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Detention of At-Risk Individuals during COVID-19: Humanitarian Parole and the Eighth Amendment

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DETENTION OF AT-RISK INDIVIDUALS DURING COVID-19: HUMANITARIAN PAROLE AND THE EIGHTH AMENDMENT

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I. INTRODUCTION

Manuel Amaya Portillo is a 23-year-old asylum seeker from Honduras who is detained at LaSalle Detention Center in Louisiana.¹ Amaya Portillo has neurological issues, heart issues, and a physical deformity.² While detained, Amaya Portillo has not received the accommodations he needs, such as a wheelchair and accessible housing.³ On January 8, 2020, the American Civil Liberties Union (ACLU) wrote a letter to Immigration and Customs Enforcement (ICE) requesting that Amaya Portillo's request for humanitarian parole be granted in light of his disabilities.⁴ Even with access to a wheelchair, Amaya Portillo will continue to face challenges while detained, including difficulties using the toilet, bathing, and accessing bunkbeds.⁵ The ACLU is not confident that the detention facility can meet Amaya Portillo's medical needs.⁶

The trend of late releases for detained immigrants has increased during the COVID-19 pandemic, even though detainees' medical issues have been exacerbated and their medical needs have been neglected more than usual.⁷ For example, a 17-year-old boy from Guatemala, who is a survivor of trafficking, "Mariano", has been detained for more than 400 days.⁸ Mariano

1. See *ACLU of Louisiana Demands Humanitarian Parole for Asylum Seeker with Severe Disabilities*, ACLU (Jan. 9, 2020), <https://www.aclu.org/press-releases/aclu-louisiana-demands-humanitarian-parole-asylum-seeker-severe-disabilities> (stating that the ACLU is requesting that Portillo be released on humanitarian parole).

2. See *id.* (describing Portillo as being four feet tall with a left leg that is half the length of his right leg and having an extensive surgery history).

3. See Letter from Rachel Chappell & Eunice Cho, ACLU, to Robert Gentry, Deportation Officer, Immigration and Customs Enforcement Office of the Principal Legal Advisor (Jan. 8, 2020) (explaining Portillo's medical needs).

4. See *id.* (detailing the difficulties Portillo's disabilities present daily).

5. See *id.* (stating that merely obtaining a wheelchair does not allow Amaya Portillo to overcome the challenges he faces in detainment).

6. See *id.* (arguing that the detention facility cannot alleviate Portillo's specific harm).

7. See *US: COVID-19 Threatens People Behind Bars*, HUMAN RIGHTS WATCH (Mar. 12, 2020, 8:00 AM), <https://www.hrw.org/news/2020/03/12/us-covid-19-threatens-people-behind-bars> (stating that detention centers often provide inadequate health care under normal conditions).

8. See Molly O'Toole & Cindy Carcamo, *Citing Coronavirus, Trump Officials Refuse to Release Migrant Kids to Sponsors — and Deport Them Instead*, L.A. TIMES (May 12, 2020, 3:00 AM), <https://www.latimes.com/politics/story/2020-05-12/trump-officials-coronavirus-refuse-releasing-migrant-kids> (arguing that the administration may

secured sponsorships for his release but is still detained and at a high risk of contracting COVID-19 in detention.⁹

In the climate of a global pandemic, detention centers can be epicenters for the spread of COVID-19, and detaining individuals with medical issues increases the risk of contracting COVID-19 for an already vulnerable population.¹⁰ There is a strong public interest in preventing the spread of the virus in hotspots such as detention facilities.¹¹ The proper or improper management of the spread of COVID-19 in detention facilities directly impacts the communities outside detention facilities as well.¹² Detention centers put vulnerable individuals at greater risk of contracting COVID-19 because they force individuals to live in close proximity to one another.¹³ COVID-19 has increased detained individuals' risk of death or serious injury, which could be prevented or minimized by granting detained individuals humanitarian parole.¹⁴

This Comment argues that when there is an alternative to detaining vulnerable immigrants, such as release to a sponsor through humanitarian parole, keeping vulnerable immigrants detained when they are at risk of death or serious injury constitutes cruel and unusual punishment under the

use the pandemic as a reason to continue Mariano's detention).

9. *See id.* (describing the challenges the Minnesota family encountered to sponsor "Mariano"). *See also* Letter from Bennie G. Thompson, Chairman, House Comm. on Homeland Sec. & Frank Pallone, Jr., Chairman, House Comm. on Energy & Commerce, to Alex M. Azar II, Secretary, U.S. Dep't of Health and Human Serv. & Chad Wolf, Acting Sec'y, U.S. Dep't of Homeland Sec. (May 8, 2020) (discussing the lack of information about the federal response to the pandemic).

10. *See Basank v. Decker*, 449 F. Supp. 3d 205, 212 (S.D.N.Y. 2020) (recognizing that health risks are particularly acute for the elderly and those with underlying health conditions).

11. *See US: COVID-19 Threatens People Behind Bars*, *supra* note 7 (explaining that protecting the health of individuals behind bars is crucial to protecting the overall health of the public).

12. *See Thakker v. Doll*, 451 F. Supp. 3d 358, 367 (M.D. Pa. 2020) (quoting Catherine E. Shoichet, *Doctors Warning of 'Tinderbox Scenario' for Detention Facilities*, CNN, <https://www.cnn.com/2020/03/20/health/doctors-ice-detention-coronavirus/index.html>) (last accessed March 28, 2020)) (stating that an outbreak at a detention center will overwhelm local hospitals and decrease available resources such as ventilators).

13. *See US: COVID-19 Threatens People Behind Bars*, *supra* note 7 (describing institutions where individuals are tightly confined and endure substandard health care).

14. *See Tammy La Gorce*, *'Everybody Was Sick': Inside an ICE Detention Center*, N.Y. TIMES (May 15, 2020), <https://www.nytimes.com/2020/05/15/nyregion/coronavirus-ice-detainees-immigrants.html> (discussing efforts to release detainees in New York and New Jersey who are at high risk).

Eighth Amendment.¹⁵ Part II describes the procedure for obtaining humanitarian parole and the release of detainees during the COVID-19 pandemic.¹⁶ Part III asserts that COVID-19 creates a risk of medical harm that meets the standard of a medical emergency for humanitarian parole, making detention inappropriate.¹⁷ Part III also argues that detaining at-risk individuals during COVID-19 is circumstantially punitive and violates the Eighth Amendment.¹⁸ Part IV asserts that the medical emergency provision under humanitarian parole should include global health pandemics such as COVID-19 because the increased risk of harm to one's health from being detained makes continued detention inappropriate.¹⁹ Part V concludes by asserting that the conditions of confinement in detention facilities during COVID-19 are punitive because they create an increased risk to the health and safety of vulnerable detainees.²⁰ The government's disregard for the medical needs of detainees is a violation of the Eighth Amendment.²¹

II. BACKGROUND

A. Applying for Humanitarian Parole

Individuals apply for humanitarian parole through the United States Citizenship and Immigration Services (USCIS).²² Humanitarian parole is used for emergencies and allows otherwise inadmissible individuals to enter the United States.²³ As such, humanitarian parole is a method of last resort

15. See *Thakker*, 451 F. Supp. 3d at 371 (admitting that petitioners are likely to be successful on the merits of Fifth and Eighth Amendment claims).

16. See *infra* Part II (providing background on the application process for humanitarian parole, granting of humanitarian parole and the status of releasing detainees during COVID-19).

17. See *infra* Part III (evaluating COVID-19 as a medical emergency under humanitarian parole).

18. See *infra* Part III (analyzing continued detention of civil detainees amid COVID-19 as a violation of the Eighth Amendment).

19. See *infra* Part IV (arguing that the medical emergency provision under humanitarian parole should be expanded).

20. See *infra* Part V (discussing the unsafe conditions of detention facilities).

21. See *infra* Part V (describing the inadequate measures taken by detention facilities to prevent the spread of COVID-19).

22. See *Fact Sheet: Humanitarian Parole*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (Jan. 28, 2010) (explaining that the application package includes Form I-131 Application for Travel Document, Form I-134 Affidavit of Support, filing fee, reason for applying and requested length of parole, reason an individual cannot obtain a nonimmigrant visa or a waiver of inadmissibility, and other supporting documents).

23. See 8 C.F.R. § 212.5 (2020) (stating that humanitarian parole applies to

that individuals use to lawfully enter the United States.²⁴ Individuals who were, or are, currently detained under the Code of Federal Regulations § 235.3(c) are eligible to apply for humanitarian parole.²⁵ Under § 235.3(c), an individual that is determined to be inadmissible shall be detained and can be considered for parole under § 212.5(b).²⁶

USCIS reviews requests for humanitarian parole on a case-by-case basis and requires that individuals do not pose a security risk or risk of escape.²⁷ Requests for humanitarian parole may be made for the following reasons: medical needs, family reunification, civil and criminal court proceedings, or other emergent reasons.²⁸ A request for humanitarian parole based on medical reasons must argue that the detained individual has a serious enough medical condition to make detention inappropriate.²⁹ Other emergent circumstances include pregnancy, minors to be released to adult relatives, those who will be witnesses in court proceedings, and situations where there is no public interest in detention.³⁰ In addition to the above factors, USCIS's review of a request for humanitarian parole is required to take into consideration (1) assurance of appearance or departure, (2) community ties, and (3) agreement to reasonable conditions.³¹

B. Granting of Humanitarian Parole

The Attorney General has discretion in granting humanitarian parole.³² The Secretary of Homeland Security and those designated by the Secretary also have the discretion to grant humanitarian parole.³³ There is no appeal

inadmissible aliens).

24. See *Humanitarian Parole Program*, U.S. CITIZENSHIP & IMMIGR. SERV.'S (Jan. 22, 2014) (explaining that humanitarian parole cannot be used to circumvent regular immigration procedures and that all other methods for entry should be used first).

25. See 8 C.F.R. § 235.3 (2020) (discussing the determination of inadmissibility and expedited removal for arriving aliens).

26. See 8 C.F.R. § 235.3 (stating that §212.5(b) applies to inadmissible aliens).

27. See 8 C.F.R. § 212.5 (discussing the requirements for parole of inadmissible aliens).

28. See *Humanitarian Parole Program*, *supra* note 24 (explaining the humanitarian parole program).

29. See 8 C.F.R. § 212.5(b)(1) (2020) (stating that detaining an immigrant with a serious medical condition is inappropriate).

30. See 8 C.F.R. § 212.5(b)(2)-(5) (describing the conditions in which humanitarian parole would be applicable).

31. See 8 C.F.R. § 212.5(d) (detailing the factors to consider when reviewing humanitarian parole requests).

32. See 8 C.F.R. § 212.5(a) (stating that humanitarian parole is discretionary).

33. See 8 C.F.R. § 212.5(a) (identifying "the Assistant Commissioner, Office of

process for the discretionary denial of an application for humanitarian parole.³⁴ The only available option would be for the prospective parolee to file a new application if there are new facts to consider.³⁵ Some reasons for the denial of humanitarian parole include not using alternative immigration processes, insufficient or lack of support for an emergent circumstance, prior immigration or criminal violations, likelihood that the individual would stay in the United States beyond the parole period, and inadequate financial support.³⁶

If a request for humanitarian parole is denied, a civil detainee has the option to petition the court for a writ of habeas corpus, which, if granted, would release the detainee from the detention facility.³⁷ Detainees must seek habeas corpus relief in the district in which they are confined.³⁸ If a detainee is not confined in the district where the case is brought, the court does not have jurisdiction.³⁹ District Courts do not have jurisdiction to review discretionary decisions by agencies and review habeas corpus requests separately from denied humanitarian parole applications.⁴⁰ The discretion of the Attorney General is excluded from judicial review under the REAL ID Act,⁴¹ meaning that a district court cannot review a denial of humanitarian

Field Operations; Director, Detention and Removal; directors of field operations; port directors; special agents in charge; deputy special agents in charge; associate special agents in charge; . . . and those other officials as may be designated” as having the authority to grant parole).

34. See *Fact Sheet: Humanitarian Parole*, *supra* note 22 (describing the denial of a request for humanitarian parole).

35. See *id.* (showing the process of reapplying for humanitarian parole).

36. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-282, IMMIGRATION BENEFITS: INTERNAL CONTROLS FOR ADJUDICATING HUMANITARIAN PAROLE CASES ARE GENERALLY EFFECTIVE, BUT SOME CAN BE STRENGTHENED 15-16 (2008) (explaining reasons why adjudicators may recommend a denial of a humanitarian parole request).

37. See *Rumsfeld v. Padilla*, 542 U.S. 426, 442 (2004) (quoting *Carbo v. United States*, 364 U.S. 611, 618 (1961)) (“The traditional rule . . . ‘has always been that the Great Writ [habeas corpus] is ‘issuable only in the district of confinement’”).

38. See *Dada v. Witte*, No. CV 20-1093, 2020 WL 1674129, at *2-3 (E.D. La. Apr. 6, 2020) (concluding that the District Court lacks jurisdiction over the plaintiffs because none of the plaintiffs are within the territorial jurisdiction of the court).

39. See *id.* at *3 (describing the court’s authority to grant habeas corpus to a detainee who is confined in the court’s territorial jurisdiction).

40. See 5 U.S.C. § 701(a) (2018) (discussing the review of discretionary decisions).

41. See *Sacal-Micha v. Longoria*, 499 F. Supp. 3d 656, 667 (S.D. Tex. 2020) (explaining that subsection 1252(a)(B)(ii) precludes judicial review of the granting of parole).

parole because it is a discretionary decision.⁴²

C. Release of Detainees During COVID-19

In some recent cases, courts have granted the release of at-risk detainees during COVID-19.⁴³ For example, in *Basank v. Decker*, the court granted a temporary restraining order (TRO) against ICE and ordered the release of detainees who were held in New Jersey county jails.⁴⁴ This decision was made as Bergen County reported 819 positive COVID-19 test results, Essex County reported 381 positive test results, and Hudson County reported 260.⁴⁵ All of the petitioners in these cases had chronic medical conditions and were at the risk of imminent death or serious injury if they were exposed to COVID-19 while detained.⁴⁶ Similarly, in *Thakker v. Doll*, detention facilities in York County, Pike County, and Clinton County reported fifty-four, thirty-nine, and zero cases of COVID-19, respectively, and the petitioning detainees were released from all facilities.⁴⁷ The presence of confirmed cases in these facilities is evidence of the high-risk conditions of detention facilities.⁴⁸

However, some courts have denied the release of detainees who, when arguing for release under a writ of habeas corpus, relied on the future risk that COVID-19 posed to their health.⁴⁹ In *Sacal-Micha v. Longoria*, the Southern District of Texas denied the petitioner's Motion for Temporary Restraining Order (TRO) to be released from the detention center.⁵⁰ The

42. See § 701(a) (stating that discretionary decisions cannot be reviewed).

43. See *Basank v. Decker*, 449 F. Supp. 3d 205, 216 (S.D.N.Y. 2020) (ruling for petitioners' release amid COVID-19).

44. See *id.* at 216 (discussing that petitioners have shown irreparable harm by establishing a risk to their health and constitutional rights).

45. See *id.* at 211 (reporting the number of confirmed COVID-19 cases in each facility).

46. See *Castillo v. Barr*, 449 F. Supp. 3d 915, 917, 919 (C.D. Cal. 2020) (stating "Jaimie Meyer, M.D., M.S., . . . submitted a declaration . . . noting that the risk of COVID-19 to people held in New York-area detention centers, . . . 'is significantly higher than in the community, . . . '").

47. See *Thakker v. Doll*, 451 F. Supp. 3d 358, 366 (M.D. Pa. 2020) (granting a Motion for a Temporary Restraining Order and ordering the immediate release of petitioners on their own recognizance).

48. See *id.* at 367 (acknowledging that the conditions of the facilities are high risk because they create the inability to social distance).

49. See *Jose D. M. v. Barr*, 456 F. Supp. 3d 626, 634 (D.N.J. 2020) (emphasizing the consideration of serious underlying medical conditions).

50. See *Sacal-Micha v. Longoria*, 499 F. Supp. 3d 656, 657 (S.D. Tex. 2020) (denying an application for temporary restraining order).

court found Sacal's argument general and speculative because Sacal did not show how the current conditions of his detention would affect his health and that the ICE detention facility was incapable of meeting his medical needs.⁵¹ In *Coreas v. Bounds*, the District Court of Maryland denied the TRO request and the release of detainees Mauricio Coreas and Angel Guzman Cedillo, finding that there was no constitutional violation.⁵² An important factor in the Court's decision was that there had been no reported cases of COVID-19 in the Howard County Detention Center or the Worcester County Detention Center at the time of the court proceedings.⁵³ *Coreas* may have been decided differently had the detention facilities reported cases of COVID-19, or failed to acquire and administer tests to those experiencing COVID-19 symptoms.⁵⁴ In *Jones v. Mayorkas*, instead of granting the detainees release, the detainees were authorized to temporarily leave the facility for vaccination.⁵⁵ Generally, courts have granted TROs when there have been confirmed cases of COVID-19 in the petitioner's detention facility.⁵⁶

D. The Eighth Amendment Applied to Conditions of Confinement

The threat of COVID-19 in detention facilities may create conditions of confinement that violate the Eighth Amendment.⁵⁷ A civil detainee can establish that the detainment violates his or her constitutional rights under the Eighth Amendment if he or she shows that the conditions of confinement

51. *See id.* at 665 (discussing that accepting Sacal's general argument would require the release of all detainees who are vulnerable to COVID-19).

52. *See Coreas v. Bounds*, 451 F. Supp. 3d 407, 430 (D. Md. 2020) (denying petitioner's claim of unconstitutional conditions of confinement).

53. *See id.* (acknowledging that there has been no granting of temporary restraining orders in cases where there were no reports of COVID-19 associated with the detention facility).

54. *See id.* (concluding that petitioners can renew the Motion for a Temporary Restraining Order in the event of (1) evidence of a COVID-19 case in the facility; (2) the failure of Respondents to file a Testing Certification; (3) postponement of petitioners' scheduled immigration hearing; or (4) other materially changed circumstances).

55. *See Jones v. Mayorkas*, No. 20-CV-361 LJV, 2021 U.S. Dist. LEXIS 51398, at *2 (W.D.N.Y. Mar. 18, 2021) (ordering vaccination outside the facility and prohibiting the disclosure of appointment details).

56. *See id.* at 414 (explaining that in previous cases where courts granted TROs there have been confirmed cases of COVID-19 in the detention facility).

57. *See Jose D. M. v. Barr*, 456 F. Supp. 3d 626, 633-34 (D.N.J. 2020) (discussing that a condition of confinement can be punitive when lacking a legitimate government objective).

constitute impermissible punishment.⁵⁸ A petitioner for release can show that the conditions of confinement amount to cruel and unusual punishment by establishing that the conditions are not rationally related to a legitimate government purpose.⁵⁹ Both civil and criminal detainees are entitled to reasonable safety and adequate medical care.⁶⁰ A claim under the Eighth Amendment requires an establishment of deliberate indifference to an individual's health and safety.⁶¹ Deliberate indifference under the Eighth Amendment is not limited to current serious health problems, and courts can consider future health problems caused by the conditions of confinement; however, the future harm must not be speculative.⁶²

The Center for Disease Control and Prevention (CDC) has released safety guidelines for incarceration and detention centers to follow during COVID-19, but there have been variations regarding the extent to which facilities have the resources and practices in place to follow the guidelines.⁶³ Some facilities separate those exhibiting symptoms of COVID-19 from others with no symptoms.⁶⁴ Even though vaccines are available, the risk of contracting

58. *See* *Coreas v. Bounds*, 451 F. Supp. 3d 407, 420 (D. Md. 2020) (describing the standard for conditions of confinement). *See also* *Bell v. Wolfish*, 441 U.S. 520, 538-39 (1979) (discussing that where there is a reasonable legitimate government interest, the condition of confinement is not punitive).

59. *See* *Thakker v. Doll*, 451 F. Supp. 3d 358, 370 (M.D. Pa. 2020) (applying the Fifth Amendment Due Process standard).

60. *See* *Youngberg v. Romeo*, 457 U.S. 307, 315-316 (1982) (stating that “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.”).

61. *See* *Helling v. McKinney*, 509 U.S. 25, 31 (1993) (discussing the subjective component of deliberate indifference).

62. *See id.* at 29 (affirming the Court of Appeals decision that there was cause of action for an Eighth Amendment claim when petitioners acted with deliberate indifference when respondent was exposed to levels of environmental tobacco smoke that posed a risk to his future health).

63. *See Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 19, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf> (suggesting that detention centers provide free access to hygiene products, quarantine, practice social distancing, educate detainees about the virus and screen all new entrants).

64. *See* *Nat'l Immigration Project of Nat'l Lawyers Guild v. Exec. Office of Immigration Review*, 456 F. Supp. 3d 16, 22 (D.D.C. 2020) (explaining measures taken to decrease the risk of exposure to COVID-19 in detention centers); *see also* *Toure v. Hott*, 458 F. Supp. 3d 387, 406 (E.D. Va. 2020) (stating that the facilities have cohorting protocols and isolation rooms available for quarantine).

COVID remains high for the unvaccinated.⁶⁵ Vaccines have not been widely available to individuals in ICE detention facilities.⁶⁶ The asymptomatic nature of COVID-19 still poses a high risk to vulnerable populations and casts doubt on how effective quarantine measures can be in densely populated detention centers.⁶⁷ The highly contagious nature of COVID-19, and the severe health conditions it can impose on vulnerable individuals, support the argument for expanding the use of humanitarian parole to protect the health of medically at-risk detainees.⁶⁸

III. ANALYSIS

A. Under 8 C.F.R. § 212.5(b)(1), COVID-19 Constitutes a Medical Emergency Warranting Humanitarian Parole for Vulnerable Detainees

A serious medical emergency that would warrant humanitarian parole is a condition that would make detention inappropriate.⁶⁹ The detainment of at-risk individuals during the COVID-19 pandemic is inappropriate.⁷⁰ When a detainee's application for humanitarian parole is denied, the detainee can seek a writ of habeas corpus and TRO from a court.⁷¹ In cases where detention facilities have implemented the recommended precautions set by the CDC, courts have denied the release of the petitioning detainee because the detainee could not establish that the detention facility would fail to meet

65. See *Different COVID-19 Vaccines*, CTRS. FOR DISEASE CONTROL & PREVENTION (April 23, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines.html> (identifying vaccines available in the United States).

66. See Maria Sacchetti, *ICE has no Clear Plan for Vaccinating Thousands of Detained Immigrants Fighting Deportation*, WASH. POST (March 12, 2021), https://www.washingtonpost.com/immigration/ice-detainees-covid-vaccine/2021/03/12/0936ee18-81f5-11eb-81db-b02f0398f49a_story.html (describing the lack of a vaccination program in ICE facilities).

67. See *Coreas v. Bounds*, 451 F. Supp. 3d 407, 413 (D. Md. 2020) (discussing asymptomatic individuals' ability to transmit COVID-19).

68. See *Coronel v. Decker*, 449 F. Supp. 3d 274, 283 (S.D.N.Y. 2020) (finding that the government knew of the risk COVID-19 posed to vulnerable detainees and failed to mitigate that risk).

69. See 8 C.F.R. § 212.5(b) (2020) (describing how humanitarian parole can be granted when detainment is inappropriate).

70. See 8 C.F.R. § 212.5(b)(1) (stating that immigrants with serious medical conditions should not be detained).

71. See *Jose D. M. v. Barr*, 456 F. Supp. 3d 626, 631 (D.N.J. 2020) (discussing a petitioner seeking relief through habeas corpus when his application for humanitarian parole was denied).

the petitioner's medical needs if the petitioner is exposed to COVID-19.⁷² However, in making such decisions, the courts have overlooked the future threat to a detainee's health that still exists even if the detention facility implements the recommended precautions to the best of its ability.⁷³ The implementation of the recommended precautions does not guarantee that COVID-19 will not spread to detention facilities, since it is only a measure to manage the spread of the virus.⁷⁴ Asymptomatic individuals, infrequent testing, and the overall novelty of the virus itself make COVID-19 a constant threat even when social distancing is implemented in detention facilities.⁷⁵ If a detainee with a pre-existing medical condition contracts COVID-19, the harm to the detainee's health can be irreparable, as the detainee could likely experience severe lung damage or die.⁷⁶

Those seeking humanitarian parole for medical reasons have already established a serious health condition.⁷⁷ To apply for humanitarian parole using a medical reason, an individual's medical condition must be serious enough that detention would be inappropriate, meaning that the individual is already in a medically vulnerable state.⁷⁸ Even if the request for humanitarian parole is denied, there is the presence of a serious medical condition that has likely been supported by documentation from a medical expert.⁷⁹ Government authorities, having a record of a detainee's medical condition and deciding to continue detention in an unsafe setting, are

72. See *Toure v. Hott*, 458 F. Supp. 3d 387, 406 (E.D. Va. 2020) (describing the precaution measures the Caroline and Farmville detention facilities implemented such as educating detainees, conducting screenings, decreasing occupancy by 40%, and providing sanitizing products).

73. See *Coronel v. Decker*, 449 F. Supp. 3d 274, 280 (S.D.N.Y. 2020) (stating that the government's steps do not alleviate the specific harm of at-risk detainees).

74. See *id.* at 282 (acknowledging that the conditions of confinement make the risk of COVID-19 imminent).

75. See *Coreas v. Bounds*, 451 F. Supp. 3d 407, 413 (D. Md. 2020) (explaining the incapacity of detention facilities to screen asymptomatic individuals).

76. See *Basank v. Decker*, 449 F. Supp. 3d 205, 212 (S.D.N.Y. 2020) (discussing the elderly and those with underlying health conditions being at a high risk of severe medical conditions and lethality for contracting COVID-19).

77. See *Fact Sheet: Humanitarian Parole*, *supra* note 22 (describing a serious medical condition as an appropriate reason to request humanitarian parole).

78. See 8 C.F.R. § 212.5(b)(1) (2020) (stating that detainment of individuals with serious medical conditions is inappropriate).

79. See U.S. Gov't Accountability Office, GAO-08-282 *supra* note 36 (explaining that the application for humanitarian parole begins with the receipt of the application and supporting documentation such as a doctor's statement).

disregarding the medical needs of the detainee.⁸⁰

Conditions of confinement that put vulnerable individuals at a greater risk of contracting COVID-19 warrant a granting of humanitarian parole under immigration regulations.⁸¹ For example, detainees share bathrooms, dining halls, telephones, and residences, all of which are areas that increase the likelihood of transmission of COVID-19.⁸² A detention facility could have no active known cases at the time a detainee submits a humanitarian parole application, but later report a case of the virus in the facility, which is a significant fact warranting another review of a request for humanitarian parole.⁸³

Humanitarian parole applies to individuals who have serious medical conditions to the extent that continued detention would be inappropriate.⁸⁴ COVID-19 can exacerbate a serious medical condition, such as a respiratory issue.⁸⁵ It is not appropriate to detain immigrants with serious medical conditions amid COVID-19 because the conditions of confinement create a substantial risk of serious injury or death, clearly making detention inappropriate.⁸⁶

B. Detention of Vulnerable Prisoners During COVID-19 Constitutes Cruel And Unusual Punishment Under the Eighth Amendment

If the conditions of confinement do not relate to a legitimate government interest, the conditions can be determined to be punitive.⁸⁷ The conditions

80. *See* Coronel v. Decker, 449 F. Supp. 3d 274, 284 (S.D.N.Y. 2020) (emphasizing that petitioners' submission of letters to ICE detailing their medical conditions gave ICE actual knowledge of the medical conditions).

81. *See* 8 C.F.R. § 212.5(b)(1) (stating that detainment of individuals with serious medical conditions is inappropriate).

82. *See* Coreas v. Bounds, 451 F. Supp. 3d 407, 416 (D. Md. 2020) (describing the shared facilities in a crowded detention center and insufficient sanitation of commonly used areas).

83. *See id.* at 430 (stating that petitioner could renew his motion if a detainee or staff member has contracted COVID-19).

84. *See* 8 C.F.R. § 212.5(b)(1) (2020) (discussing how detainment of individuals with serious medical conditions is inappropriate).

85. *See* Basank v. Decker, 449 F. Supp. 3d 205, 212 (S.D.N.Y. 2020) (emphasizing the health risks of the elderly and those with underlying health conditions).

86. *See* Thakker v. Doll, 451 F. Supp. 3d 358, 366 (M.D. Pa. 2020) (discussing the seriousness of COVID-19 and the potential permanent damage to lung tissue).

87. *See* Bell v. Wolfish, 441 U.S. 520, 538-39 (1979) (stating that "if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to punishment"); *see also* Jose D. M. v. Barr, 456 F. Supp. 3d. 626, 633 (D.N.J. 2020) (discussing that a lack of a

of confinement in detention facilities during the COVID-19 pandemic are circumstantially punitive.⁸⁸ Continued detention in unsafe conditions is unjustified.⁸⁹ Detention is unjustified because the government's interest in preventing detainees from absconding is not rationally related to keeping detainees in unsafe conditions.⁹⁰ There are other measures that the government can use to ensure that a detainee appears in court, making confinement in unsafe conditions an unnecessary measure.⁹¹

The threat of future harm to one's health is also sufficient to bring a cause of action under the Eighth Amendment.⁹² In *Sacal-Micha v. Langoria*, the court heavily relied on the fact that there were no reported cases of COVID-19 in the detention facility and stated that Sacal's claim for relief depended on general news articles regarding the threat of COVID-19.⁹³ The threat of COVID-19 remains in detention facilities even without reported cases; despite this, the court did not recognize a future threat sufficient to maintain a cause of action.⁹⁴ This case is distinguishable from *Thakker v. Doll*, where the court recognized the future harm to an individual's health by being exposed to environmental tobacco smoke.⁹⁵

Some courts have acknowledged that a detention facility's reporting of a COVID-19 case is a significant fact that may require a case to be reviewed again, since it evidences the high risk of current exposure to COVID-19.⁹⁶

government objective for the confinement of an immigration detainee is unconstitutional).

88. See *Coreas v. Bounds*, 451 F. Supp. 3d 407, 421 (D. Md. 2020) (describing confined individuals as having a right to reasonable safety and adequate medical care).

89. See *Basank*, 449 F. Supp. 3d at 212 (acknowledging that the public interest is not served by detaining the elderly or ill amid COVID-19).

90. See *Basank v. Decker*, 449 F. Supp. 3d 205, 216 (S.D.N.Y. 2020) (stating that the public interest is best served by not keeping individuals in unsafe conditions).

91. See *id.* at 215 (discussing consequences for not appearing in court as a sufficient incentive as oppose to confinement in unsafe conditions).

92. See *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (describing reasonable safety as a basic human need protected by the Eighth Amendment).

93. See *Sacal-Micha v. Longoria*, 449 F. Supp. 3d 656, 665 (S.D. Tex. 2020) (discussing the lack of fact specific analysis); see also *Toure v. Hott*, 458 F. Supp. 3d 387, 406 (E.D. Va. 2020) (stating that the harm was speculative because the petitioners would have to (1) be exposed to COVID-19, (2) contract COVID-19 and (3) experience a serious injury).

94. See *Sacal-Micha*, 449 F. Supp. 3d at 665 (describing the lack of a fact-specific analysis would lead to a generalized result).

95. See *Thakker v. Doll*, 451 F. Supp. 3d 358, 365 (M.D. Pa. 2020) (noting that it was insufficient that the harm would occur in the indefinite future).

96. See *id.* at 364 (acknowledging that courts have been unlikely to grant release of

Similarly, a detainee's future health is at risk by being exposed to COVID-19 even without there being a reported case in the facility.⁹⁷ A challenge to preventing the spread of COVID-19 is that asymptomatic carriers can transmit the virus.⁹⁸ Even if there are no reported cases of contracting the virus in a facility, the risk of transmission is still present because an individual may be asymptomatic.⁹⁹ There are also issues with detention centers accurately reporting the number of COVID-19 cases and adequately testing detainees.¹⁰⁰ The status of COVID-19 is changing every day, making it likely that the facts of particular detention centers will also change.¹⁰¹

Courts have also taken into consideration the serious medical condition of the petitioning detainee when determining whether to grant release under a habeas corpus claim.¹⁰² A petitioner with a serious underlying medical condition can overcome the threshold for release because the threat of serious future medical harm is more imminent than mere generalized fear.¹⁰³ Some serious medical conditions warranting release include diabetes, high blood pressure, kidney failure, blood clots, aortic issues, and other conditions that would put a detainee with such a condition at greater risk for severe complications if they were to contract COVID-19.¹⁰⁴

1. *Detention Facilities' Conditions of Confinement Are Unsafe*

Detention facilities that do not take appropriate precautions to decrease the spread of COVID-19 to vulnerable detainees create unsafe conditions of

detainees in facilities with no reported cases).

97. *See id.* at 370 (explaining that keeping detainees in tightly packed unsanitary conditions is not a legitimate government interest).

98. *See Coreas v. Bounds*, 451 F. Supp. 3d 407, 413 (D. Md. 2020) (acknowledging the inability to screen asymptomatic individuals).

99. *See Castillo v. Barr*, 449 F. Supp. 3d 915, 918 (C.D. Cal. 2020) (noting that asymptomatic individuals can spread the virus unknowingly during the incubation period).

100. *See Coreas*, 451 F. Supp. 3d at 426-27 (concluding that the court would recognize a deliberate indifference to petitioner's needs if the detention facility failed to submit a testing certification).

101. *See Thakker v. Doll*, 451 F. Supp. 3d 358 366 (M.D. Pa. 2020) (voicing that the statistics on the number of reported COVID-19 cases increases each day).

102. *Cf. Jose D. M. v. Barr*, 456 F. Supp. 3d 626, 633-34 (D.N.J. 2020) (comparing cases where the petitioner had an underlying medical condition and requested parole to cases where the petitioner had no underlying medical condition).

103. *See id.* at 634 (acknowledging that generalized fear of contracting COVID-19 has been insufficient).

104. *See Thakker*, 451 F. Supp. 3d at 362-63 (discussing the petitioners' underlying health conditions).

confinement.¹⁰⁵ Unsafe conditions of confinement violate the Eighth Amendment because the conditions deny confined individuals a reasonably safe environment.¹⁰⁶ For COVID-19, courts have required a showing that the conditions of the detention facility increase the likelihood that a vulnerable detainee would be infected with the virus than if they were not detained.¹⁰⁷ Anyone that is detained has a risk of contracting the virus, but to be granted release based on a habeas corpus claim, the conditions of the detention facility must make the risk of contracting COVID-19 greater than the risk an average individual would encounter outside detention.¹⁰⁸

Detention facilities that are not able to practice social distancing and provide means for sufficient hygiene are unsafe because social distancing and adequate hygiene are the only measures effective at preventing the spread of COVID-19.¹⁰⁹ There are three vaccines available in the U.S. to prevent an individual from experiencing severe illness from contracting COVID-19, but the CDC has not confirmed that vaccinated individuals cannot spread the virus.¹¹⁰ ICE has not issued guidance on its vaccination plan for detainees, has not received vaccines directly from manufacturers, and it is unknown how many detainees have been vaccinated.¹¹¹ Despite the increased availability of COVID-19 vaccines to the general public, some detainees were forced to petition the courts to get vaccinated because they have not had access to vaccines in detention facilities and the risk of

105. *See id.* at 367 (discussing detention facilities that are poorly equipped to allow safe social distancing practices).

106. *See Youngberg v. Romeo*, 457 U.S. 307, 315 (1982) (emphasizing that it is unconstitutional to confine non-criminals in unsafe conditions).

107. *See Jose D. M.*, 456 F. Supp. 3d at 634 (comparing the increased risk of detainees with underlying medical conditions to generalized fear).

108. *See id.* at 634-35 (denying detainee's request for release because detainee did not have an underlying medical condition and only expressed generalized fear).

109. *See Thakker v. Doll*, 451 F. Supp. 3d 358 367 (M.D. Pa. 2020) (acknowledging that the detention facility cannot social distance detainees and keep the facility sufficiently clean to combat the spread of COVID-19); *see also Rafael L.O. v. Tsoukaris*, Civ. No. 20-3481 (JMV), 2020 U.S. Dist. LEXIS 62389, at *24 (D.N.J. Apr. 9, 2020) (discussing that limited living and sleeping quarters and access to hygienic products raises concerns about the facilities' capability to manage the spread of the virus).

110. *See Different COVID-19 Vaccines*, *supra* note 65 (comparing Pfizer, Moderna and Johnson and Johnson vaccine types); *Benefits of Getting COVID-19 Vaccine*, CTRS. FOR DISEASE CONTROL & PREVENTION (April 12, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/vaccine-benefits.html> (announcing ongoing research for whether vaccination reduces the spread of COVID-19).

111. *See Sacchetti*, *supra* note 66 (contrasting ICE facilities to the Bureau of Prisons, which has a vaccination program and receives vaccines directly from manufacturers).

contracting COVID-19 from the conditions of confinement remain high, continuing the need for social distancing and proper hygiene.¹¹²

When determining whether the conditions of confinement are acceptable under the Eighth Amendment, courts look at whether the conditions are rationally related to a legitimate government objective.¹¹³ An expressed intent to punish is not required to determine that conditions of confinement amount to punishment.¹¹⁴ COVID-19 is not a normal circumstance, and the normal importance given to government objectives is altered by the context of the pandemic.¹¹⁵ For a vulnerable detainee, the risk of serious injury or death that COVID-19 poses to their health are harms that outweigh the government's interest.¹¹⁶ The government's interest in detention is further weakened when the goals of detention can be achieved through alternative methods, such as release under a granting of humanitarian parole because the individual will still be required to appear in court.¹¹⁷ The government may argue that the conditions of confinement are necessary to prevent detainees from absconding and to ensure their appearance at court proceedings.¹¹⁸ These governmental objectives are valid, but the government is also required to balance the likelihood that a specific detainee will abscond with the protections of health and safety owed to the detainee.¹¹⁹

Reasonable safety is a basic human need that is guaranteed by the Eighth

112. See *Jones v. Mayorkas*, No. 20-CV-361 LJV, 2021 U.S. Dist. LEXIS 51398, at *1-3 (W.D.N.Y. Mar. 18, 2021) (showing that the judge ordered detainees at the Buffalo Federal Detention Facility to be transported outside the facility for vaccinations).

113. See *Rafael L.O.*, 2020 U.S. Dist. LEXIS 62389, at *25-27 (comparing the public interest for detainees' release rather than continued confinement).

114. See *Rafael L.O. v. Tsoukaris*, Civ. No. 20-3481 (JMV), 2020 U.S. Dist. LEXIS 62389, at *20 (D.N.J. Apr. 9, 2020) (finding that the government did not have an expressed intent to punish the immigrant detainees and such expressed intent is not a prerequisite).

115. See *id.* at *20-21 (emphasizing that the associated risks of COVID-19 changes how governmental objectives are evaluated).

116. See *id.* at *25 (acknowledging that the potential harm to detainees with underlying health conditions is grave).

117. See *Coreas v. Bounds*, 451 F. Supp. 3d 407, 419 (D. Md. 2020) (discussing petitioner's request for community-based alternatives to detention).

118. See *id.* at 429 (referring to petitioners' prior convictions).

119. Compare *Sacal-Micha v. Longoria*, 449 F. Supp. 3d 656, 663 (S.D. Tex. 2020) (explaining that petitioner represented a danger to the community because of his criminal charges in Mexico and pending arrest warrant), with *Coreas*, 451 F. Supp. 3d at 421 (stating that the government has an interest in detaining Coreas because he was convicted of illegal re-entry in the past).

Amendment and owed to each civil detainee.¹²⁰ Government authorities are responsible for ensuring the health and safety of detainees and other confined individuals when their confinement exposes them to risks that jeopardize their health.¹²¹ There are consequences, such as deportation, for detainees who fail to appear for their court proceedings, and the impact of COVID-19 on domestic and international travel makes it more challenging for a detainee to abscond.¹²² Additionally, an outbreak at a detention facility would have a lesser impact on the community at large if more vulnerable civil detainees are released during the COVID-19 pandemic.¹²³

Managing the spread of COVID-19 in detention facilities and decreasing the number of detainees is also in the public's interest.¹²⁴ Public health has been recognized as a public interest.¹²⁵ There is a public interest in managing the spread of COVID-19 in detention facilities because infected detainees have to seek medical treatment from the same institutions that treat the general public.¹²⁶ COVID-19 not only poses a risk of infection to those detained, but also to personnel working in the operations of the facilities.¹²⁷ Therefore, during the COVID-19 pandemic, the government's objectives for detainment are outweighed by the public's interest and the protection of civil

120. *See Helling v. McKinney*, 509 U.S. 25, 33 (1993) (clarifying that prisoners can seek a relief from unsafe conditions under the Eighth Amendment).

121. *See Basank v. Decker*, 449 F. Supp. 3d 205, 214-15 (S.D.N.Y. 2020) (discussing government authorities' deliberate indifference to a condition of confinement that exposes an inmate to a communicable disease).

122. *See id.* at 215 (explaining that the consequences for not appearing at court are sufficient incentives to safeguard the public's interest in ensuring that detainees appear).

123. *See Thakker v. Doll*, 451 F. Supp. 3d 358, 372 (M.D. Pa. 2020) (discussing that the continued detention of civil detainees does not serve the public's interest).

124. *See Basank*, 449 F. Supp. 3d at 211 (acknowledging that an increase of the number of COVID-19 cases in detention centers will consume significant medical and financial resources).

125. *See id.* (citing *Grand River Enterprises Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 169 (2d Cir. 2005)) (stating that public health and safety is benefited by decreasing the number of detainees in unsafe conditions); *Thakker*, 451 F. Supp. 3d at 372 (stating that releasing vulnerable detainees will help stop the spread of COVID-19 and promote public health).

126. *See Thakker*, 451 F. Supp. 3d at 367 (discussing detainees being sent to local hospitals for treatment); *see also Coronel v. Decker*, 449 F. Supp. 3d 274, 288 (S.D.N.Y. 2020) (discussing that the government's interest in continued detention is outweighed by the public's interest in detainees' release considering COVID-19).

127. *See Coreas v. Bounds*, 451 F. Supp. 3d 407, 418 (D. Md. 2020) (noting that as of April 1, 2020, ICE has reported four cases of COVID-19 for detainees and five for personnel working in detention facilities); *see also Basank*, 449 F. Supp. 3d at 211 (acknowledging the health risks to inmates, guards, and the community at large).

detainees' health and safety, a constitutional right under the Eighth amendment.¹²⁸

2. *The Government Acted With Deliberate Indifference Towards the Medical Needs of At-Risk Detainees*

To support an Eighth Amendment claim, a detainee must show that the government acted with deliberate indifference to the health and safety of the detainee.¹²⁹ First, the petitioner must establish a serious risk of serious harm from exposure to the challenged condition.¹³⁰ COVID-19 does pose a serious risk of serious harm and therefore satisfies this first prong, which courts must analyze objectively.¹³¹ The reason is a medically high-risk detainee is likely to suffer severe medical complications if they contract COVID-19 which is highly contagious.¹³² During the COVID-19 pandemic, the medical needs for such detainees are unmet when there are no measures taken to socially distance high-risk unvaccinated individuals and maintain sanitary conditions.¹³³

Next, the petitioner must establish that there was a disregard for a known risk or harm to the detainees' health and safety.¹³⁴ This prong is analyzed subjectively.¹³⁵ COVID-19 is recognized as a global pandemic and the risk COVID-19 poses to detainees is known to ICE.¹³⁶ Detention facilities have

128. *See Coreas*, 451 F. Supp. 3d at 421 (stating that an Eighth Amendment claim can be established for failure to ensure reasonable safety and medical care).

129. *See id.* (discussing deliberate indifference application to insufficient medical treatment).

130. *See id.* (quoting *Helling v. McKinney*, 509 U.S. 25, 33–34 (1993)) (stating “[A] condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year” may violate the Constitution, even if “the complaining inmate shows no serious current symptoms”).

131. *See Coreas v. Bounds*, 451 F. Supp. 3d 407, 424 (D. Md. 2020) (establishing that COVID-19 presents an “imminent risk to health and safety”).

132. *See Coronel v. Decker*, F. Supp. 3d 274, 283 (S.D.N.Y. 2020) (acknowledging that it is necessary for high risks individuals with serious medical needs to social distance and reside in sanitary conditions).

133. *See Basank v. Decker*, 449 F. Supp. 3d 205, 211 (S.D.N.Y. 2020) (explaining that the Department of Homeland Security’s medical experts stated that the facilities did not have adequate protocols to detect and contain infectious diseases).

134. *See id.* at 214 (indicating that disregard would be established if the guards knew of the risk, could have taken steps to avoid it and failed to do so).

135. *See Coronel*, F. Supp. 3d at 284 (describing the deliberate indifference standard as whether the state knew or should have known of the substantial risk and failed to mitigate the risk).

136. *See Sacal-Micha v. Longoria*, 449 F. Supp. 3d 656, 664 (S.D. Tex. 2020) (showing preventive measures governmental authorities have taken considering the

the distinct characteristic of dense populations in tight living spaces, making transmission of the highly contagious virus easier.¹³⁷ The government's failure to provide access to vaccinations in detention facilities disregards the risk of contracting COVID-19.¹³⁸ The analysis of this prong is specific to the individual detention facility and the detainee seeking release.¹³⁹

Individual detainees can satisfy the second prong of an Eighth Amendment claim by sending a notice to ICE expressing their medical conditions, which gives ICE actual knowledge of the serious medical risk detainment poses to that specific detainee.¹⁴⁰ The government is not able to address the specific medical needs of high-risk detainees because governmental authorities have only addressed COVID-19 generally, neglecting the special circumstances of specific detainees.¹⁴¹ The continued detention of at-risk individuals constitutes cruel and unusual punishment because the government's interest does not outweigh detainees' rights to reasonable health and safety while being confined.¹⁴² Furthermore, detention facilities that are unable to manage a COVID-19 outbreak not only threaten the health and safety of the individuals detained, but also contradict the public's interest in managing the spread of the virus and conserving limited medical resources.¹⁴³

threat of COVID-19).

137. See *Basank*, 449 F. Supp. 3d at 211 (describing detention facilities as tinderboxes for the spread of infection); see also *US: COVID-19 Threatens People Behind Bars*, *supra* note 7 (stating that infectious diseases pose a serious risk to populations that live in congregate settings).

138. See *Sacchetti*, *supra* note 66 (describing ICE's failure to plan to provide detainees access to vaccinations).

139. See *Sacal-Micha*, 449 F. Supp. 3d at 664 (finding that ICE met Sacal's medical needs, and the measures implemented by ICE at Sacal's specific detention facility was insufficient to establish deliberate indifference).

140. See *Coronel v. Decker*, 449 F. Supp. 3d 274, 284 (S.D.N.Y. 2020) (referring to the letters petitioners wrote to ICE detailing their medical conditions that puts petitioners at a higher risk for complications).

141. See *id.* at 285 (discussing the suspension of visits, the increase of sanitation, and provision of sanitization supplies as a general approach).

142. See *Coreas v. Bounds*, 451 F. Supp. 3d 407, 421 (D. Md. 2020) (recognizing confined individuals' rights to reasonable safety and medical care).

143. See *Basank v. Decker*, 449 F. Supp. 3d 205, (S.D.N.Y. 2020) (referring to a public interest in conserving medical and financial resources).

IV. POLICY RECOMMENDATION

A. Humanitarian Parole Should Be Accommodating During Global Pandemics That Increase the Risk of Health Complications for Those With Preexisting Medical Conditions.

On June 26, 2020, federal judge Dolly M. Gee ordered that minors in family detention centers be released in light of the COVID-19 pandemic.¹⁴⁴ ICE's Family Residential Centers (FRCs) reduced capacity during the pandemic but have only taken half measures to stop the spread of the virus in facilities.¹⁴⁵ The Order requires ICE to transfer the class members, which consists of detainees, to non-congregate settings, which have a lower population density, by (1) releasing minors to their sponsors or a non-congregate setting, or (2) using its discretion to release the adults and allowing minors to be released with their guardians.¹⁴⁶ Even though there is a lower risk that children will develop severe complications from COVID-19 in comparison to the elderly and those with pre-existing medical conditions, the court recognized that continued detention in FRCs incapable of implementing sufficient social distancing and sanitary measures was inappropriate.¹⁴⁷

Similarly, adult detainees with pre-existing medical conditions are at greater risk for future injury to their health and safety during COVID-19.¹⁴⁸ If courts can recognize the threat of confinement of children during the pandemic, they should also recognize the threat to vulnerable adult detainees.¹⁴⁹ The grave consequences of the virus are recognized globally.¹⁵⁰

144. See Priscilla Alvarez, *Judge Rules Migrant Children in Government Family Detention Centers Must be Released Due to Coronavirus*, CNN (June 27, 2020 3:06 PM), <https://www.cnn.com/2020/06/26/politics/children-released-from-immigration-detention-centers/index.html> (noting that release applied to children who have been at one of the three facilities for more than 20 days).

145. See *Flores v. Barr*, No. CV 85-4544-DMG (AGRx) 2020 WL 3488040, at *1 (C.D.Cal. June 26, 2020) (stating that at least eleven detainees in a FRC had contracted the virus).

146. See *id.* at *3 (ordering class members of the FRC to be released from congregate settings).

147. See *id.* at *1 (stating that the Court is not surprised that individuals in congregate settings are more vulnerable to COVID-19).

148. See *Basank v. Decker*, 449 F. Supp. 3d 205, 211 (S.D.N.Y. 2020) (explaining the high risk of experiencing severe medical complications or death from contracting COVID-19).

149. See *Thakker v. Doll*, 451 F. Supp. 3d 358, 369 M.D. Pa. 2020) (acknowledging that courts have recognized COVID as constituting an irreparable harm).

150. See Dr. Tedros Adhanom Ghebreyesus, WHO Director-General, Opening

The operators of detention facilities are aware of the increased risk the conditions of confinement pose to detainees with pre-existing medical conditions.¹⁵¹ The detention facilities that are unable to implement proper social distancing, sanitary measures, or vaccinations cannot meet the medical needs of at-risk-detainees.¹⁵²

Humanitarian parole should recognize global pandemics, such as COVID-19, under its provision for medical emergencies under 8 C.F.R. § 212.5(b)(1).¹⁵³ Expanding the medical emergency provision of humanitarian parole to include global pandemics would make it easier for at-risk detainees to apply for release, since their detention in a facility unable to implement proper social distancing and sanitary measures would be inappropriate.¹⁵⁴ Including global pandemics in the regulation for medical emergencies would give USCIS clear guidelines on how to adjudicate pandemic-related claims for parole.¹⁵⁵ Further, it would give petitioners using the pandemic in their claims for release better standing if they can refer to an established provision.¹⁵⁶

Expanding the medical provision of humanitarian parole would not be overbroad and would not allow any detainee to claim medical parole because of a generalized risk of contracting COVID-19.¹⁵⁷ First, detention facilities that can implement recommended social distancing and sanitary measures can lower the risk that detainees will contract the virus.¹⁵⁸ The problem with detention facilities is not implementing the recommended precautions, but

Remarks at the Media Briefing on COVID-19 - 11 March 2020 (Mar. 11, 2020) (declaring COVID-19 a pandemic).

151. See *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, *supra* note 63 (discussing the unique challenges of managing COVID-19 in correctional and detention facilities).

152. See *Toure v. Hott*, 458 F. Supp. 3d 387, 406 (E.D. Va. 2020) (reasoning that petitioners were protected because Caroline and Farmville detention facilities successfully implemented proper precautions and Farmville did not have any confirmed cases).

153. See 8 C.F.R. § 212.5(b)(1) (2020) (stating that there is a medical provision for the grant of humanitarian parole).

154. See 8 C.F.R. § 212.5(b)(1) (2020) (stating that humanitarian parole can be granted for a medical condition that makes detention inappropriate).

155. See *Toure*, 458 F. Supp. 3d at 398 (describing the circuit split).

156. See 8 C.F.R. § 212.5(b)(1) (2020) (mystifying what is considered a medical emergency).

157. See *Jose D. M. v. Barr*, 456 F. Supp. 3d 626, 634 (D.N.J. 2020) (noting that a generalized fear of contracting the virus is insufficient for release).

158. See *Toure v. Hott*, 458 F. Supp. 3d 387, 406 (E.D. Va. 2020) (describing the facilities compliance with social distancing and sanitary guidelines).

that the conditions of confinement make facilities ideal places, or tinderboxes, for the spread of the virus.¹⁵⁹ Second, the petitioner must have an underlying medical condition that makes it foreseeable that serious harm would result from contracting COVID-19.¹⁶⁰ Third, humanitarian parole is not the first method used to enter the United States, and it is limited by being a discretionary decision not reviewable by district courts.¹⁶¹

Including global pandemics as part of the medical emergency provision for humanitarian parole is a good solution, since the medical emergency provision already encompasses that release should be granted for those that have a medical condition that would make detention inappropriate.¹⁶² Detaining at-risk individuals in unsafe conditions is inappropriate during a pandemic, and including pandemics in the provision would improve USCIS's processing of such claims by providing clear guidelines.¹⁶³ USCIS, using its discretionary authority in granting humanitarian parole, would be able to release qualified vulnerable detainees instead of wavering on whether the current medical provision adequately covers claims.¹⁶⁴

Detention centers' unsafe conditions have worsened with the spread of COVID-19.¹⁶⁵ The more prevalent cases become in detention facilities, the greater and more imminent the risk of injury to vulnerable detainees' health

159. *See* *Coreas v. Bounds*, 451 F. Supp. 3d 407, 418 (D. Md. 2020) (acknowledging expert opinions that COVID-19 is spreading "like wildfire in detention facilities around the nation").

160. *See* *Jose D. M.*, 456 F. Supp. 3d at 634 (discussing petitioner's lack of an underlying medical condition and reliance on general fear).

161. *See Fact Sheet: Humanitarian Parole*, *supra* note 22 (stating that all other methods for entry into the United States should be used first before applying for humanitarian parole); *see also* 8 C.F.R. § 212.5 (2020) (stating that humanitarian parole is discretionary).

162. *See* 8 C.F.R. § 212.5(b)(1) (2020) (emphasizing that humanitarian parole can be granted for a medical condition that makes detention inappropriate).

163. *See id.* (explaining that humanitarian parole can be granted for a medical condition that makes detention inappropriate).

164. *See id.* (stating that humanitarian parole is discretionary).

165. *See* Eunice Cho, *DHS Watchdog Confirms: ICE is Failing to Protect Detained People From COVID*, ACLU (June 29, 2020), <https://www.aclu.org/news/immigrants-rights/dhs-watchdog-confirms-ice-is-failing-to-protect-detained-people-from-covid/> (reporting that almost 2,500 people have been infected with COVID-19 in detention facilities).

and safety.¹⁶⁶ Detention should not be a death sentence.¹⁶⁷ By expanding humanitarian parole's medical provision to include global pandemics, vulnerable detainees would be able to make solid claims for parole and be removed from unsafe detention facilities, decreasing the risk of injury to their health and safety.¹⁶⁸

V. CONCLUSION

COVID-19 and detention centers' inability to manage the spread of the virus because of the conditions of confinement warrants granting humanitarian parole and an Eighth Amendment claim for release.¹⁶⁹ The conditions of confinement during COVID-19 make confinement punitive because the government's legitimate interest in detaining individuals is weakened and outweighed by the substantial risk to a detainee's health and safety.¹⁷⁰ ICE is aware of the risks of the pandemic, particularly for the elderly and those with underlying health conditions, yet there are detention facilities that have failed to take action to defend vulnerable detainees.¹⁷¹ Failure to take action to protect vulnerable detainees' health and safety is deliberate indifference to the detainees' medical conditions.¹⁷² Granting humanitarian parole is appropriate for unvaccinated detainees with medical conditions and a high risk of contracting COVID-19 because continued

166. See Alisa Reznick, *You Can Either Be A Survivor Or Die': COVID-19 Cases Surge In ICE Detention*, NPR (July 1, 2020 9:17 AM), <https://www.npr.org/2020/07/01/871625210/you-can-either-be-a-survivor-or-die-covid-19-cases-surge-in-ice-detention> (describing detention facilities' increase in cases, failure to reduce population size and inability to social distance).

167. See Cho, *supra* note 165 (referring to the poor conditions observed during detention facility site visits of the Richwood Correctional Center, Winn Correctional Center, La Palma Correctional Center and Jackson Parish Correctional Center).

168. See 8 C.F.R. § 212.5(b)(1) (2020) (stating that humanitarian parole can be granted for a medical condition that makes detention inappropriate).

169. See *Thakker v. Doll*, 451 F. Supp. 3d 358, 371 (M.D. Pa. 2020) (admitting that petitioners are likely to be successful on the merits of a Fifth and Eighth Amendment claim).

170. See *Rafael L.O. v. Tsoukaris*, Civ. No. 20-3481 (JMV), 2020 U.S. Dist. LEXIS 62389, at *23 (D.N.J. Apr. 9, 2020) (acknowledging that there is a public interest in detainees release rather than continued confinement).

171. See *Basank v. Decker*, 449 F. Supp. 3d 205, 211 (S.D.N.Y. 2020) (emphasizing how easy the virus spreads in detention facilities).

172. See *Coronel v. Decker*, 449 F. Supp. 274, 285 (S.D.N.Y. 2020) (describing the suspension of visits, increase of sanitation, and provision of sanitization supplies as a general approach).

detention increases the risk of serious injury or death.¹⁷³

173. See *Fact Sheet: Humanitarian Parole*, *supra* note 22 (stating a serious medical condition is an appropriate reason to request humanitarian parole).