UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

JENNER BENAVIDES, *et al.*,

Petitioners/Plaintiffs,

v.

PATRICK GARTLAND, *et al.*,

the unconstitutional risk of harm that Petitioners face

more detained people at Folkston than are currently reported.[7] A recent study estimates that, assuming a moderate rate of transmission, approximately 77% of the detained population, or about 600 people, at Fo

additional harm).

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

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

Respondents are failing to take adequate steps to protect Petitioners from the risk of COVID-19 while they remain within Folkston, despite Petitioners' filing of this lawsuit one month ago warning of the risks of serious harm posed by their continued detention at Folkston. Respondents recognize the CDC Guidance as an authoritative source regarding the standard of care required of them during the COVID-19 pandemic. *See generally* Dkt. 29-1; Dkt. 29-2. ICE guidance states

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

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

7 ¶¶ 15-18; Dkt. 37-9 ¶¶ 4-6, 8-9; Dkt. 37-10 ¶¶ 12-

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

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

3. Transfers of Detained People

Under the CDC Guidance, transfers of detained individuals between detention facilities with confirmed cases[21] should be "suspend[ed]" unless "necessary." CDC Guidance at 14. If a transfer is "absolutely necessary," detention centers must take specific measures to screen and, where needed, isolate or quarantine, new intakes. *Id*; *see infra* Section I.B.7.

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

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

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

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

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

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

5. Response to Symptoms of COVID-19

The CDC Guidance requires

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

6. Other Failures to Implement CDC Guidance

Respondents have failed to implement other aspects of the CDC Guidance at Folkston. Dkt.

requested them. Dkt. 37-8 ¶ 17. Even those detained people who should use PPE in the scope of their work at Folkston do not consistently receive it. *See* Dkt. 37-6 ¶ 14. *Third*, staff at Folkston are inconsistent in performing even the minimal screening of visitors that ICE purports to have implemented. *Compare* CDC Guidance at 5, 13-14, 26 *with* Dkt.4-7 ¶¶ 7-8, 12; Dkt. 30-1 ¶ 3. As recently as April 10, 2020, an attorney entering Folkston reported that these screenings were not consistently conducted in full or properly – for example, a guard filled out a questionnaire on her behalf without asking her the screening questions. Dkt. 30-1 ¶ 3. *Finally*, Respondents routinely provide medically vulnerable people with incorrect medications or care and delay or ignore medical requests. *Compare* CDC Guidance at 16, 23[26] *with* Dkt. 4-10 ¶ 8; Dkt. 30-4 ¶ 4; Dkt. 37-6 ¶¶ 4-5; Dkt. 37-7 ¶ 11. For instance, diabetic Petitioners are not receiving the special diets they need to manage their diabetes and are not consistently provided with medically necessary insulin. *Compare* CDC Guidance at 16, 23[27] *with* Dkt. 4-10 ¶ 8; Dkt. 37-7 ¶ 11. And Petitioner Kumar, who has tuberculosis, was not provided with necessary medication for more than six months after he was brought to Folkston and, during this time, unwittingly passed tuberculosis to his cellmate. Dkt. 37-6 ¶ 5. On April 14, 2020, he stopped receiving medication for tuberculosis,37

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

II. ARGUMENT

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

A. Petitioners Are Likely to Succeed on the Merits

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

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

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

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

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

Helling, 509 U.S. at 33).

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

Petitioners' continued detention under conditions that fail to

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

Having deprived Petitioners of their ability to practice the most effective defense against exposure to COVID-19—sheltering in place at home—Respondents must take reasonable precautions to reduce Petitioners' risk of infection. Even with only a limited factual record before the Court, Respondents' failure to implement the most crucial aspects of the CDC Guidance is clear. As explained in detail, *supra* Section I.B, Respondents are failing to ensure

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

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

When the government promulgates

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

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

4. Petitioners Are Entitled to a Writ of Habeas Corpus

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

[37] Performance-Based National Detention Standards 2011, https://www.ice.gov/doclib/detentionstandards/2011/pbnds2011r2016.pdf.
[38] *Id.* §§ 4.3(II)(1), (V)(C)(1).

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

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

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

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

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

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

The "very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." *Harris v. Nelson*, 394 U.S. 286, 291 (1969). The Court is fully empowered to remediate the particular illegality here—exposure to a highly contagious and potentially lethal virus that is substantially likely to harm Petitioners in the congreg1

cap), *cert. denied*, 465 U.S. 1108 (1984). *Gomez* poses no barrier because it does not constrain courts from ordering

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