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and

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I. INTRODUCTION

1. The COVID-19 pandemic is wreaking havoc throughout the world. The United States has

6. In immigration detention facilities—including Stewart Detention Center ("Stewart") in Lumpkin, Georgia and Irwin County Detention Center ("Irwin") in Ocilla, Georgia, where Plaintiffs-Petitioners ("Petitioners") are imprisoned—social distancing is impossible. In these congregate environments, hundreds or thousands of people live, eat, and sleep together in close quarters. Contact with other detained individuals and ICE personnel is a fact of life. ICE detention facilities are also notorious for their unsanitary conditions, inadequate medical care, and meager provision of hygiene products. Under these circumstances, an outbreak of COVID-19 will "spread like wildfire," according to a former high-level ICE official.

7. Due to their underlying medical conditions, Petitioners are particularly vulnerable to serious cases of COVID-19. If they contract the virus, there is a high risk they will require critical care—largely unavailable in southern Georgia where the facilities are located—and face serious

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of the amount of food normally served. The food it has provided is served at unpredictable times, including very late at night, and is less nutritious than the food normally served. While chronic underfeeding of detained people is unacceptable at any time, depriving detained people of nourishment in the context of a pandemic further demonstrates Respondents' inability to provide constitutionally adequate care.

9. Petitioners bring this action to remedy ICE's violations of their constitutional rights and to protect themselves—as well as others detained or employed at Stewart and Irwin or living in the surrounding communities—from the imminent harm that will result from their continued

11. Petitioner Peter Owusu is a 40-year-old citizen of Ghana who has been detained at Stewart since January 2020. He is seeking asylum, withholding of removal, and protection under the Convention Against Torture based on persecution he experienced in Ghana. His request for release on parole was denied. Mr. Owusu has difficulty breathing due to a stab wound he suffered prior to fleeing Ghana. He received a breathing machine at a previous detention center but has not been

lived in the U.S. since 1984. He is currently appealing the second denial of his application for protection under the Convention Against Torture. Mr. Khan has severe asthma that requires him to have an inhaler at all times. He also takes medication for epilepsy and depression and has been diagnosed with delusional disorder. As a consequence of his age and health conditions, he is at high risk for severe illness, long-term organ damage, or death if he contracts COVID-19.

14. Petitioner Joseph Lloyd Thompson is a 49-year-old citizen of Jamaica, lawful permanent resident of the United States, and long-term resident of Georgia. He is currently detained at Irwin

16. Petitioner Karen Lopez is a 42-year-old citizen of Honduras who has been held at Irwin since March 2020. She has a partner and five children, ages 13 to 27 years old, with whom she lived in Atlanta, Georgia before she was detained. She is pursuing deferral of removal under the Convention Against Torture and is also eligible for a U visa. Ms. Lopez has a pacemaker due to a heart condition that caused her to suffer a stroke. She additionally suffers from multiple sclerosis,

21. Respondent-Defendant ("Respondent") Russell Washburn is the Warden of Stewart County Detention Center. Pursuant to a contract with ICE, Mr. Washburn is responsible for the operation of Stewart, where Mr. Robinson, Mr. Owusu. Mr. Tinarwo, and Mr. Khan are detained.

22. Respondent David Paulk is the Warden of Irwin County Detention Center. Pursuant to a contract with ICE, Mr. Paulk is responsible for the operation of Irwin, where Mr. Thompson, Mr. Jammeh, Ms. Lopez, Mr. Barahona Marriaga, Ms. Dingus, Ms. Salazar, and Ms. Cabrera Benitez are detained.

23. Respondent Thomas Giles is the Field Office Director for the ICE Atlanta Field Office. The ICE Atlanta Field Office has complete control over the transfer to and release of noncitizens from Stewart and Irwin. Respondent Giles is a legal custodian of Petitioners. He is sued in his official capacity.

28 U.S.C. § 1651 (All Writs Act), Article I, Section 9, clause 2 of the U.S. Constitution (the

V. STATEMENT OF FACTS

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

31. Coronavirus disease 2019 ("COVID-19") is a highly contagious respiratory disease caused by a newly discovered coronavirus. Since the first case was reported in December 2019, the transmission of COVID-19 has been growing exponentially. The number of reported cases climbed from 1 to 100,000 in 67 days; from 100,000 to 200,000 in only 11 days; and from 200,000 to 300,000 in just 4 days.⁴

32. On March 11, 2020, the World Health Organization ("WHO") declared the outbreak a global pandemic,⁵ and COVID-19 has now touched nearly every country on the planet.⁶ As of April 24, 2020, the number of confirmed cases worldwide has surpassed 2.8 million, including over 903,775 people in the United States. Over 195,218 people have died as a result of COVID-19 worldwide, including at least 50,988 in the United States.⁷

⁴ Berkeley Lovelace Jr., et al., CNBC, *Coronavirus pandemic is accelerating as cases eclipse 350,000, WHO says* (last updated Mar. 23, 2020), https://www.cnbc.com/2020/03/23/coronavirus-pandemic-is-accelerating-as-cases-eclipse-

³⁵⁰⁰⁰⁰⁻who-says.html.

⁵ Tedros Adhanom Ghebreyesus, WHO Director-General's opening remarks at the media briefing on COVID-19 – 11 March 2020 (Mar. 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.

⁶ Coronavirus disease 2019 (COVID-19) Situation Report – 73, World Health Organization (April 2, 2020), <u>https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200402-sitrep-73-covid-19.pdf?sfvrsn=5ae25bc7_4https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200330-sitrep-70-covid-19.pdf?sfvrsn=7e0fe3f8_2.</u>

⁷ Worldometer: Coronavirus, <u>https://www.worldometers.info/coronavirus/#countries</u> (last accessed Apr. 24, 2020).

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had jumped to 22,147 with 157 counties now affected.¹³ Governor Kemp issued a shelter-in-place order for the state of Georgia on April 3, 2020.¹⁴

35. With 892 fatalities reported as of April 24, 2020, Georgia is the state with the eleventh highest number of COVID-19-related deaths in the United States.¹⁵ Approximately 19% of individuals with confirmed diagnoses have been hospitalized and 4.03% have died.¹⁶ The risk of serious illness or death from COVID-19 is greater in Georgia than in other parts of the United States because the population is overall much less healthy. Georgia has among the highest incidence of diabetes, hypertension, obesity, and stroke in the country, particularly in areas with high poverty rates.¹⁷ It is also among the top three states that have experienced the largest number of rural hospital closures in the last ten years.¹⁸

36. Due to the lack of widespread testing available in the United States, including in Georgia, the number of confirmed cases is likely but a fraction of the true number of COVID-19 cases. As of April 24, 2020, approximately 4,692,797 tests have been administered in the entire United

¹³ Georgia Department of Public Health COVID-19 Daily Status Report (Apr. 24, 2020), https://dph.georgia.gov/covid-19-daily-status-report.

¹⁴ Governor Brian P. Kemp, *Governor Kemp Issues Shelter in Place Order*, Office of the Governor (Apr. 2, 2020), <u>https://gov.georgia.gov/press-releases/2020-04-02/governor-kemp-issues-shelter-place-order</u>.

¹⁵ Listing of United States Total Coronavirus Cases (last updated Apr. 23, 2020), <u>https://www.worldometers.info/coronavirus/country/us/</u>.

¹⁶ Georgia Department of Public Health COVID-19 Daily Status Report (Apr. 24, 2020), https://dph.georgia.gov/covid-19-daily-status-report.

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

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

States; in Georgia, only about 101,433.¹⁹ Because of the shortage of tests in the United States admitted to be a "failing" by top infectious disease expert Dr. Anthony Fauci²⁰—the CDC currently recommends prioritizing testing for symptomatic healthcare providers and hospitalized patients²¹—which means that the number of diagnosed COVID-19 cases may be only the tip of a very large iceberg.²²

i. <u>Transmission of COVID-19</u>

37. COVID-19 easily spreads through respiratory droplets that an infected person expels when they cough, sneeze, speak, or breathe. Transmission occurs if these virus-carrying droplets land directly on a nearby person's nose or mouth. It can also occur when a person inhales these droplets or touches a contaminated surface and then touches their mouth, nose, or eyes.²³ The coronavirus can survive up to four hours on copper, 24 hours on cardboard, and two to three days on plastic and stainless steel.²⁴

²² George Citroner, *How Many People in the United States Actually Have COVID-19?*, Healthline (Mar. 18, 2020), <u>https://www.healthline.com/health-news/how-many-coronavirus-</u> <u>cases-are-there</u>.

¹⁹ The COVID Tracking Project, Our most up-to date data and annotations (last accessed Apr. 24, 2020), <u>https://covidtracking.com/data/</u>.

²⁰ Elizabeth Chuck, 'It is a failing. Let's admit,' Fauci says of coronavirus testing capacity NBC News (Mar. 12, 2020), <u>https://www.nbcnews.com/health/health-news/it-failing-let-s-admit-it-fauci-says-coronavirus-testing-n1157036</u>.

 ²¹ Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19),
Evaluating and Testing Persons for Coronavirus Disease 2019 (COVID-19) (last updated Mar. 24, 2020), https://www.cdc.gov/coronavirus/2019-nCoV/hcp/clinical-criteria.html.

²³ Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19),

41. Older individuals and those with certain medical conditions are at particularly high risk for serious illness or death from COVID-19. Medical conditions that increase the risk of severe illness

44. There is currently no vaccine against or cure for COVID-19. Nor are there any known prophylactic medications that will prevent or reduce the risk of a COVID-19 infection. Therefore, the only effective way to protect people against the risk of serious illness or death from COVID-19 is to limit their exposure to the virus through social distancing—i.e., physical separation of at least six feet from all others and staying at home as much as possible—vigilant hygiene, including

equipment ("PPE") to enter, the CDC advises following its general guidance on airborne pathogen clearance rates under differing ventilation conditions.³⁴

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

France, for example, imposed a strict nationwide lockdown, prohibiting gatherings of any size and

Congress to take immediate actions to slow the spread of COVID-19 in ICE detention centers, including releasing immigrants to facilitate social distancing—which, they say, is an "oxymoron" in congregate settings.⁴¹

53. In March 2020, over 3,000 medical professionals across the United States also urged ICE to release individuals and families from detention "to prevent the spread of COVID-19 and mitigate the harm of an outbreak" to detained individuals, as well as to facility staff.⁴² They warned that social distancing measures recommended by the CDC are nearly impossible in immigration detention and that large-scale quarantines may be unfeasible at ICE facilities that are already at maximum capacity. They also expressed concern that "isolation may be misused and place individuals at higher risk of neglect and death."

54. Like these and other experts, ⁴³ Drs. Allen and Rich also warned of the dire consequences that a COVID-19 outbreak within an ICE detention facility would have on the community outside the facility. They describe a "tinderbox" scenario where a rapid outbreak inside a facility would result in the hospitalization of multiple detained people in a short period of time, which would then spread the virus to the surrounding community and create a demand for ventilators far exceeding the supply.

⁴¹ Scott A. Allen, MD, FACP and Josiah Rich, MD, MPH Letter to Congress (Mar. 19, 2020) <u>https://assets.documentcloud.org/documents/6816336/032020-Letter-From-Drs-Allen-Rich-to-</u>

55. Once a disease is introduced into a jail, prison, or detention facility, it spreads faster than under most other circumstances due to overcrowding, poor sanitation and hygiene, poor ventilation, and lack of access to adequate medical services. For these same reasons, the outbreak is harder to control.⁴⁴ The severe outbreaks of COVID-19 in congregate environments, such as cruise ships and nursing homes, illustrate just how rapidly and widely COVID-19 would rip through an ICE detention facility. On the Diamond Princess cruise ship, for example, approximately 700 passengers and crew on board were infected over the course of three weeks despite the initiation of quarantine protocols.

56. Good hygiene is also critical to reducing exposure to COVID-19, but the notoriously unsanitary conditions in detention centers and ICE's meager provision of hygiene and cleaning products rob detained individuals of the ability to practice good hygiene.

57. Despite the global pandemic and shelter-in-place orders across the country, ICE continues to bring new people into detention centers and to transfer previously detained people between facilities.⁴⁵ Some detained people have staged public protests, including initiating hunger strikes

⁴⁵ See Richard Hall, Coronavirus: ICE Crackdown Stokes Fears for Safety of Undocumented Immigrants During Pandemic, Independent (Mar. 13, 2020), <u>https://www.msn.com/en-gb/news/world/coronavirus-ice-crackdown-stokes-fears-for-safety-of-undocumented-immigrants-during-pandemic/ar-BB119hw8</u> (noting that "[i]n New York, immigration advocates have noted a marked increase in ICE activity in recent months, which has not slowed as the coronavirus outbreak has worsened."). On March 18, 2020, ICE announced it would "temporarily adjust" its enforcement practices during the COVID-19 outbreak," but declined to say it would stop arresting people altogether. See Rebecca Klar,

⁴⁴ Christina Potter, *Outbreaks in Migrant Detention Facilities*, Outbreak Observatory (Jul. 11, 2019), <u>https://www.outbreakobservatory.org/outbreakthursday-1/7/11/2019/outbreaks-in-migrant-detention-facilities</u>.

and threatening suicide, to express their outrage at being housed with newly arriving individuals who may have been exposed to COVID-19.46

58. Correctional staff is also an especially dangerous vector for a COVID-19 outbreak within a detention center since they regularly travel back and forth between the outside world and the detention facilities where they work.

CBP facilities have also been sites of other infectious outbreaks in recent years,⁴⁹ as have other prisons and jails.⁵⁰

60. COVID-19 is indeed already spreading inside prisons and jails across the United States,⁵¹ including in Georgia.⁵² A jail in Chicago exploded from two confirmed cases to more than 350 in the course of two weeks—despite isolation of the first two confirmed cases. ⁵³ As of April 19, 2020, a single prison in Ohio had 1,828 confirmed cases among its incarcerated population of 2,500 and more than 100 cases among its staff—all together accounting for more than 17% of the state's entire caseload.⁵⁴ A new analysis studying the spread of COVID-19 through jails projects that nearly 100,000 more people could die of the virus in the U.S. unless "drastic reforms" are made at jails, including significant population reductions and strict social distancing.⁵⁵

⁴⁹ Christina Potter, Outbreak Observatory *supra* n. 44, (describing outbreaks of acute respiratory illnesses like influenza, and other diseases like scabies and chickenpox).

⁵⁰ J. O' Grady, et al., *Tuberculosis in prisons: anatomy of global neglect*, European Respiratory Journal (2011), <u>https://erj.ersjournals.com/content/38/4/752.short</u> (stating that tuberculosis prevalence among prisoners worldwide can be up to 50 times higher than national averages).

⁵¹ Emma Grey Ellis, Covid-19 Poses a Heightened Threat in jails and Prisons

61. Nationally and internationally, governments and jail and prison staff are responding to the threat posed by COVID-19. Authorities in Iran,⁵⁶ Ethiopia,⁵⁷ the Democratic Republic of Congo,⁵⁸ Indonesia,⁵⁹

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have done the same,⁶³ including Dougherty County Detention Center in Albany, which is suffering from one of the most severe outbreaks in the state.⁶⁴ The Federal Bureau of Prisons has also instructed prison directors to prioritize releasing federal inmates to home confinement, taking into consideration factors including "[t]he age and vulnerability of the inmate to COVID-19, in accordance with the [CDC] guidelines."⁶⁵

62. Even with the known significant gaps in ICE's tracking of COVID-19 cases, data shows that COVID-19 has already hit ICE detention facilities. As of April 23, 2020, ICE has publicly reported that 297 detained individuals and 35 employees in at least 33 detention facilities have tested positive for COVID-19.⁶⁶ These numbers do not include any contract staff, any detained individuals who tested positive after leaving ICE premises, or any individuals held in facilities not run by ICE.⁶⁷

⁶³ Christian Boone, *Hall, Fulton counties releasing nonviolent offenders early as virus looms*, The Atlanta Journal-Constitution (Mar. 23, 2020), <u>https://www.ajc.com/news/crime-law/hall-fulton-counties-releasing-nonviolent-offenders-early-virus-looms/IOZTaZ9IV Swoy38Cp6XJIP/</u>.

⁶⁴ Stanley Dunlap, *Georgia jailers cope with COVID-19; release inmates, quarantine arrivals,* Georgia Recorder (Mar. 30, 2020), <u>https://georgiarecorder.com/2020/03/30/georgia-jailers-cope-with-covid-19-release-inmates-quarantine-arrivals/</u>.

⁶⁵ Office of the Attorney General, Washington, DC, Memorandum for Director of Bureau of Prisons, *Prioritization of Home Confinement As Appropriate in Response to COVID-19 Pandemic* (Mar. 26, 2020), <u>https://www.politico.com/f/?id=00000171-1826-d4a1-ad77-fda671420000</u>.

⁶⁶ U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement, *ICE Guidance on COVID-19* (last updated Apr. 23, 2020), <u>https://www.ice.gov/covid19</u> [hereinafter *ICE Guidance on COVID-19*].

⁶⁷ Tanvi Misra, *ICE's COVID-19 test figures hint at health crisis in detention*, Roll Call (April 17, 2020), <u>https://www.rollcall.com/2020/04/17/ices-covid-19-test-figures-hint-at-health-crisis-in-detention/?emci=28c66e67-2a80-ea11-a94c-00155d03b1e8& emdi=cf21f97e-6182-ea11-a94c-00155d03b1e8& ceid=6006620.</u>

63. These numbers also fail to capture the scores of detained individuals who have been exposed to COVID-19 but not tested. As of April 17, 2020, ICE had reportedly tested only 300 individuals in its custody.⁶⁸ Respondent Albence admitted to Members of Congress that the agency has a limited number of test kits but would "certainly do more testing" if more test kits were available.⁶⁹

C. Stewart and Irwin Detention Centers Are Primed for COVID-19 Exposure and Severe Outbreaks

i. <u>Existing Conditions at Stewart and Irwin Will Further Enable COVID-19</u> <u>Transmission</u>

64. The ICE Atlanta Field Office currently detains approximately 2,000 noncitizens in total at Stewart and Irwin.

65. Preventing the spread of COVID-19 inside Stewart and Irwin is impossible. The design of these facilities requires detained individuals to remain in close contact with one another—the opposite of the social distancing recommended for stopping the spread of lethal coronavirus.

66. Both Stewart and Irwin house people in very close quarters, making social distancing and the recommended hygiene measures effectively impossible. Most people sleep in bunk rooms housing dozens of immigrants—where beds are feet apart from each other—and use shared toilets and showers. The facilities also have some smaller cells housing 2-4 people with shared

⁶⁸ Id.

⁶⁹ House Committee on Oversight & Reform, DHS Officials Refuse to Release Asylum Seekers and Other Non-Violent Detainees De tIh(40.9(,)]TJ ET Q q BT /F3 12 Tf 1 0 0 1fJ1 72 1

bathrooms. People regularly congregate in common areas of their housing units.⁷⁰ At Irwin, people also continue to eat together at times in shared cafeterias.

67. The conditions at Stewart and Irwin are also flagrantly unsanitary and dangerous to the health of detained individuals. Private contractors operate Stewart and Irwin, and the DHS Office of Inspector General has repeatedly concluded that ICE fails to hold detention facility contractors accountable for meeting performance standards required to ensure humane conditions.⁷¹

69. Access to items necessary for personal hygiene, such as soap, clean clothing, and cleaning supplies, has historically been insufficient at both Stewart and Irwin. ⁷³ In a pending class action lawsuit, people detained at Stewart allege that they are forced to work in the facility for cents an hour in order to buy additional hygiene supplies like soap and toilet paper at the commissary.⁷⁴

undercooked, rotten, or rancid and that contains hair and foreign objects such as rocks, insects, mice, plastic, a tooth, and a nail.⁷⁷

ii.

79. Failing to address people's medical needs has already had deadly consequences at Stewart and Irwin. Four people detained at Stewart have died since spring 2017.⁸⁴ One man died from complications of pneumonia, despite being a healthy 33-year-old before entering detention.⁸⁵ According to ICE's own records, facility staff failed to properly monitor the man's documented symptoms of hypertension (a condition that increases the risk of a serious case of COVID-19), failed to immediately authorize emergency medical services after a provider ordered them to do so, and failed to suspend the man's food service work duties even though he had symptoms that could "potentially transmit[] contagious illnesses."⁸⁶

81. Preliminary data suggests that a person with COVID-19 is most infectious during the early stage of the disease.⁸⁸ Early, proactive action is necessary to prevent the virus's spread. The well-documented failure to provide adequate and timely medical care at Stewart and Irwin is the mark of a system that cannot possibly cope with the spread of COVID-19.

84. According to ICE, there is also at least one confirmed case among the detained population at Irwin, as well as one confirmed case among staff—an "outside transportation officer."⁹²

85. In roughly the last two weeks, confirmed cases of COVID-19 in Stewart County jumped from zero to 17.93 Cities and counties surrounding Lumpkin also have growing numbers of

kits is quite limited and that the agency would "certainly do more testing" if only it had more test kits.

90. Now that the virus has appeared in these facilities, it will be effectively impossible for

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94. Stewart and Irwin are geographically isolated from appropriate levels of medical care to treat COVID-19. The closest hospitals to these facilities are either critical access hospitals without the necessary facilities or regional hospitals that serve many counties and are already overwhelmed or will quickly become overwhelmed if there are outbreaks within these detention centers.

95. Critical access hospitals, which are common in rural areas, generally have fewer than 25 beds and are designed to care for patients who will require fewer than 96 hours of care. Importantly, even if some have ICU-type beds, they do not have capacity for the type of long-term treatment required for COVID-19 patients. Critical access hospitals are not designed to care for critically ill patients; they are designed to stabilize and transfer them.

96. Stewart is at least one hour away from t.7(d t)-2.7(bo)]TJ ET 5.2(a)4(c1)3(i)-1.9.9(l)-2(l)-1.1(

i. <u>Respondents' Custody Review of High-Risk Detainees Has Been Largely</u> <u>Illusory</u>

99. ICE has engaged in extremely limited efforts to re-evaluate the necessity of detaining medically vulnerable people. The current ICE guidance governing custody re-evaluation does not mandate or meaningfully encourage the release of Petitioners or other medically vulnerable individuals from ICE custody.¹⁰¹ Indeed, no Petitioner in this action has, to their knowledge, received an individualized or specialized medical evaluation related to COVID-19.

100. Instead, the policy merely directs ICE field office directors to review the custody of detained individuals with certain underlying medical conditions to determine on a "case-by-case" basis whether their continued detention is appropriate. For these custody reviews, the medical condition that puts an individual at high risk for a serious COVID-19 infection is not necessarily the "determinative factor" in the decision-making process.¹⁰² In addition, the policy treats medically vulnerable individuals differently based on which immigration detention statute governs their detention.¹⁰³ And by delegating the custody re-evaluation process to field directors and their staff, requiring only after-the-fact consultation with any medical professionals, and failing to include all risk factors identified by the CDC, this docket review process apparently left many people with true risk factors in detention.

101. As of April 17, ICE had released fewer than 700 medically vulnerable noncitizens under this custody re-evaluation process. According to Respondent Albence, ICE does not plan to

¹⁰¹ U.S. Immigration and Customs Enforcement, *ERO COVID-19 Pandemic Response Requirements* (Version 1.0, April 10, 2020).

 ¹⁰²U.S. Immigration and Customs Enforcement, *Updated Guidance: COVID-19 Detained Docket Review* (April 4, 2020), <u>https://www.ice.gov/doclib/coronavirus/attk.pdf</u>.
¹⁰³ Id.

severe depression, suicides, and other medical emergencies. In the context of an infectious disease outbreak, where onsite medical staff are operating at or over capacity, these problems will only

109. According to reports received by SIFI staff, many members of the kitchen staff, which is mostly comprised of detained individuals, have been quarantined. Thus, the kitchen is no longer sufficiently staffed, leading to significant delays in meals. While lunch is typically served around 11:00 A.M. and dinner around 5:00 P.M., callers from the detention center reported that breakfast is now sometimes delayed until after 10:30 A.M. lunch until around 5:00 P.M., and dinner until late at night. One caller estimated that the meal portions are 10% of what they were before the COVID-19 pandemic; another reported being served a dinner of bread and apples at 9:00 P.M.—and only after banging on the doors to demand food. Callers also reported that they struggle to purchase supplemental food at the commissary because access has been restricted to certain days of the week, and when they are able to request food to purchase they may not receive it for days.

110. Petitioners Owusu and Tinarwo have confirmed the inadequacy of food at Stewart. They both received smaller portions and lower quality food than usual, including low-nutrition tortilla shells and cereal. Petitioner Tinarwo is being fed cold eggs and oatmeal and estimates that he is receiving only about 30% of the normal amount of food. Both are very hungry and afraid.

iii. <u>Respondents Are Failing to Adhere to CDC Guidance</u>

111. The CDC has issued Interim Guidance on Management of Coronavirus Disease

112.

Guidance at Stewart and Irwin and that the facilities are generally in compliance with CDC Guidance.¹⁰⁹

115. But reports from detained individuals and their attorneys indicate that, contrary to Respondents' testimony, conditions at Stewart and Irwin fall short of the CDC Guidance in many respects.

116. Respondents' failure to comply with the CDC Guidance is unsurprising. ICE is unlikely to be able to ensure compliance with the CDC Guidance due to longstanding lack of

Owusu described being housed at Stewart in bunk beds "so close together that [they] can easily reach out and touch each other," and as of April 15, 2020, he was still being housed with another person in the bunks above and beside his. As of April 23, 2020, Petitioner Dingus was housed in an open dorm at Irwin with almost 40 other women, in bunk beds "less than three feet from each

127. At both facilities, detained individuals are still forced to shower and use the toilet in close quarters. Toilets at both facilities do not have lids. Some people have a shower and a toilet inside their small cells; others use communal showers and toilets that they share with their entire pod unit. For example, Petitioner Owusu is in the latter category, and about 50 people in his pod unit use the same set of toilets, which are cleaned only in the mornings and evenings, not after each use. In either situation, detained individuals are not able to bathe or use the bathroom while maintaining six feet of distance from other people.

128. Detained people at Stewart and Irwin continue to eat in close quarters as well. At

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

134.

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individuals with gloves or face masks to use while cleaning or train them on hygiene measures to limit the spread of infectious disease while cleaning.

141. At Irwin, detention center staff only spray living spaces with Lysol once in a while, if at all, and even this task is at times passed off to detained individuals. This type of spraying not only fails to comply with CDC Guidance on cleaning but also exacerbates the medical conditions of many people, particularly those with asthma. Petitioner Dingus reported that although the Lysol spray in her dorm has made her asthma much worse, Irwin has not provided face masks to protect her or others with asthma and has "ignored [their] pleas for help." Petitioner Salazar reported guards spraying her unit with bleach, which caused her and other detained people to suffer shortness of breath.

142. Petitioners have also reported that other sporadic cleaning of the facility has negatively affected their health. For example, Petitioner Thompson reported that a maintenance staff "used a brush to sweep out the dust from the air vents," which irritated Petitioner Thompson's eyes, nose, and throat. He and the other detained people were not provided face masks for their protection while this was happening.

e. Respondents Are Violating the CDC Guidance by Failing to Screen Detained People at Stewart and Irwin

143. The CDC Guidance requires that facilities must "[i]mplement daily temperature checks in housing units where COVID-19 cases have been identified, especially if there is concern that ... detained individuals are not notifying staff of symptoms."

144. Respondents have been on notice for over two weeks that there is some fear of reporting symptoms among the detained population at Stewart.¹¹²

¹¹² Dkt. 5-9 ¶ 14 ("detainees with symptoms are afraid to report them because of fears of being placed in segregation, where a number of detainees have died by suicide," and "people who are

145. Respondents have also been on notice for over two weeks that staff at Irwin

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

149. The CDC Guidance further states that "[f]acilities should make every possible effort to place suspected and confirmed COVID-19 cases under medical isolation individually. Each isolated individual should be assigned their own housing space and bathroom where possible. Cohorting should only be practiced if there are no other available options."

150. If cohorting is necessary because there are "no other available options," the CDC Guidance states that cohorted cases must "wear face masks at all times"; that "[o]nly individuals who are laboratory confirmed COVID-19 cases should be placed under medical isolation as a cohort"; and that confirmed cases should not be cohorted with suspected cases or case contacts.

151. Instead of responding immediately to symptoms among the detained population at Stewart and Irwin as required by the CDC Guidance, Respondents routinely do the opposite. They ignore reports of COVID-19 symptoms and requests for medical attention and allow people who exhibit COVID-19 symptoms to remain sleeping and eating within feet of others.

152. For example, at Irwin, Petitioner Dingus reported that women in her dorm presented COVID-19 symptoms, including cough, sore throat, and fever, but were provided only cough drops, if anything at all. To Petitioner Dingus's knowledge, these women have not been tested for COVID-19. Similarly, at Stewart, one of Petitioner Robinson's cellmates put in a request to see a doctor because he had a cough, but was neither allowed to access medical care nor isolated from

156. As for requirements for staff interacting with people in medical isolation, the CDC Guidance use of PPE, including eye protection, gloves, a hospital gown or disposable coveralls, and an N95 respirator (or a face mask when the supply chain of N-95 masks cannot meet demand). Staff monitoring those in medical isolation should be designated to do so exclusively where possible, and "should limit their own movement between different parts of the facility to the extent possible." On information and belief, Respondents are not in compliance with this Guidance at Stewart and Irwin.

g. Respondents Are Violating the CDC Guidance Regarding Quarantine of People Who Have Been Exposed to a Known or Suspected Case of COVID-19

157. The CDC Guidance requires that "detained persons who are close contacts of a confirmed or suspected COVID-19 case (whether the case is another incarcerated/detained person, staff member, or visitor)" be placed under quarantine for 14 days. Facilities should "make every possible effort" to quarantine these people individually. Cohort quarantine for close contacts of a COVID-19 case "should only be practiced if there are no other available options" because it can cause COVID-19 to be transmitted to people who are not yet infected. If quarantined individuals are cohorted, the CDC requires them to wear face masks at all times to prevent transmission from infected to uninfected individuals.

158. Cohorting in a detained person's "regularly assigned housing but with no movement outside of the unit (if an entire housing unit has been exposed)," is an option provided in the CDC Guidance, but it is the lowest on the list of preferred arrangements, aside from transferring the person to another facility with the ability to quarantine more effectively. This method of quarantining is only recommended if it is possible for all cohorted people to wear face masks and "to maintain at least 6 feet of space between individuals." The last option of transfer "should be avoided due to the potential to introduce infection to another facility."

159. Rather than using individual quarantining of people who have been exposed to

temperatures of the remaining detainees in the unit and cohorted only those who had a fever, rather than quarantining all who had been exposed. And given that both facilities are ignoring reports of COVID-19 symptoms, it is likely that additional people who have been exposed to the virus have not been quarantined at all.

163. Finally, release is an option for people in civil detention, such as Petitioners. The CDC Guidance acknowledges that *even if* a person is subject to medical isolation, they may be released with appropriate planning. Because Respondents can and should release Petitioners and those similarly situated, "cohort quarantine" is not the only "available option."

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

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

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

large scale transfers:

If a transfer is absolutely necessary, perform verbal screening and a temperature check as outlined in the Screening section below, before the individual leaves the facility. If an individual does not clear the screening process, delay the transfer and follow the protocol for a suspected COVID-19 case—including putting a face mask on the individual, immediately placing them under medical isolation, and evaluating them for possible COVID-19 testing. If the transfer must still occur, ensure that the receiving facility has capacity to properly isolate the individual upon

also reported that the screening of new arrivals to Stewart consists only of a temperature check. At Irwin, a woman from North Carolina was placed in Petitioner Lopez's pod in late March without first being isolated from the rest of the detained population, even though she had a fever.

i. Respondents Are Violating the CDC Guidance Related to Screening of Visitors

172. The CDC Guidance requires that visitors, like staff, have their temperatures taken and be screened for symptoms in the last 24 hours and any contact with known cases in the last 14 days prior to entry into Stewart or Irwin. Staff performing this screening should wear PPE she met with her client in one of the legal visitation rooms at Stewart, the client did not have gloves, a mask, or hand sanitizer.

176. Another immigration attorney reported that, as recently as April 6, 2020, no guards or other court staff wore any PPE during hearings at Stewart Immigration Court. ICE also refused to let the attorney supply his clients with PPE. Later that day, the same attorney was permitted to visit clients at Stewart without being screened for symptoms or potential exposure to COVID-19.

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

177. The CDC Guidance requires Respondents to post signage throughout Stewart and Irwin advising detained people of the symptoms of COVID-19. Respondents should also provide instructions advising detained people on proper hand hygiene and cough etiquette; to avoid touching their faces without first washing their hands; to avoid sharing dishes and utensils; to avoid non-essential physical contact; and to report any symptoms to staff. Respondents must "[e]nsure that materials can be understood by non-English speakers and those with low literacy,

with the CDC Guidance. For example, the only precaution that Petitioner Barahona Marriaga and other kitchen workers were instructed to take was to replace plastic ware with disposable plates. Any notices or flyers about COVID-19 are provided only in English, and some Petitioners cannot understand them.¹¹⁴ Most Petitioners get information about COVID-19 from the news on television or their families.

k. Respondents Are Violating the CDC Guidance Related to Testing

181. The CDC Guidance directs testing of symptomatic individuals based on the CDC's general testing guidance. The CDC's testing guidelines direct that "[c]linicians should use their

184. Respondent Washburn testified that Stewart has "no shortage in the tests on site."

with cleaning and disinfecting products, particularly those that are sprayed directly onto a cleaning surface.¹²⁰

187.

191. In addition, Respondents' numerous violations of the CDC Guidance discussed above, *supra* ¶¶ 111-90, all increase the risk that COVID-19 will continue to spread within Stewart and Irwin, magnifying the risk of infection to medically vulnerable people.

192. Given the realities of detention at Stewart and Irwin, no conditions of confinement can possibly protect Petitioners from the heightened risk of COVID-19 posed by their detention. As long as Petitioners remain detained, they are at greater risk of exposure than they would be if permitted to comply with state stay-at-home orders and self-isolate outside of detention.

F. Petitioners Are Particularly Vulnerable to Serious Illness or Death if Infected by COVID-19 and Should Be Released from Detention.

193. Public health experts with experience in immigration detention and correctional settings have unequivocally concluded that medically vulnerable people, like Petitioners, will be safer if they are released from custody.

194. Michael Robinson. Mr. Robinson has been detained by ICE at Stewart since February 2020. Mr. Robinson suffers from asthma, cardiac murmur, high blood pressure, and 196. Mr. Robinson is critically vulnerable to COVID-19 because of his age and his significant health problems. Upon his release, he plans to self-quarantine with either his family in Florida, sister in Long Island, New York, or mother in Brooklyn, New York.

197. Peter Owusu. Mr. Owusu has been detained at Stewart since January 2020. Before he fled Ghana, he suffered a stab wound that causes him difficulty breathing. At a previous detention center, he received a breathing machine, but he has not been able to access it at Stewart. He has trouble breathing without the machine, particularly at night and when it is cold. Without the machine, he cannot sleep well. The wound he sustained also led to other complications, including improperly healed stitches, ongoing stomach pain, digestion issues, dizziness, headaches, and heart issues. He has also recently begun to experience constant pain all over his body, concentrated in his joints and veins. Mr. Owusu has requested to see a doctor multiple times at Stewart, but ICE has not taken him to see one, and instead told him to take a painkiller.

198. Mr. Owusu is critically vulnerable to COVID-19 because of his significant health problems. Upon his release, he plans to self-quaranti7(a)471 905nti7abl

wheel chair makes it difficult for him to get around the detention center as required to be able to shower, eat, and go to medical, and difficult for him to clean his cell. Although Stewart was instructed by the hospital to assign him a detainee assistant to help him get around, and told that he needs to receive therapy or see a neurologist to help him regain mobility in his legs, Mr. Tinarwo has not received either.

200. Mr. Tinarwo is critically vulnerable to COVID-19 because of his significant health problems. Upon his release, he plans to self-quarantine with his parents and youngest child in Winston-Salem, North Carolina.

201. Shehza Khan. Mr. Khan is currently detained at Stewart, and has been in ICE custody since June 2018. He has severe asthma that requires him to have an inhaler at all times and has been aggravated by the air inside the detention center. While at Stewart, Mr. Khan has not been consistently provided with an inhaler. In fact, during the COVID-19 pandemic, he has gone over a week without receiving a new one, and is forced to share the inhaler of another detained person in his unit. Mr. Khan also has epilepsy and depression, which he takes medication for, and has been diagnosed with delusional disorder. He has been housed with other detained people with pre-existing medical conditions, but continues to be in close contact with other detained people and has not received personal protective equipment.

202.

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pneumonia, and many times for his heart problems. During his time in ICE custody, Mr. Thompson has been hospitalized on at least ten occasions.

204. While in ICE custody, including at Irwin, Mr. Thompson has consistently been denied adequate medical care. While detained in North Carolina, he was assaulted by ICE and detention officers, to the point that he could not swallow and that he still has nerve damage in his right hand from being handcuffed so violently. He did not receive any treatment for his hand.

205. Mr. Thompson has not received adequate care for chest pain from his aneurysm. When he was detained at Folkston previously, he was transferred to several other facilities, but instead of approving necessary operations to address his aneurysm, ICE continues to only medicate his symptoms. At Irwin, Mr. Thompson described an incident wherein he began experiencing severe chest pain while in his cell, and pressed a buzzer in the cell to request medical assistance. It was not until his cellmate banged on the door of the cell that someone came to help. Mr. Thompson was sent to a local hospital for two weeks after this. He has been hospitalized multiple times after that as well after experiencing chest pains, and each time "ICE was always very delayed in getting [him] medical attention." There is also typically no follow-up to his hospitalizations by staff at Irwin. The only treatment provided by ICE is medication, and even then, there was a two week period in March 2020 during which Mr. Thompson received no medication at all. Even though doctors have told him he is a "walking time bomb" because of his aneurysm, ICE has not provided Mr. Thompson with the surgery or care he needs. He is also forced to live in unsanitary conditions and drink unhygienic water.

206. Mr. Thompson is critically vulnerable to COVID-19 because of his significant health problems. Upon his release, he will self-quarantine at his U.S. Citizen sister's home in Snellville, Georgia.

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207. **Ansumana Jammeh**. Mr. Jammeh has been detained by ICE at Irwin since March 2019. Mr. Jammeh suffers from diabetes for which he requires insulin pills and blood sugar checks, as well as a special diabetic diet that he is not provided at Irwin. Recently Mr. Jammeh has also been struggling to ensure that he gets his insulin pills daily as required, because Irwin has begun bringing a pill cart around and calling for pill distribution at 4am in the morning. Mr. Jammeh is forced to wake up and run to the pill cart to be sure that he gets the medication he needs. He has also faced challenges in getting his blood sugar levels checked each afternoon.

208. Mr. Jammeh also has severe hemorrhoids that developed while in ICE custody, cause him extreme pain, and recently required surgery in March 2020. He was prescribed antibiotics after the surgery but has not received them, instead receiving only prescription pain medication and Ibuprofen, which have not managed his pain. He will likely require a second surgery to treat other hemorrhoids. In December 2019, he was taken to the emergency room for severe abdominal pain caused by inflammation in his intestines. When he returned to Irwin, ICE similarly failed to provide most of the medications prescribed by the doctor.

209. At Irwin, in addition to repeatedly struggling to obtain the medications and medical services that he requires, Mr. Jammeh is also not provided with enough hygiene products each week, including soap, and was told by staff that he had to clean his own room while he was bedridden from the hemorrhoids surgery.

210. Due to his significant health problems, Mr. Jammeh is critically vulnerable to COVID-19. Upon his release, he plans to self-quarantine at the home of a close friend in Atlanta, Georgia. He also has two cousins in Marietta, Georgia who are willing to take him in as well.

211. Karen Lopez. Ms. Lopez has been detained by ICE at Irwin since March 2020. She has a pacemaker due to a heart condition that also caused her to suffer a stroke about six years

ago. Her heart condition makes it difficult for her to even climb in and out of a top bunk bed. Irwin has delayed care for her heart condition. She also suffers from multiple sclerosis (MS), which causes her severe chronic pain along with problems with her vision, balance, muscle control, and other bodily functions.

212. Three weeks ago, ICE forced her to have a mammogram against her wishes, which, because of her pacemaker, made her feel very sick and weak for several days and develop severe chest pain and difficulty breathing. She had to be taken to the emergency room before stabilizing. Ms. Lopez also may have a stomach ulcer. Despite all of her serious medical conditions, ICE has not provided her with the medications and medical services she needs. She has only been given Ibuprofen and aspirin for her pain, and not a specialized medication or diet for her MS.

213. Ms. Lopez is critically vulnerable to COVID-19 because of her significant health

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215. Mr. Barahona Marriaga is critically vulnerable to COVID-19 because of his significant health problems. Upon his release, he would self-quarantine in his home in Lawrenceville, Georgia, where his wife and child eagerly await his return.

216. Shelley Dingus. Ms. Dingus is currently detained by ICE at Irwin, and has been in ICE custody since January 2020. She suffers from asthma, chronic obstructive pulmonary disease, severe migraines, depression, anxiety, and eczema that causes severe skin allergies and open wounds that are easily infected. She requires an inhaler and other medicines for her asthma every day. She also requires lotion and cream for her skin condition, medication for her migraines, anti-depressants, and hormone replacement tablets due to a full hysterectomy.

217. ICE does not consistently provide her with her medications, or provides her with improper medications. She relies on the medication Singulair to prevent wheezing and shortness of breath from her asthma, and on April 23, 2020, the medical staff at Irwin told her they did not have it for her because they "ran out." They did not provide an alternative medication. Ms. Dingus states that "Irwin almost always forgets to bring at least one [medication]." Her requests for medical care are also often ignored or delayed, and she is not provided enough hygiene products. She states she has feels "like a child having to beg to get the [asthma] medicine [she] need[ed]."

218. Ms. Dingus is critically vulnerable to COVID-19 because of her age and her significant health problems. Her husband and two younger sons await her return; upon her release, she plans to self-quarantine at their home in Virginia.

219. **Kimberly Salazar.** Ms. Salazar has been detained at Irwin since December 2019. She has asthma and tuberculosis, which cause her to have trouble breathing and painful cough attacks. She also suffers from hypertension, pre-diabetes, and anemia. The conditions at Irwin, including some of the cleaning routines of the detention center staff, have made her respiratory

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issues worse. For example, when guards spray bleach in her pod unit, she "can barely breathe at all." She has also begun to experience headaches and body aches since being detained.

220. Despite her health condition, Ms. Salazar has had difficulty accessing medical care at Irwin. Although she was first detained at Irwin in December 2019, she did not receive an inhaler for her asthma until April 2020. Medical staff have also failed to address the cough she has due to her tuberculosis. She continues to be forced to share one big room with 16 other women and sleep in beds that are a foot apart from each other and interact both with new immigrants brought into her unit and guards who do not wear masks or gloves.

221. Ms. Salazar is critically vulnerable to COVID-19 because of her significant health problems. Upon her release, she would self-quarantine at her sister's home in Staten Island, New York.

222. Sonia Cabrera Benitez. Ms. Cabrera Benitez has been detained at Irwin since June 2019, and in ICE custody since May 2018. She suffers from asthma, and often has asthma attacks in the mornings. She also recently had surgery to remove a tumor from her breast, and has a large cyst in her ovary.

223. While Ms. Cabrera Benitez has a lot of difficulty breathing due to her asthma, she has not been able to obtain medication or even an adequate medical evaluation of her respiratory condition. She has experienced so many delays in medical care at Irwin, and heard of other detained people facing delayed or ignore requests for medical care, that she resorts to using the hot water in the showers to help her breathe instead. The cleaning sprays that guards at Irwin have been using to spray the cells in her unit have only made these breathing problems worse. Despite the ongoing COVID-19 pandemic, she continues to be forced to live in a small, dirty cell with another woman and interact with guards without protective gear.

224. Ms. Cabrera Benitez is critically vulnerable to COVID-19 because of her significant health problems. Upon her release, she would self-quarantine with her family, including her youngest child, near Fairfax, Virginia.

i. ICE's Alternatives to Detention Program

225. ICE has a longstanding practice of exercising its authority to release from custody particularly vulnerable immigrants with significant medical or humanitarian needs, including on bond, parole, or under other alternatives to detention ("ATD") such as GPS monitoring and telephone check-ins. *See, e.g.,* 8 U.S.C. §§ 1182(d)(5)(a), 1226(a); 8 C.F.R. § 212.5(a)-(d); 8 C.F.R. § 235.3(b)(2)(iii), (b)(4)(ii); 8 C.F.R. § 241.4. The INA also provides for what is commonly known as "mandatory" detention for people with a history of certain criminal convictions under 8 U.S.C. § 1226(c), but despite the nominally "mandatory" nature of this detention, ICE has always, in fact, exercised discretion over individuals in this category, even if rarely exercising that discretion to release individuals.

226. For over 15 years, DHS/ICE has sought and obtained congressional funding for its ATD program, which uses supervised release, case management, and monitoring of individuals instead of detention.¹²¹ ICE has repeatedly told Congress that the ATD program increases ICE's operational effectiveness and individual compliance with release conditions.

¹²¹ ICE's current ATD program is called Intensive Supervision Appearance Program III (ISAP III). The program features different levels of case management including in-person or telephonic meetings, unannounced home visits, scheduled office visits, and court and meeting alerts. Some participants are also enrolled in technology-based monitoring including telephonic monitoring, GPS monitoring via ankle bracelet, and smart phone application monitoring called SmartLink that uses facial recognition and location monitoring via GPS. The private contractor that operates the program for ICE is BI, Inc., a wholly-owned subsidiary of The GEO Group, Inc. *See* CRS Report R45804, Immigration: Alternatives to Detention (ATD) Programs, (Jul. 8, 2019). On March 23, 2020, DHS awarded BI, Inc. a 5-year \$2.2 billion contract for continued ISAP support. https://beta.sam.gov/opp/2479131ff88f405999e126b52ff105f5/view.

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227. The DHS FY2021 Congressional Budget Justification for ICE states that it costs \$125.06 per day to jail an adult immigrant in ICE custody. The average cost per ATD participant is \$4.43 per day. The DHS FY2021 funding request seeks to support 120,000 daily participants in the ATD program.¹²²

228. A 2014 GAO Report found that 95% of those on full-service ATD (i.e. those that include case management) appear for their final hearings.¹²³ According to 2017 contract data, supervision coupled with some case management results in a more than 99% appearance rate for all immigration court hearings, and a more than 91% appearance rate for final hearings.¹²⁴

229. As of April 18, 2020, ICE has 89,490 individuals enrolled in ATD, including 3,068 in the Atlanta area.¹²⁵

VI. LEGAL FRAMEWORK

230. By continuing to detain Petitioners at Stewart and Irwin at this time, Respondents are in violation of two different substantive standards flowing from the Fifth Amendment Due Process Clause: (1) the right to be free from punishment; and (2) the right to reasonable safety.

¹²² DHS/ICE FY2021 Congressional Budget Justification, at Operations & Support 132, 171, 173,

<u>https://www.dhs.gov/sites/default/files/publications/u.s. immigration and customs enforcement</u>.<u>pdf</u>. Due to court backlogs and delays for those who are non-detained, ATD participants are enrolled for a longer periods of time than they would have been detained. However, even considering the average length of stay in detention and the average length of time in ATD, taxpayers are paying an average of \$4,000 more <u>per individual detained</u> than for each of those released on ATD.

¹²³ GAO-15-26, Alternatives to Detention, at 30 (Nov. 2014), available at <u>https://www.gao.gov/assets/670/666911.pdf</u>.

¹²⁴ The Real Alternatives to Detention (June 2019), available at <u>https://www.womensrefugeecommission.org/research-resources/alternatives-to-detention/</u>.

¹²⁵ ICE, Detention Management, <u>https://www.ice.gov/detention-management#tab2</u> (last visited Apr. 24, 2020).

The Court has the power to remedy constitutional violations by ordering Petitioners' release or other available remedial actions short of release, either by issuing a writ of habeas corpus under 28 U.S.C. § 2241 and Art. I, § 9, cl. 2 of the U.S. Constitution, or alternatively, through the court's

due process. *Hamm*, 774 F.2d at 1573; *Cook ex rel. Estate of Tessier v. Sheriff of Monroe Cty.*, 402 F.3d 1092, 1115 (11th Cir. 2005).

235. To establish that a particular condition or restriction of detention constitutes impermissible punishment, a petitioner must show either (1) an expressed intent to punish; or (2) lack of a reasonable relationship to a legitimate governmental purpose, from which an intent to punish may be inferred. *See Wolfish*, 441 U 0 sh

238. At a minimum, the Fifth Amendment Due Process Clause prohibits Respondents' deliberate indifference to a substantial risk of serious harm that would rise to the level of an Eighth Amendment violation in the post-conviction criminal context. *Revere v. Mass. Gen. Hosp.*, 463

of [the United States'] common-law heritage," which "was given explicit recognition in the Suspension Clause of the Constitution, Art. I, § 9, cl. 2."). *See also Munaf v. Geren*, 553 U.S. 674, 693 (2008) ("Habeas is at its core a remedy for unlawful executive detention."). "[O]ver the years, the writ of habeas corpus [has] evolved as a remedy available to effect discharge from *any* confinement contrary to the Constitution or fundamental law" *Preiser*, 411 U.S. at 485 (emphasis added).

247.

Respondents in their official capacities.¹²⁶ Federal courts have long recognized an implicit private right of action under the Constitution "as a general matter" for injunctive relief barring unlawful government action. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010); *accord Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001) (equitable relief "has long been recognized as the proper means for preventing entities from acting unconstitutionally"); *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (holding that the Fifth Amendment and 28 U.S.C. § 1331 created a remedy for unconstitutional racial discrimination in public schools); *Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution"). Indeed, "federal courts have broad equitable powers to remedy proven constitutional violations." *See Gibson v. Firestone*, 741 F.2d 1268, 1273 (11th Cir. 1984); *see also Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15-16 (1971) (similar).

255. Federal courts' broad equitable powers include fashioning equitable remedies to address constitutional violations in custodial settings. *See Hutto v. Finney*, 437 U.S. 678, 687 n.9 (1978); *Stone v. City & County of San Francisco*, 968 F.2d 850, 861 (9th Cir. 1992) ("Federal courts possess whatever powers are necessary to remedy constitutional violations because they are charged with protecting these rights.")."When necessary to ensure compliance with a constitutional mandate, courts may enter orders placing limits on a prison's population." *Brown v. Plata*, 563 U.S. 493, 511 (2011); *Duran v. Elrod*, 713 F.2d 292, 297-98 (7th Cir. 1983), *cert.*

¹²⁶ The implied constitutional cause of action available to Petitioners is distinct from a suit brought under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). A *Bivens*

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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).

256. Thus, there is both jurisdiction under 28 U.S.C. § 1331 and a cause of action under the Fifth Amendment to enjoin Petitioners' unconstitutional confinement, either through release or remediation of the injurious conditions. *See Malam*, 2020 WL 1672662, at *4 (explaining that apart from habeas, "the Fifth Amendment provides [the] [p]etitioner with an implied cause of action, and accordingly 28 U.S.C. 1331 would vest the Court with jurisdiction"); *cf. Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1231-32 (10th Cir. 2005) (implied cause of action under Eighth Amendment to enjoin unconstitutional prison conditions).

257. The Eleventh Circuit has never opined on whether a person in civil immigration detention is entitled to release under the Fifth Amendment when all steps short of release would fail to ameliorate a substantial risk of harm—as is the case here. In *Gomez v. United States*, the Eleventh Circuit held that the proper remedy for a prisoner who proves cruel and unusual punishment is discontinuance of the improper practice or correction of the unconstitutional condition. 899 F.2d 1124, 1126 (11th Cir. 1990). But "the *Gomez* rule is based on the implicit assumption that a 'correction' or [']discontinuance' of the unconstitutional practice is actually *available*. If no correction is feasible, then the remedy which the Eleventh Circuit relied upon would become illusory." *Gayle v. Meade*, Report and Recommendation at 55 (S.D. Fla. Apr. 22, 2020); *see also Gomez*, 899 F.2d at 1126 (asking whether adequate treatment within the prison system was possible, such that the unconstitutional condition could be corrected absent release, and concluding that such treatment was possible).

258. Releasing Petitioners, who are medically vulnerable to severe illness or death if they contract COVID-19, is the only remedy to cure the unconstitutionally high risk of injury that

they suffer in detention. Petitioners' only defenses against COVID-19 are stringent social distancing and hygiene measures—both of which are simply impossible in the environment of an ICE detention facility. Petitioners face unreasonable harm from continued detention and should be released immediately.

259. Alternatively, the Court has broad authority under section 1331 to order remediation of conditions. The federal government's own source on appropriate standards for jails, prisons, and detention centers—the CDC Guidance—surely represents the minimum standard of care owed to Respondents under the Due Process Clause. This Court, then, has authority to order specific compliance with the terms of the CDC Guidance, or to order greater protections where necessary to address the constitutional harms Petitioners are suffering.

VII. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

Violation of Fifth Amendment Right to Substantive Due Process

Detention Constituting Unlawful Punishment

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

261. The Due Process Clause of the Fifth Amendment guarantees individuals in

without access to sufficient food (at Stewart), is excessive in relation to any legitimate governmental purpose. Less harsh measures are available to satisfy any government interest in continuing to detain Petitioners, including release with conditions.

264. Respondents' continued detention at Stewart and Irwin, especially without

Stewart and Irwin, including the provisions requiring:

i.

extending for fourteen days after the infected individual has been removed

COVID-19, hand hygiene and cough etiquette, and other methods of protection against COVID-19, and that can be understood by non-English speakers and those with low literacy or needing other accommodations, and (2) clear and frequent in-person communication with detained people about risk reduction and the presence of COVID-19 cases inside the facilities; and

xiii. Testing of all symptomatic individuals, including rapid identification and appropriate triage of those at highest risk of complication of infection;

2.

detailing progress toward compliance with the Court's order, with evidence of compliance with each of the specified provisions in (c)(1)-(6);

d. Appoint a Special Master to assist the Court and the Parties with ensuring compliance with the relief ordered by the Court;

e. Issue a declaration that Respondents' continued detention of individuals at

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