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

PETITIONERS-PLAINTIFFS G[redacted] C[redacted] AND KEMCHA'S MEMORANDUM OF LAW IN SUPPORT OF THEIR RENEWED 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.

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 WCDC. ECF 59, ¶¶ 6 (Declaration of Kevin J. Brown, Jr.). Despite this certification, however, Petitioners have submitted evidence that a person with COVID-19 symptoms at WCDC was placed in isolation because of suspected COVID-19, but was never tested. *See* Ex. 74, Declaration of Mariam Masumi Daud. His medical records confirm that the facility placed him in isolation due to suspected COVID-19 but failed to test him. *See* Ex. 75, Medical Records [filed under seal].

Thus, despite Respondents' certification, they have failed to test individuals exhibiting

symptoms and still appear to lack appropriate testing capability at WCDC. 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. And in fact, the evidence suggests that the facility has been exposed to COVID-19, even if this fact has not been confirmed through testing.

As a result, Petitioners G[redacted] C[redacted] and Kemcha ("Petitioners") face the extreme risk of serious illness or death from COVID-19 if they continue to be confined in WCDC. As this Court recognized, 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. Petitioners' continued detention at WCDC violates their due process right to reasonable safety and endangers their lives. Thus, for the reasons set forth in its prior Order, this Court should grant Petitioners' renewed motion for a preliminary injunction and order their immediate release. If released, both Mr. G[redacted] C[redacted] and Mr. Kemcha would reside with their families and friends in Maryland, where they can safely self-isolate for the duration of the pandemic. *See* ECF No. 52-4, ¶ 22 (Declaration of Eleni Bakst); Ex. 73, ¶ 15 (Declaration of William Kemcha).

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 27, 2020, there were nearly 2.9 million confirmed cases and over 198,000 deaths worldwide and more than 930,000 confirmed cases and almost 48,000 deaths in the United States.[1] In Maryland, over 20,000 people have tested

[1] Ex. 77, Coronavirus Disease (COVID-19) Situation Report – 98, World Health Org. (Apr. 27, 2020).

positive for COVID-19 and 929 people have died from the disease as of April 28, 2020.[2] The Governor of Maryland issued a stay-at-home order on March 30, 2020.[3] 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.[4] 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.[5] ECF No. 76-10.

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 deteriorate in a matter of days. ECF No. 52-7 ¶ 6, (Declaration of Dr. Jonathan Louis Golob). Symptoms of COVID-19 include fever, cough, and shortness of breath. *Id*. ¶ 5. People can also be infected with COVID-19 and infectious but present no symptoms. ECF No. 52-6 ¶¶ 4, 22 (Greifinger Decl.).

---

[2] Ex. 78, Coronavirus Disease 2019 (COVID-19) Outbreak, Maryland Dep't of Health (accessed Apr. 28, 2020).

[3] *See* ECF 52-14.

[4] ECF No. 76-9 ("Officials say, 45 inmates, 127 correctional officers and 8 non-uniformed staff employees have tested positive for COVID-19 at correctional facilities").

[5] *See* ECF No. 76-13 (Governor Hogan's order would "allow[] for the potential release of hundreds of inmates").

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 recent modeling 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 a facility.[6] The study additionally found that, among the 132 individuals detained at WCDC, between 46 and 117 people will be infected within 30 days of an infection reaching the facility, between 92 and 126 people within 60 days, and between 104 and 126 people within 90 days.[7]

Although ICE has temporarily suspended social visitation in all detention facilities,[8] 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 27, 2020, ICE has reported that 360 immigrants in detention and 35 ICE detention facility personnel in several states have contracted COVID-19.[9] COVID-19 has already arrived at the HCDC, ECF No. 71, and without the adequate testing that this Court ordered, there is no way to know if it has already reached WCDC.

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. Yet despite Respondents' assurances to this Court that "any individual at WCDC

[6] ECF No. 76-11.

[7] Ex. 79, Worcester County Detention Center, Modeling COVID-19 and Impacts on ICE detention facilities in the US, 2020 (accessed Apr. 28, 2020).

[8] *See* ECF No. 76-15.

[9] *Id*.

with suspected COVID-19 symptoms will be tested," ECF No. 59 ¶¶ 6 (Declaration of Kevin J. Brown, Jr.), the facility has not conducted that level of testing. Detained individuals in WCDC have exhibited COVID-19 symptoms but have not been tested since Respondents filed their Testing Certification. Ex. 74, ¶¶ 2-11 (Declaration of Mariam Masumi Daud); *see also* Ex. 72, ¶¶ 1-2 (Supplemental Declaration of A[redacted] G[redacted] C[redacted]). Therefore, despite this Court's Order, the WCDC 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").

Instead of testing, the only measure WCDC appears to be taking is to isolate those who meet the Centers for Disease Control and Prevention ("CDC") criteria for epidemiologic risk of exposure to COVID-19.[10] Ex. 74, ¶¶ 2-11 (Daud Decl.). But 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.). WCDC is not equipped with negative pressure rooms to properly

[10] ECF No. 76-15 ("Detainees who meet CDC criteria for epidemiologic risk of exposure to COVID-19 are housed separately from the general population.").

isolate individuals who contract COVID-19. ECF No. 39-2 ¶¶ 11, 19 (Declaration of Captain Jennifer Moon). 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,[11] stop the spread of COVID-19 in the WCDC. These new policies fall well short of what is required to prevent the spread of the virus. 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 implements a cohorting strategy that will accelerate the spread of COVID-19, among other shortcomings. ECF No. 76-6, ¶¶ 5-17 (Second Greifinger Decl.). And in any event, it is unclear whether and to what degree WCDC is implementing those protocols.

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.[12] Moreover, ICE has a longstanding practice of releasing

[11] *See* ECF No. 76-16.

[12] *See* ECF No. 76-17 (ICE "will temporarily halt enforcement across the United States . . . amid the coronavirus outbreak").

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.[13]

III. Petitioners Detained at WCDC Face an Imminent and Substantial Risk of Contracting COVID-19.

Even though there are no confirmed COVID-19 cases in the WCDC, Petitioners G C and Kemcha face an imminent and substantial risk of COVID-19 infection. The fact that Respondents have not confirmed any cases of COVID-19 in WCDC is meaningless given that they have not engaged in the widespread testing needed to detect infections. The WCDC had already imposed at least one quarantine as a result of possible COVID-19 exposure. ECF No. 2-6 ¶¶ 10-12 (Lopez Decl.); *see* ECF No. 52-4 ¶¶ 10-11 (Declaration of Eleni Bakst); ECF No. 52-3 ¶ 7 (Declaration of G C; ECF No. 52-16, Memo, Worcester County Detention Center. And at least one detained person was sick with COVID-19-like symptoms, was isolated for an extended period of time, then was sent back into the general population without ever being tested for COVID-19. Ex. 74, ¶¶ 3-11 (Daud Decl). This person continued to exhibit symptoms and be isolated and monitored even after Respondents filed their Testing Certification to this Court. Ex. 75, Medical Records [filed under seal]. 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. Thus, given the lack of testing at WCDC, there is an immediate and impending

[13] ECF No. 76-18 ("Acting Director Albence stated [to the U.S. House of Representatives Committee on Oversight and Reform] that 'our review of existing population has been completed' and that ICE does not plan to release any other detainees to slow the spread of the coronavirus in detention facilities").

threat that COVID-19 will become widespread in WCDC, and Petitioners, who are at high risk for serious illness or death should they contract COVID-19, face imminent and substantial risk of COVID-19 infection.

Conditions at the WCDC 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.[14] The dormitories in these detention centers house many individuals in close quarters, well under six feet apart.[15] The hallways and corridors are tight, and people in the hallways are constantly in very close proximity.[16] Staff and detained persons are not consistently wearing masks and gloves.[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 WCDC have a plan to address the

[14] Ex. 73, ¶ 9 (Kemcha Decl.); Ex. 74, ¶ 3 (Daud Decl.); ECF No. 2-6 ¶¶ 4-5 (Lopez Decl.); ECF No. 2-8 ¶ 4 (Declaration of Eleni Bakst).

[15] Ex. 73 ¶ 10 (Kemcha Decl.); ECF No. 2-6 ¶ 4 (Lopez Decl.); ECF No. 2-8 ¶ 4 (Bakst Decl.).

[16] Ex. 73 ¶ 9 (Kemcha Decl.); ECF No. 2-6 ¶ 5 (Lopez Decl.); ECF No. 2-8 ¶ 4 (Bakst Decl.).

[17] Ex. 73 ¶ 11 (Kemcha Decl.).

[18] Ex. 73 ¶ 10 (Kemcha Decl.); ECF No. 2-8 ¶ 4 (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.

heightened risks that confront individuals with pre-existing medical conditions. ECF No. 56 at 24-25. The WCDC has 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 WCDC has no 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. 39-2 ¶¶ 11, 19 (Moon Decl.). ICE and WCDC remain woefully unprepared and incapable of taking necessary precautions to protect people in their custody against a life-threatening illness. Given the lack of testing at WCDC, Petitioners' risk of contracting the virus is severely heightened.

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 Petitioners, 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*. The area surrounding WCDC in particular would likely face a shortage of ICE beds needed in case of an outbreak.[21]

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

[21] Ex. 79, Worcester County Detention Center, Modeling COVID-19 and Impacts on ICE

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, in Maryland, over 2,000 individuals have been released from jails and prisons due to the threat of COVID-19.[22] In the United States and worldwide, several jurisdictions have also released detained and incarcerated individuals for the same reasons.[23]

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

Petitioners in this case are individuals who are particularly vulnerable to serious illness or death if they contract COVID-19 and who are currently detained at WCDC as they await adjudication of their immigration cases.

A[redacted] G[redacted] C[redacted]. Mr. G[redacted] C[redacted] is a [redacted]-year-old citizen of [redacted] who is currently detained at the WCDC. ECF No. 2-8 ¶¶ 5-6 (Bakst Decl.). He suffers from [redacted] and [redacted], including [redacted]. *Id*. ¶ 6. He takes [redacted] to treat those conditions. *Id*. Mr. G[redacted] C[redacted] has sustained [redacted] throughout his life [redacted]. *Id*. ¶ 7. [redacted]. *Id*. These [redacted]. *Id*. Mr.

detention facilities in the US, 2020 (accessed Apr. 27, 2020).

[22] ECF No. 76-20 ("A District Court judge [in Prince George's County] agreed to release 50 inmates"); ECF No. 76-21 ("Dozens of inmates have been released from jails and prisons in Baltimore"); ECF No. 76-22 ("the [Maryland] Department of Public Safety and Correctional Services revealed" the release of "over 2,000 eligible incarcerated individuals").

[23] ECF No. 76-19 ("Iran has temporarily freed about 85,000 people from jail"); ECF No. 76-23 ("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.").

G C is critically vulnerable to serious illness or death from COVID-19 because of his . *Id*. ¶ 10; ECF No. 52-6 ¶ 31 (Greifinger Decl.). *See also* ECF No. 56 at 8 (finding Mr. G C to be at high risk for complications from COVID-19). If released, Mr. G C would reside with his , where he can safely self-isolate for the duration of the pandemic. ECF No. 52-4, ¶ 22 (Declaration of Eleni Bakst).

William Kemcha. Mr. Kemcha is a 58-year-old man who is currently detained at the WCDC. Ex. 73, ¶ 1 (Kemcha Decl.). He suffers from high blood pressure, a compromised immune system, a history of cancer, and lymphedema. *Id.* ¶¶ 2-7, 14. Mr. Kemcha is critically vulnerable to serious illness or death from COVID-19 because of his age, his high blood pressure, his history of cancer, and his compromised immune system. *Id.* ¶ 14; Ex. 76, ¶¶ 6-8 (Second Declaration of Dr. Kate Sugarman, M.D.). If released, Mr. Kemcha would reside with his family in his home in Laurel, Maryland, where he can safely self-isolate for the duration of the pandemic. Ex. 73, ¶ 15 (Kemcha Decl.).

LEGAL STANDARD

In order to prevail on a motion for a preliminary injunction, a plaintiff must show: (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. Petitioners Are Likely to Succeed on the Merits.

A. Petitioners' Detention Violates Their Constitutional Right to Reasonable Safety Because It Constitutes Impermissible Punishment.

1. Respondents Are Deliberately Indifferent to Petitioners' Health and Safety.

Persons in civil immigration detention, like Petitioners, 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.[24]

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

[24] 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.

> 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, 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).

Petitioners are likely to prevail under the deliberate indifference standard and thus have demonstrated a likely violation of their due process rights. To satisfy this standard, Petitioners must satisfy objective and subjective factors. First, 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, Petitioners must establish subjective

deliberate indifference to their health or safety—that is, that Respondents 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)).

Petitioners satisfy 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 been a dramatic increase in COVID-19 cases in Maryland jails and prisons, and without adequate testing, there is no way to know that it is not already in the WCDC. Individuals in WCDC have exhibited COVID-19 symptoms but have not been tested. Ex. 74, ¶¶ 2-11 (Daud Decl.); *see also* Ex. 72, ¶¶ 1-2 (G[redacted] C[redacted] Supp. Decl.). It is clear that COVID-19 presents an objective, imminent risk to the health and safety of Petitioners. 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 WCDC, despite the high risk of infection. *See id*. Individuals at the facility 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, 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 and WCDC were 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 "if [the WCDC] fail[s] to . . . administer a test to any individual at [the WCDC] 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, WCDC has not administered tests to at least one individual who has exhibited COVID-19 symptoms in the facility. Given the lack of testing, there is no way of knowing whether there are confirmed COVID-19 cases in WCDC. For these reasons, Petitioners are likely to succeed on the merits of their due process claim.

2. Respondents Are Subjecting Petitioners to Unconstitutionally Punitive Conditions of Confinement.

Petitioners are also likely to succeed on their due process claim because their detention during the COVID-19 pandemic constitutes impermissible punishment. To prevail on this claim, Petitioners 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 Petitioners' detention is to ensure their 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.

Petitioners' 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 Respondents lack the capability to test all individuals who exhibit COVID-19 symptoms in the WCDC and has failed to test at least one person with COVID-19 symptoms, Petitioners are likely to succeed on the merits of their due process claim.

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

This Court clearly has authority to protect Petitioners' due process rights by ordering their release. Petitioners have 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 Petitioners 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 Petitioners' 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.").

Second, the Fifth Amendment provides Petitioners 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 Petitioners' challenge. First, Petitioners are 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, Petitioners can prevail under both theories.[25]

Moreover, this Court clearly has the power to order Petitioners' 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*

[25] 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.

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 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 Chavez Garcia v. Acuff*, 3:20-cv-00357 (NJR), Dkt. No. 20 (S.D. Ill. Apr. 27, 2020); *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); *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 Petitioners from detention is the only effective remedy for the constitutional violation they face. 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.). Petitioners continue to live with others in close quarters, and are unable to maintain the necessary hygiene and social distancing measures that could protect them from the disease. ECF No. 2-6 ¶ 4 (Lopez Decl.); ECF No. 2-8 ¶ 4 (Bakst Decl.). And Respondents have failed to institute the testing protocols required by this Court. Thus, for Petitioners, release is the only effective remedy.

II. Petitioners Are Likely to Suffer Irreparable Harm Absent Release.

Because Petitioners have established a likelihood of success on their due process claims, they have 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 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 Petitioners' Favor.

Finally, the balance of harms and public interest weigh strongly in favor of a temporary restraining order. "[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 Petitioners' 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 G[redacted] C[redacted] 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 G[redacted] C[redacted]'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 Petitioners' 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 Petitioners to Provide Security Prior to Issuing a Temporary Restraining Order.

Finally, this Court should waive the security requirement for a temporary restraining order 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, Petitioners G[redacted] C[redacted] and Kemcha respectfully request that this Court grant the motion for a preliminary injunction and order their immediate release from custody.

Dated: April 28, 2020

Respectfully submitted,

/s/ Sirine Shebaya
Sirine Shebaya (Bar No. 07191)
sirine@nipnlg.org
Amber Qureshi (Bar No. 21218)
amber@nipnlg.org

David C. Fathi*†
dfathi@aclu.org
Eunice H. Cho*†
echo@aclu.org
AMERICAN CIVIL LIBERTIES UNION

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
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.

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 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