay, Respondents released eighteen of the remaining twenty Petitioners. Two remained detained on criminal detainers. Respondents subsequently transferred one Petitioner over the weekend to Texas. Petitioner Armando Avecilla's New York state detainer was lifted on April 14 and he has since been released.

#### **B. The Record Before the District Court**

Petitioners developed a robust evidentiary record in the District Court, by way of thirty-three fact declarations, documenting the conditions of confinement at Pike and York. *See* ECF Nos. 3-3 through 3-26, 6-8 and 15-4 through 15-11. Petitioners also introduced two expert witness reports, from a public-health expert (Dr. Amon) and a medical expert (Dr. Golob), who discussed the extremely high risk of serious

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<sup>4</sup> The District Court ordered seven different conditions, including that the release order expires if a Petitioner absconds; Petitioners must report their whereabouts once a week; Petitioners must attend all removal hearings and if ordered deported, comply with an order of deportation; and Respondents are permitted to impose "other reasonable nonconfinement terms of supervision." ECF No. 22 at 5-6. As noted *supra*, ICE did impose additional supervision terms, fitting nine of the Petitioners with ankle monitors and imposing more reporting requirements, including future check-ins with their local ICE field office.

illness for medically vulnerable people, like Petitioners; the elevated risk of COVID-19 contagion in detention facilities; how ICE's guidelines and practices, even if followed, were ineffective; and how the conditions at Pike and York posed an imminent and severe public health and safety threat. *See* ECF No. 3-1, Amon Decl.; ECF No. 3-2, Golob Decl. Importantly, the record in this case built on a voluminous record developed before this same District Court a week earlier, in *Thakker v. Doll*. In short, the District Court had ample evidence to evaluate Petitioners' allegations, witness the progression of the virus through the two facilities over a two-week period, and assess the relative harm to the respective parties.

The risk of severe illness and even death to Petitioners, were they to contract COVID-19, is clear. Dr. Golob described how deadly COVID-19 is for people in high-risk categories: the death rate is 15%, meaning one in seven high-risk people will die if infected. ECF No. 3-2, Golob Decl. ¶ 4. Short of killing someone, the virus can cause severe harm to people who are in the high-risk categories, including permanent lung damage and heart failure. *Id.* at ¶¶ 4, 9. Dr. Amon reviewed Petitioners' declarations and found each to be medically vulnerable, ECF No. 3-2, Amon Decl. ¶¶ 10-32, with twenty at a "high risk for severe illness or death," *id.* at ¶¶ 11-19, 21, 23-31, and the other two at "heightened risk of complications from COVID-19," *id.* at ¶¶ 20, 22.

Central to Petitioners' claim in both this case and *Thakker* is the concept of social distancing, which underlies the stay-at-home and business-closure orders affecting about 300 million people in nearly all states, including Pennsylvania. *See* ECF No. 1, Pet. & Compl. ¶¶ 40-49, 116-19; ECF No. 6, TRO Mem. at 6, 7; ECF No. 3-1, Amon Decl. ¶¶ 33-42, 45-46, 48, 55, 67, 69. Dr. Amon emphasized that because there is not yet a cure for COVID-19, social distancing is critical, *i.e.*, at least six feet must be maintained between all individuals, as this is “the main strategy for limiting disease transmission.” ECF No. 3-1, Amon Decl. ¶ 35. Because it is the primary means of preventing transmission, the CDC recommends social distancing for correctional and detention facilities. *Id.* at ¶ 42.

The record is replete with Petitioner declarations, submitted both at the inception of the lawsuit on April 3 and supplemental ones accompanying the response to Respondents' motion for reconsideration on April 8, describing how the housing arrangements in the two facilities effectively make social distancing impossible. *See, e.g.*, ECF No. 3-8, Mukhina Decl. ¶ 10; ECF No. 3-9, Gebretnisae Decl. ¶ 14; ECF No. 3-13, Dominguez Decl. ¶ 12; ECF No. 3-15, Paul Decl. ¶ 12; ECF No. 3-21, Briette Decl. ¶ 14. The record evidence in *Thakker* and this case demonstrates beyond peradventure that Petitioners are forced to live in cramped spaces—either in dorms of 50 to 60 people at York, or in cells at Pike, where they are triple-bunked. *See, e.g.*, ECF No. 3-15, Paul Decl. ¶ 10; ECF No. 3-18, Avecilla



Decl. ¶ 8; ECF No. 15-5, Thompson Decl. ¶ 7. Dr. Amon testified that these practices are not only insufficient to prevent the spread of COVID-19, but will actually hasten it. ECF 3-1, Amon Decl. ¶¶ 44-48; *see also* ECF No. 3, Amon Decl. ¶¶ 44-50, 61-62, 67-69. And even with the best protocols (which ICE does not have), the “only viable public health strategy available is risk mitigation,” which includes “the release of individuals who can be considered at high-risk of severe disease if infected with COVID-19.” ECF No. 3, Amon Decl. ¶ 70; *see also id.* at ¶¶ 44-50; 61-62; 67-69.

Respondents’ rejoinder is confined to two declarations submitted by ICE Assistant Field Office Director (“AFOD”) in the Philadelphia office, Joseph Dunn, ECF No. 12-1, Dunn Decl.; ECF No. 21-1, Supp. Dunn. Decl., wherein he confirms, either directly or by ignoring Petitioners’ verified claims, that ICE does not follow the most important CDC guidelines on social distancing, robust hygiene, and effective screening and quarantine practices. For instance, he does not refute or even dispute the Petitioners’ verified pleading that they are housed in spaces where it is not possible to maintain six feet of separation from others, *i.e.*, people are triple celled at Pike, and in rooms clustering up to 60 individuals at York.

Even where Mr. Dunn provides details of the policies in place at these facilities, his descriptions reveal that ICE’s alleged preventative measures fall short of CDC guidelines. For instance, he claims that the facilities are “cohorting” (the

ICE term for quarantine), but admits they are doing so in a way the CDC cautions detention centers to avoid, *i.e.*, “cohort[ing] confirmed cases with suspected cases or case contacts.” *See* ECF 3-1, Amon Decl. ¶ 57. Indeed, Dunn touts the ICE policy that does just that: any person who has had contact with a confirmed case is forced into a common space. ECF 12-1, Dunn Decl. ¶ 12. At Pike, this means that cellmates of an individual with symptoms are kept not only on the same unit, but quarantined in the same cell as the potentially infected individual. *Id.* at ¶ 22.b. At York, where individuals are housed in dorms, the whole dorm would be subject to such a quarantine. Because detained individuals cannot practice social distancing in these quarantined spaces, the facilities are forcing vulnerable individuals into direct contact with the virus. ECF No. 3-1, Amon Decl. ¶ 61. In so doing, they are facilitating transmission, including to Petitioners and others who are elderly and/or medically vulnerable. *Id.*

The foregoing is a small sampling of the evidence Petitioners adduced in the District Court to demonstrate that the conditions at York and Pike, acknowledged by Respondents’ sole witness, expose Petitioners to extreme risk of contracting COVID-19, which because of their age or medical condition may be a death sentence.

## ARGUMENT

As set forth above and in Petitioners’ separate jurisdictional brief, *see* Dkt. No. 13, Petr’s’ Jurisdictional Ltr., this Court does not have appellate jurisdiction under 28 U.S.C. § 1292 to review a temporary restraining order, and the Court should reject the government’s request that it exercise mandamus jurisdiction.

If the Court reaches the merits of the government’s stay application, this Court must consider four factors: “(1) whether the appellant has made a strong showing of the likelihood of success on the merits; (2) will the appellant suffer irreparable injury absent a stay; (3) would a stay substantially harm other parties with an interest in the litigation; and (4) whether a stay is in the public interest.” *In re Revel AC, Inc.*, 802 F.3d 558, 565 (3d Cir. 2015) (citing *Republic of Philippines v. Westinghouse Electric Corp.*, 949 F.2d 653, 658 (3d Cir. 1991)); *see also Nken v. Holder*, 556 U.S. 418, 425-26 (2009) (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)) (setting out the “traditional” standard for stay). Notably, the Supreme Court has warned that a “stay is an ‘intrusion into the ordinary processes of administration and judicial review,’ . . . and accordingly ‘is not a matter of right, even if irreparable injury might otherwise result to the appellant.’” *Nken*, 556 U.S. at 427 (quoting *Va. Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (per curiam); *Virginian R. Co. v. United States*, 272 U.S. 658, 672 (1926)). The government’s application fails to demonstrate any injury necessitating a stay, much less irreparable

injury, while the Petitioners face a high risk of dying of COVID-19 if the stay is granted and they are re-detained in virus-infested detention centers. The government fails to meet the stay standard, and the application should be denied.

**I. THE GOVERNMENT FAILS TO ESTABLISH A LIKELIHOOD OF SUCCESS ON THE MERITS**

The government argues it is likely to defeat Petitioners' Fifth Amendment claim, but the District Court correctly held that it is Petitioners who are likely to succeed on the merits. The government's merits arguments are a mix of substantive and procedural contentions, but each fails and the Court should not disturb the District Court's findings.

**A. The District Court Correctly Applied Fifth and Eighth Amendment Standards**

The government argues that the District Court applied the incorrect standard when it found that the government's continued detention of the Petitioners is not rationally related to a legitimate government purpose; that the proper standard is the Eighth Amendment's deliberate indifference standard, which applies to convicted prisoners; and that Petitioners' detention is rationally related to a legitimate interest. As an initial matter, the government's assertion that the District Court erred in applying the due process standard fails because that court also correctly concluded, in the alternative, that Petitioners were likely to prevail on the deliberate indifference standard. ECF No. 11, *Hope* Apr. 7 TRO at 11 n.11.

### **Fifth Amendment Due Process**

The District Court correctly applied the due process standard. People in immigration detention, even those with prior criminal convictions, are detained pursuant to civil immigration laws that are “nonpunitive in purpose and effect.” *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). As civil detainees, they are “entitled to more considerate treatment and conditions of confinement than criminal[] detainees whose conditions of confinement are designed to punish.” *Aruanno v. Johnson*, 683 F. App’x 172, 175 (3d Cir. 2017) (quoting *Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982)). Importantly, this Court recently recognized that immigration detainees have the same due process protections as pretrial detainees. *E. D. v. Sharkey*, 928 F.3d 299, 306-07 (3d Cir. 2019).

When considering the constitutionality of civil detention, the Supreme Court has held that the due process touchstone is whether the detention is punitive. ECF No. 11, *Hope* Apr. 7 TRO at 9-10 (citing *Hubbard v. Taylor*, 538 F.3d 229, 232 (3d Cir. 2008); *United States v. Salerno*, 481 U.S. 739, 746 (1987) (citing *Bell v. Wolfish*, 441 U.S. 520, 535 & n. 16 (1979)). The test “to determine whether challenged conditions of confinement amount to punishment . . . [is] whether a condition of confinement is reasonably related to a legitimate governmental objective.” *Sharkey*, 928 F.3d at 307 (quoting *Hubbard*, 538 F.3d at 232). If the detention is excessive in relation to the asserted purpose, it is deemed punitive. *Salerno*, 481 U.S. at 747

(citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–169 (1963)). *See also Sharkey*, 928 F.3d at 307 (quoting *Hubbard*, 538 F.3d at 232) (“if it is not [reasonably related to a legitimate governmental objective], we may infer ‘that the purpose of the governmental action is punishment that may not be constitutionally inflicted upon detainees *qua* detainees.’”).

Importantly, the prohibition on punitive civil immigration detention applies regardless of which statute underlies the detention. Congress has generally provided that noncitizens defending against removal proceedings may be released on bond or conditions to address any flight risk they might pose. *See* 8 U.S.C. § 1226(a). Congress has also provided for detention without any custody hearing for noncitizens who are charged under certain criminal grounds of deportability. 8 U.S.C. § 1226(c). But detention under both statutes is still subject to constitutional limits. *See, e.g., Diop v. ICE*, 656 F.3d 221, 235 (3d Cir. 2011) (holding that at a certain point mandatory detention under § 1226(c) can become “unreasonable and, therefore, a violation of the Due Process Clause”); *see also Demore v. Kim*, 538 U.S. 510, 526 (2003) (“the Government may constitutionally detain deportable aliens during the *limited* period necessary for their removal proceedings.”) (emphasis

added); *Zadvydas*, 533 U.S. at 699-700 (“if removal is not reasonably foreseeable, the court should hold continued detention unreasonable.”).<sup>5</sup>

At a minimum, the Fifth Amendment Due Process Clause prohibits ““unsanitary, unsafe, or otherwise inadequate conditions,”” which is why these conditions are sufficient to state a due process claim for civil detainees. *Thakker*, 2020 WL 1671563, at \*7 n.14 (quoting *Petty v. Nutter*, No. 15-3430, 2016 WL 7018538, at \*2 (E.D. Pa. Nov. 30, 2016)).

The District Court correctly applied these precedents to the following factual findings, among others: that Petitioners “face[] an imminent risk of death or serious injury if exposed to COVID-19,” ECF No. 11, *Hope* Apr. 7 TRO at 2; that there were confirmed cases of COVID-19 already in the Pike County and York County prisons where some of the Petitioners were being detained, *id.* at 7; and that “no effective containment measures have been put into place to protect Petitioners,” *id.* at 8. As to this last finding, the District Court cited to declarations submitted by the Petitioners that refuted many of the government’s contentions about protective measures it had put in place, *see* ECF No. 11, *Hope* Apr. 7 TRO at 8; *see also* ECF

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<sup>5</sup> In *Borbot v. Warden Hudson County Correctional Facility*, 906 F.3d 274, 278 (3d Cir. 2018), this Court acknowledged that “[t]he Supreme Court recently overruled *Diop*’s interpretation of 8 U.S.C. § 1226(c).” This Court clarified, however, that “*Jennings* [*v. Rodriguez*, 138 S. Ct. 830 (2018)] did not call into question our constitutional holding in *Diop* that detention under § 1226(c) may violate due process if unreasonably long.” *Id.*

No. 3-4, 3-8, 3-16, 3-17, 3-23, which the government repeats in the instant stay application. Dkt. No. 10, Mot. Stay at 4-6, 14-16. Under these circumstances, continued ICE detention is not rationally related to the legitimate governmental purpose of assuring appearance. Instead, it puts the Petitioners at risk of death or severe illness, transforming civil detention rationally related to the purpose of assuring appearance for removal proceedings into unquestionably punitive detention in violation of the Due Process Clause. The District Court further found that the government's interests in ensuring the Petitioners' appearance could be met through means other than continued detention under risk of death, such as release conditions. ECF No. 11, *Hope* Apr. 7 TRO at 11; ECF No. 22, *Hope* Apr. 10 TRO at 4.

### **Eighth Amendment Conditions of Confinement**

The District Court also concluded correctly that the conditions Petitioners face are so severe that they likely violate not only the Fifth Amendment, but also the stricter prohibition of cruel and unusual punishment that applies to convicted prisoners under the Eighth Amendment. ECF No. 11, *Hope* Apr. 7 TRO at 11, n.11. If a condition of confinement violates prisoners' rights under the Eighth Amendment, it necessarily violates the rights of civil detainees as well. *See Natale v. Camden Cty. Corr. Facility*, 318 F.3d 575, 581 (3d Cir. 2003).

To prevail on a claim under the Eighth Amendment, Petitioners "must meet two requirements: (1) the deprivation alleged must be objectively 'sufficiently



serious,’ and (2) the ‘prison official must have a sufficiently culpable state of mind’”—that is, deliberate indifference to the prisoner’s health or safety. *Thomas v. Tice*, 948 F.3d 133, 138 (3d Cir. 2020) (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)).

Placing Petitioners in the path of COVID-19 despite the significant likelihood that they will experience serious illness or death if infected clearly constitutes a “sufficiently serious” deprivation. The Supreme Court has recognized that the government violates the Eighth Amendment when it crowds prisoners into cells with others who have “infectious maladies,” “even though the possible infection might not affect all of those exposed.” *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (citing *Hutto v. Finney*, 437 U.S. 678, 682 (1978)). *See also Monmouth Cty. Corr. Inst. Inmates v. Lanzaro*, 595 F. Supp. 1417, 1430–31, 1438 (D.N.J. 1984), *as amended*, 717 F. Supp. 268 (D.N.J. 1989) (Eighth Amendment rights of prisoners living in overcrowded cells, with inoperable showers, an over-utilized medical department, and dirty and unsanitary conditions that “create health and safety hazards” were violated because those individuals “are deprived of basic human needs such as habitable shelter and are generally forced to endure conditions which amount to an unnecessary infliction of pain”). *See generally* ECF No. 3, Amon Decl.; ECF No. 3-2, Golob Decl. Petitioners are at specific and heightened risk of serious illness or death.

Furthermore, the record contains overwhelming evidence that Respondents are aware of the risk posed by COVID-19. Individuals at both York and Pike have tested positive for the disease, and two have died from it. ECF No. 15-2. Beginning in February 2020, medical experts for DHS repeatedly alerted ICE to the threat posed by COVID-19 and have now urged officials to consider releasing, at a minimum, detainees who are particularly vulnerable to COVID-19. *See* Letter of Dr. Allen & Dr. Rich at 2-3, 5-6.<sup>6</sup> Additionally, in late March, Petitioners' counsel sent a letter to the Philadelphia ICE office requesting the agency release medically vulnerable detainees to protect against the risk of severe harm from COVID-19. ECF No. 1, Pet. & Compl. ¶ 123 (citing *Thakker* ECF No. 2-19, Ruiz Decl. ¶ 3).

Finally, in addition to Respondents' actual knowledge of the risk, the evidence establishes Respondents' deliberate indifference to the risks posed by COVID-19 because those risks are obvious. *See Farmer v. Brennan*, 511 U.S. 825, 842 (1994); *Phillips v. Superintendent Chester SCI*, 739 F. App'x 125, 129 n.7 (3d Cir. 2018) (applying *Farmer* standard). As many other courts have now recognized, "[t]he risk of contracting COVID-19 in tightly-confined spaces, especially jails, is now exceedingly obvious." *Basank v Decker*, No. 1:20-cv-02518,

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<sup>6</sup> March 19, 2020 letter from Scott A. Allen, MD, FACP and Josiah Rich, MD, MPH to House and Senate Committees on Homeland Security, *available at* <https://whistleblower.org/wp-content/uploads/2020/03/Drs.-Allen-and-Rich-3.20.2020Letter-to-Congress.pdf>

2020 WL 1481503, at \*12 (S.D.N.Y. Mar. 26, 2020) (ordering releases of people detained by ICE); *see also* supra at n.2 (collecting cases).

In short, the evidence shows that COVID-19 poses a serious risk of severe injury and death and that Respondents are aware of that risk, both from explicit notice they have received, and because it is obvious. Respondents' failure to release Petitioners from these intolerable conditions is deliberate indifference to that risk, in violation of the Petitioners' constitutional rights. *See Farmer*, 511 U.S. at 842.

### **Release is Proper Remedy**

The government's argument that the remedy of release was improper (Dkt. No. 10, Mot. Stay at 16-17) is misplaced. The cases it cites do not address emergent and life-threatening conditions like those presented in the record here. *Crawford v. Bell*, 599 F.2d 890, 891-92 (9th Cir.1979); *Davis v. Pa. Dep't of Corr.*, No. 15-587, 2015 WL 5918909, at \*2 (W.D. Pa. Oct. 7, 2015). The District Court properly found that Petitioners' situation was dire and that it was physically impossible for the Respondents to maintain proper distancing and adequate medical care, and the court had the authority to preserve the lives and health of the Petitioners by immediately removing them from the life-threatening conditions at Pike and York. ECF No. 11, *Hope* Apr. 7 TRO at 6-9, 12-14. It is beyond dispute that a federal court may order the release even of convicted state prisoners if necessary to remedy a constitutional violation. *See Brown v. Plata*, 563 U.S. 493, 545 (2011) (affirming prisoner release

order when necessary to remedy the state’s failure to provide minimally adequate medical and mental health care).

### **The District Court Plainly Considered Respondents’ Submissions**

The government’s complaints about a lack of opportunity to brief the issues before the District Court fall flat. As set forth above, *see* discussion at p. 5, *supra*, the District Court *did* consider the government’s motion for reconsideration and “substantive brief” (Dkt. No. 10, Mot. Stay at 17) after it issued its initial temporary restraining order on April 7—indeed, the court *stayed its own order* at the government’s request. ECF No. 13, Stay Pending Recons. In vacating the stay and reinstating the earlier order, the District Court’s April 10 order added new findings relating to the actual spread of COVID-19 in the Pike and York facilities and addressed Mr. Dunn’s declaration. In light of this procedural posture, there was no error in the District Court holding the government to the standard for a motion for reconsideration.

In short, the District Court correctly held that the Petitioners demonstrated a likelihood of success on the merits. The government has entirely failed to carry its burden here of proving the opposite, that it is likely to prevail on the merits.

## **II. PETITIONERS WILL SUFFER AN IRREPARABLE INJURY—DEATH OR SERIOUS COVID-19 ILLNESS—IF THE STAY IS GRANTED.**

The substantial risk of death or life-threatening illness to the Petitioners is such an extreme and irreparable injury that the stay should be denied based upon this factor alone. Even if the government were to demonstrate a likelihood of success on the merits (which it has failed to do), the irreparable harm that Petitioners would suffer more than justifies the District Court’s order and the denial of the instant stay application. *See Reilly v. City of Harrisburg*, 858 F.3d 173, 178 (3d Cir. 2017) (“How strong a claim on the merits is enough depends on the balance of the harms: the more net harm an injunction can prevent, the weaker the plaintiff’s claim on the merits can be while still supporting some preliminary relief.”) (quoting *Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009)); *see also In re Revel AC, Inc.*, 802 F.3d 558, 569 (3d Cir. 2015) (“In deciding how strong a case a stay movant must show, we have viewed favorably what is often referred to as the “sliding-scale” approach.”) (citing *Constructors Ass’n of W. Pa. v. Kreps*, 573 F.2d 811, 815 (3d Cir.1978); *Del. River Port Auth. v. Transamerican Trailer Transp., Inc.*, 501 F.2d 917 (3d Cir.1974)).

The government asks this Court to overturn the District Court’s findings on Petitioners’ irreparable harm, which were based upon a record that was substantial even at the TRO stage. As discussed above, the evidentiary record amply supports

the District Court's irreparable harm findings that Petitioners' age or medical condition places them at high risk of serious illness or death and that Respondents have not provided, and given the infrastructure limitations of the two detention facilities cannot provide, safe conditions. *See* discussion at 7-9, *supra*.

Based on copious record evidence, the District Court made findings that each of the Petitioners meets the criteria for a high risk of death or serious illness from COVID-19 infection: being over 65 years old and/or suffering from one or more of a specific list of medical conditions. ECF No. 11, *Hope* Apr. 7 TRO at 9. The District Court found that Petitioners' medical conditions include diabetes, hypertension, asthma, traumatic brain injury, hepatitis C, emphysema, and chronic pulmonary disease, among others. *Id.* at 2-4. The District Court found, based on this record evidence, that "[e]ach Petitioner suffers from chronic medical conditions and faces an imminent risk of death or serious injury if exposed to COVID-19," *id.* at 2, and that there were "declarations that no effective containment measures have been put into place to protect Petitioners." *Id.* at 8. In short, the District Court found, "catastrophic outcomes" were likely once COVID-19 infections took hold in the prisons where Petitioners were detained. *Id.*

The government's contention that the District Court improperly disregarded its declarations setting out measures it claims to have taken to protect the health of the Petitioners, Dkt. 10, Mot Stay at 9-10, is simply not true. The two declarations

submitted by ICE AFOD Joseph Dunn purportedly describe “precautionary measures” ICE has undertaken to “protect all detainees from COVID-19.” *Id.* at 14-15. The District Court expressly considered the Dunn declarations and found that they do little more than show a “ramp[] up of sanitation protocols,” and do not demonstrate that ICE has cured the fundamental problem that “inmates are incapable of social distancing in the facilities.” ECF No. 22, *Hope* Apr. 10 TRO at 4. The District Court therefore had no reason to reconsider its prior finding that “keeping Petitioners detained in unsanitary, tightly-packed environments” subjected them to an unconstitutional risk of grave harm. ECF No. 11, *Hope* Apr. 7 TRO at 10-11 (quoting *Thakker*, 2020 WL 1671563 at \*8); *see also Thakker*, 2020 WL 1671563 at \*5-6 (describing conditions of “overcrowding that makes social distancing impossible at all three [ICE] facilities” in the Middle District). The District Court also rightly pointed out that Mr. Dunn’s assessment of the prisons was based “exclusively on the assurances of others,” ECF No. 22, *Hope* Apr. 10 TRO at 3 n.3, in contrast to the substantial firsthand evidence Plaintiffs presented. ECF Nos. 3-1 (Amon Decl.), 3-2 (Golob Decl.), 3-3 through 3-26 (Pet’rs’ Decls.), 15-4 through 15-11 (Supp. Pet’rs’ Decls.); *see also Thakker*, 2020 WL 1671563, at \*5-6.

Moreover, at the time the District Court issued its orders, the growing number of confirmed cases at the prisons was bearing out the court’s concerns. *See* ECF No. 22, *Hope* Apr. 10 TRO at 4 n.4 (“As the parties are aware, inmates at [Pike and

York] are infected with COVID-19, and two female inmates at Pike have died of COVID-19 in recent days.”). No publicly-available reporting indicates that conditions in these facilities have improved.

### **III. THE BALANCE OF EQUITIES AND PUBLIC INTEREST WEIGH AGAINST A STAY.**

The government’s contentions about irreparable harm to its interests pale in comparison to the risk of death or serious injury on the Petitioners’ side. The government argues that the District Court’s temporary restraining order “has already inflicted harm by causing the release into the community of 19 criminal aliens” and asserts that “[a]ll petitioners have criminal histories and some have significant criminal history.” Dkt. 10, Mot. Stay at 18. The government also asserts that the release of the Petitioners (to shelter in place at home) irreparably harms the United States because “Petitioners are in immigration detention because they have violated the immigration laws of the United States.” *Id.* at 2.

Contrary to the government’s assertions in the stay application, the District Court considered all of the government’s submissions about Petitioners’ past criminal history—and rejected them or found them outweighed by the risk of harm to the Petitioners. The District Court wrote that it “respects the Respondents’ position that certain Petitioners pose a flight risk or danger to the community. However, it is the Court’s view that attaching conditions to the Petitioners’ release, which we shall do herein, quells that concern.” ECF No. 22, *Hope* Apr. 10 TRO at



3. The District Court then imposed seven release conditions, including several sought by the government, and specifically authorized “other reasonable nonconfinement terms of supervision.” ECF No. 22 at 5-6. Indeed, Respondents fitted half of the Petitioners with ankle monitors prior to release last Friday.

The government also makes the straw man argument that “[t]o the extent that the District Court believed that all criminal aliens should be released during the pandemic, that is not the view of Congress, which has mandated detention for several categories of aliens under section 1226(c) and other provisions without providing health exceptions.” Dkt. No. 10, Mot. Stay at 18. But the District Court held no such thing. Rather, based on ample record evidence, the District Court “*disagree[d] entirely* with the Respondents’ contention that the Petitioners face no potential risk of irreparable harm” where *these* “Petitioners all suffer from pre-existing conditions that render them *exceptionally vulnerable* to COVID-19 and places them at a greater risk of death than the average individual.” ECF No. 25, Order Denying Stay (emphasis added). The District Court did not reach any holding about whether §1226(c) applies because that is not an issue in the case. Even if §1226(c) applies to some of the Petitioners, that statute cannot possibly stand for the proposition that detention overrides all other emergency conditions. By the government’s logic, if an ICE detention facility were on fire, people subject to § 1226(c) should not be evacuated.

The public interest would not be served by a stay order that would overturn the District Court's well-supported factual findings and legally sound temporary restraining order, and put the Petitioners back into prisons where their very lives would be in danger.

### CONCLUSION

Petitioners urge this Court to heed the District Court's rationale for issuance of the temporary restraining order:

We previously held, considering the present living conditions present at the *same detention Facilities* now at issue here, that, "we can see no rational relationship between a legitimate government objective and keeping Petitioners detained in unsanitary, tightly-packed environments—doing so would constitute a punishment to Petitioners." *Thakker* at 20-21. There is no indication that there has been an improvement in conditions at the Facilities. Indeed, all indications point towards the contrary. There are now individuals who have tested positive at both Facilities, and we have further accusations that those situations are not being properly contained. "Considering, therefore, the grave consequences that will result from an outbreak of COVID-19, particularly to the high-risk Petitioners in this case, we cannot countenance physical detention in such tightly-confined, unhygienic spaces." *Thakker* at 21.

ECF No. 11, *Hope* Apr. 7 TRO at 10 (citing *Thakker*, 2020 WL 1671563 at \*8).

We have before us clear evidence that the protective measures in place in the York and Pike County prisons are not working. We can only expect the number of positive COVID-19 cases to increase in the coming days and weeks, and we cannot leave the most fragile among us to face that growing danger unprotected.

*Id.* at 13.

The situation inside the detention facilities continues to deteriorate. This Court should reject the government's motion to allow it to re-detain medically vulnerable Petitioners in the virus-infested ICE detention facilities. Such re-detention is likely to have tragic results.

Respectfully Submitted,

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**CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,007 words. This brief complies with L.A.R. 31.1(c) because the text of the electronic brief is identical to the text in the paper copies and because a virus-protection program, Metadact has been run on the file and no virus was detected.

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Dated: April 15, 2020

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 15, 2020, I caused to be served via ECF filing on all Counsellisted below, a true and correct copy of the following documents:

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**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF PENNSYLVANIA**

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JESUS DE LA PENA; RAKIBU ADAM  
DUC VIET LAM; YELENA MUKHINA  
NAHOM GEBRETNISAE; ISMAIL  
MUHAMMED; GLENN WEITHERS  
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ARMANDO AVECILLA; COSWIN  
RICARDO MURRAY; EDWIN LUIS  
CRISOSTOMO RODRIGUEZ; ELDON  
BERNARD BRIETTE; DEMBO  
SANNOH; JESUS ANGEL JUAREZ  
PANTOJA; and ALGER FRANCOIS,

Petitioners-Plaintiffs,

vs.

CLAIR DOLL, in his official capacity as  
Warden of York County Prison; CRAIG  
A. LOWE, in his official capacity as  
Warden of Pike County Correctional  
Facility; SIMONA FLORES-LUND, in  
her official capacity as Field Office  
Director, Enforcement and Removal  
Operations, U.S. Immigration and  
Customs Enforcement; MATTHEW  
ALBENCE, in his official capacity as  
Acting Director, U.S. Immigration and  
Customs Enforcement; and CHAD  
WOLF, in his official capacity as Acting  
Secretary, U.S. Department of Homeland  
Security,

Respondents-Defendants.

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

**VERIFIED PETITION FOR  
WRIT OF HABEAS  
CORPUS AND  
COMPLAINT FOR  
EMERGENCY  
INJUNCTIVE RELIEF**



## INTRODUCTION

Petitioners/Plaintiffs (hereafter “Petitioners”) are a diverse group of twenty-two individuals from around the world who are held in *civil detention* by Immigration and Customs Enforcement (ICE) at York County Prison and Pike County Correctional Facility while they await disposition of their immigration cases. They are united by the fact that they are over age 65 and/or adults who have a serious pre-existing medical condition, which the United States Centers for Disease Control has determined puts them at significantly higher risk of severe disease and death if they contract COVID-19. On March 31, this Court ordered ICE to release similarly-situated immigration detainees from these facilities because record evidence showed that, “adequate measures are not in place and cannot be taken to protect [such high-risk detainees] from COVID-19 in the [York, Clinton and Pike] detention facilities, and that [absent release] catastrophic results may ensue, both to Petitioners and to the communities surrounding the Facilities.” *See Thakker v. Doll*, No. 1:20-cv-00480-JEJ, at \*19 (M.D. Pa. Mar. 31, 2020) (elipses added). *See also, id.* at \*9 (“Based upon the nature of the virus, the allegations of current conditions in the prisons, and Petitioners’ specific medical

concerns, detailed below, we therefore find that Petitioners face a very real risk of serious, lasting illness or death. There can be no injury more irreparable.”).<sup>1</sup>

The precarious situation facing the medically-at-risk petitioners in this case is in all material respects indistinguishable from *Thakker*, with one difference: the impending irreparable harm is far greater because the situation at York and Pike has deteriorated significantly since March 31, with quarantines in effect and reports of positive COVID-19 test results at both facilities. “[T]he status quo of a mere few [days] ago no longer applies. Our world has been altered with lightning speed, and the results are both unprecedented and ghastly.” *Id.* at 24. In light of the deteriorating conditions bearing down on these medically vulnerable petitioners, they respectfully ask this Court to issue a temporary restraining order directing their release forthwith.

## **JURISDICTION AND VENUE**

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

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<sup>1</sup> Filings in the *Thakker v. Doll*, Case No. 20-480 (M.D. Pa.) litigation will hereafter be referred to as *Thakker* Dkt. No. \_\_\_\_.

2. Venue lies in the United States District Court for the Middle District of Pennsylvania because Petitioners are detained by Respondents/Respondents (hereafter “Respondents”) at two county prisons – located in York and Pike counties – both of which are located within the Middle District. 28 U.S.C. § 2242. Venue is proper in the Middle District of Pennsylvania because a substantial portion of the relevant events occurred in the District and because several Respondents reside in the District. 28 U.S.C. § 1391(b), (e)(1).

## PARTIES

### **Petitioners**

3. Petitioner **Aaron Hope** is a 32-year-old male native of Trinidad. Ex. 3 (Hope) at ¶ 1. He has been detained at York County Prison since September 15, 2019. *Id.* at ¶ 3. Mr. Hope has a series of respiratory problems—he has suffered from asthma since childhood, was hospitalized with pneumonia in 2012, and was diagnosed with sleep apnea in 2013—and was diagnosed with high blood pressure in 2017. *Id.* at ¶¶ 6-9. His underlying health conditions place him at high risk of severe illness or death if he contracts COVID-19.

4. Petitioner **Iwan Rahardja** is a 51-year-old a citizen of Indonesia who has lived in the U.S. for nearly 20 years. Ex. 4 (Rahardja) at ¶ 1. He has been detained by ICE at the York County Prison since February 27, 2020. *Id.* at ¶ 6. He

suffers from diabetes and hypertension. *Id.* at ¶¶ 4, 5. These conditions place him at high risk of severe illness or death if he contracts, COVID-19.

5. Petitioner **Jesus De La Pena** is a 37-year-old man from Mexico who has lived in this country since age 6. Ex. 5 (De La Pena) at ¶ 1. He has been detained by ICE for a year at Pike County Correctional Center. *Id.* at ¶ 3. He suffers from severe asthma, hypertension and is over-weight. *Id.* at ¶¶ 4-7. His medical condition places him at high risk of severe illness or death if he contracts COVID-19.

6. Petitioner **Rakibu Adam** is a 34-year-old man from Ghana who has lived in the United States for approximately six years. Ex. 6 (Adam) ¶ 1. He has been detained by ICE at the York County Prison since October 2019. *Id.* at ¶ 3. He suffers from asthma and high blood pressure. *Id.* at ¶ 6. His medical condition places him at high risk of severe illness or death if he contracts COVID-19.

7. Petitioner **Duc Viet Lam** is a 50-year-old man from Vietnam who has lived in the U.S. for 13 years. Ex. 7 (Viet Lam) at ¶ 1. He has been detained by ICE at the Pike County Correctional Center since January 2020. *Id.* at ¶ 3. He suffers from diabetes and high blood pressure. *Id.* at ¶ 4. His medical condition places him at high risk of severe illness or death if he contracts COVID-19.

8. Petitioner **Yelena Mukhina** is a 35-year-old woman from Ukraine. Ex. 8 (Mukhina) at ¶ 1. She has been detained at York County Prison since February 2020. Ms. Mukhina has asthma, a heart murmur, and hepatitis C. She has suffered

with blood clots in her heart and also suffers from seizures when she is stressed. *Id.* at ¶¶ 5-8. Her underlying health conditions place her at high risk of severe illness or death if she contracts COVID-19.

9. Petitioner **Nahom Gebretnisae** is a 28-year-old man from Eritrea who has lived in the U.S. for more than 20 years. Ex. 9 (Gebretnisae) at ¶¶ 1, 2. He has been detained by ICE since February 18 at York County Prison. *Id.* at ¶ 3. He has for the past 13 years suffered from Crohn’s Disease and related arthritis and severe nerve and general pain, *id.* at ¶ 4, for which he takes many medications, *id.* at ¶¶ 5-11. His medical condition places him at high risk of severe illness or death if he contracts COVID-19.

10. Petitioner **Ismail Muhammed** is a 69-year-old man from Pakistan who has been in the U.S. since 2002. Ex. 10 (Ismael) at 1<sup>st</sup> un-numbered ¶ and ¶ 1. He has been held at the York County Prison since December 19, 2019. *Id.* at ¶ 1. He has recently lost about 25 pounds, suffered from asthma-type attacks, and is pre-diabetic. *Id.* at ¶¶ 3-8. His advanced age and medical condition place him at high risk of severe illness or death if he contracts COVID-19.

11. **Glenn Weithers** is a 59-year-old man from Guyana. He has lived in the United States for more than 32 years. Ex. 11 (Weithers) ¶ 1. He has been detained by ICE since January 2019. *Id.* at ¶ 4. Mr. Weithers suffers from emphysema and

chronic obstructive pulmonary disease (COPD). *Id.* at ¶ 7. His medical conditions place him at high risk of severe illness or death if he contracts COVID-19.

12. Petitioner **Konstantin Bugarenko** is 49-year-old man from Ukraine. He has lived in the United States for nearly 24 years as a lawful permanent resident. Ex. 12 (Bugarenko) ¶ 1. He has been detained by ICE since October 2017. *Id.* at ¶ 5. Mr. Bugarenko suffers from prediabetes, high blood pressure, and diverticulitis. *Id.* He also suffers re-occurring and debilitating pain in his feet that renders him temporarily unable to walk. *Id.* at ¶ 5. His medical conditions place him at high risk of severe illness or death if he contracts COVID-19.

13. Petitioner **Brisio Balderas-Dominguez** is a 47-year-old man from Mexico who came to this country in 1991 after cartel members murdered his father, a judge. Ex. 13 (Balderas-Dominguez) at ¶¶ 1, 3. He has been detained by ICE for nearly three years at the Pike County Correctional Center. *Id.* at ¶ 5. He suffers from diabetes, atrial fibrillation and high blood pressure. *Id.* at ¶¶ 8, 9. His medical condition places him at high risk of severe illness or death if he contracts COVID-19.

14. Petitioner **Viviana Ceballos** is a 56-year-old woman from Argentina who has lived in the United States for over 29 years. Ex. 14 (Ceballos) ¶ 1. She became a lawful permanent resident in 1994. *Id.* She has been detained by ICE at York County Prison since March 2019. *Id.* at ¶ 7. She suffers from high blood

pressure. *Id.* at ¶ 12. Her medical condition and age places her at a high risk of severe illness or death if she contracts COVID-19.

15. Petitioner **Wilders Paul** is a 32-yr old man from Haiti who has lived in the United States since he was three years old. Ex. 15 (Paul) ¶ 1. He is seeking adjustment of status through his wife. *Id.* He suffered a traumatic brain injury and suffers from seizures as well as headaches. *Id.* at ¶¶ 6,7. His medical condition places him at a high risk of severe illness or death if he contracts COVID-19.

16. Petitioner **Marco Javier Ortiz Matos** is a 32-year-old man from the Dominican Republic who has lived in this country for nearly 20 years. Ex. 16 (Ortiz Matos) at ¶¶ 1, 2. He has been detained by ICE since November 2019 at Pike County Correctional Center. *Id.* at ¶ 3. He suffers from diabetes. *Id.* at ¶¶ 4-7. His medical condition places him at high risk of severe illness or death if he contracts COVID-19.

17. Petitioner **Alexander Alvaregna** is a 46-year-old man from El Salvador. Ex. 17 (Alvaregna) at 1<sup>st</sup> unnumbered ¶ and ¶ 1. He has been detained at York County Prison since March 2, 2019. *Id.* at ¶ 5. He suffers from diabetes, high blood pressure, atrial fibrillation, high cholesterol, and partial physical disability due to a 2019 automobile accident. *Id.* at ¶¶ 7-11. His serious health conditions place him at high risk of severe illness or death if he contracts COVID-19.

18. Petitioner **Armando Avecilla** is a 53-year-old native of Panama. Ex. 18 (Avecilla) at ¶ 1. He has been detained at Pike County Correctional Center since November 2019. *Id.* at ¶ 4. He suffers from diabetes. *Id.* at ¶ 6. His age and serious health conditions place him at high risk of severe illness or death if he contracts COVID-19.

19. Petitioner **Coswin Ricardo Murray** is a 45-year-old native of Barbados who has lived in this country for 33 years. Ex. 19 (Murray) at ¶¶ 1-2. His wife is suffering from advanced cancer. *Id.* at ¶ 2. He has been detained at Pike County Correctional Center since August 2019. *Id.* at ¶ 6. Mr. Murray suffers from asthma, for which Pike refuses to give him an inhaler. *Id.* at ¶¶ 7-8. His underlying medical condition places him at high risk of severe illness or death if he contracts COVID-19.

20. Petitioner **Edwin Luis Crisostomo Rodriguez** is a 31-year-old native of Dominican Republic who has lived in the U.S. since 2016. Ex. 20 (Rodriguez) ¶¶ 1,4. He has been detained since February 20, 2020, at the Pike County Correctional Center. *Id.* at ¶ 3. Mr. Crisostomo Rodriguez has suffered from asthma since childhood, *id.* at ¶ 7, which places him at high risk of severe illness or death if he contracts COVID-19.

21. Petitioner **Eldon Bernard Briette** is a 46-year-old man from Turks and Caicos who has lived in the U.S. for 35 years. Ex. 21 (Briette) at ¶ 1. He has been



detained at the Pike County Correctional Center by ICE since November 12, 2019. *Id.* at ¶ 5. He suffers from diabetes, high blood pressure, high cholesterol, depression and anxiety. *Id.* at ¶¶ 6-9. His medical condition places him at high risk of severe illness or death if he contracts COVID-19.

22. Petitioner **Dembo Sannoh** is a 41-year-old man from Sierra Leone. Ex. 22 (Sannoh) ¶ 1. He has been detained by ICE at York County Prison since August 2019. He has diabetes, Hepatitis B, and a heart issue. *Id.* at ¶ 6. His medical condition places him at high risk of severe illness or death if he contracts COVID-19.

23. Petitioner **Jesus Angel Juarez Pantoja** is a 36-year-old man from Mexico who has lived in the U.S. since age 6. Ex. 23 (Juarez Pantoja) at ¶ 1. He has been detained by ICE at York County Prison since November 2019. *Id.* at ¶ 2. He suffers from asthma, sleep apnea and high blood pressure. *Id.* at ¶¶ 3-6. These conditions place him at high risk of severe illness or death if he contracts COVID-19.

24. Petitioner **Duckens Max Alder Francois** is a 45-year-old man from Haiti. Ex. 24 (Francois) ¶ 1. He has been detained by ICE at Pike County Correctional Facility for six months. *Id.* at ¶ 2. He has hypertension, pain when he urinates, and swollen feet. *Id.* at ¶ 6. He also has latent tuberculosis. His body mass index qualifies him as obese. He has an intellectual disability. His cumulative

medical conditions place him at a high risk of severe illness or death if he contracts COVID-19.

### **Respondents**

25. Respondent Simona Flores-Lund is the Field Office Director for Enforcement and Removal Operations (“ERO”) in the Philadelphia Field Office of Immigration and Customs Enforcement (“ICE”), an agency within the U.S. Department of Homeland Security. ERO is a division of ICE that manages and oversees the immigration detention system. In her capacity as Field Director for ERO, Respondent Flores-Lund exercises control over and is a custodian of immigration detainees held at all of the correctional facilities in Pennsylvania that house ICE detainees, including the two at issue in this case, namely, the York County Prison and the Pike County Correctional Facility. At all times relevant to this Complaint, Respondent Flores-Lund was acting within the scope and course of her employment with ICE. She is sued in her official capacity.

26. Respondent Matthew T. Albence is the Deputy Director and Senior Official Performing the Duties of the Director of ICE. Respondent Albence is responsible for ICE’s policies, practices, and procedures, including those relating to the detention of immigrants. Respondent Albence is a legal custodian of Petitioners. At all times relevant to this complaint, Respondent Albence was acting within the scope and course of his position as an ICE official. He is sued in his official capacity.

27. Respondent ICE is a federal law enforcement agency within the Department of Homeland Security. ICE is responsible for the criminal and civil enforcement of immigration laws, including the detention and removal of immigrants. ERO, a division within ICE, manages and oversees the immigration detention system. Respondent ICE is a legal custodian of Petitioners.

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

29. Respondent Clair Doll is the Warden of the York County Prison in York, Pennsylvania, where Petitioners Aaron Hope, Iwan Rahardja, Rakibu Adam, Yelena Mukhina, Nahom Gebretnisae, Ismail Muhammed, Glenn Weithers, Konstantin Bugarenko, Viviana Ceballos, Wilders Paul, Alexander Alvarenga, Dembo Sannoh, and Jesus Angel Juarez Pantoja are detained. Respondent Doll is the immediate, physical custodian of these Petitioners. He is sued in his official capacity.

30. Respondent Craig A. Lowe is the Warden of the Pike County Correctional Facility in Lords Valley, Pennsylvania, where Petitioners Jesus De La

Pena, Duc Viet Lam, Brisio Balderas-Dominguez, Marcos Javier Ortiz Matos, Armando Avecilla, Coswin Ricardo Murray, Edwin Luis Crisostomo Rodriguez, Eldon Bernard Briette, and Alger Francois are detained. Respondent Lowe is the immediate, physical custodian of these Petitioners. He is sued in his official capacity.

## STATEMENT OF FACTS

### **A. COVID-19 Poses A Grave and Elevated Risk of Harm, Including Serious Illness or Death, to Persons Age 65 and Over and Those with Certain Medical Conditions.**

31. COVID-19 is a disease caused by coronavirus that has reached pandemic status. According to the World Health Organization, as of April 3, more than 932,166 people have been diagnosed with COVID-19 in 25 countries or territories around the world and 46,764 have died as a result. Ex. 1, Apr. 3, 2020 Amon Decl. (Amon 1) at ¶ 5.<sup>2</sup> The United States has the highest number of reported cases: 245,573 people have been diagnosed with the disease and 6,058 people have died thus far. *Id.* In Pennsylvania, there are at least 7,016 confirmed cases and 90 deaths. *Id.* The rates of infection are exponential, not linear, meaning that, for each person infected one day, the next day we should expect to see not one, but many more instances of infection. *Id.* Without effective public health interventions, CDC projections indicate about 200 million people in the United States could be infected

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<sup>2</sup> Petitioners rely on two declarations from Dr. Amon. Ex. 1 has been prepared for this lawsuit and is dated April 3. They also rely on Ex. 2, his March 24, 2020, declaration in *Thakker*.

over the course of the pandemic, with as many as 1.5 million people dying from this infection. Ex. 3 (Golob) at ¶ 11.<sup>3</sup> Outcomes from COVID-19 vary from asymptomatic infection to death. Individuals who are at low risk may experience mild symptoms, while high-risk individuals may suffer respiratory failure from the disease. Amon 1 at ¶ 6. In the highest risk populations, the fatality rate is about 15 percent, meaning that out of 100 vulnerable people infected, fifteen will die. Golob at ¶ 4. In other words, more than one in every seven people in this high-risk group are likely to die, and an even higher percentage will suffer serious illness.

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

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

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

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<sup>3</sup> Dr. Golob's declaration was prepared for *Thakker v. Doll*, but is still relevant to provide medical background about the virus.

syndrome that can result in widespread damage to other organs, including permanent injury to the kidneys and neurologic injury. *Id.*

35. Individuals aged 65 and older and those of any age with serious underlying medical conditions are at the *highest risk* of severe disease and death if they are infected with COVID-19. Amon 1 ¶ 9. According to the Centers for Disease Control and Prevention (CDC), these underlying conditions include: blood disorders, chronic kidney or liver disease, compromised immune system, endocrine disorders, including diabetes, metabolic disorders, heart and lung disease, neurological and neurodevelopmental conditions “including disorders of the brain, spinal cord, peripheral nerve, and muscle such as cerebral palsy, epilepsy (seizure disorders), stroke, intellectual disability[,]” and current or recent pregnancy. *Id.* at ¶ 8. The CDC also identifies individuals with a body mass index (BMI) greater than 40 to be at higher risk for severe illness. *Id.*

36. There is no vaccine to prevent COVID-19. There is no known cure or anti-viral treatment for COVID-19 at this time. The only way to protect vulnerable people from serious health outcomes, including death, is to prevent them from being infected with the coronavirus. *Id.* at ¶ 6.

37. COVID-19 infects people who come into contact with respiratory droplets that contain the coronavirus. *Id.* at ¶ 33. Speech alone can produce these droplets. *Id.* at 34. Contact with particles that transmit the virus can occur at a

distance of six feet. *Id.* at ¶ 33. It is also possible that an individual can become infected by touching a surface with the virus and then touching their mouths. Thus, the only known means of minimizing the risk of infection are social distancing and increased sanitization. *Id.* at ¶ 35.

38. Increasingly, research shows that social distancing is the primary means of risk mitigation. Distancing must occur before individuals display symptoms, as they may be contagious before they are symptomatic. The CDC recommends a social distance of at least 6 feet to minimize the risk of spread. *Id.* at ¶¶ 33, 34; Golob at ¶ 10.

39. In response to this research, countries around the world have sought to make social distancing into public policy. In the United States, fifty states, seven territories, and the District of Columbia have all taken formal executive action to contain the outbreak. *Id.* at ¶ 36. These measures include stay at home orders that now cover at least 97 million people across the country. *Id.* On April 1, Governor Wolf extended the pre-existing county-by-county stay-at-home orders to cover the entire state of Pennsylvania. *Id.* The idea behind these actions is that, by “flattening the curve,” those most vulnerable will be least likely to become infected and, if they do, the numbers of infected individuals will be low enough that medical facilities will have enough beds, masks, and ventilators for those who need them. *Id.* at ¶ 26.

**B. Conditions in Pennsylvania’s Immigration Detention Facilities Increase the Risk of COVID-19 Infection.**

40. The conditions in Pennsylvania’s immigrant detention facilities contravene all medical and public health directives for risk mitigation. People live in close quarters and cannot achieve the “social distancing” needed to effectively prevent the spread of COVID-19. Nor is such social distancing a possible solution, given the crowding of the facilities and the limitations on space.

41. At York, individuals are crowded into dorms of around 60 people. Juarez Pantoja at ¶ 8. They sleep in bunk beds only about 2 feet apart. Muhammed at ¶ 10. Ventilation in the facility is poor. Paul at ¶ 12. Plaintiffs are forced to move within these spaces without attention to necessary social distancing. *Id.* at ¶ 10.

42. In Pike, individuals within blocks are forced into small cells that they share with two other people, with two people sleeping on a bunk bed and one person in a bed just two or three feet away. Avecilla at ¶ 8. A toilet and sink that the detained individuals must share further crowds the cell, making it impossible to maintain 6 feet of distance. *Id.*

43. Other aspects of detention also preclude the CDC-recommended social distancing, and increase transmission opportunities. Shared use of common facilities generates further opportunities for infection. Toilets, sinks, and showers are shared, without disinfection between use. Amon 1 ¶ 41. Mass food preparation and distribution across the facility presents a further locus for virus transmission. *Id.*



44. At York, detained individuals eat at communal tables for four so small that the edges of the trays touch the end of the table. Juarez Pantoja at ¶ 10. Social distancing is impossible in this small space.

45. Nor is there adequate space in bathrooms: there are four toilets and two urinals and six showers for a unit of nearly sixty. *Id.* at ¶ 8. Because sanitization supplies are not provided, detained individuals cannot maintain proper hygiene. Detainees are given only one bar of soap a week, which they must bring with them to the bathroom. Alvarenga at ¶ 15. They are not provided hand sanitizer. *Id.*; Rahardja at ¶ 12. They also must clean the bathrooms with a cleaning material that likely has no alcohol or bleach. Alvarenga at ¶ 15. When one individual asked for disinfectant, he was denied. Hope at ¶ 12. Detainees have limited access to running water, and must use bathroom sinks that are for hand washing and brushing teeth to access water for food they prepare in their dorms. Ruiz at ¶ 5.

46. Additional common surfaces, including phones and tablets, create potential sources of infection. Because there are a limited number of tablets and phones, the only means to communicate with loved ones and counsel is to share these devices. Hope at ¶ 10. Yet the facilities limit access to proper disinfecting products to clean them between use. *Id.* at ¶ 12. Detainees resort to using toilet paper and towels to try to keep themselves safe from infectious spread. Alvarenga at ¶ 15.

47. At Pike, an entire unit of around 50 people shares a set of four showers, with an average of 12 people sharing each shower when all showers are functional. Avecilla at ¶ 11. Ventilation in the facility is poor. *Id.* at ¶ 13; Briette at ¶ 14. As at York, phones and tablets at Pike are shared among many detained individuals within each block, yet the supplies allotted to clean are diluted and insufficient. Briette at ¶ 15.

48. While Pike has instituted a lockdown in response to COVID-19, it is still insufficient to protect detainees. Groups of 12 men are let out of their cells together for a short time every day and clamber to use the shared tablets and showers. De La Pena at ¶ 10. Detainees are still working, including Plaintiff De La Pena, who works nights cleaning the floors of the facility. *Id.*

49. These crowded conditions, in both sleeping and social areas prohibit effective social distancing necessary to protect against transmission. Shared objects (bathrooms, sinks, etc.) maximize the likelihood that COVID-19 will spread rapidly across the facilities. Amon 1 at ¶ 48. These conditions create serious risk that vulnerable detainees will become infected.

50. Similar viral spread has already occurred at other detention facilities. In New York City, for example, where the testing began earlier than in Pennsylvania, jails have become an epicenter of infectious spread. As of Tuesday, March 31, 141 staff and 180 individuals in custody had tested positive at Riker's Island and city

jails in New York City. The Legal Aid Society in New York recently reported that the infection rate for COVID-19 at local jails is more than seven times higher than the rate citywide and 87 times higher than the country at large. Amon 1 ¶ 51.

51. There is growing evidence of contagion and inadequate medical care within the facilities where Plaintiffs are detained. Even before quarantines, plaintiffs from each facility reported having issues receiving adequate medical care. *See* Juarez Pantoja at ¶5. Rahardja at ¶ 8; Briette at ¶ 10.

52. Since COVID-19 has become a known public health threat, the facilities have failed to take precautions. Not only are detained individuals not provided with masks to protect themselves, but the workers who come in and out of units to serve food also do not wear masks. Alvarenga at ¶17; Matos at ¶¶ 12-13. Staff also move between units without masks. Juarez Pantoja at ¶ 11. Even medical workers sometimes do not wear masks. Avecilla at ¶ 14. These multiple points of contact provide multiple potential vectors for infection. Indeed, Plaintiffs are concerned that guards may be infected and may be spreading the illness through the facility. Avecilla at ¶17.

53. Even where measures are taken, they are insufficient to prevent spread across the facility. For example, at York, all individuals housed in a single unit are put on quarantine within the same dorms in which they are unable to practice social distancing. Mukhina at ¶ 11; Paul at ¶ 10. Because no one is tested to determine who

is actually infected and who is not, this kind of quarantine facilitates transmission to non-infected individuals within the unit. Paul at ¶ 12; Alvarenga at ¶ 19; *see also* Amon 1 ¶ 61. In one instance, an individual was removed, but his bunk was not cleaned and his bunk mate continues to sleep in this potentially contaminated space. Rahardja at ¶ 10. Temperature checks are infrequent, with one individual reporting a single test about a week and a half ago. Juarez Pantoja at ¶ 11; *see also* Alvarenga at ¶ 20. In the women's unit, multiple individuals under quarantine have reported symptoms, but those who are not are left without protection. Muhkina at ¶ 11. The women's unit has also been unable to access utilities like the laundry, which makes the space less hygienic. *Id.*

54. Access to medical treatment and medication has also been delayed or inconsistent at York, which is especially troubling for detainees who take medications that should be given at evenly spaced intervals. Paul at ¶¶ 11, 13. Detainees' quarantined blocks have also had their immigration hearings or custody reviews rescheduled, which may lengthen their detention. Mukhina at ¶ 12; Paul at ¶ 13; Ceballos at ¶ 9.

55. At Pike, two individuals reported COVID-19 symptoms, but were being left in the cell without care, risking their health and the health of others still in the unit. Avecilla at ¶ 15. Pike is also keeping quarantined detainees in the same block as other detainees, including the working block, which houses 67 men. De La

Pena at ¶ 14. Individuals in cells with others who were removed after presenting symptoms of COVID-19 report that the facility did not even test them. Crisostomo Rodriguez at ¶ 8. Detainees housed in the same block as those in quarantine are not provided masks. De La Pena ¶ 13. As at York, cohorting in this way could mean disease transmission will be facilitated rather than prevented. Amon 1 ¶ 61.

56. While some individuals have reported temperature checks, no plaintiffs have observed or heard word of medical staff administering tests to anyone reporting symptoms. De La Pena ¶13. In fact, Pike denied a Petitioner’s request to be tested after he his cellmates exhibited symptoms and were removed from his cell. Crisotomo Rodriguez at ¶ 8. Because of asymptomatic and pre-symptomatic transmission, temperature checks alone are insufficient to identify infected individuals who may be infected and infecting others. Amon 1 ¶ 50(a).

57. The failure to perform tests of staff who have ongoing community contacts presents a daily risk of introduction of the virus into the detention facility. *Id.* at ¶ 50(d). The entire state of Pennsylvania is reported to have “widespread” community transmission, and therefore all staff are potential vectors of the virus. *Id.* at ¶ 50(b). The possibility of asymptomatic transmission means that monitoring staff for fever is also inadequate for identifying all who may be infected and preventing transmission. *Id.* at ¶ 50(a). This is also true because not all individuals infected with COVID-19 report fever in early stages of infection. Ex. 2 (Amon Decl.) at ¶ 42.

58. A lack of proven cases of COVID-19 where there is little to no testing is functionally meaningless for determining if there is a risk for COVID-19 transmission in a community or institution. Golob at ¶ 7. In other jurisdictions where testing has been made available to correctional officers who enter and leave facilities regularly, the rates of infection are high. Amon 1 at ¶¶ 51, 52.

59. At Pike, one inmate has tested positive for COVID-19 and is currently hospitalized, and three staff members, and one contract employee have tested positive for COVID-19.<sup>4</sup> Many others have witnessed cell mates and people in their unit exhibiting symptoms, sometimes without any attention from the correctional officers. Avecilla at ¶¶ 15, 16. York's quarantine suggests that the virus may have infected that facility as well.

60. Once introduced, it will be impossible to stop the spread of the virus within the facility, where social distancing measures are impossible. CDC guidance specifically recommends implementing social distancing strategies to increase the physical space between incarcerated and detained persons, "ideally 6 feet between all individuals, regardless of the presence of symptoms," but Respondents continue to hold Plaintiffs in conditions where they sleep an arm's reach away from each other

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<sup>4</sup> Coronavirus COVID-19 Updates from the Pike County Commissioners, April 2, 2020 Update, <https://news.pikepa.org/post/2020/03/09/COVID-19-Update> (last visited April 3, 2020)

in a room full of people with whom they share bathrooms and eating spaces. Weithers at ¶ 12; Alvarenga at ¶ 13; Avecilla at ¶ 8. *see also* Amon 1 at ¶¶ 42.

61. Even were the Respondents to implement the specific ICE guidance for cohorting stringently across the facilities—which they have not done—these actions will not prevent the introduction of the virus and its spread within the facility because of the potential for asymptomatic transmission from facility staff or other individuals in ICE custody. *Id.* at ¶¶ 61, 62. Moreover, the CDC guidance makes clear that cohorting must separate those suspected of having the virus from those who are not, a determination that can only be made with widespread testing. *Id.* at ¶¶ 59, 61. Yet Respondents fail to follow this protocol. There is no evidence that Respondents are conducting widespread testing. Without knowing who is infected, cohorts threaten to facilitate transmission. Amon 1 at ¶ 61. The size of the cohort that Respondents used at the Pike facility—a block of 48 men—threatens to expose many individuals to the virus. Avecilla at ¶¶ 8, 15, 16; Crisostomo Rodriguez at ¶¶ 10; 11; *see also* De La Pena at ¶ 9 (describing how his block has 67 men). York has a similar practice, “cohorting” the entire block, which is about 60 people. Alvarenga at ¶ 19; Mukhina at ¶ 11. Given that York’s housing is dormitory style and open, this practice puts the entire block is at risk of exposure.

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

62. Without a vaccine or cure for COVID-19, mitigating the risk of contracting virus is the only known way to protect those who are most vulnerable to serious harm from infection. Golob at ¶ 10; Amon 1 at ¶¶ 6, 35.

63. Because the risk of infection is at its zenith in detention centers where social distancing measures are impossible to implement, where people share common spaces that are not regularly sanitized, and where individuals are regularly exposed to potential vectors of infection, public health experts with experience in detention and correctional settings have recommended release of vulnerable individuals from custody. Golob at ¶ 14; Amon 1 at ¶¶ 70, 73.

64. High risk individuals who become infected will not receive adequate treatment. Immigration detention facilities lack adequate medical care infrastructure to address the strain of an outbreak. Amon 1 at ¶¶ 54, 64, 65. As a result, detained individuals who are age 65 and over or are any age with medical conditions that put them at high risk of illness if infected by COVID-19 are at grave risk of severe illness and death and should be released.

65. If they are not released before the virus spreads through the prison, ill detainees will likely be unable to access necessary medical care, including positive pressure ventilation and, in extreme cases, extracorporeal mechanical oxygenation. *See* Golob at ¶ 8. This is because an outbreak among detainees and corrections staff



will strain the limited medical infrastructure in the rural counties in which these detention facilities are located. Once infection spreads throughout the detention center, the burden of caring for these individuals will shift to local medical facilities. The few facilities will likely not be able to provide care to all infected individuals with serious cases, increasing the likelihood that these individuals will die. Amon 1 at ¶ 65. Thus, high risk individuals should be released from detention centers before it is too late.

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

66. Plaintiffs in this case are all individuals who are especially vulnerable to serious illness and death if they are infected with COVID-19, but ICE nonetheless continues to detain at York County Prison and Pike County Correctional Facility, while they await the adjudication of their immigration cases.

67. Plaintiff **Aaron Hope** is a 32-year-old male native of Trinidad. Hope at ¶ 1. He is eligible to adjust his status through his U.S. citizen wife. *Id.* at ¶ 2. One brother is also a citizen and his other brother and mother are legal permanent residents. *Id.* He has been detained at the York County Prison since September 15, 2019. *Id.* at ¶ 3.

68. Mr. Hope has suffered from asthma since childhood, was hospitalized with pneumonia in 2012, was diagnosed with sleep apnea in 2013, and was

diagnosed with high blood pressure in 2017. *Id.* at ¶¶ 6-9 His underlying health conditions place him at high risk of severe illness or death if he contracts COVID-19. Mr. Hope's serious health conditions place him at high risk of severe illness or death if he contracts COVID-19. Amon 1 at ¶ 11.

69. On March 27, 2019, Mr. Hope joined in a hunger strike at York County Prison to protest the unhygienic conditions and lack of appropriate precautions to prevent the spread of COVID-19. *Id.* at ¶¶ 10-13. The next day, March 28, correctional officers told Mr. Hope that they believed he was a leader of the strike and therefore was being put into segregation. *Id.* at ¶ 14. In the process of being moved to segregation, unidentified officers severely assaulted him, stripped him naked, and left him naked, badly bruised and handcuffed on the floor of the segregation cell. *Id.* at ¶¶ 12-19. He was denied repeated requests for medical treatment until Tuesday, April 1, when the prison finally transported him to a local hospital emergency room. *Id.*

70. Plaintiff **Iwan Rahardja** is a 51-year-old a citizen of Indonesia who has lived in the U.S. for nearly 20 years. Rahardja ¶ 1. He is married to a U.S. citizen and has two daughters, who are legal permanent residents. *Id.* at ¶ 3. He was granted asylum, but the finding was overturned on appeal. *Id.* at ¶ 2. He has been attempting to adjust his status based on his marriage to a U.S. citizen wife. Mr. Rahardja has

been detained by ICE at the York County Prison since February 27, 2020. *Id.* at ¶ 6. He has no criminal record.

71. Mr. Rahardja suffers from diabetes and hypertension, for which he has been prescribed medications that he continues to take while in detention. *Id.* at ¶¶ 4. His medical conditions place him at high risk of severe illness or death if he contracts COVID-19. Amon 1 at ¶ 12.

72. Plaintiff **Jesus De La Pena** is a 37-year-old man from Mexico who has lived in this country since age 6. De La Pena at ¶ 1. He is married and has four children, ranging in age from 5 to 18. He has been detained for a year by ICE at Pike County Correctional Center. *Id.* at ¶ 3. He was granted non-lawful permanent resident cancellation of removal in October 2019, but remains detained pending ICE's appeal. *Id.*

73. Mr. De La Pena suffers from severe asthma and hypertension. *Id.* at ¶ 5. He is also over-weight, i.e., 5' 7" tall and 290 pounds. *Id.* He is prescribed about 12 pills per day. *Id.* at ¶ 7. Several months ago Pike took him to the hospital with bad chest pains and an abnormal EKG. *Id.* at ¶ 6. His immigration lawyer recently asked ICE to release him due to health issues, but on March 31 ICE officials refused. *Id.* at ¶ 8. His medical conditions and his obesity place him at high risk for severe disease and death if he contracts COVID-19. Amon 1 at ¶ 13.

74. Plaintiff **Rakibu Adam** is a 34-year-old man from Ghana who has lived in the United States since 2014. Adam ¶ 1. He is married with two U.S. citizen children (ages 2 and 5). He recently had his merits hearing and is awaiting a decision in his claim for asylum. Mr. Adam has been detained by ICE at York County Prison since October 2019. *Id.* at ¶ 3. ICE picked him up after his first court hearing for retail theft. *Id.* at ¶ 4.

75. Mr. Adam suffers from asthma and high blood pressure. *Id.* at ¶ 6. He takes daily medication for his high blood pressure and has recently had trouble breathing. *Id.* at ¶ 6. His medical condition places him at high risk of severe illness or death if he contracts COVID-19. Amon 1 at ¶ 14.

76. Plaintiff **Duc Viet Lam** is a 50-year-old man from Vietnam who has lived in the U.S. for 13 years. Viet Lam at ¶¶ 1. He is married to a lawful permanent resident and has filed an 1-130 petition to adjust his status, thereby staying his deportation order. *Id.* at ¶ 2.

77. Mr. Viet Lam has been detained by ICE at the Pike County Correctional Center since January 2020. *Id.* at ¶ 3. ICE picked him up after he received probation for a disorderly conduct summary offense, for which he received probation. *Id.* at ¶ 2. That is his only offense. *Id.*

78. Mr. Viet Lam suffers from diabetes and high blood pressure, for which he receives medications. *Id.* at ¶ 4. Several years ago he was hospitalized for three

days because of the high blood pressure. *Id.* His medical condition places him at high risk of severe illness or death if he contracts COVID-19. Amon 1 at ¶ 15.

79. Plaintiff **Yelena Mukhina** is a 35-year-old woman from Ukraine who has been in this country for 14 years. Mukhina at ¶ 1. She is a lawful permanent resident and has a 10-year-old U.S. citizen daughter. *Id.* at ¶ 2. Her fiancé is also a U.S. citizen. *Id.* Ms. Mukhina has been detained by ICE at York County Prison since February 2020. *Id.* at ¶ 3. She is seeking Lawful Permanent Resident Cancellation of Removal. Because her block is on quarantine, her immigration hearing was rescheduled from April 1, 2020 to May 12, 2020. *Id.* at ¶ 13.

80. Ms. Mukhina has suffered from asthma since 2010. *Id.* at ¶ 5. She is unable to sleep because of how bad her breathing problems are. *Id.* at ¶ 9. She has hepatitis C, suffers from seizures, has suffered from blood clots in her heart, and has a heart murmur. *Id.* at ¶ 7-9. Her multiple health issues place her at high risk of severe illness or death if she contracts COVID-19. Amon 1 at ¶ 16.

81. Plaintiff **Nahom Gebretnisae** is a 28-year-old man from the Eritrea who has lived in the U.S. for more than 20 years. Gebretnisae at ¶¶ 1, 2. His entire family – elderly parents, ages 79 and 91 and four older siblings – arrived in 1998 and now are U.S. citizens. *Id.* at ¶ 2. He has been detained by ICE since February 18, 2020, at York County Prison. *Id.* at ¶ 3.

82. Mr. Gebretnisae has for the past 13 years suffered from Crohn's Disease and related arthritis and severe nerve and general pain. *Id.* at ¶ 4. He is prescribed many medications. *Id.* at ¶¶ 5-11. Mr. Gebretnisae cannot alleviate his symptoms with the limited food choices available in the prison, which has caused him to suffer severe cramps, diarrhea, arthritis and pain. *Id.* at ¶¶ 9-10. Because he taking immunosuppressants, he may be immunocompromised and at high risk of severe illness or death if he contracts COVID-19. Amon 1 at ¶ 17.

83. Plaintiff **Ismail Muhammed** is a 69-year-old man from Pakistan who has been in the U.S. since 2002. Ismael at ¶¶ 1<sup>st</sup> un-numbered and 1. Mr. Ismael has been held at the York County Prison since December 19, 2019. *Id.* at ¶ 1.

84. Mr. Ismael has recently lost about 25 pounds, suffered from asthma-type attacks, and is pre-diabetic. *Id.* at ¶¶ 3-8. In recent months he has grown increasingly frail. *Id.* His advanced age puts him at high risk of severe illness or death if he contracts COVID-19. Amon 1 at ¶ 18. His prediabetes and breathing difficulties could also put him at increased risk and complicate treatment. *Id.*

85. Plaintiff **Glenn Weithers** is a 49-year-old man from Guyana who has lived in the United States for more than 32 years as a lawful permanent resident. Weithers at ¶ 1. His brother, sister, children, and grandchildren are all U.S. citizens. *Id.* at ¶ 2. Mr. Weithers has been detained by ICE at York County Prison since January 2019. *Id.* ¶ 4. He currently has a motion to reopen pending. *Id.*

86. Mr. Weithers has emphysema and chronic obstructive pulmonary disease. *Id.* at ¶ 7. He has had difficulty receiving adequate treatment and has recently been having breathing issues at night. *Id.* at ¶ 9. His lung-related illness places him at high risk of severe illness or death if he contracts COVID-19. Amon 1 at ¶ 19.

87. Plaintiff **Konstantin Bugarenko** is a 49-year-old man from Ukraine. Bugarenko at ¶ 1. He has lived in the United States for nearly 24 years as a lawful permanent resident. *Id.* He is married to a U.S. citizen and they have five U.S. citizen children together. *Id.* at ¶ 2. Mr. Bugarenko has been detained by ICE at York County Prison since October 2017. *Id.* at ¶ 5. He is currently seeking a rehearing in his case before the U.S. Third Circuit Court of Appeals. *Id.* at ¶ 4.

88. Mr. Bugarenko suffers from prediabetes, high blood pressure, and diverticulitis. *Id.* at ¶ 5. He also suffers re-occurring and debilitating pain in his feet that renders him temporarily unable to walk. *Id.* at ¶ 5. His medical conditions could put him at a heightened risk of complications if he contracts COVID-19. Amon 1 at ¶ 20.

89. Plaintiff **Brisio Balderas-Dominguez** is a 47-year-old man from Mexico who came to this country in 1991 after cartel members murdered his father, a judge. Balderas-Dominguez at ¶¶ 1, 3. He is married to a U.S. citizen woman and has four U.S. citizen children. *Id.* at ¶ 4. Mr. Balderas-Dominguez has been detained

by ICE for nearly three years at the Pike County Correctional Center. *Id.* at ¶ 5. His application for relief under the Convention Against Torture (“CAT”) is pending before the U.S. Third Circuit Court of Appeals, which issued an order staying his deportation. *Id.* at ¶ 6.

90. Mr. Balderas-Dominguez suffers from diabetes, atrial fibrillation, and high blood pressure, for which he takes many medications. *Id.* at ¶¶ 8, 9. His medical conditions place him at high risk of severe illness or death if he contracts COVID-19. *Amon 1* at ¶ 21.

91. Plaintiff **Viviana Ceballos** is a 56-year-old woman from Argentina who has lived in the United States for over 29 years. **Ceballos** ¶ 3. She became a lawful permanent resident in 1994. *Id.* She has been detained by ICE at York County Prison since March 2019. *Id.* at ¶ 7.

92. Ms. Cabellos is awaiting a decision from the Board of Immigration Appeals to reopen her case on the grounds that she is now eligible for Cancellation of Removal after vacating a conviction for stolen property under the Post Conviction Relief Act (PCRA). *Id.* at ¶¶ 5, 6. DHS has indicated they to not oppose her Motion to Reopen. *Id.* at 6.

93. On April 2, 2020, Ms. Cabellos’s attorney received an email from an ICE officer informing her that Ms. Cabello’s parole redetermination hearing was postponed because she is in a cohorted dorm. *Id.* at ¶ 7.



94. Ms. Cabellos has high blood pressure, for which she receives medication. *Id.* at ¶ 12. Her high blood pressure and age likely place her at a heightened risk of complications from s COVID-19. Amon 1 at ¶ 22.

95. Plaintiff **Wilders Paul** is a 32-year-old man from Haiti. Wilders at ¶ 1. He has lived in the United States since he was three years old. *Id.* at ¶ 1. He is married to a U.S. citizen and they have two children together—a son (age 13) and daughter (age 7). *Id.* He has been detained by ICE since December 28, 2019. *Id.* at ¶ 3. Mr. Paul is seeking adjustment of status through his U.S. citizen wife before EOIR. *Id.* His immigration lawyer recently asked ICE to release him due to health issues, but on March 31 they refused. *Id.* at ¶ 8.

96. As a result of a traumatic brain injury, Mr. Paul suffers from seizures and migraines. *Id.* at ¶¶ 6, 7. He takes the anti-seizure medication Keppra twice a day. *Id.* at ¶ 7. Prior to his detention, he also took migraine medication, but York is not providing him with this medication. *Id.* at ¶¶ 6, 7. His seizures likely put him at high risk of severe illness or death if he contracts COVID-19. Amon 1 at ¶ 23.

97. Plaintiff **Marco Javier Ortiz Matos** is a 32-year-old man from the Dominican Republic who has lived in this country for nearly 20 years. Ortiz Matos at ¶¶ 1, 2. He has been detained by ICE since November 2019 at Pike County Correctional Center. *Id.* at ¶ 3.

98. Mr. Ortiz Matos suffers from diabetes, for which he takes two medications. *Id.* at ¶¶ 4-7. He also has stomach ulcers. *Id.* His diabetes places him at high risk of severe illness or death if he contracts COVID-19. Amon 1 at ¶ 24.

99. Plaintiff **Alexander Alvaregna** is a 46-year-old man from El Salvador. Alvaregna at 1<sup>st</sup> unnumbered ¶ and ¶ 1. He has lived in the U.S. since 1984, when he was age 9. *Id.* at ¶ 1. All of his siblings live in the U.S. *Id.* He has three children – age 13, 25 and 29 – all of whom are U.S. citizens. *Id.* at ¶¶ 1, 4. He is very close to all of the aforementioned family members. *Id.* at ¶ 4.

100. Mr. Alvaregna was granted Temporary Protected Status in 1991, which then adjusted to Lawful Permanent Resident status in 1993. *Id.* at ¶ 2. Mr. Alvaregna has been detained at York County Prison since March 2, 2019. *Id.* at ¶ 5. An appeal of his denial of relief under the Convention Against Torture is pending before the BIA. *Id.* at ¶ 6.

101. Mr. Alvaregna suffers from diabetes, high blood pressure, atrial fibrillation, high cholesterol, and partial physical disability due to a 2019 accident. *Id.* at ¶¶ 7-11. He is prescribed and takes medications for all of the foregoing medical conditions. *Id.* His serious health conditions place him at high risk of severe illness or death if he contracts COVID-19. Amon 1 at ¶ 25.

102. Plaintiff **Armando Avecilla** is a 53-year-old man from Panama. Avecilla at ¶ 1. He fled Panama after he was shot multiple times in the head, which

put him into a coma for a month, blinded one eye, and injured his jaw so badly he has difficulty eating. *Id.* at ¶ 7. Mr. Avecila has been detained at Pike County Correctional Center since November 2019. *Id.* at ¶ 4. His appeal of his denial of asylum by the immigration court will be filed shortly by his immigration lawyer with the BIA. *Id.* at ¶ 2.

103. Mr. Avecilla has suffered from diabetes since 2010, for which he continues to receive daily medication. *Id.* at ¶ 6. He also suffers from partial disability caused by the gunshot wounds to his head. *Id.* at ¶ 7. His diabetes puts him at high risk of severe illness or death if he contracts COVID-19. Amon 1 at ¶ 26.

104. Plaintiff **Coswin Ricardo Murray** is a 45-year-old man from Barbados who has lived in this country for 33 years. Murray at ¶¶ 1-2. He is married and has four children, between the ages of 11 and 22, all of whom are U.S. citizens. *Id.* at ¶ 2. His wife is suffering from cancer—she has already had one kidney removed and the disease has spread to her bones—and he desperately wants to be with her. *Id.* at ¶¶ 2, 5, 6. ICE has detained Mr. Murray at Pike County Correctional Center since August 2019. *Id.* at ¶¶ 4, 6. Mr. Murray is in the process of trying to adjust his status based on his marriage to a U.S. citizen. *Id.* at ¶ 3.

105. Mr. Murray suffers from asthma, for which Pike refuses to give him an inhaler. *Id.* at ¶¶ 7-8. Mr. Murray's lung-related illness places him at high risk of severe illness or death if he contracts COVID-19. Amon 1 at ¶ 27.

106. Plaintiff **Edwin Luis Crisostomo Rodriguez** is a 31-year-old man from the Dominican Republic who has lived in the U.S. since 2016. Rodriguez at ¶¶ 1, 3. He is married to a lawful permanent resident, and has two step daughters. *Id.* at ¶ 4. Mr. Crisostomo Rodriguez has been detained since February 20, 2020, at the Pike County Correctional Center. *Id.* at ¶ 3.

107. Mr. Crisostomo Rodriguez has suffered from asthma since childhood, *id.* at ¶ 7, which places him at high risk of severe illness or death if he contracts COVID-19. Amon 1 at ¶ 28.

108. Plaintiff **Eldon Bernard Briette** is a 46-year-old man from Turks and Caicos who has lived in the U.S. for 35 years, since age 12. Briette at ¶¶ 1, 4. He is engaged to a U.S. citizen and has two U.S. citizen children. *Id.* at ¶ 4. Mr. Briette has been detained at the Pike County Correctional Center by ICE since November 12, 2019. *Id.* at ¶ 5. His case seeking withholding of removal is pending before the BIA. *Id.* at ¶ 2.

109. Mr. Briette suffers from diabetes, high blood pressure, high cholesterol, depression and anxiety. *Id.* at ¶¶ 6-9. He takes medications for all of these conditions, probably 8-9 pills a day, including now at Pike. *Id.* For the past two months, he has coughed heavily and fever-related symptoms. *Id.* at ¶ 10. His medical condition likely put him at high risk of severe illness or death if he contracts COVID-19. Amon 1 at ¶ 29.

110. Plaintiff **Dembo Sannoh** is a 41-year-old man from Sierra Leone. Sannoh at ¶ 1. He fled Sierra Leone after his parents were killed during the civil war and arrived to the United States in 2002. *Id.* at ¶ 2. He was granted asylum and in 2013 became a lawful permanent resident. *Id.* at ¶ 3. Mr. Sannoh has been detained by ICE at York County Prison since August 2019. His case is currently before the Board of Immigration Appeals (BIA). *Id.* at ¶ 3.

111. He has diabetes, hepatitis C, and an unidentified heart condition. *Id.* at ¶ 6. His medical condition places him at high risk of severe illness or death if he contracts COVID-19. Amon 1 at ¶ 30.

112. Plaintiff **Jesus Angel Juarez Pantoja** is a 36-year-old man from Mexico who has lived in the U.S. since age 6. Juarez Pantoja at ¶ 1. He is married and has three children, ages 8, 10 and 19, as well as a 3-month-old grandson. *Id.* One of his daughters suffers from depression, which has been exacerbated by his detention. *Id.* at 16. Mr. Juarez Pantoja has been detained by ICE at York County Prison since November 2019. *Id.* at ¶ 2. His immigration appeal is pending before the BIA. *Id.* at ¶ 14.

113. He suffers from asthma, sleep apnea and high blood pressure. *Id.* at ¶¶ 3-6. He is prescribed an inhaler for the asthma, but York does not allow him to keep it; rather he needs to let a correctional officer know he needs it and they will bring him to the medical unit to use the inhaler. *Id.* at ¶ 3. York recently placed him in

disciplinary status for suspected organizing activity around a hunger strike to protest conditions and treatment involving COVID-19, *id.* at ¶ 7, but being alone in a cell raises increased health concerns because he may not be able to summon help in the event he experiences asthma-related breathing problems, *id.* at ¶ 15. His asthma puts him at high risk of severe illness or death if he contracts COVID-19. Amon 1 at ¶ 31. His other health issues, including high blood pressure and obesity, also put him at risk for possible complications in his treatment should he contract COVID-19. *Id.*

114. Plaintiff **Duckens Max Adler Francois** 45-year-old man from Haiti who has lived in the United States for 30 years. Francois at ¶ 1. Mr. Francois has been detained by ICE at Pike County Correctional Facility for six months. *Id.* at ¶ 2. He is seeking Lawful Permanent Resident Cancellation of Removal and is awaiting his merits hearing. Hubbard at ¶ 4.

115. Mr. Francois has hypertension, pain when he urinates, and swollen feet. Francois at ¶ 6. He is awaiting a medical appointment for further testing and diagnosis. *Id.* He also has an intellectual disability and is obese. Hubbard at ¶ 5. He also has latent tuberculosis. *Id.* His medical conditions likely puts him at a high risk of severe illness or death if he contracts COVID-19. Amon 1 at ¶ 32.

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

116. Public health measures across the country, including in Pennsylvania, demonstrate the widespread recognition that the only clinically recommended course of action to protect individuals who have medical conditions that make them vulnerable to serious illness or death from COVID-19 is to practice social distancing and increased hygiene. Only these practices mitigate the risk of contracting this novel virus that has no cure. Golob at ¶ 10; Amon 1 at ¶¶ 6, 35.

117. CDC guidance for detention centers and prisons specifically recommends implementing social distancing strategies to increase the physical space between people, “ideally 6 feet between all individuals, regardless of the presence of symptoms.” *Id.* at ¶ 42.

118. None of the ICE facilities are following CDC guidance in relation to social distancing, putting all detainees, and especially those at high risk of severe disease and death, in jeopardy. *Id.* at ¶ 48. Plaintiffs are forced to sleep in crowded dorms that do not allow six feet of distance from each other, Juarez Pantoja at ¶ 8; Muhammed at ¶ 10,<sup>5</sup> or are housed three to an eight-foot-by-

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<sup>5</sup> See also *Thakker* Dkt. 2-10 (Pratt Decl.) at ¶ 7; *Thakker* Dkt. 2-4 (Idowu Decl.) at ¶ 11; *Thakker* Dkt. 2-11 (Augustin Decl.) at ¶ 16.

twelve-foot cell, with two people sharing a bunk bed, and with a shared toilet and sink between all three. AVECILLA at ¶ 8.<sup>6</sup>

119. Nor will the policy of “cohorting” prevent the spread of the virus to Plaintiffs. Contrary to CDC recommendations to cohort individually, ICE cohorts many people together, between 30 to 50 to a room or triple celled at Pike and 60 to a room at York. Even if ICE is to implement this policy at the facilities, asymptomatic transmission will allow individuals to infect others before showing the signs that would trigger the cohorting measures, and will force non-infected individual into small cohorted spaces with infected individuals. AMON 1 at ¶ 61.

120. CDC guidance on correctional and detention facilities emphasizes that there are many opportunities for COVID-19 to be introduced into a correctional or detention facility, including from staff and transfer of incarcerated/detained persons. AMON 1 at ¶ 66. ICE claims to be following CDC guidance at its facilities. *Id.* However, the ICE action plan only provides for verbal screening and temperature checks. But asymptomatic transmission of the virus means that monitoring fever of staff or detainees is inadequate for identifying all who may be infected and preventing transmission. *Id.* at ¶

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<sup>6</sup> See also *Thakker* Dkt. 2-3 (Thakker Decl.) at ¶ 11



50(b). Given the shortage of COVID-19 testing in the United States, it is likely that detention facilities are and will continue to be unable to conduct aggressive, widespread testing to identify all positive cases of COVID-19. *Id.* at 50(d).

121. Respondents also have failed to implement their own alleged protocol for isolation. The protocol states: “ICE places detainees with fever and/or respiratory symptoms in a single medical housing room, or in a medical airborne infection isolation room specifically designed to contain biological agents, such as COVID-19.” *Id.* at ¶ 60. Plaintiffs’ declarations make clear that these procedures are not being implemented. But even if they were, they would be insufficient to address infectious spread. Given the rate of spread in detention facilities, there will be many more than people with COVID-19 than there are isolation rooms. *Id.* Limited infrastructure will thus mean that ICE will not be able to comply with this protocol and will therefore expose non-infected individuals held in quarantine with infected individuals.

122. Respondents also expose Plaintiffs to unsanitary conditions that increase the risk of infection and spread. They must use common toilets and showers, *Avecilla* at ¶ 8, which individual detainees clean for a dollar a day. They have no control over their soap rations or access to other sanitization products. *Alvarenga* at ¶ 15.

123. Respondents have been aware of the serious hygiene issues at their facilities, including York. Stakeholders sent a detailed letter to Ms. Flores-Lund and Warden Doll in July 2019 detailing various deficiencies in hygiene, sanitation and medical care, and thus these officials are or should have been aware of these serious problems at York County Prison. See *Thakker* Dkt. 2-19 (Ruiz Decl.) at ¶ 3. To date, York Country Prison has not implemented any changes. *Id.* at ¶ 12; Ruiz at ¶ 12.

124. On March 13, 2020, as infection rates began to increase in Pennsylvania at an alarming rate, the American Civil Liberties Foundation (ACLU) of Pennsylvania sent a letter to Defendant Flores-Lund, and other agency officials, alerting them to the high risk of COVID-19 infection in detention facilities and the dangerous health outcomes of an infection for vulnerable individuals. *Thakker* Dkt. 2-20.

125. Neither Ms. Flores-Lund nor any other agency official has responded to the letter.

126. CDC guidance recognizes that incarcerated/detained persons are at “heightened” risk for COVID-19 infection once the virus is introduced. Amon 1 at ¶ 66. All of the risks are present here, where Plaintiffs cannot practice social distancing, share common spaces and touch common surfaces, and where new individuals and staff come into the facility each day.

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

128. Respondents do not have the capability to put out this fire with the scarcity of tests and the limited physical infrastructure in which they can neither isolate nor distance individuals from each other.

## LEGAL FRAMEWORK

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

129. Immigrant detainees, even those with prior criminal convictions, are civil detainees entitled to the same Fifth and Fourteenth Amendment due process protections as any other pretrial detainee. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *E. D. v. Sharkey*, 928 F.3d 299, 306–07 (3d Cir. 2019).<sup>7</sup>

130. Due process rights for civil detainees mean that they are “entitled to more considerate treatment and conditions of confinement than criminals

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<sup>7</sup> The Fifth Amendment requires the federal Respondent-Respondents to provide due process protections to Plaintiffs. The Fourteenth Amendment requires the state Respondent-Respondents to provide the same due process.

whose conditions of confinement are designed to punish.” *Aruanno v. Johnson*, 683 F. App’x 172, 175 (3d Cir. 2017) (quoting *Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982); *see also Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979) (“Due process requires that a pretrial detainee not be punished.”).

131. “To determine whether challenged conditions of confinement amount to punishment, this Court determines whether a condition of confinement is reasonably related to a legitimate governmental objective; if it is not, we may infer ‘that the purpose of the governmental action is punishment that may not be constitutionally inflicted upon detainees *qua* detainees.’” *Sharkey*, 928 F.3d at 307 (quoting *Hubbard v. Taylor*, 538 F.3d 229, 232 (3d Cir. 2008)). Put differently, to assess whether a condition constitutes impermissible punishment, “[w]e must ask, first, whether any legitimate purposes are served by these conditions, and second, whether these conditions are rationally related to these purposes.” *Hubbard*, 538 F.3d at 232. Conditions must be assessed in their totality. *Id.* at 233.

132. The government has an affirmative duty to provide conditions of reasonable health and safety to the people it holds in its custody, and violates the constitution when it “fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety” for those in custody. *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189,

199-200 (1989); *see also Union County Jail Inmates v. Di Buono*, 713 F.2d 984, 999, 1008 (3d Cir. 1983) (explaining that conditions are cruel and unusual when they “deprive inmates of the minimal civilized measure of life’s necessities,” such as the “necessity” of “habitable shelter,” as measured under “contemporary standards of decency”).

133. Courts in this Circuit have repeatedly found such “unsanitary, unsafe, or otherwise inadequate conditions” sufficient to state a Due Process claim. *Petty v. Nutter*, No. 15-3430, 2016 WL 7018538, at \*2 (E.D. Pa. Nov. 30, 2016); *see Grohs v. Lanigan*, No. 16-7083, 2019 WL 150061, at \*11 (D.N.J. Apr. 5, 2019) (allegations of exposure to “extreme heat combined with lack of potable water, as well as generally unsanitary conditions” sufficient to state a conditions-of-confinement claim under the Fourteenth Amendment).

134. Conditions that would violate the Eighth Amendment are more than enough to also violate a civil detainee’s due process rights. *See Natale v. Camden Cty. Corr. Facility*, 318 F.3d 575, 581 (3d Cir. 2003) (explaining that the Fourteenth Amendment affords pretrial detainees protections ‘at least as great as the Eighth Amendment protections available to a convicted prisoner’) (quoting *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983)).

135. To prevail on a claim that conditions of confinement violate the Eighth Amendment, Petitioners must meet two requirements: (1) the deprivation alleged must be, objectively, “sufficiently serious,” and (2) the “prison official must have a sufficiently culpable state of mind,” such as deliberate indifference to the detainee’s health or safety. *See Thomas v. Tice*, 948 F.3d 133, 138 (3d Cir. 2020) (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)).

136. The Supreme Court has recognized that it violates the Eighth Amendment to crowd prisoners into cells with others who have “infectious maladies,” “even though the possible infection might not affect all of those exposed.” *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (citing *Hutto v. Finney*, 437 U.S. 678, 682 (1978)); *see also Stewart v. Kelchner*, No. 06-2463, 2007 WL 9718681, at \*13 (M.D. Pa. May 11, 2017), *report and recommendation adopted*, 2007 WL 9718672 (M.D. Pa. June 1, 2017).

137. Petitioners can establish deliberate indifference based on circumstantial evidence that the risk is obvious. The obviousness of the risk the Petitioners face, by itself, is enough to allow a factfinder to conclude that Respondents know of the risk. *Phillips v. Superintendent Chester SCI*, 739 F. App’x 125, 129 n.7 (3d Cir. 2018) (citing *Farmer v. Brennan*, 511 U.S. 825, 842 (1994)). Put another way, deliberate indifference may be shown through circumstantial

evidence. *Farmer*, 511 U.S. at 842 (explaining that “[w]hether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence”).

138. Due process rights may be violated even before a detainee is exposed to disease. Because the Eighth Amendment requires that “inmates be furnished with the basic human needs, one of which is ‘reasonable safety[.]’” *Helling v. McKinney*, 509 U.S. at 33. (quoting *DeShaney*, 489 U.S. at 200), “[i]t would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them[.]” *Id.*

#### **B.Respondents Are Violating Petitioner’s Constitutional Due Process Rights.**

139. The conditions at the ICE Facilities described above, *supra* ¶¶ 40-61, are sufficient to demonstrate that Petitioners’ constitutional due process rights are being violated. Keeping at-risk Petitioners detained in such close proximity to one another and without the sanitation necessary to combat the spread of the virus serves no legitimate purpose. Nor is detention under these circumstances rationally related to the enforcement of immigration laws.

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

COVID-19 and Respondents are being deliberately indifferent to this critical safety concern.

141. There is no question that COVID-19 poses a serious risk to Petitioners. COVID-19 is highly contagious, and can cause severe illness and death. *See supra*, Statement of Facts § A. Petitioners are at a heightened risk because of their age and/or underlying health conditions. *See supra* ¶¶ 66, 68, 71, 73, 75, 78, 80, 82, 84, 86, 88, 90, 94, 96, 98, 101, 103, 105, 107, 109, 111, 113, 115.

142. Respondents are aware of and have completely disregarded the serious risk that COVID-19 poses to Petitioners. *See supra* ¶ 124 (ACLU March 13, 2020 letter).

143. The risk that COVID-19 poses to Petitioners is also obvious, including to Respondents. Medical experts for the Department of Homeland Security have also identified the risk of COVID-19 spreading to ICE detention centers.<sup>8</sup> John Sandweg, a former acting director of ICE, has written publicly about the need to release nonviolent detainees because ICE detention centers “are extremely susceptible to outbreaks of infectious diseases” and

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<sup>8</sup> *See* March 19, 2020 letter from Scott A. Allen, MD, FACP and Josiah Rich, MD, MPH to House and Senate Committees on Homeland Security, available at <https://whistleblower.org/wp-content/uploads/2020/03/Drs.-Allen-and-Rich-3.20.2020-Letter-to-Congress.pdf>.



“preventing the virus from being introduced into these facilities is impossible.”<sup>9</sup> Prisons and jails around the country are *already* releasing non-violent detainees because the risk of contagion is overwhelming.<sup>10</sup>

144. The circumstances of this case make clear that release is the only means to ensure compliance with Petitioners’ due process rights. Public health information makes clear that the only way to prevent infection is through social distancing and increased hygiene, and that these measures are most imperative to protect individuals with underlying medical conditions. *See supra* ¶¶ 38, 63, 116. The only course of action that can remedy these unlawful conditions is release from the detention centers where risk mitigation is impossible.

**C. ICE Regularly Uses Its Authority To Release People Detained In Custody Because They Suffer Serious Medical Conditions.**

145. ICE has a longstanding practice of prosecutorial discretion, which demonstrates that the agency understands that its authority extends to— and

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<sup>9</sup> See John Sandweg, “I Used to Run ICE. We Need to Release the Nonviolent Detainees.” *The Atlantic* (March 22, 2020), available at <https://www.theatlantic.com/ideas/archive/2020/03/release-ice-detainees/608536/>.

<sup>10</sup> See Order, Supreme Court of New Jersey, Docket No. 084230 (March 22, 2020) (ordering release of most county jail detainees), available at <https://njcourts.gov/notices/2020/n200323a.pdf?c=4EF>; *United States v. Stephens*, No. 15-cr-95, 2020 WL 1295155, at \*2 (S.D.N.Y. Mar. 19, 2020) (concluding that the “unprecedented and extraordinarily dangerous nature of the COVID-19 pandemic” constituted compelling circumstances to adjust a Respondent’s bail conditions and release him, even though there was “not yet a known outbreak among the jail and prison populations” when the order was issued).

includes— humanitarian releases from custody. The agency has routinely exercised its authority to release particularly vulnerable detainees. As former Deputy Assistant Director for Custody Programs in ICE Enforcement and Removal Operations Andrew Lorenzen-Strait explains, “ICE has exercised and still exercises discretion for purposes of releasing individuals with serious medical conditions from detention.” *See Thakker* Dkt. 2-17 (Strait Decl.) at ¶ 3.

146. ICE has a range of highly effective tools at its disposal to ensure that individuals report for court hearings and other appointments, including conditions of supervision. For example, ICE’s conditional supervision program, called ISAP (Intensive Supervision Appearance Program), relies on the use of electronic ankle monitors, biometric voice recognition software, unannounced home visits, employer verification, and in-person reporting to supervise participants. A government-contracted evaluation of this program reported a 99% attendance rate at all immigration court hearings and a 95% attendance rate at final hearings. *See Thakker* Dkt. 2-17 (Lorenzen-Strait Decl.) ¶ 15.

147. This exercise of discretion comes from a long line of agency directives explicitly instructing officers to exercise favorable discretion in cases involving severe medical concerns and other humanitarian equities militating

against detention. *See Thakker* Dkt. 2-17 (Strait Decl.) at ¶¶ 10-14. For example, under 8 C.F.R. § 212.5(b)(1), ICE has routinely exercised its discretion to release particularly vulnerable detainees. *Id.* at 4-11.

148. ICE's discretion applies regardless of the statutory basis for a noncitizen's detention. *See Thakker* Dkt. 2-17 (Strait Decl.) at ¶ 11.

149. While ICE officers may be exercising discretion less frequently in recent years, the statutory and regulatory authority underlying the use of prosecutorial discretion in custodial determinations remains in effect. *See Thakker* Dkt. 2-17 (Straight Decl.) at ¶ 13.

150. Consistent with the Due Process clause of the Fifth Amendment to the U.S. Constitution, ICE must release detainees where civil detention has become punitive and where release is the only remedy to prevent this impermissible punishment. The fact that ICE has the authority to release immigrants from custody and has exercised this authority in the past indicates that the remedy Petitioners request is neither unprecedented nor unmanageable for the agency.

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

151. Courts have broad power to fashion equitable remedies to address constitutional violations in prisons, *Hutto v. Finney*, 437 U.S. 678, 687 n.9 (1978), and "[w]hen 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).

152. This authority extends to "placing limits on a prison's population" when necessary to ensure compliance with the Constitution. *Brown v. Plata*, 563 U.S. 493, 511 (2011); *see also Duran v. Elrod*, 713 F.2d 292, 297-98 (7th Cir. 1983), *cert. denied*, 465 U.S. 1108 (1984) (concluding that court did not exceed its authority in directing release of low-bond pretrial detainees as necessary to reach a population cap).

153. The circumstances of this case make clear that release is the only means to ensure compliance with the Fifth Amendment's prohibition against punitive detention. Petitioners' medical conditions put them at grave risk of severe illness or death if they contract COVID-19. Public health information makes clear that the only way to prevent infection is through social distancing and increased hygiene, and that these measures are most imperative to protect individuals with pre-existing medical conditions. Yet Respondents are detaining vulnerable Petitioners under conditions where they are forced into close contact with many other detainees and officers. By continuing detention in these circumstances, Respondents are subjecting Petitioners to unreasonable harm. The only course of action that can remedy these unlawful conditions is release from the detention centers where risk mitigation is impossible.

## **CLAIM FOR RELIEF**

### **Violation of Fifth Amendment Right to Substantive Due Process (Unlawful Punishment; Freedom from Cruel Treatment and Conditions of Confinement)**

154. The forgoing allegations are re-alleged and incorporated herein.

155. The Fifth Amendment of the Constitution guarantees that civil detainees, including all immigrant detainees, may not be subjected to punishment. The federal government violates this substantive due process right when it fails to satisfy its affirmative duty to provide conditions of reasonable health and safety to the people it holds in its custody, and violates the constitution when it fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety for those in custody. The federal government also violates substantive due process when it subjects civil detainees to cruel treatment and conditions of confinement that amount to punishment.

156. By detaining Petitioners in the ICE Facilities, Respondents are subjecting Petitioners to a heightened risk of contracting COVID-19, for which there is no vaccine and no cure. Petitioners are particularly vulnerable to serious medical complications from COVID-19 infection and are risk of illness and death as long as they are held in detention. By subjecting Petitioners to this risk Respondents are maintaining detention conditions that amount to

punishment and fail to ensure safety and health in violation of Petitioners' due process rights.

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

### **PRAYER FOR RELIEF**

WHEREFORE Petitioners request that the Court grant the following relief:

- a. Issue a Writ of Habeas Corpus on the ground that their continued detention violates the Due Process Clause and order Petitioners' immediate release, with appropriate precautionary public health measures;
- b. In the alternative, issue injunctive relief ordering Respondents to immediately release Petitioners, with appropriate precautionary public health measures, on the grounds that their continued detention violates Petitioners' constitutional due process rights;
- c. Issue a declaration that Respondents' continued detention in civil immigration custody of individuals at increased risk for severe illness, including all people ages 65 and older and persons of any age with

underlying medical conditions that may increase the risk of serious COVID-19, violates the Due Process Clause;

- d. Award Petitioners their costs and reasonable attorneys' fees in this action under the Equal Access to Justice Act ("EAJA"), as amended, 5 U.S.C. § 504 and 28 U.S.C. § 2412, and on any other basis justified under law; and
- e. Grant any other and further relief that this Court may deem just and proper.

Dated: April 3, 2020

Respectfully Submitted,

/s/ Will W. Sachse

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*\*Petition for permission to file pro hac vice forthcoming*



**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

AARON HOPE,	:	1:20-cv-562
<i>et al.</i> ,	:	
Petitioners-Plaintiffs,	:	
	:	
v.	:	Hon. John E. Jones III
	:	
CLAIR DOLL, <i>in his official capacity</i>	:	
<i>as Warden of York County Prison,</i>	:	
<i>et al.</i> ,	:	
Respondents-Defendants.	:	

**MEMORANDUM AND ORDER**

**April 7, 2020**

Pending before the Court is the Motion for Temporary Restraining Order and/or Preliminary Injunction filed by Petitioners-Plaintiffs Aaron Hope, Iwan Rahardja, Jesus De La Pena, Rakibu Adam, Duc Viet Lam, Yelena Mukhina, Nashom Gebretinsae, Ismail Muhammed, Glenn Weithers, Konstantin Bugarenko, Brisio Balderas-Dominguez, Viviana Ceballos, Wilders Paul, Marcos Javier Ortiz Matos, Alexander Alvarenga, Armando Avecilla, Coswin Ricardo Murray, Edwin Luis Crisostomo Rodriguez, Eldon Bernard Briette, Dembo Sannoh, Jesus Angel Juarez Pantoja and Alger Fracois, (collectively “Petitioners”). (Doc. 5).

For the reasons that follow, the temporary restraining order shall be granted and the Respondents shall be directed to immediately release Petitioners today on their own recognizance.

## **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

Petitioners are a diverse group of individuals from around the world who are being held in civil detention by Immigration and Customs Enforcement, (“ICE”), at York County Prison and Pike County Correctional facility, (“the Facilities”), while they await final disposition of their immigration cases.

Each Petitioner suffers from chronic medical conditions and faces an imminent risk of death or serious injury if exposed to COVID-19. Hope is 32 years old and has serious respiratory problems that have led to his hospitalization for pneumonia. He also has sleep apnea and high blood pressure. (Doc. 1, ¶ 3).

Rahardja is 51 years old and suffers from diabetes and hypertension.

(Doc. 1, ¶ 4). De La Pena is 37 years old and suffers from severe asthma and hypertension and is over-weight. (Doc. 1, ¶ 5). Adam, 34 years old, suffers from asthma and high blood pressure. (Doc. 1, ¶ 6). Viet Lam is 50 years old and suffers from diabetes and high blood pressure. *Id.* at ¶ 7. Mukhina is 35 years old and suffers from asthma, a heart murmur, and hepatitis C, and has a history of blood clots and seizures. (Doc.1, ¶ 8). Gebretnisae is 28 years old and suffers from Cn’s arthritis and nerve pain, requiring many medications. (Doc. 1, ¶ 9).

Muhammed is 69 years old and suffers from asthma, is pre-diabetic, and has recently lost a significant amount of weight. (Doc. 1, ¶ 10). Weithers is 59 years old and suffers from emphysema and chronic obstructive pulmonary

disease. (Doc. 1, ¶ 11). Bugarenko, age 49, suffers from pre-diabetes, high blood pressure, and diverticulitis, as well as debilitating pain that inhibits his ability to walk. (Doc. 1, ¶ 12). Baldarez-Domingez is 47 years old and suffers from diabetes, atrial fibrillation, and high blood pressure. (Doc. 1, ¶ 13). Ceballos, 56 years old, suffers from high blood pressure. (Doc. 1, ¶ 14). Paul is 32 years old and suffers from traumatic brain injury, seizures, and headaches. (Doc. 1, ¶ 15).

Matos is 32 years old and suffers from diabetes. (Doc. 1, ¶ 16). Alvargena, age 46, suffers from diabetes, high blood pressure, atrial fibrillation, high cholesterol, and partial physical disability from a prior accident. (Doc. 1, ¶ 17). Avecilla is 53 years old and suffers from diabetes. (Doc 1, ¶ 18). Murray is 45 years old and suffers from asthma but has been unable to obtain an inhaler. (Doc. 1, ¶ 19). Rodriguez is 31 years old and suffers from asthma. (Doc. 1, ¶ 20). Briette is 46 years old and suffers from diabetes, high blood pressure, high cholesterol, depression, and anxiety. (Doc. 1, ¶ 21). Sannoh, 41 years old, suffers from diabetes requiring daily medication. (Doc. 1, ¶ 22). Pantoja is 36 years old and suffers from asthma, sleep apnea, and high blood pressure. (Doc.

1, ¶ 23). Francois is 45 years old and suffers from hypertension, pain when he urinates, and swollen feet. (Doc. 1, ¶ 24).<sup>1</sup>

Named as Respondents are: Clair Doll, Warden of York County Prison; Craig A. Lowe, Warden of Pike County Correctional Facility; Simona Flores-Lund, Field Office Director, ICE Enforcement and Removal Operations; Matthew Albence, Acting Director of ICE; and Chad Wolf, Acting Secretary of the Department of Homeland Security.

## II. DISCUSSION

We had occasion to consider the substantially same set of circumstances less than a week ago in our opinion *Thakker v. Doll*. No. 1:20-CV00480 (M.D. Pa. Mar. 31, 2020) (Jones, J.) (discussing in-depth the potential severity of COVID-19, its prevalence across the globe, and its impact upon ICE detention facilities in particular). We now begin our analysis of Petitioners' claims guided by our previous findings.

### i. Legal Standard

Courts apply one standard when considering whether to issue interim injunctive relief, regardless of whether a petitioner requests a temporary restraining order ("TRO") or preliminary injunction. *See Ellakkany v. Common Pleas Court of*

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<sup>1</sup> We have previously held that ICE detainees have the requisite standing to bring claims based upon imminent contraction of COVID-19, and that a *habeas* petition is the proper vehicle to do so. *Thakker v. Doll*, No. 1:20-CV00480, at 5-6 (M.D. Pa. Mar. 31, 2020).

*Montgomery Cnty.*, 658 Fed.Appx. 25, 27 (3d Cir. July 27, 2016) (applying one standard to a motion for both a TRO and preliminary injunction). “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Apple Inc. v. Samsung Electronics Co.*, 695 F.3d 1370, 1373–74 (Fed. Cir. 2012) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365 (2008)).

The Supreme Court has emphasized that “a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997); *Apotex Inc. v. U.S. Food and Drug Admin.*, 508 F.Supp.2d 78, 82 (D.D.C. 2007) (“Because interim injunctive relief is an extraordinary form of judicial relief, courts should grant such relief sparingly.”). “Awarding preliminary relief, therefore, is only appropriate ‘upon a clear showing that the plaintiff is entitled to such relief.’” *Groupe SEC USA, Inc. v. Euro-Pro Operating LLC*, 774 F.3d 192, 197 (3d Cir. 2014) (quoting *Winter*, 555 U.S. at 22).

## ii. Irreparable Harm

COVID-19 is a novel coronavirus that causes “serious, potentially permanent, damage to lung tissue, and can require extensive use of a ventilator. [20-cv-562, Doc. 3, Ex. 2]. The virus can also place greater strain on the heart muscle and can cause damage to the immune system and kidneys. (*Id.*)” *Thakker* at 10.

Because of these potentially catastrophic complications, COVID-19 has radically transformed our everyday lives in ways previously inconceivable. Most of the county can no longer leave their homes unless absolutely necessary.<sup>2</sup> “Large portions of our economy have come to a standstill. Children have been forced to attend school remotely. Workers deemed ‘non-essential’ to our national infrastructure have been told to stay home.” *Thakker*. at 4. Indeed, the World Health Organization (“WHO”) has declared a global pandemic<sup>3</sup> in light of the

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<sup>2</sup> Sarah Mervosh, Denise Lu, and Vanessa Swales, “See Which States and Cities have Told Residents to Stay at Home,” NEW YORK TIMES, <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html> (last accessed April 7, 2020).

<sup>3</sup> The World Health Organization (“WHO”) officially declared COVID-19 as global pandemic on March 11, 2020. *See WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020*, WORLD HEALTH ORGANIZATION, (March 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

stark realities we now face: over one million people worldwide have contracted COVID-19. Well over sixty thousand have perished as a result.<sup>4</sup>

Less than one week ago, we found that the threat of a COVID-19 outbreak in the Facilities constituted irreparable harm to substantially similar Petitioners, despite the fact that there were, at that time, *no* confirmed cases of COVID-19 in the Facilities. *Thakker*, at 7-19.<sup>5</sup> In so doing, we noted that “it is not a matter of *if* COVID-19 will enter Pennsylvania prisons, but *when* it is finally detected therein.” *Id.* at 8 (emphasis in original).

We have, unfortunately, been proven correct in this regard. As of the time of this writing, the Pike County Correctional Facility has officially reported that four ICE detainees housed therein have tested positive for COVID-19.<sup>6</sup> Four Pike County Correctional employees have also tested positive. (Doc. 6, Ex. 3). An additional detainee at York County Prison has also tested positive. *See ICE Latest Statement*. And we can only assume that these numbers may well be much higher

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<sup>4</sup> See *Coronavirus Disease (COVID-19) Pandemic*, WORLD HEALTH ORGANIZATION, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019> (last accessed April 7, 2020).

<sup>5</sup> In *Thakker*, we considered the potential harm faced by ICE detainees in county prisons located in York, Pike, and Clinton Counties, finding that there was a high likelihood that Petitioners would face severe complications, and even death, should they contract COVID-19 in the Facilities—which we found to be a likely outcome of their continued detention. *Thakker* 7-19. Here, we again consider the likelihood of irreparable harm in two of those same facilities: those in York and Pike Counties.

<sup>6</sup> *ICE Latest Statement*, ICE GUIDANCE ON COVID-19, <https://www.ice.gov/coronavirus#wcm-survey-target-id> (last accessed April 7, 2020).

than reported—we have allegations before us that requests by detainees for COVID-19 tests have not been granted, despite explicit knowledge that the virus has entered the Facilities. (Doc. 6, Ex. 7).

We also have further declarations that no effective containment measures have been put into place to protect Petitioners.<sup>7</sup> Officers and medical staff, who regularly leave the confines of the Facilities and have ample opportunities to contract the virus elsewhere, do not reliably wear gloves and masks when interacting with inmates. (Doc. 3, Ex. 17; Doc. 3, Ex. 16, Doc. 3, Ex. 4; Doc. 3, Ex. 8; Doc. 3, Ex. 23). Temperature checks are infrequently conducted, even among detainees who had close contact with others who have since tested positive. (Doc. 3, Ex. 23). The cell blocks which housed those who test positive are not thoroughly evacuated and cleaned to prevent the spread. (Doc. 3, Ex. 4). We even have reports that detainees exhibiting COVID-like symptoms are remaining in general housing for days, and that once they are quarantined, no testing is being provided to those who remain. (Doc. 3, Ex. 8).

We have previously discussed in great detail how the incursion of COVID-19 into ICE detention facilities could result in catastrophic outcomes, particularly in light of the grim conditions present in these specific Facilities. *See Thakker* at

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<sup>7</sup> We have previously discussed the overcrowding and unsanitary conditions present at these Facilities. *See Thakker* at 14-15.



14-15. It now seems that our worst fears have been realized—COVID-19 is spreading, and not nearly enough is being done to combat it. We cannot allow the Petitioners before us, all at heightened risk for severe complications from COVID-19, to bear the consequences of ICE’s inaction. We therefore find that irreparable harm faces the Petitioners before us should they contract COVID-19.<sup>8</sup>

### iii. Likelihood of Success on the Merits

Petitioners argue that they are “likely to establish a due process violation through conditions of confinement that expose them to the serious risks associated with COVID-19.” (Doc. 6 at 13). For the reasons that follow, we agree.

As we previously stated in *Thakker*, Petitioners must show that their conditions of confinement “amount to punishment of the detainee.” *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). “To determine whether challenged conditions of confinement amount to punishment, this Court determines whether a condition of confinement is reasonably related to a legitimate governmental objective; if it is not, we may infer ‘that the purpose of the governmental action is punishment that may not be constitutionally inflicted upon detainees *qua* detainees.’” *E. D. v. Sharkey*, 928 F.3d 299, 307 (3d Cir. 2019) (quoting *Hubbard v. Taylor*, 538 F.3d

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<sup>8</sup> Many of our sister courts across the nation have agreed with our conclusion. *See Thakker* at 16-19.

229, 232 (3d Cir. 2008)). We therefore ask whether the conditions imposed are rationally related to a legitimate government purpose. They are not.

We previously held, considering the present living conditions present at the *same detention Facilities* now at issue here, that, “we can see no rational relationship between a legitimate government objective and keeping Petitioners detained in unsanitary, tightly-packed environments—doing so would constitute a punishment to Petitioners.” *Thakker* at 20-21. There is no indication that there has been an improvement in conditions at the Facilities. Indeed, all indications point towards the contrary. There are now individuals who have tested positive at both Facilities,<sup>9</sup> and we have further accusations that those situations are not being properly contained.<sup>10</sup> “Considering, therefore, the grave consequences that will result from an outbreak of COVID-19, particularly to the high-risk Petitioners in this case, we cannot countenance physical detention in such tightly-confined, unhygienic spaces.” *Thakker* at 21.

We further note that Respondents previously proffered legitimate government objective holds no greater sway here than it did in *Thakker*. The Respondents had

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<sup>9</sup> *ICE Latest Statement*, ICE GUIDANCE ON COVID-19, <https://www.ice.gov/coronavirus#wcm-survey-target-id> (last accessed April 7, 2020).

<sup>10</sup> *See* Doc. 3, Ex. 17; Doc. 3, Ex. 16, Doc. 3, Ex. 4; Doc. 3, Ex. 8; Doc. 3, Ex. 23 (alleging that proper medical protective equipment is not being used by Facility staff, that temperature checks and COVID-19 testing are not being performed on detainees in close contact with the virus, and that proper cleaning of housing blocks is not taking place).

maintained that “preventing detained aliens from absconding and ensuring that they appear for removal proceedings is a legitimate governmental objective.” (*Thakker*, 20-cv-480, Doc. 35 at 38). However, “we note that ICE has a plethora of means *other than* physical detention at their disposal by which they may monitor civil detainees and ensure that they are present at removal proceedings, including remote monitoring and routine check-ins. Physical detention itself will place a burden on community healthcare systems and will needlessly endanger Petitioners, prison employees, and the greater community. We cannot see the rational basis of such a risk.” *Thakker* at 21-22. We therefore find that Petitioners are likely to succeed on the merits of their due process “conditions of confinement” claim.<sup>11</sup>

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<sup>11</sup> As previously discussed in *Thakker*, we also think it likely Petitioners will prevail under the more exacting Eighth Amendment standards as well. To succeed on an Eighth Amendment conditions of confinement claim, the Petitioners must show: (1) the deprivation alleged must objectively be “sufficiently serious,” and (2) the “prison official must have a sufficiently culpable state of mind,” such as deliberate indifference to the prisoner’s health or safety. See *Thomas v. Tice*, 948 F.3d 133, 138 (3d Cir. 2020) (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)). “COVID-19 has been shown to spread in the matter of a single day and would well prove deadly for Petitioners. Such a risk is objectively ‘sufficiently serious.’” *Thakker* at n.15. Furthermore, we note that authorities can be “deliberately indifferent to an inmate’s current health problems” when they “ignore 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). There is no requirement that Petitioners show that “they actually suffered from serious injuries” to succeed on this claim. See *Helling*, 509 U.S. at 33. “The current measures undertaken by ICE, including ‘cohorting’ detainees, are patently ineffective in preventing the spread of COVID-19,” as is now evidenced by multiple positive COVID-19 tests in both Facilities. *Thakker* at n.15.

#### **iv. Balancing of the Equities and Public Interest**

The equities at issue and public interest “weigh heavily in Petitioners’ favor.” *Thakker* at 23. We have already noted that Petitioners face a very real risk of serious COVID-19 complications. We also find that Respondents face very little potential harm from Petitioner’s immediate release. While we “agree that preventing Petitioners from absconding. . .is important, we note that Petitioners’ failure to appear at future immigration proceedings would carry grave consequences of which Petitioners are surely aware. Further, it is our view that the risk of absconding is low, given the current restricted state of travel in the United States and the world during the COVID-19 pandemic.” *Id.*

Finally, the public interest strongly encourages Petitioners’ release. “As mentioned, Petitioners are being detained for civil violations of this country’s immigration laws. Given the highly unusual and unique circumstances posed by the COVID-19 pandemic and ensuing crisis, ‘the continued detention of aging or ill civil detainees does not serve the public’s interest.’” *Thakker* at 23 (citing *Basank*, 2020 WL 1481503, \*6; see also *Fraihat v. U.S. Imm. and Customs Enforcement*, 5:19 Civ. 1546, ECF No. 81-11 (C.D. Cal. Mar. 24, 2020) (opining that “the design and operation of detention settings promotes the spread of communicable diseases such as COVID-19”); *Castillo v. Barr*, CV-20-00605-TJH (C.D. Cal. 2020)). Releasing these high-risk Petitioners, and therefore providing more space for effective social

distancing within the Facilities, will clearly benefit the surrounding areas. Rural hospitals will be less overwhelmed by potential detainee COVID-19 cases and there will be less of a risk that Facilities staff will carry the virus into their homes and communities. “Efforts to stop the spread of COVID-19 and promote public health are clearly in the public’s best interest, and the release of these fragile Petitioners from confinement is one step further in a positive direction.” *Thakker* at 23-24.

### III. CONCLUSION

“In times such as these, we must acknowledge that the *status quo* of a mere few weeks ago no longer applies. Our world has been altered with lightning speed, and the results are both unprecedented and ghastly. We now face a global pandemic in which the actions of each individual can have a drastic impact on an entire community. The choices we now make must reflect this new reality.” *Thakker* at 24.

We have before us clear evidence that the protective measures in place in the York and Pike County prisons are not working. We can only expect the number of positive COVID-19 cases to increase in the coming days and weeks, and we cannot leave the most fragile among us to face that growing danger unprotected.

We are mindful that judicial decisions such as these are both controversial and difficult for the public to absorb. It is all too easy for some to embrace the notion that individuals such as Petitioners should be denied relief simply because they lack citizenship in this country. However, Article III Courts do not operate according to

polls or the popular will, but rather to do justice and to rule according to the facts and the law.

Based on the foregoing, we shall grant the requested temporary restraining order. Respondents, and the York County Prison and Pike County Correctional Facility shall be ordered to immediately release the Petitioners **today** on their own recognizance without fail.

**NOW, THEREFORE, IT IS HEREBY ORDERED THAT:**

1. The Petitioners' Motion for Temporary Restraining Order, (Doc. 5), is  
**GRANTED.**
2. Respondents, and the York County Prison and Pike County Correctional Facility **SHALL IMMEDIATELY RELEASE** the Petitioners  
**TODAY** on their own recognizance.
3. Petitioners will **SELF-QUARANTINE** in their respective homes for  
**FOURTEEN (14) DAYS** from the date of release.
4. This TRO will expire on April 20, 2020 at 5:00 p.m.
5. No later than noon on April 13, 2020, the Respondents shall **SHOW**  
**CAUSE** why the TRO should not be converted into a preliminary injunction.
6. The Petitioners may file a response before the opening of business on  
April 16, 2020.

s/ John E. Jones III

John E. Jones III  
United States District Judge

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

AARON HOPE,	:	1:20-cv-562
<i>et al.</i> ,	:	
Petitioners-Plaintiffs,	:	
	:	
v.	:	Hon. John E. Jones III
	:	
CLAIR DOLL, <i>in his official capacity</i>	:	
<i>as Warden of York County Prison,</i>	:	
<i>et al.</i> ,	:	
Respondents-Defendants.	:	

**ORDER**

**April 10, 2020**

Before the Court for resolution is the Respondents’ Motion to Reconsider and Stay Temporary Restraining Order (“the Motion”) (Doc. 12) filed on April 7, 2020. On April 7, 2020, we issued an Order (Doc. 13) staying the TRO issued by us earlier that day.<sup>1</sup> We have received the Petitioners’ brief in opposition to the Motion to Reconsider and the Respondents’ reply. (Docs. 15 and 17). This matter is therefore ripe for our review. For the reasons that follow, we shall deny the Motion, lift the stay imposed on our April 7, 2020 TRO and order that the Petitioners<sup>2</sup> be released forthwith.

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<sup>1</sup> The TRO ordered Respondents to immediately release Petitioners from detention and ordered Petitioners to self-quarantine in their homes for a period of 14 days. (Doc. 11).

<sup>2</sup> Since the filing of this matter, Petitioners Duc Viet Lam and Iwan Rahardja have been released from ICE custody. Therefore, this matter is moot as to these Petitioners and they shall be terminated as parties to this action.



## I. STANDARD OF REVIEW

The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence, *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985), and, as such, “motions for reconsideration should be granted sparingly.” *Continental Casualty Co. v. Diversified Indus., Inc.*, 884 F.Supp. 937, 943 (E.D. Pa. 1995). Generally, a motion for reconsideration will only be granted on one of the following three grounds: (1) if there has been an intervening change in controlling law; (2) if new evidence, which was not previously available, has become available; or (3) if it is necessary to correct a clear error of law or to prevent manifest injustice. *Max’s Seafood Café by Lou Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999). A motion for reconsideration may not be used to present a new legal theory for the first time, to raise new arguments that could have been made in support of the original motion, *see Vaidya v. Xerox Corp.*, No. CIV.A.97-547, 1997 WL 732464, at \*2 (E.D. Pa. 1997), and should not ask the court to rethink a decision that it has already made. *Tobin v. GE*, No. Civ. A. 95-4003, 1998 WL 31875, at \*2 (E.D. Pa. 1998). Mere dissatisfaction with the Court’s ruling is not a proper basis for reconsideration. *Glendon Energy Co. v. Borough of Glendon*, 836 F.Supp. 1109, 1122 (E.D. Pa. 1993).

With this exacting standard in mind, we turn to an analysis of the Respondents’ Motion.

## II. DISCUSSION

In support of their reconsideration request, the Respondents rely on a newly supplied affidavit of Joseph Dunn, Assistant Field Office Director (AFOD) with the Department of Homeland Security, Immigration and Customs Enforcement (ICE). (Doc. 12, Ex. 1). Within his affidavit, AFOD Dunn advises of various protocols being undertaken at Pike and York County Correctional Facilities to prevent the spread of COVID-19.<sup>3</sup> Respondents submit that the new evidence, in the form of AFOD Dunn's affidavit, makes it clear that the Petitioners' constitutional rights are not being violated by the conditions inside the institutions. Respondents argue, therefore, that Petitioners cannot and have not established a likelihood of success on the merits of their claims. Additionally, within his affidavit AFOD Dunn supplies the criminal histories of the Petitioners, and Respondents argue that the public interest is not served by releasing the Petitioners into the community.

Taking the latter point first, the Court respects the Respondents' position that certain Petitioners pose a flight risk or danger to the community. However, it is the Court's view that attaching conditions to the Petitioners' release, which we shall do herein, quells that concern. We simply cannot find, in the face of the

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<sup>3</sup> It is well to note that AFOD Dunn drafted his affidavit relying exclusively upon the assurances of others. We have no indication that he has personally visited these facilities in the course of preparing his affidavit.

scope of the COVID-19 pandemic that is washing through this country and the subject facilities, that the public interest favors continued detention of civil immigration detainees with underlying health conditions that render them particularly vulnerable were they to contract COVID-19.

Further, we are unmoved by AFOD Dunn's assertions that the facilities are equipped to stop the spread of COVID-19.<sup>4</sup> While they may have ramped up their sanitation protocols, the simple fact that inmates are incapable of social distancing in the facilities remains. The conditions at the facilities as faced by these Petitioners continue to represent a threat to their constitutional rights.

Accordingly, based on the foregoing, the Respondents' Motion shall be denied and the stay previously placed on the TRO shall be lifted. In the Order that follows, we shall include additional conditions relative to the Petitioners' release, in an attempt to allay some of the Respondents' fears concerning risk of flight and danger to the community. Nothing herein prevents us from imposing different or additional conditions in the future, should this TRO be extended or converted into a preliminary injunction.

**NOW, THEREFORE, IT IS HEREBY ORDERED THAT:**

1. The Respondents' Motion to Reconsider (Doc. 12) is **DENIED**.

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<sup>4</sup> As the parties are aware, inmates at both institutions are infected with COVID-19, and two female inmates at Pike have died of COVID-19 in recent days.

2. The stay imposed (Doc. 13) on the TRO of April 7, 2020 is **LIFTED** and Respondents, and the York County Prison and Pike County Correctional Facility, **SHALL IMMEDIATELY RELEASE** the Petitioners **TODAY**. The said release period shall extend until such time as the COVID-19 state of emergency as declared by the Governor of the Commonwealth of Pennsylvania is lifted, or by further Order of this Court.
3. Petitioners will **SELF-QUARANTINE** in their respective homes for **FOURTEEN (14) DAYS** from the date of release.
4. The following conditions shall attach to this Order of the Petitioners' release:
  - a. This Order expires immediately if a Petitioner absconds;
  - b. This Order requires Petitioners to comply with all Executive Orders of the Governor of Pennsylvania, as well as national, state, and local guidance regarding staying at home, sheltering in place, and social distancing;
  - c. This Order does not prevent the government from taking Petitioners back into custody should they commit any further crimes or otherwise violate the terms of their release;
  - d. The Petitioners shall report their whereabouts once per week to

their attorneys, who in turn shall report to the Respondents if a  
Petitioner has absconded;

e. The Petitioners must appear at all hearings pertaining to their  
removal proceedings, and in the event that they are subject to a  
final order of deportation for which arrangements have been  
finalized within the period of this Order, they shall fully comply  
with the said order of deportation and all instructions pertaining  
thereto; and

f. Respondents may impose other reasonable nonconfinement terms  
of supervision that would not require Petitioners to violate  
national, state and local guidance regarding staying at home,  
sheltering in place, and social distancing.

5. As referenced in our April 7, 2020 Order, the TRO expires on April 20,  
2020 at 5:00 p.m.

s/ John E. Jones III

John E. Jones III  
United States District Judge