IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

COREAS, *et al.*, *Petitioners-Plaintiffs*, v. BOUNDS, *et al.*, *Respondents-Defendants*.	Civil Action No.: 8:20-cv-00780-TDC

PETITIONER-PLAINTIFF COREAS'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION FOR A PRELIMINARY INJUNCTION

Sirine Shebaya (Bar No. 07191)
sirine@nipnlg.org
Amber Qureshi (Bar No. 21218)
amber@nipnlg.org
Matthew Vogel*
matt@nipnlg.org
NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD
2201 Wisconsin Ave NW, Suite 200
Washington, DC 20007
(202) 656-4788

Adina Appelbaum*
adina@caircoalition.org
CAPITAL AREA IMMIGRANTS' RIGHTS (CAIR) COALITION
1612 K Street NW Suite 204
Washington, DC 20006
(202) 899-1412

Nicholas T. Steiner, Esq. (Bar No. 19670)
steiner@aclu-md.org
ACLU OF MARYLAND FOUNDATION
3600 Clipper Mill Road, Suite 350
Baltimore, MD 21211
(410) 889-8550

David C. Fathi*†
dfathi@aclu.org
Eunice H. Cho*
echo@aclu.org
ACLU FOUNDATION, NATIONAL PRISON PROJECT
915 15th Street N.W. 7th Floor
Washington, DC 20005
(202) 548-6616

Michael Tan*
mtan@aclu.org
Omar Jadwat*
ojadwat@aclu.org
ACLU FOUNDATION, IMMIGRANTS' RIGHTS PROJECT
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2600

Stephen B. Kang*
skang@aclu.org
ACLU FOUNDATION, IMMIGRANTS' RIGHTS PROJECT
39 Drumm Street
San Francisco, CA 94111
(415) 343-0783

Attorneys for Petitioners-Plaintiffs

* Admitted *pro hac vice*.
† Not admitted in D.C.; practice limited to federal courts.

INTRODUCTION

On April 3, 2020, this Court denied without prejudice Petitioners-Plaintiffs' ("Petitioners") Motion for a Temporary Restraining Order seeking their immediate release from the Howard County Detention Center ("HCDC") and Worcester County Detention Center ("WCDC") (collectively, "Maryland Detention Facilities"). ECF No. 56 at 33. The Court held that Petitioners had not yet shown they were likely to succeed on the merits of their claims that Respondents-Defendants ("Respondents") were violating their due process rights by putting them in extreme danger of exposure to COVID-19—a lethal virus with no vaccine or cure. However, the Court concluded that it likely *would* find a violation of Petitioners' due process rights in either of two circumstances: (1) upon evidence that a detained person or staff member at the HCDC or WCDC has tested positive for COVID-19 or (2) upon Respondents' failure to certify that they have COVID-19 tests and will administer tests to any individual at the HCDC or WCDC with suspected COVID-19 symptoms. *Id*. at 27, 29, 33. The Court further concluded that, under either of these circumstances, Petitioners would face irreparable harm to their life and health, and that the public interest and balance of hardships would favor their immediate release. *Id*. at 29-33.

Unfortunately, the former predicate has come to pass at the HCDC. Pursuant to this Court's order, on April 8, 2020, Respondents certified to this Court that they will begin testing anyone who exhibits COVID-19 symptoms at the HCDC and WCDC. ECF 59, ¶¶ 5-6 (Declaration of Kevin J. Brown, Jr.). Respondents further certified that they would inform the Court if anyone at either facility tests positive for COVID-19. *Id*. ¶ 7. On April 25, 2020, Respondents informed the Court that a nurse in HCDC has tested positive for COVID-19. ECF No. 71. This poses particular risk for Mr. Coreas because he goes to the medical unit twice each day in order to receive insulin for his diabetes. ECF No. 2-7, ¶ 7 (Declaration of Eleni Bakst).

Respondents are also still likely under-counting the number of cases of COVID-19 at the two facilities. Respondents are not testing any of the individuals who may have had contact with the nurse in HCDC who tested positive for COVID-19. ECF No. 71 at 2. Respondents still do not have an adequate number of testing kits to administer COVID-19 tests to individuals who exhibit COVID-19 symptoms, and Respondents have failed to administer tests to individuals exhibiting symptoms in HCDC. *See infra* Section III. As this Court concluded, "the lack of testing capability [is] the equivalent of having positive tests in the detention facility, as there [is] no way to know whether high-risk detainees are at direct risk of exposure to the Coronavirus." ECF No. 56 at 27.

As a result, Petitioner Coreas faces the extreme risk of serious illness or death from COVID-19 if he continues to be confined in HCDC. Indeed, the Court recognized that if Petitioners "contract the Coronavirus they have up to a 20 percent chance of death, greater than the odds of losing a game of Russian roulette." ECF No. 56 at 28. Petitioner Coreas's continued detention at the HCDC violates his due process right to reasonable safety and endangers his life. Thus, for the reasons set forth in its prior Order, this Court should grant Petitioner Coreas's motion for a preliminary injunction and order his immediate release. If released, Petitioner Coreas will go to live with his friends in Prince George's County, who have indicated that he can stay with them for as long as he needs to, and will comply with any conditions of release the Court imposes.[1]

FACTUAL BACKGROUND

I. COVID-19 Poses a Grave Risk of Harm, Including Serious Illness or Death, to Older Adults and Those with Certain Medical Conditions.

COVID-19 has become a global pandemic. As of April 26, 2020, there were over 2.8

[1] Petitioners' counsel has been unable to speak with Mr. Coreas as of this filing to confirm the details of his release plan, but will file a supplemental declaration promptly after speaking with Mr. Coreas.

million confirmed cases and 193,000 deaths worldwide and almost 900,000 confirmed cases and 46,000 deaths in the United States.[2] In Maryland, nearly 19,500 people have tested positive for COVID-19 and 858 people have died from the disease as of April 27, 2020.[3] The Governor of Maryland issued a stay-at-home order on March 30, 2020.[4] The coronavirus has spread dramatically in Maryland jails and prisons. On April 1, 2020, Petitioners reported that three people in Maryland correctional facilities had tested positive for COVID-19. ECF 52 at 2. As of April 23, 2020, there have been 180 confirmed cases, including one death in the state's correctional system.[5] On April 18, 2020, Maryland's Governor issued an executive order allowing for the potential release of hundreds of incarcerated individuals who are especially vulnerable to serious illness or death if they contract COVID-19.[6]

COVID-19 is a highly contagious disease that can result in severe and widespread damage to lungs, heart, liver, and other organs. In many cases, COVID-19 results in death. ECF No. 56 at 2; *see also* ECF No. 52-6 ¶¶ 3-5 (Declaration of Robert Greifinger, MD). Individuals who do not die from the disease may face prolonged recovery periods, including extensive rehabilitation from neurological damage and loss of respiratory capacity. *Id*. ¶ 6. A patient's condition can seriously

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[2] Ex. 54, Coronavirus Disease (COVID-19) Situation Report – 97, World Health Org. (Apr. 26, 2020).

[3] Ex. 55, Coronavirus Disease 2019 (COVID-19) Outbreak, Maryland Dep't of Health (accessed Apr. 27, 2020).

[4] *See* ECF 52-14.

[5] Ex. 56, Tiffany Watson, *180 Confirmed COVID-19 Cases in Maryland Correctional Facilities*, Fox5News (Apr. 23, 2020).

[6] *See* Ex. 57, Order of the Governor of the State of Maryland, No. 20-04-18-01 (Apr. 18, 2020); Ex. 39, Danielle E. Gaines, *Hogan Issues Order to Guide Speedier Inmate Releases During COVID-19 Outbreak*, Maryland Matters (Apr. 19, 2020).

deteriorate in a matter of days. ECF No. 52-7 ¶ 6, (Declaration of Dr. Jonathan Louis Golob). People can also be infected with COVID-19 and infectious but present no symptoms. ECF No. 52-6 ¶¶ 4, 22 (Greifinger Decl.).

Older individuals and those with certain medical conditions face greater chances of serious illness or death from COVID-19. ECF No. 56 at 2; ECF No. 52-6 ¶ 7 (Greifinger Decl.); ECF No. 52-7 ¶ 3 (Golob Decl.). Certain underlying medical conditions increase the risk of serious COVID-19 disease for individuals of any age, including but not limited to lung disease, chronic liver or kidney disease, diabetes, epilepsy, hypertension, compromised immune systems, blood disorders, inherited metabolic disorders, stroke, and pregnancy. ECF No. 56 at 3; ECF No. 52-6 ¶ 7 (Greifinger Decl.); ECF No. 52-7 ¶¶ 3, 14 (Golob Decl.).

Most people in higher risk categories who develop serious disease will need advanced medical support. *Id*. ¶ 8. This level of supportive care requires highly specialized equipment that is in limited supply, and an entire team of care providers, including 1:1 or 1:2 nurse to patient ratios, respiratory therapists, and intensive care physicians. *Id*. *See also* ECF No. 52-6 ¶ 6 (Greifinger Decl.). This level of support is especially difficult to provide for detained individuals. *Id*. ¶ 11.

There is no vaccine against COVID-19, nor any known medication to prevent or treat infection from the virus. ECF No. 56 at 3; ECF No. 52-7 ¶ 10 (Golob Decl.). The only known effective measure to reduce the risk of severe illness or death to vulnerable individuals is to prevent them from being infected with COVID-19. *Id*. Social distancing, or remaining physically separated from known or potentially infected individuals, and vigilant hygiene, including washing hands with soap and water, are the only known effective measures to prevent infection. *Id*.

II. U.S. Immigration and Customs Enforcement's ("ICE") COVID-19 Plan is Insufficient to Prevent the Spread and Management of COVID-19 in Detention Facilities.

As this Court has found, "[p]risons, jails, and detention centers are especially vulnerable to outbreaks of COVID-19." ECF No. 56 at 4. Once one person in a detention facility contracts the virus, it spreads quickly because people live, sleep, eat, and use the bathroom in close proximity with others, and because behind bars, some of the most basic disease prevention measures are simply impossible. *See id*. at 4-5; *see also* ECF No. 52-6 ¶¶ 10, 19 (Greifinger Decl.). According to a study, between 72% and nearly 100% of individuals in ICE detention are expected to be infected with COVID-19 within 90 days of an infection reaching the facility.[7] The study additionally found that, among the 60 individuals detained at HCDC, between 28 and 52 people will be infected within 30 days of the infection reaching the facility, between 44 and 55 people within 60 days, and between 46 and 55 people within 90 days.[8]

Although ICE has temporarily suspended social visitation in all detention facilities,[9] staff, contractors, and vendors continue to enter and leave the detention centers. ECF No. 52-6 ¶ 25 (Greifinger Decl.). Thus, ICE detention facilities are at high risk for infections. Indeed, as of April 24, 2020, ICE has reported that 317 immigrants in detention and 35 ICE detention facility personnel in several states have contracted COVID-19.[10] And now COVID-19 has arrived at the

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[7] Ex. 58, Michael Irvine, et al., *Modeling COVID-19 and Impacts on U.S. Immigration and Enforcement (ICE) Detention Facilities, 2020*, Journal of Urban Health (forthcoming).

[8] Ex. 59, Modeling COVID-19 and Impacts on ICE detention facilities in the US, 2020 (accessed Apr. 27, 2020).

[9] *See* Ex. 62, ICE Guidance on COVID-19, U.S. Immigration and Customs Enforcement, *available at* https://www.ice.gov/coronavirus.

[10] Ex. 61, Confirmed Cases, U.S. Immigration and Customs Enforcement (accessed Apr. 26, 2020).

HCDC. ECF No. 71.

Nothing short of aggressive screening and testing of detained individuals, staff, officials, and other care and service providers who enter the facility will contain the spread of the coronavirus. However, neither ICE nor the Maryland detention facilities have the necessary resources to engage in this effort. ECF No. 52-6 ¶¶ 13, 21, 24 (Greifinger Decl.). Despite Respondents' assurances to this Court that "any individual [at the HCDC or the WCDC] with suspected COVID-19 symptoms will be tested," ECF No. 59 ¶¶ 5-6 (Declaration of Kevin J. Brown, Jr.), neither facility has conducted that level of testing. Detained individuals in HCDC have exhibited COVID-19 symptoms but have not been tested since Respondents filed their Testing Certification. Ex. 52, ¶¶ 3-4, 6, 10 (Supplemental Declaration of Katie Yorick); *see also* Ex. 51, ¶¶ 1-2 (Supplemental Declaration of Mauricio Coreas). Respondents also do not plan to conduct any further testing at HCDC even after learning of a confirmed case. ECF No. 71. Therefore, despite this Court's Order, the HCDC continues to lack both the capability and plans to conduct testing. *See* ECF No. 56 at 8-10.

Given the general lack of testing, it is impossible for detention facilities to consistently and adequately screen detained persons and staff for new infections. ECF No. 52-6 ¶¶ 17-18 (Greifinger Decl.). Moreover, to the extent ICE limits testing to individuals with symptoms, such testing is inadequate. Since COVID-19 carriers can be asymptomatic or not show symptoms for weeks after exposure, "screening people based on observable symptoms is just a game of catch up." *In re Extradition of Alejandro Toledo Manrique,* No. 19-mj-71055, 2020 WL 1307109 (N.D. Cal. Mar. 19, 2020) (ordering release on bond in part because government's COVID-19 management plan did not "say anything about testing"). The fact that the nurse who has tested positive for COVID-19 in the HCDC was asymptomatic when she was physically present in the

facility and only began showing symptoms two days later underscores this point.

Instead of testing, ICE continues to segregate those who meet the Centers for Disease Control and Prevention ("CDC") criteria for epidemiologic risk of exposure to COVID-19.[11] Even assuming ICE has adequate space in its detention facilities to segregate such individuals, isolating people in this manner is an ineffective way to prevent transmission. Unless an individual is isolated in a specialized negative pressure room, air continues to flow outward from rooms to the rest of the facility. *See* ECF No. 52-6 ¶ 29 (Greifinger Decl.). The HCDC is not equipped with negative pressure rooms to properly isolate individuals who contract COVID-19. ECF No. 2-6 ¶ 6 (Declaration of Eric Lopez). Furthermore, as this Court recognized, isolating those who present symptoms "does not remove the risk that the virus will spread quickly once inside the facility and would specifically threaten high-risk detainees like Petitioners." ECF 56 at 30.

Nor can ICE's recent changes to its COVID-19 protocol, issued on April 10, 2020,[12] stop the spread of COVID-19 in HCDC. These new policies fall well short of what is required to prevent the spread of the virus, especially given the confirmed presence of COVID-19 in the facility. ICE's new protocol fails to mandate social distancing in its facilities; fails to identify all categories of people medically vulnerable to COVID-19 as defined by the CDC; fails to address how facilities will account for people who have already been exposed to COVID-19, including asymptomatic and pre-symptomatic people; fails to account for lack of testing, as described above; does not account for any surge in medical need and any staffing deficiencies due to COVID-19; and

[11] Ex. 62, ICE Guidance on COVID-19, U.S. Immigration and Customs Enforcement, *available at* https://www.ice.gov/coronavirus ("Detainees who meet CDC criteria for epidemiologic risk of exposure to COVID-19 are housed separately from the general population.").

[12] Ex. 63, U.S. Immigration and Customs Enforcement, Enforcement and Removal Operations, COVID-19 Pandemic Response Requirements (Apr. 10, 2020).

implements a cohorting strategy that will accelerate the spread of COVID-19, among other shortcomings. Ex. 53, ¶¶ 5-17 (Supp. Greifinger Decl.).

Given the rapid community spread of COVID-19, the variability in symptoms and the likelihood of it being spread before a patient is symptomatic, the general lack of testing, and ICE's history of failure to meet adequate standards for the containment and treatment of infectious diseases, Respondents cannot reliably prevent the spread of the virus in their detention facilities.

ICE has publicly acknowledged the need to limit the spread of the coronavirus and the number of people in its detention centers.[13] Moreover, ICE has a longstanding practice of releasing individuals from custody and has routinely done so to release particularly vulnerable individuals like Petitioners on medical grounds. ECF No. 2-5 ¶¶ 3-15 (Declaration of Andrew Lorenzen-Strait). However, after releasing fewer than 700 individuals out of over 32,000 detained across the country, Respondent Albence has informed Congress that ICE has no plans to release more vulnerable people held in detention.[14]

III. People Detained at Maryland Detention Facilities Face an Imminent and Substantial Risk of Contracting COVID-19.

On April 25, 2020, Respondents confirmed that one person in HCDC has tested positive for COVID-19. ECF No. 71. That person is a nurse who works at the facility once a week, and just two days before testing positive for COVID-19, came into contact with at least seven or eight detained persons, and had been at the medical unit all day. *Id*. Respondents have not provided

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[13] *See* Ex. 64, Maria Sacchetti and Arelis R. Hernández*, ICE to Stop Most Immigration Enforcement Inside the U.S., Will Focus on Criminals During Coronavirus Outbreak,* The Washington Post (Mar. 18, 2020).

[14] Ex. 65, *DHS Officials Refuse to Release Asylum Seekers and Other Non-Violent Detainees Despite Spread of Coronavirus*, U.S. House of Representatives Committee on Oversight and Reform (Apr. 17, 2020).

any information about how many staff members she interacted with that day; nor have they provided information about how many detained persons and staff she interacted with in the prior week. Because COVID-19 can be asymptomatic for up to 14 days, the number of people exposed to her who are currently present in the HCDC may be far greater than the seven people mentioned in Respondents' submission.

Respondents' confidence that no exposure occurred as a result of this nurse's case is unsupported by any specific evidence. The assurance that the nurse was required to wear personal protective equipment ("PPE") does not eliminate the risk of COVID-19 spread in the facility, even under the best circumstances. Ex. 53, ¶ 7 (Supp. Greifinger Decl.). The government has not provided any assurance that the nurse wore PPE at all times; that PPE was available at all times to staff; and that PPE was worn properly. PPE's primary function, moreover, is meant to protect the wearer, and does not eliminate the risk of transmission. *Id*. Given the exponential spread of coronavirus in closed congregate environments, particularly correctional facilities, which are now the sites of the largest COVID-19 outbreaks in the nation, everyone in HCDC is now at heightened risk of contracting COVID-19. Ex. 53, ¶¶ 6-7 (Supp. Greifinger Decl.). Thus, there is an immediate and impending threat that COVID-19 will become widespread in HCDC, and Petitioner Coreas, who is at high risk for serious illness or death should he contract COVID-19, faces imminent and substantial risk of COVID-19 infection. As this Court found, in the absence of widespread testing, there is no way to be certain that outbreaks are not already occurring. ECF No. 56 at 25.

Conditions HCDC will only facilitate the spread of the virus. Groups of detained people are housed together and use common spaces together, sharing tables, telephones, and bathrooms.[15]

[15] Ex. 52, ¶ 7 (Yorick Supp. Decl.); ECF No. 2-6 ¶¶ 4-5 (Lopez Decl.); ECF No. 2-7 ¶ 4

The dormitories in these detention centers house many individuals in close quarters, well under six feet apart.[16] The hallways and corridors are tight, and people in the hallways are constantly in very close proximity.[17] Bathrooms are limited in number and are not sanitized or disinfected after each use.[18] Staff arrive and leave on a shift basis, and even asymptomatic staff can carry the infection into the facility—as has already happened at HCDC.[19]

Further, the detention centers are ill-equipped to manage an infectious disease outbreak. According to Robert Greifinger, MD, a physician who has worked in correctional healthcare for 30 years, "ICE has failed to adequately comprehend and respond to the COVID-19 pandemic for those detained in ICE custody, including at Worcester and Howard County Detention Centers." ECF No. 52-6 ¶ 17 (Greifinger Dec.). Neither ICE nor the facilities have a plan to address the heightened risks that confront individuals with pre-existing medical conditions. ECF No. 56 at 24-25. Facilities generally have very limited on-site medical facilities. ECF No. 52-6 ¶ 11 (Greifinger Decl.); ECF No. 2-6 ¶ 7 (Lopez Decl.); ECF No. 2-7 ¶ 7 (Bakst Decl.); ECF No. 2-8 ¶¶ 6, 8 (Bakst Decl.). And HCDC does not have negative pressure isolation units, meaning that isolating infected people through solitary confinement will not prevent transmission of the disease because air continues to flow outwards from those rooms to the rest of the facility. ECF No. 52-6 ¶ 29 (Greifinger Decl.); ECF No. 2-6 ¶ 6 (Lopez Decl.). ICE and the HCDC remain woefully

(Declaration of Eleni Bakst).

[16] ECF No. 2-6 ¶ 4 (Lopez Decl.); ECF No. 2-7 ¶ 4 (Bakst Decl.).

[17] ECF No. 2-6 ¶ 5 (Lopez Decl.); ECF No. 2-7 ¶ 4 (Bakst Decl.).

[18] ECF No. 2-7 ¶ 8 (Bakst Decl.); *see also* ECF No. 56 at 7-8 (describing conditions at the HCDC); *id*. at 9-10 (describing conditions at the WCDC).

[19] ECF No. 52-6 ¶ 25 (Greifinger Decl.); ECF No. 71.

unprepared and incapable of taking necessary precautions to protect people in their custody against a life-threatening illness. Given the confirmed COVID-19 case at HCDC, Petitioner Coreas's risk of contracting the virus has now increased exponentially.

IV. People Most Vulnerable to COVID-19 Should Be Released from ICE Detention.

Public health experts with experience in immigration detention and correctional settings have recommended the release of vulnerable people from custody. As Dr. Greifinger explains, "the public health recommendation is to release high-risk people from detention." ECF No. 52-6 ¶ 32 (Greifinger Decl.). Two medical experts for DHS have also sent a letter to Congress warning of the severe public health risks of keeping individuals detained and recommending release of medically vulnerable people from immigration detention.[20]

Releasing the most vulnerable people, such as Petitioner Coreas, would also reduce the burden on regional hospitals and health centers. *Id*. In case of an outbreak at a detention center, those institutions would bear the brunt of having to treat infected individuals from detention centers and would have fewer medical resources available for the general population. *Id*. Governments worldwide have also recognized the threat posed by the spread of COVID-19 among detained and incarcerated populations and have released detained persons for that reason. For example, Iran temporarily released more than 80,000 detained individuals to curb the spread of the virus.[21] In the United States, several jurisdictions, including Prince George's County and Baltimore, have also released detained individuals for the same reasons.[22]

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[20] ECF No. 52-19, Letter from Dr. Scott Allen and Dr. Josiah Rich.

[21] Ex. 66, Parisa Hafezi, *Iran Temporarily Frees 85,000 From Jail Including Political Prisoners*, Reuters (Mar. 17, 2020).

[22] Ex. 67, Scott Broom, *50 Prisoners Released Early in Prince George's County as Coronavirus Precaution*, WUSA9 (Mar. 19, 2020); Ex. 68, Associated Press, *Dozens Released From*

V. Petitioner Coreas Is Vulnerable to Serious Illness or Death If Infected by COVID-19 and Must Be Released from Custody.

Mr. Coreas is a 52-year-old citizen of El-Salvador who is currently detained at the HCDC. ECF No. 2-7 ¶¶ 5-6 (Bakst Decl.). In addition to being over 50, Mr. Coreas suffers from Type 2 diabetes. *Id*. ¶ 6. Mr. Coreas is critically vulnerable to serious illness or death from COVID-19 because of his diabetes. ECF No. 52-6 ¶ 31 (Greifinger Decl.). *See also* ECF No. 56 at 6 (finding Mr. Coreas to be at high risk for complications from COVID-19).

LEGAL STANDARD

Motions for fpreliminary injunctions are governed by the same four-factor test. Courts consider whether plaintiffs have shown: (1) a likelihood of success on the merits; (2) that they are likely to suffer irreparable harm in the absence of such relief; (3) that the balance of equities tips in plaintiffs' favor; and (4) that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008); *see also Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 188-89 (4th Cir. 2013) (en banc) (outlining *Winter* standard). To show a likelihood of success on the merits, plaintiffs "need not show a certainty of success." *Pashby v. Delia*, 709 F.3d 307, 321 (4th Cir. 2013).

ARGUMENT

I. Petitioner Coreas Is Likely to Succeed on the Merits.

A. Petitioner Coreas's Detention Violates His Constitutional Right to Reasonable Safety Because It Constitutes Impermissible Punishment.

Baltimore Jails, Prisons, WBAL News (Apr. 6, 2020); Ex. 69, Hannah Gaskill, *Md. Prisons Release New COVID-19 Data, Quietly Free More Than 2,000 Inmates*, WTOP News (Apr. 21, 2020); *see also* Ex. 70, Catherine Kim, *Why People Are Being Released From Jails and Prisons During the Pandemic*, Vox (Apr. 3, 2020) ("California announced that it would let out 3,500 nonviolent inmates in the next 60 days — the most drastic measure taken by states so far. New York City Mayor Bill de Blasio also announced the city had released 900 people as of March 31.").

1. Respondents Are Deliberately Indifferent to Petitioner Coreas's Health and Safety.

Persons in civil immigration detention, like Petitioner Coreas, are protected by the Due Process Clause of the Fifth Amendment. *See Youngberg v. Romeo*, 457 U.S. 307, 315 (1982) (holding that "the right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause" and "that right is not extinguished by lawful confinement" (quoting *Ingraham v. Wright*, 430 U.S. 651, 673 (1977))). Individuals who are subject to civil detention "are entitled to more considerate treatment and conditions of confinement" than persons who are incarcerated because of a criminal conviction. *Id*. at 321-22. Thus, the Due Process Clause's protections are *at least* as strong as those of the Eighth Amendment. "If it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed—who may not be punished at all—in unsafe conditions." *Id*. at 315-16.[23]

The government has an affirmative duty to provide conditions of reasonable health and safety to the people it holds in its custody. As the Supreme Court has made clear,

> [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 . . . . The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself,

[23] Petitioners submit that those held in civil immigration detention are entitled to even stronger protections than individuals held in criminal pretrial detention. *See Jones v. Blanas*, 393 F.3d 918, 933-34 (9th Cir. 2004). Because a person in civil detention is "entitled to 'more considerate treatment' than his criminally detained counterparts," "a presumption of punitive conditions arises where the individual is detained under conditions identical to, similar to, or more restrictive than those under which pretrial criminal detainees are held." *Id.* at 932, 934 (citing *Youngberg*, 457 U.S. at 321-22). *See also* ECF No. 2-1 at 5-6; ECF No. 52 at 15-16. However, because Petitioners prevail under even the deliberate indifference standard, the Court need not address this issue.

> and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment . . . .

DeShaney v. Winnebago County Dept. of Soc. Servs., 489 U.S. 189, 199-200 (1989).

The Eighth Amendment "protects against future harm," including a "condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year." *Helling v. McKinney*, 509 U.S. 25, 33 (1993). Thus, constitutional violations may arise from "the exposure of inmates to a serious, communicable disease" even if "the complaining inmate shows no serious current symptoms" and "even though the possible infection might not affect all those exposed." *Id.*; *see also Hutto v. Finney*, 437 U.S. 678, 682-83, 687 (1978) (holding that a state prison violated the Eighth Amendment where, among other things, it randomly redistributed mattresses to prisoners, some of whom suffered from communicable diseases such as hepatitis and sexually transmitted disease).

Petitioner Coreas is likely to prevail under the deliberate indifference standard and thus has demonstrated a likely violation of his due process rights. To satisfy this standard, a petitioner must satisfy objective and subjective factors. First, a petitioners must show an objectively "serious deprivation" of rights "in the form of a serious or significant physical or emotional injury," *Danser v. Stansberry*, 772 F.3d 340, 346-47 (4th Cir. 2014), or "a substantial risk of such serious harm resulting from the prisoner's unwilling exposure to the challenged conditions," *Shakka v. Smith*, 71 F.3d 162, 166 (4th Cir. 1995). A medical condition is serious when it is "so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Iko v. Shreve*, 535 F.3d 225, 241 (4th Cir. 2008)) (citation omitted). Second, a petitioner must establish subjective deliberate indifference to their health or safety—that is, that the respondent must "subjectively know[] of and disregard[] an excessive risk to inmate health or safety." *Jackson v. Lightsey*, 775

F.3d 170, 178 (4th Cir. 2014) (quoting *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)).

Petitioner Coreas satisfies both objective and subjective requirements. As this Court found, "COVID-19 is a highly communicable disease that presents a potentially mortal risk, particularly for high-risk individuals such as Petitioners," whose "spread has been remarkably rapid, including into prisons and detention facilities." ECF No. 56 at 21. Indeed, in the short time since this Court issued its Order, there has already been a confirmed case of COVID-19 at the HCDC. It is clear that COVID-19 presents an objective, imminent risk to the health and safety of Petitioner Coreas. ECF No. 56 at 22.

Moreover, "there is no dispute that Respondents were and are subjectively aware of the risk that COVID-19 poses to both healthy and high-risk individuals," and the evidence establishes that Respondents disregarded this risk. *Id*. As this Court has found, Respondents at best have taken only limited protective measures at HCDC, despite the high risk of infection. *See id*. Individuals at HCDC are "housed in close quarters" and "spend approximately 11 hours in communal activities and spaces, where they are in close proximity to one another." *Id*. at 23. As of the filing of Plaintiffs' Motion for Temporary Restraining Order, ECF No. 2, Respondents were not implementing any social distancing protocols; providing individuals with adequate cleaning or sanitizing materials; or disinfecting communal spaces, including bathrooms, regularly. *Id*. "Such facts lead to the inescapable conclusion that, before this lawsuit, HCDC [was] disregarding the known risk of a highly communicable and potentially fatal disease." *Id*.

Moreover, although Respondents may have adopted additional precautions after the lawsuit was filed, "these measures leave notable gaps." *Id*. at 24. As this Court found, "there continue to be no social distancing protocols at either facility," nor is there any "evidence of any actions to increase the distance among" those detained as the CDC recommends. *Id*. Respondents

continue to "lack [] any procedures to address the heightened risk to detainees with certain medical conditions"—which, as the Court noted, is a "major deficiency" in Respondents' protocols. *Id*. Finally, the facilities have not conducted tests for detained persons exhibiting COVID-19 symptoms, and "they have neither the capability nor any plans to do so." *Id*. at 25.

For these reasons, the Court concluded that "in the event that the Coronavirus is found in HCDC or WCDC, or if those facilities fail to . . . administer a test to any individual at either Detention Facility who exhibits suspected COVID-19 symptoms . . . , the Court would find a likelihood of success on the due process claim based on deliberate indifference to the serious medical needs of Petitioners." *Id*. As of this filing, both circumstances have come to pass in HCDC. For these reasons, Petitioners are likely to succeed on their due process claim.

2. Respondents Are Subjecting Petitioner Coreas to Unconstitutionally Punitive Conditions of Confinement.

Petitioner Coreas is also likely to succeed on his due process claim because his detention during the COVID-19 pandemic constitutes impermissible punishment. To prevail on this claim, Petitioner must show either that (1) the conditions at issue were imposed with the express intent to punish; or (2) those conditions are not reasonably related to a legitimate, nonpunitive governmental objective, such that the intent to punish can be inferred. *Matherly v. Andrews*, 859 F.3d 264, 275 (4th Cir. 2017). Here, the primary purpose of Petitioner's detention is to ensure his appearance for their immigration proceedings. *See Zadvydas v. Davis*, 533 U.S. 678, 690-91 (2001). But there are many alternatives to detention that would serve that purpose equally well.

Petitioner's detention is not reasonably related to a legitimate, nonpunitive objective. As this Court found, "Petitioners are confined in facilities where they are particularly vulnerable to COVID-19 because of the lack of ability to maintain distance from others, and if they contract the Coronavirus they have up to a 20 percent chance of death, greater than the odds of losing a game

of Russian roulette." ECF No. 56 at 28. The Court thus concluded that, if COVID-19 were confirmed in the facilities, Petitioners' detention under "conditions imposing a palpable risk of death or serious harm inflict far more serious consequences on them than are justified by the need to hold them for their immigration proceedings," and thus "bear no reasonable relationship 'to the purpose for which persons are committed.'" *Id*. (quoting *Matherly*, 859 F.3d at 275). The Court further held that it "would consider the lack of a testing capability to be the equivalent of having positive tests in the detention facility, as there would be no way to know whether high-risk detainees are at direct risk of exposure to the Coronavirus." *Id*. at 29.

Because both these circumstances have come to pass in HCDC, Petitioner Coreas is likely to succeed on the merits of their due process claim.

B. The Court Has Authority to Order Petitioner's Release as the Sole Effective Remedy for the Constitutional Violation.

This Court clearly has authority to protect Petitioner Coreas's due process rights by ordering his release. Petitioner Coreas has filed this case as both a habeas action and a civil action seeking declaratory and injunctive relief. ECF No. 1. Both vehicles are available to Petitioner here.

First, as this Court already has held, a claim by a person "seeking release [from immigration detention] because of unconstitutional conditions or treatment is cognizable under [the federal habeas statute, 28 U.S.C. § 2241]." ECF No. 56 at 14 (citing cases). "[A]lthough the grounds on which they seek release relate to their conditions of confinement, Petitioners seek complete release from confinement, which is 'the heart of habeas corpus.'" *Id*. at 14-15 (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973). A growing number of courts hearing claims identical to Petitioner's have reached the same conclusion. *See, e.g*., *Malam v. Adducci*, 2:20-cv-10829 (JEL) (APP), Dkt. No. 23, at 8 (E.D. Mich. Apr. 6, 2020) (holding that "where a petitioner claims no set of conditions would be sufficient to protect her constitutional rights, her claim should

be construed as challenging the fact, not conditions, of her confinement and is therefore cognizable in habeas."); *Thakker v. Doll*, 1:20-cv-00480 (JEJ), Dkt No. 47, at 5 (E.D. Pa. Mar. 31, 2020) (holding that court has jurisdiction under § 2241 to hear conditions of confinement challenge by Petitioner seeking release from ICE detention due to threat from COVID-19).

Second, the Fifth Amendment provides Petitioner with an implied cause of action, and thus 28 U.S.C. § 1331 serves as an independent basis for jurisdiction. Federal courts have long recognized an implicit private right of action under the Constitution "as a general matter" to issue prospective injunctive relief against 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 (1954) (holding that the Fifth Amendment and § 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"). *See also United States v. Minor*, 228 F.3d 352, 356 (4th Cir. 2000) (recognizing an "equitable cause of action" under the Fifth Amendment and explaining that "[w]hen constitutional interests are so clearly implicated, federal courts have broad discretion to fashion a remedy in equity").

Thus, there is both jurisdiction under 28 U.S.C. § 1331 and a cause of action under the Fifth Amendment to enjoin the Defendants' unconstitutional actions. *See Malam*, 2020 WL 1672662, at *4 ("Should Petitioner's habeas petition fail on jurisdictional grounds, the Fifth Amendment provides Petitioner with an implied cause of action, and accordingly 28 U.S.C. 1331 would vest the Court with jurisdiction."). *See also Simmat v. U.S. Bureau of Prisons*, 413 F.3d

1225, 1231 (10th Cir. 2005) (implied cause of action under Eighth Amendment to enjoin unconstitutional prison conditions).

Sovereign immunity poses no bar to Petitioner's challenge. First, Petitioner is suing for injunctive relief against federal officers in their official capacity. "The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong v. Exceptional Child Ctr., Inc*., 575 U.S. 320, 327 (2015) (emphasis added). Second, Section 702 of the Administrative Procedures Act, 5 U.S.C. § 702, waives the federal government's sovereign immunity in suits that challenge agency action and seek relief other than money damages. *City of New York v. United States Dep't of Def*., 913 F.3d 423, 430 (4th Cir. 2019); *see also Malam*, 2020 WL 1672662, at *5 (holding that sovereign immunity did not apply where detained immigrant "raise[d] a constitutional challenge to her detention as the result of actions taken by [Defendant Rebecca] Adducci, a federal officer"). Thus, Petitioner can prevail under both theories.[24]

Moreover, this Court clearly has the power to order Petitioner's release. "A district court enjoys wide discretionary authority in formulating remedies for constitutional violations." *Smith v. Bounds*, 813 F.2d 1299, 1301 (4th Cir. 1987). 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). For example, in cases involving prisons and jails, federal courts have repeatedly ordered the release of detained persons when necessary to remedy constitutional violations caused by overcrowding. *See, e.g.*, *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

[24] Thus, Petitioners respectfully disagree with the Court's suggestion that, in the absence of habeas, Petitioners "may have no vehicle by which to seek redress . . . ." ECF No. 56 at 14. Rather, Petitioners may challenge their detention directly under the Due Process Clause.

directing release of low-bond pretrial detainees as necessary to reach a population cap); *Mobile Cty. Jail Inmates v. Purvis*, 581 F. Supp. 222, 224-25 (S.D. Ala. 1984) (concluding that district court properly exercised remedial powers to order a prison's population reduced to alleviate unconstitutional conditions and noting other cases); *Inmates of the Allegheny Cty. Jail v. Wecht*, 565 F. Supp. 1278, 1297 (W.D. Pa. 1983) (order to reduce overcrowding "is within our power to correct the constitutional violations"); *Brenneman v. Madigan*, 343 F. Supp. 128, 139 (N.D. Cal. 1972) ("If the state cannot obtain the resources to detain persons . . . in accordance with minimum constitutional standards, then the state simply will not be permitted to detain such persons.").

Since this Court's order, courts all over the country have continued to invoke their authority to order the immediate release of individuals in immigration detention centers in light of the risk posed by COVID-19. *See Essien v. Barr*, 1:20-cv-01034 (WJM), Dkt. No. 17 (D. Colo. Apr. 24, 2020); *Sallaj v. ICE*, 1:20-cv-00167 (JJM) (LDA), Dkt. No. 18 (D.R.I Apr. 24, 2020); *Hernandez v. Kolitwenzew*, 2:20-cv-02088 (SLD), Dkt. No. 12 (C.D. Ill. Apr. 23, 2020); *Durel B. v. Decker*, 2:20-cv-3430 (KM), Dkt. No. 34 (D.N.J. Apr. 21, 2020); *Zaya v. Adducci*, 5:20-cv-10921 (JEL) (APP), Dkt. No. 9 (E.D. Mich. Apr. 18, 2020); *Amaya-Cruz v. Adducci*, 1:20-cv-00789 (DAP), Dkt. No. 35 (N.D. Ohio Apr. 18, 2020); *Vazquez Barrera v. Wolf*, 4:20-cv-01241, Dkt. No. 41 (S.D. Tex. Apr. 17, 2020); *Wright v. Anderson*, 20-cv-3704 (BRM), Dkt. No. 22 (D.N.J. Apr. 17, 2020); *J.G. v. Decker*, 20-cv-3644 (KM) (D.N.J. Apr. 15, 2020); *Ixchop Perez v. Wolf*, 19-cv-5191 (EJD), Dkt. No 29 (C.D. Cal. Apr. 14, 2020); *Fofana v. Albence*, 20-cv-10869 (GAD), Dkt. No. 15 (E.D. Mich. Apr. 14, 2020); *Bahena Ortuno v. Jennings*, 3:20-cv-02064 (MMC), Dkt No. 51 (N.D. Cal. Apr. 14, 2020); *A.R. v. Decker*, No. 20-cv-3600 (MCA), Dkt. No. 26 (D.N.J. Apr. 12, 2020); *Doe v. Barr*, 20-cv-2141 (LB), Dkt. No. 27 (N.D. Cal. Apr. 12, 2020); *Arias v. Decker*, No. 20-cv-2802 (AT), 2020 WL 1847986 (S.D.N.Y. Apr. 10, 2020); *L.O., v. Tsoukaris*, No. CV 20-

3481 (JMV), 2020 WL 1808843 (D.N.J. Apr. 9, 2020); *Bent v. Barr*, No. 19-CV-06123-DMR, 2020 WL 1812850 (N.D. Cal. Apr. 9, 2020); *Toma v. Adducci*, 20-cv-10829 (JEL), Dkt. No. 29 (E.D. MI Apr. 9, 2020); *Hope v. Doll*, No. 1:20-cv-00562-JEJ (M.D. Pa., Apr. 7, 2020); *Malam v. Adducci*, No. 2:20-cv-10829-JEL-APP, 2020 WL 1672662 (E.D. Mich., Apr. 6, 2020); *see also Savino v. Souza*, 20-cv-10617 (WGY), Dkt. No. 64 (D. Mass. Apr. 8, 2020).

Similarly, in this case, the release of Petitioner Coreas from detention is the only effective remedy for the constitutional violation he faces. Preventive measures, such as social distancing, may be effective in the community, but are impossible to implement in the detention setting. ECF No. 52-6 ¶ 19 (Greifinger Decl.). Petitioner Coreas continues to live with others in close quarters, and is unable to maintain the necessary hygiene and social distancing measures that could protect him from the disease. ECF No. 2-6 ¶ 4 (Lopez Decl.); ECF No. 2-7 ¶ 4 (Bakst Decl.). COVID-19 has already reached HCDC and Respondents have failed to institute the testing protocols required by this Court. Thus, for Petitioner Coreas, release is the only effective remedy.

II. Petitioner Is Likely to Suffer Irreparable Harm Absent Release.

Because Petitioner Coreas has established a likelihood of success on his due process claim, he has also shown irreparable harm. ECF No. 56 at 29-30. The "denial of a constitutional right . . . constitutes irreparable harm for purposes of equitable jurisdiction." *Ross v. Meese*, 818 F.2d 1132, 1135 (4th Cir. 1987). In addition, as this Court has found, "Petitioners have introduced uncontroverted evidence that contracting COVID-19 would put them at serious risk of severe medical complications and even death." ECF No. 56 at 30 (citing ECF No. 52-6 ¶¶ 6, 14 (Greifinger Decl.)). Given that there is both a confirmed case in the HCDC and Respondents have failed to provide adequate testing, there is "a high likelihood of irreparable health consequences that could not be alleviated without release." *Id*.

III. The Public Interest and Balance of Equities Weigh Heavily in Petitioner's Favor.

Finally, the balance of harms and public interest weigh strongly in favor of a preliminary injunction. "[U]pholding constitutional rights surely serves the public interest." *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002). "Moreover, the significant risk that the Coronavirus, [having entered the] HCDC or WCDC, [will] cause death or serious harm to high-risk detainees like Petitioners, weighs in favor of the requested injunction." ECF No. 56 at 31.

Respondents assert an interest in Petitioner's detention based on the general public interest in immigration enforcement, ECF No. 39 at 23-24. However, as this Court concluded, that interest "is of markedly less importance than the interest in incarceration of convicted federal or state prisoners, or even the detention of individuals formally charged with federal or state criminal offenses" and "thus tips significantly less favorably toward the Government than in a case involving criminal pretrial detention or post-conviction imprisonment." ECF No. 56 at 31. Respondents also rely on the fact that Petitioner Coreas is subject to the mandatory detention statute, 8 U.S.C. § 1226(c), based on his criminal history. ECF No. 39 at 25. However, Petitioner's mandatory detention does "not provide a basis to conclude that upon a finding of a likely constitutional violation, the balance of equities and public interest would not favor release." ECF No. 56 at 32. Moreover, as explained in section I.B., *supra*, release is the only adequate remedy for Petitioner's unconstitutional and life-threatening confinement. Thus, here "the interests of the health and safety of Petitioners . . . outweigh the public interest in the assurance of the completion of civil proceedings, particularly where ICE would be able to impose conditions of release using 'a range of highly effective tools' designed to result in Petitioners' appearances at their hearings." *Id*. at 33 (quoting ECF No. 2-5 ¶ 15 (Lorenzen-Strait Decl.)).

IV. The Court Should Not Require Petitioner to Provide Security Prior to Issuing a Preliminary Injunction.

Finally, this Court should waive the security requirement for a preliminary injunction set forth at Federal Rule of Civil Procedure 65(c). *Pashby*, 709 F.3d at 332 (explaining that "the district court retains the discretion to . . . waive the security requirement." (citation omitted)). District courts routinely exercise this discretion to require no security in cases brought by indigent and/or incarcerated people. *See, e.g.*, *Beck v. Hurwitz*, 380 F. Supp. 3d 479, 485 (M.D. N.C. 2019) (federal prisoner); *Toussaint v. Rushen*, 553 F. Supp. 1365, 1383 (N.D. Cal. 1983) (state prisoners); *Orantes–Hernandez v. Smith*, 541 F. Supp. 351, 385 n. 42 (C.D. Cal. 1982) (detained immigrants). This Court should do the same here.

CONCLUSION

For the foregoing reasons, Petitioner Coreas respectfully requests that this Court grant the motion for a preliminary injunction and order his immediate release from custody.

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Respectfully submitted,

/s/ Sirine Shebaya
Sirine Shebaya (Bar No. 07191)
sirine@nipnlg.org
Amber Qureshi (Bar No. 21218)
amber@nipnlg.org
Matthew Vogel*
matt@nipnlg.org
NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD
2201 Wisconsin Ave NW, Suite 200
Washington, DC 20007
(202) 656-4788

Adina Appelbaum*
adina@caircoalition.org
CAPITAL AREA IMMIGRANTS' RIGHTS (CAIR) COALITION

David C. Fathi*†
dfathi@aclu.org
Eunice H. Cho*†
echo@aclu.org
AMERICAN CIVIL LIBERTIES UNION FOUNDATION, NATIONAL PRISON PROJECT
915 15th Street N.W. 7th Floor
Washington, DC 20005
(202) 548-6616

Michael Tan*
mtan@aclu.org
Omar Jadwat*
ojadwat@aclu.org
AMERICAN CIVIL LIBERTIES UNION FOUNDATION, IMMIGRANTS' RIGHTS

1612 K Street NW Suite 204
Washington, DC 20006
(202) 899-1412

Nicholas T. Steiner, Esq. (Bar No. 19670)
steiner@aclu-md.org
AMERICAN CIVIL LIBERTIES UNION OF MARYLAND FOUNDATION
3600 Clipper Mill Road, Suite 350
Baltimore, MD 21211
(410) 889-8550

Attorneys for Petitioners-Plaintiffs
* Admitted *pro hac vice*.
† Not admitted in D.C.; practice limited to federal courts.

PROJECT
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2600

Stephen B. Kang*
skang@aclu.org
AMERICAN CIVIL LIBERTIES UNION FOUNDATION, IMMIGRANTS' RIGHTS PROJECT
39 Drumm Street
San Francisco, CA 94111
(415) 343-0783