

**IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA**

KENNETH ANDERSON <i>et al.</i> ,)	
)	
Petitioners,)	
)	
v.)	CIVIL ACTION
)	
THEODORE JACKSON <i>et al.</i> ,)	NO. HC-01062
)	
Respondents.)	
)	

**BRIEF OF THE SOUTHERN CENTER FOR HUMAN RIGHTS
AS AMICUS CURIAE IN SUPPORT OF PETITIONERS**

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INTRODUCTION

The current pandemic represents an unprecedented public safety threat that demands an unprecedented response at all levels of government. As illustrated by last week's statewide and countywide orders for citizens to remain in their homes, protecting the public in this time of crisis requires unconventional, dramatic, and decisive action sooner rather than later. Behind each new protective measure is an implicit recognition that the status quo is not appropriate to the current reality; entrenched ways of doing things must yield for the good of us all.

Few groups in Georgia are more at risk from the status quo than the thousands of detainees confined in the Fulton County Jail. With a daily inmate population of around 3,000, the Fulton County Jail system holds so many people in its confined facilities that, if it were a town instead of a jail, its population would rank in the top half of Georgia's cities. Responsibility for caring for this massive population falls on the shoulders of a group of perpetually overworked and understaffed detention officers. The jail's detainees and officers live and work under conditions that are often unsanitary and sometimes, in the words of a judge last year, "repulsive." Even in normal times, these conditions push the limits of what the Constitution tolerates—the jail has spent the better part of 20 years under court orders to improve jail conditions for that reason. In the context of the current

health crisis, however, conditions in the jail go well beyond any arguable constitutional line.

The virus that causes Covid-19 has entered the jail. It is almost certainly spreading to an increasing number of inmates. Without an urgent and significant reduction in the Fulton County Jail's inmate population, the current pandemic threatens to overwhelm the jail's already tenuous operations and significantly compromise both public safety and the health of officers and detainees assigned to the jail. Petitioners' habeas corpus petition presents an opportunity for this Court to relieve the risk of infection for not only Petitioners but all of the jail's detainees and officers while protecting Petitioners' right not to be jailed, particularly during a historic pandemic, solely because they cannot afford the bail set in their cases. There is no effective backstop if this Court does not promptly act to address these issues. The Court should grant a writ of habeas corpus and release Petitioners.

STATEMENT OF INTEREST

The Southern Center for Human Rights is a non-profit law firm dedicated to ensuring the civil and human rights of people in the criminal justice system. Through litigation and advocacy, the Center works to defend people accused of crimes, prevent discrimination against the indigent, and ensure humane conditions of confinement in jails and prisons.

For over two decades, the Center has been involved in litigation concerning conditions in the Fulton County Jail system. The Center's experience with the Fulton County Jail confirms that overcrowded, understaffed, and unsanitary living conditions in the jail have been recurring problems over the past 20 years. In light of the current health crisis, those conditions take on special importance. The Center has a strong interest in ensuring that the jail's population is reduced to a manageable level.

In addition, the Center has a history of litigating on behalf of people who are jailed solely for inability to pay money. The Center has an interest in ensuring that Petitioners, all of whom have been granted bond that they cannot afford, will not continue to be held solely because they cannot afford to pay for release.

BACKGROUND

A. Coronavirus Pandemic

The risks and consequences of the Covid-19 global pandemic cannot be overstated. Over 1,400,000 individuals worldwide have confirmed diagnoses, including more than 383,000 in the United States, which now has more than twice as many detected cases as any other country.¹ More than 80,000 individuals

¹ John Hopkins Univ., Ctr. for Systems Sci. & Eng., *Coronavirus COVID-19 Global Cases*, available at <https://bit.ly/39METce>.

worldwide have died as a result of Covid-19, including more than 12,000 in the United States.² Each day these statistics climb exponentially higher.

Covid-19 is a highly contagious disease, with an infection rate double that of the seasonal flu. It is easily transmitted through respiratory droplets emitted when infected people breathe, talk, or cough.³ The risk of transmission is particularly acute when one is within six feet of an infected individual. The virus, which can survive for days on contaminated materials, is also transmitted through contact with surfaces previously touched by an infected individual. Recent research reveals that a significant portion of infection is due to asymptomatic transmission: infected individuals who never develop—or have not yet developed—symptoms and are unknowingly spreading the virus, rendering testing or seclusion of only those who are symptomatic an ineffective solution.⁴ For this reason, the Centers

² *Id.*

³ World Health Org., *Modes of Transmission of Virus Causing COVID-19: Implications for IPC Precaution Recommendations*, Mar. 29, 2020, available at <https://bit.ly/2ULdp2y>.

⁴ See Jillian Mock, *Asymptomatic Carriers Are Fueling the COVID-19 Pandemic. Here's Why You Don't Have to Feel Sick to Spread the Disease*, Discover, Mar. 26, 2020, available at <https://bit.ly/2XcWcAS> (summarizing studies); Josephine Moulds, *People with Mild or No Symptoms Could Be Spreading COVID-19*, World Economic Forum, Mar. 23, 2020, available at <https://bit.ly/34apy4i> (same); Apoorva Mandavilli, *Infected but Feeling Fine: The Unwitting Coronavirus Spreaders*, N.Y. Times, Apr. 1, 2020, available at <https://nyti.ms/3aPK6S4>.

for Disease Control and Prevention (CDC) has taken the extraordinary step of recommending every American wear a cloth mask over their face when in public.⁵

The effects of Covid-19 are lethal, and can include respiratory failure, major organ damage, and death. The risk of death or serious illness is especially high for certain populations, including people over the age of 50 and people, regardless of age, with underlying health conditions such as—but not limited to—weakened immune systems, hypertension, diabetes, and lung, kidney, heart, or liver disease.⁶ While early reporting emphasized the risks of the disease to older adults, new data shows that young people infected with Covid-19 often suffer severe, debilitating illness.⁷ People infected with Covid-19, especially those in vulnerable populations, may require significant medical attention, including ventilator assistance for respiration and intensive care. Rapid complications are possible. A patient can

⁵ Ctrs. for Disease Control & Prevention, *Recommendation Regarding the Use of Cloth Face Coverings, Especially in Areas of Significant Community-Based Transmission*, Apr. 3, 2020, available at <https://bit.ly/2V2ytQZ> (“CDC is additionally advising the use of simple cloth face coverings to slow the spread of the virus and help people who may have the virus and do not know it from transmitting it to others.”).

⁶ Ctrs. for Disease Control & Prevention, *People Who Are at Higher Risk for Serious Illness*, Apr. 2, 2020 available at <https://bit.ly/34k6OiU>.

⁷ Declaration of Dr. Marc Stern ¶ 14, *Banks v. Booth*, No. 1:20-CV-849 (D.D.C. Mar. 30, 2020), available at <https://bit.ly/2JDwL3r>.

show symptoms just two days after exposure, and their condition can seriously deteriorate in as little as five days.⁸

There is no vaccine for Covid-19.⁹ There is no cure. There is just a single strategy to reduce the risk for vulnerable people from serious illness and death, and that is to prevent them from being infected in the first place.¹⁰ The only measures known to reduce the risk of Covid-19 infection are social distancing—or maintaining a distance of at least 6 feet apart—and vigilant hygiene.¹¹

Nationally, projections from the CDC indicate that over 200 million individuals in the United States could be infected with Covid-19 over the course of the epidemic without effective public health intervention, with as many as 1.7 million deaths in the worst projections.¹² The President has predicted that even if social-distancing strategies are successful, the United States will experience up to 200,000 coronavirus-related deaths.¹³

⁸ Declaration of Dr. Jonathan Golob ¶¶ 6, 8, *Thakker v. Doll*, No. 1:20-CV-480 (M.D. Pa. Mar. 24, 2020), *available at* <https://bit.ly/2V1qQKH>.

⁹ Golob Decl. ¶ 10.

¹⁰ *Id.*

¹¹ *Id.*

¹² See James Glanz, et al., *Coronavirus Could Overwhelm U.S. Without Urgent Action, Estimates Say*, N.Y. Times, Mar. 20, 2020, *available at* <https://nyti.ms/3bNnjq2>; Sheri Fink, *Worst-Case Estimates for U.S. Coronavirus Deaths*, N.Y. Times, Mar. 13, 2020, *available at* <https://nyti.ms/2RdtnAd>.

¹³ See Rebecca Ballhause et al., *White House Extends Social-Distancing Guidelines Until End of April*, Wall St. J., Mar. 30, 2020, *available at*

1. Severe Risk to Incarcerated People

Due to its contagious nature, Covid-19 is devastating in crowded, closed environments.¹⁴ Enclosed group settings, like cruise ships,¹⁵ aircraft carriers,¹⁶ and nursing homes¹⁷ have become the sites for the most severe outbreaks of Covid-19.

<https://on.wsj.com/39Inhys> (“So, if we can hold that down, as we’re saying to 100,000—it’s a horrible number—maybe even less, but to 100,000 — so we have between 100,000 to 200,000—we all together have done a very good job.”).

¹⁴ Order, *Fraihat v. Wolf*, No. 2:20-CV-590 (C.D. Cal. Mar. 30, 2020) (ordering release of individual from immigration detention facility because Covid-19 “can spread uncontrollably with devastating results in a crowded, closed facility”).

¹⁵ After a former passenger of the Diamond Princess cruise ship tested positive for the virus on February 5, all 3,711 passengers and crew were locked down for a two-week quarantine. Two days after the quarantine came to an end, a total of 621 people tested positive for COVID-19. Kenji Mizumoto & Gerardo Chowell, *Transmission Potential of the Novel Coronavirus (COVID-19) Onboard the Diamond Princess Cruises Ship*, 5 *Infectious Disease Modelling* 264 (2020), available at <https://bit.ly/2JGBOQz>.

¹⁶ On March 24, the captain of the USS Theodore Roosevelt, an aircraft carrier with a crew of 5,000, reported that three sailors had tested positive for Covid-19 and were airlifted off the ship as a precaution. Within a week, confirmed cases spiked to nearly 100, leading the captain to seek permission to let 90 percent of the crew off the ship. “Due to a warship’s inherent limitations on space,” he wrote, the necessary quarantines and social distancing were impossible. J.D. Simkins, *Navy Fires Theodore Roosevelt Skipper Following Leaded Letter Pleading for COVID-19 Assistance*, Navy Times, Apr. 3, 2020, available at <https://bit.ly/3bNoDJw>; Matthias Gafni & Joe Garofoli, *Captain of Aircraft Carrier with Growing Coronavirus Outbreak Pleads for Help from Navy*, San Francisco Chronicle, Apr. 2, 2020, available at <https://bit.ly/2JFnvM3>.

¹⁷ In one long-term residential care facility, the virus quickly spread to over a hundred residents, staff members, and visitor; 37 persons died. King Cty. Wash. Dep’t of Pub. Health, *Urgent Need for People to Limit Contact, and Other COVID-19 Updates*, Mar. 23, 2020, available at <https://bit.ly/2RbhdYU>.

Jails are worse. They are, effectively, cruise ships packed with vulnerable guests but short on resources like cleaning supplies, protective gear, and medical care. In addition, jails constantly bring in new people with the potential to either infect or be infected.¹⁸ Jails pose a greater risk of a “worse-case scenario” spread of Covid-19 than their non-carceral counterparts because of the closer quarters, less sanitary conditions, reliance on jail staff to provide for inmates’ basic needs, disproportionate number of medically vulnerable people in jails, and constant cycling of detainees in and out of jail facilities.¹⁹

a. Impossibility of social distancing in jails

Social distancing is crucial to slowing the spread of the virus, but in the closed and often badly overcrowded confines of a jail, social distancing is a meaningless command. Jail detainees are in constant, unavoidable, close contact with others, as they eat, shower, and sleep alongside one another. People in multi-person cells and dormitories sleep with less than six feet of separation between them. Due to security restrictions, they have limited freedom of movement and no

¹⁸ Anna Flagg & Joseph Neff, *Why Jails Are So Important in the Fight Against Coronavirus*, Marshall Project, Mar. 31, 2020, available at <https://bit.ly/2JFsquw>.

¹⁹ As Kentucky’s Chief Justice recently warned, “Jails are susceptible to worse-case scenarios due to the close proximity of people and the number of pre-existing conditions.” Kyle C. Barry, *Some Supreme Courts Are Helping Shrink Jails to Stop Outbreaks. Others Are Lagging Behind.*, The Appeal, Mar. 25, 2020, available at <https://bit.ly/34dog8t>.

control over the movements of others. The World Health Organization (WHO) has recognized that incarcerated people “are likely to be more vulnerable to the coronavirus disease (COVID-19) outbreak than the general population because of the confined conditions in which they live together.”²⁰ The CDC likewise observes that social distancing—the “cornerstone” of reducing Covid-19 transmission—is “challenging” in a jail environment.²¹ And “challenging” is an understatement. It can be “impossible” for people in jails “to practice the social distancing measures which government, public health and medical officials all advocate.”²²

²⁰ World Health Org., *Preparedness, Prevention and Control of COVID-19 in Prisons and Other Places of Detention: Interim Guidance*, Mar. 15, 2020, available at <https://bit.ly/2wfl1My>.

²¹ Ctrs. for Disease Control & Prevention, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, Mar. 23, 2020, available at <https://bit.ly/2JTizDD> (hereinafter, “CDC *Interim Guidance*”).

²² *United States v. Grobman*, No. 18-CR-20989 (S.D. Fla. Mar. 29, 2020) (ordering release of detainee being housed at a detention center); *see also, e.g., United States v. Bolston*, No. 1:18-CR-382 (N.D. Ga. Mar. 30, 2020) (ordering release of defendant in part because “the danger inherent in his continued incarceration . . . during the COVID-19 outbreak justif[ies] his immediate release from custody”); *United States v. Davis*, No. 1:20-CR-9 (D. Md. Mar. 30, 2020) (ordering release of defendant due to the “urgent priority” of decarcerating, to protect both the defendant and the community); *United States v. Kennedy*, No. 18-CR-20315 (E.D. Mich. Mar. 27, 2020) (ordering release of defendant because “waiting for either Defendant to have a confirmed case of COVID-19, or for there to be a major outbreak in Defendant’s facility . . . would create serious medical and security challenges to the existing prison population and the wider community”); *United States v. Jaffee*, No. 19-CR-88, 2020 WL 1529158 (D.D.C. Mar. 26, 2020) (ordering release of defendant despite his criminal history because “incarcerating the defendant while the current COVID-19 crisis continues to expand poses a greater risk to community safety than

As the virus spreads through a jail, the idea of social distancing for those inside becomes less likely still. Under CDC guidance, confirmed or suspected Covid-19 cases should be immediately quarantined and placed into medical isolation.²³ The CDC recommends that all jails attempt to “create space for isolating” but acknowledges that “options for medical isolation are limited.”²⁴ Indeed, many large jails are already over capacity. As case numbers rise inside these jails, more and more of their limited space must be converted to medical quarantine and treatment zones. Simultaneously, people not in quarantine will be packed into ever-shrinking living quarters, subjected to overcrowding and even greater risks of Covid-19 transmission.

posed by Defendant’s release to home confinement”); *United States v. Harris*, No. 19-CR-356 (D.D.C. Mar. 26, 2020) (“incarcerating Defendant while the current COVID-19 crisis continues to expand poses a far greater risk to community safety than the risk posed by Defendant’s release to home confinement”); *United States v. Barkman*, No. 3:19-CR-52 (D. Nev. Mar. 17, 2020) (suspending confinement order, noting “conditions of pretrial confinement create the ideal environment for the transmission of contagious disease”); *Jimenez v. Wolf*, No. 1:18-CV-10225 (D. Mass. Mar. 26, 2020) (ordering release of detained immigrant and noting that “being in a jail enhances risk” and that in jail “social distancing is difficult or impossible”); *Thakker v. Doll*, No. 1:20-CV-00480, 2020 WL 1671563 (M.D. Pa. Mar. 31, 2020) (ordering release of 13 people from three immigration detention facilities in Pennsylvania because “preventative measures” against the “grave risk” of Covid-19 cannot be practiced in “tightly confined, unhygienic spaces”); *Fraihat v. Wolf*, No. 2:20-CV-590 (C.D. Cal. Mar. 30, 2020) (ordering release of individual from immigration detention facility because Covid-19 “can spread uncontrollably with devastating results in a crowded, closed facility”).

²³ CDC *Interim Guidance*.

²⁴ *Id.*

b. Deficient preventive hygiene in jails

Jail detainees are also unable to avoid Covid-19 transmission through surface contamination. One of the CDC's principal recommendations for lowering the risk of infection is to maintain vigilant hygiene.²⁵ This is a difficult task—research shows the virus can remain in the air for up to three hours, and on hard surfaces like those found in jails for two to three days.²⁶ Even under the best of circumstances, preventive hygiene is impossible in jails. Detainees are required to share or touch objects used by others. Toilets, sinks and showers are shared, without decontamination between each use. Food preparation and service is communal, providing numerous opportunities to spread the virus. The CDC recommends that individuals regularly disinfect frequently used surfaces and wash their hands or use alcohol-based hand sanitizer,²⁷ but detainees have limited access to cleaning supplies, hygiene items, and opportunities to wash themselves or change clothes. Sinks can be broken, and paper towels and soap may be

²⁵ See, e.g., *id.*; see also Ctrs. for Disease Control & Prevention, *How to Protect Yourself & Others*, available at <https://bit.ly/2yBZm6U> (hereinafter, “*How to Protect Yourself*”).

²⁶ Neeltje van Doremalen et al., *Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1*, *New England J. of Med.*, Mar. 17, 2020, available at <https://bit.ly/2Xebv>; Marilyn Marchione, *Novel Coronavirus Can Live on Some Surfaces for Up to 3 Days, New Tests Show*, *Time*, Mar. 11, 2020, available at <https://bit.ly/2V3hyOm>.

²⁷ *How to Protect Yourself*.

unavailable or accessible only to those with money to purchase them from a commissary. Everyone must share communal equipment such as telephones, with one user's respiratory droplets left on the plastic mouthpiece for the next person to pick up. These conditions greatly increase the rate at which the virus will spread.

c. Dangerous understaffing due to staff illness

The health of detainees and the health of jail staff are inseparable during this pandemic. Acknowledging that reality, the CDC and the American Correctional Association recommend that jails plan for staff shortages.²⁸ Like detainees, jail staff—correctional officers, medical professionals, and other critical staff—struggle to maintain social distancing and personal hygiene as they are brought into constant close contact with detainees and fellow staff members through the nature of their work. They arrive and leave on a shift basis, and there is limited ability to screen them for asymptomatic infection. Inevitably, staff will become infected. That will be particularly true in jails that fail to provide staff with personal protective equipment.²⁹ As staff members are required to quarantine, seek treatment, or care for dependents, jails are at risk of becoming understaffed. Understaffing makes managing internal safety in carceral settings even more

²⁸ CDC *Interim Guidance*; Am. Correctional Ass'n, *Coronavirus COVID-19 Resources and Information*, available at <https://bit.ly/34dG17H>.

²⁹ See, e.g., Ltr. from M. Willenson to T. Preckwinkle & T. Dart, Mar. 31, 2020, available at <https://bit.ly/2V5A712> (hereinafter, "Ltr. from Willenson").

challenging by forcing remaining staff members to interact with a greater number of detainees, increasing the risk that staff will spread the virus throughout the jail in the course of their many interactions with inmates.³⁰

d. Medical vulnerabilities of people in jails

Infection will be particularly destructive to people in jails, who are more medically vulnerable than their peers in the community. Half of all incarcerated persons suffer from at least one chronic disease.³¹ Health conditions that make Covid-19 more dangerous—such as tuberculosis, asthma, HIV, hypertension, diabetes, and heart problems—are significantly more common in the incarcerated population than in the general U.S. population.³² Indeed, the CDC has observed that Covid-19 presents a particularly severe danger in correctional facilities because “incarcerated/detained populations have higher prevalence of infectious and chronic diseases and are in poorer health than the general population, even at younger ages.”³³

³⁰ Stern Decl. ¶ 7.

³¹ Laura M. Maruschak & Marcus Berzofsky, *Medical Problems of State and Federal Prisoners and Jail Inmates, 2011–12*, U.S. Dep’t of Justice, available at <https://bit.ly/2UNREiN>.

³² Peter Wagner & Emily Widra, *No Need to Wait for Pandemics: The Public Health Case for Criminal Justice Reform*, Prison Policy Initiative, Mar. 6, 2020, available at <https://bit.ly/3bX8IIW>.

³³ CDC *Interim Guidance*.

e. Viral spread through detainee turnover

The boundary between a jail and the surrounding community is porous; people are steadily booked into jail while others are released, creating an active connection between inside and outside, compounded by the daily movements of jail staff. The CDC notes that the transience of jail populations poses a unique infection risk, in that jails “have high turnover, admitting new entrants daily who may have been exposed to Covid-19 in the surrounding community or other regions.”³⁴ Particularly for large jails located in virus hotspots, the churn of people in and out threatens to accelerate the spread of the disease. Every new booking—even those who are released within a few hours or days—is an opportunity for an infected person to bring the virus into the jail.³⁵

³⁴ *Id.*

³⁵ Additionally, given the inmate turnover in jails, whatever conditions arise in the jail are soon cycled out into the community through released detainees and staff members going home from work. Therefore, medical professionals have called for “comprehensive responses that straddle correctional facilities and the community.” Matthew J. Akiyama et al., *Flattening the Curve for Incarcerated Populations—Covid-19 in Jails and Prisons*, *New England J. of Med.*, Apr. 2, 2020, available at <https://bit.ly/39MwKEX>; see also T.S. Mabud et al., *Evaluating Strategies for Control of Tuberculosis in Prisons and Prevention of Spillover into Communities*, *PLOS Med.*, Jan. 24, 2019, available at <https://bit.ly/39MwKEX> (noting that in a study of tuberculosis in prison, scientists found that “the prison environment, more so than the prison population itself, drives TB incidence, and targeted interventions within prisons could have a substantial effect on the broader TB epidemic”).

2. Examples of Recent Outbreaks in Jails

Recent eruptions of Covid-19 cases in two jails starkly illustrate the ease with which Covid-19 spreads in the confined, unhygienic spaces of a jail. In Chicago’s Cook County Jail, Covid-19 has overwhelmed the jail. As of April 5, 234 detainees and 78 members of the facility staff have already tested positive for the virus.³⁶ That is an infection rate among detainees nearly *40 times* the rate in the surrounding community.³⁷ Staff members allege that the jail’s conditions “reflect a cavalier disregard of human life” and “violate CDC guidelines for detention centers.”³⁸

Even jails that follow best practices find it impossible to stem the tide. At New York City’s Rikers Island jail complex, the jail’s lead doctor and his team not only followed CDC guidelines but “moved mountains to protect [their] patients.”³⁹ Nevertheless, a week after the first reported case, the virus’s “attack rate” on Rikers Island—the rate at which the population is being infected—was 85 times

³⁶ NBC Chicago, *Cook County Jail Now Reports 234 Inmates Have Tested Positive for Coronavirus*, Apr. 5, 2020, available at <https://bit.ly/3e1Hoe3>.

³⁷ See Complaint, *Mays v. Dart*, No. 1:20-cv-2134 (N.D. Ill. Apr. 3, 2020), available at <https://cdn.buttercms.com/lCkzzgesSmy3T5HR7iVQ>.

³⁸ Ltr. from Willenson.

³⁹ Miranda Bryant, *Coronavirus Spread at Rikers Is a ‘Public Health Disaster’, Says Jail’s Top Doctor*, Guardian, Apr. 1, 2020, available at <https://bit.ly/2V1SuqU>.

higher than the average in the United States.⁴⁰ Today, just over two weeks since the jail’s first reported case, at least 239 inmates—over 5 percent of the jail’s population—are infected.⁴¹ At least 273 jail staff members are known to be infected⁴² and thousands more are out sick.⁴³ The pace of contagion is staggering; in one 24 hour period last week, 47 inmates and 54 staff members tested positive.⁴⁴ The rapidly deteriorating conditions at Rikers led the jail’s doctor to warn of a “public health disaster unfolding before our eyes.”⁴⁵

Rikers is a grim warning to other jails that, in an environment seemingly designed to accommodate and spread the virus, the only viable mitigation strategy is to reduce the inmate population to a manageable level.

⁴⁰ See Pet. for Writ of Habeas Corpus, *Stoughton v. Brann*, No. 260154, (Bronx Sup. Ct. Mar. 25, 2020), available at <https://bit.ly/3e7hHJo>.

⁴¹ Legal Aid Society, *COVID-19 Infection Tracking in NYC Jails*, available at <https://bit.ly/3bTnkJ1>.

⁴² Erin Doherty & Kelly Cannon, ‘We Need Help’: Inmates Describe Prison System Unprepared for Coronavirus, ABC News, Apr. 5, 2020, available at <https://abcn.ws/3aMgHs2>.

⁴³ Reuven Blau & Rosa Goldensohn, *First Rikers Virus-Positive Fatality Was Jailed on a Technicality*, The City, Apr. 6, 2020, available at <https://bit.ly/2UNMjI6>.

⁴⁴ Julia Craven, *Coronavirus Cases Are Spreading Rapidly on Rikers Island*, Slate, Apr. 2, 2020, available at <https://slate.com/news-and-politics/2020/04/rikers-coronavirus-cases-increase.html>.

⁴⁵ Bryant, *Coronavirus Spread at Rikers Is a ‘Public Health Disaster’*.

3. Nationwide Efforts to Reduce Jail Populations

The global Covid-19 pandemic has altered the landscape of everyday American life in ways previously thought unimaginable. Officials have taken unprecedented health measures to facilitate and enforce social distancing. Three out of four Americans are now under some sort of lockdown or shelter-in-place order from their local authorities, including all 10.6 million Georgians.⁴⁶ Restaurants, bars, gyms, and movie theaters are closed. Social gatherings are cancelled. Professional sports are on hiatus. The 1.6 million children in Georgia’s public schools are learning remotely for the rest of the school year.⁴⁷ “Non-essential” workers have been ordered to “shelter in place,” under threat of enforcement by the Georgia State Patrol.⁴⁸

Recognizing that social distancing and preventive hygiene cannot be employed effectively in a jail or prison setting, judges, prosecutors, and correctional authorities across the country are taking action.⁴⁹ Facilities in Los

⁴⁶ Covid Act Now, *available at* <https://covidactnow.org/>.

⁴⁷ Ty Tagami, *Kemp Orders Schools Closed Through End of School Year*, Atlanta J. Const., Apr. 1, 2020, *available at* <https://bit.ly/2xTYoCM>.

⁴⁸ Greg Bluestein, *Kemp Details Georgia’s Statewide Shelter in Place Order*, Atlanta J.-Const., Apr. 2, 2020, *available at* <https://bit.ly/2JI6b9q>.

⁴⁹ Courts have recognized that, in certain circumstances, releasing incarcerated people can be the only way to ensure the delivery of adequate medical care required by the Eighth and Fourteenth Amendments. *See Brown v. Plata*, 563 U.S. 493, 510-30 (2011).

Angeles, New York City, Chicago, Oakland, Cleveland, Nashville, Houston, San Antonio, Charlotte, and numerous other jurisdictions are releasing thousands of individuals because of the threat Covid-19 poses inside correctional facilities.⁵⁰

Many of the releases have occurred as a result of judicial actions. For example, the New Jersey Supreme Court issued a consent order for the presumptive release of approximately 1,000 persons.⁵¹ Similarly broad judicial orders have been entered

⁵⁰ See, e.g., Justin Carissimo, *1,700 Inmates Released from Los Angeles County in Response to Coronavirus Outbreak*, CBS News, Mar. 24, 2020, available at <https://cbsn.ws/3dQAQyW>; John Bowden, *New York City Has Released 900 Inmates in Response to Coronavirus Pandemic*, Mar. 31, 2020, available at <https://bit.ly/2XaQ38d>; Brendan Lyons, *NY to Release 1,100 Parole Violators as Coronavirus Spreads*, Times Union, Mar. 27, 2020, available at <https://bit.ly/2yEIFI2>; Clara Rodas, *Alameda County Superior Court Releases 247 Inmates in Light of COVID-19*, Daily Californian, Mar. 19, 2020, available at <https://bit.ly/3aJzFY>; Scott Noll, *Cuyahoga County Jail Releases Hundreds of Low-Level Offenders to Prepare for Coronavirus Pandemic*, News 5 Cleveland, Mar. 20, 2020, available at <https://bit.ly/2yCzTKC>; Mariah Timms, *'It's Critical We Reduce the Inmate Population': Nashville Sheriff to Release Inmates During COVID-19 Pandemic*, Nashville Tennessean, Mar. 19, 2020, available at <https://bit.ly/2V6d9tR>; Gabrielle Banks, *Sheriff Says Order for Some Releases at Harris County Jail Is Not Enough*, Houston Chronicle, Mar. 23, 2020, available at <https://bit.ly/2XbbzK3>; Scott Huddleston, *Sheriff Defends Releases from Jail in Downtown San Antonio, Says it's Helping Reduce Coronavirus Spread*, San Antonio Express-News, Mar. 31, 2020, available at <https://bit.ly/2V5VjqZ>; Michael Gordon & Ames Alexander, *Mecklenburg Begins Releasing Jail Inmates to Avoid Cellblock Outbreak of COVID-19*, Charlotte Observer, Mar. 19, 2020, available at <https://bit.ly/2XacTwn>.

⁵¹ Tracey Tully, *1,000 Inmates Will Be Released From N.J. Jails to Curb Coronavirus Risk*, N.Y. Times, Mar. 23, 2020, available at <https://nyti.ms/34aEeQU> (reporting the release of up to 1,000 people serving county jail sentences for probation violations, municipal court convictions, "low-level indictable crimes," and disorderly persons offenses).

in other states.⁵² Such releases not only protect the people with the greatest vulnerability to serious illness and death from Covid-19, they also allow those who remain incarcerated to better maintain social distancing. Moreover, because jail populations are at particularly high risk of complications from Covid-19—and treating such complications will ultimately consume scarce community health resources—releases that lower the risk of disease in jail are critical contributions to public health overall.⁵³

The urgent efforts underway to reduce jail populations underscore the reality that the Covid-19 pandemic is an extraordinary threat demanding extraordinary and decisive responses by our government.

⁵² See, e.g., Cal. Judicial Council, Emergency Rule 4(c), Apr. 6, 2020, available at <https://bit.ly/3aOu37d> (statewide rule setting bail at \$0 most misdemeanors and nonviolent felonies); Jamie Satterfield, *Knox Judges Issue ‘Extraordinary’ Book-and-Release Order Amid Coronavirus Outbreak*, Knoxville News Sentinel, Mar. 30, 2020, available at <https://bit.ly/2xU88wN>; Ben Pounds, *Virus: Cutting Number of Inmates Held at Jail*, The Oak Ridger, Apr. 3, 2020, available at <https://bit.ly/39Uup2>.

⁵³ Akiyama, *Flattening the Curve for Incarcerated Populations* (“To promote public health, we believe that efforts to decarcerate, which are already under way in some jurisdictions, need to be scaled up; and associated reductions of incarcerated populations should be sustained. The interrelation of correctional-system health and public health is a reality not only in the United States but around the world.”); see also Cal. Judicial Council, Report on Item No. 20-141 at 9, Apr. 6, 2020 available at <https://bit.ly/2V8X72l> (noting “trial courts have a vital role to play in balancing public safety and public health by assisting to safely reduce jail populations in a manner that protects the health of inmates, jail staff, those who transport defendants to courts, and others as individuals leave jail and return to their communities”).

B. Lessons Learned in Litigation Concerning Fulton County Jail

Since 1999, the Southern Center for Human Rights has litigated three lawsuits concerning conditions in the Fulton County Jail.⁵⁴ In the first of these cases, *Foster v. Fulton County*, a class of HIV-positive detainees sued to remedy the jail's unconstitutional conditions of confinement and inadequate medical care. That case resulted in a consent decree for preliminary injunctive relief entered a week after the case was filed in April 1999, and, in January 2000, was finally disposed of with a settlement agreement and consent decree addressing medical care, understaffing, sanitation.⁵⁵ The court appointed Dr. Robert B. Greifinger, M.D., an expert in correctional medicine, to monitor implementation of the decree. In November 2002, the parties reached an agreement under which the consent decree terminated and Dr. Griefinger continued to monitor healthcare delivery at the jail for another 18 months.

In connection with monitoring the *Foster* consent decree and settlement agreement, it became clear that the jail faced systemic inhumane conditions affecting all detainees, not just the class of HIV-positive people at issue in the

⁵⁴ In addition to the civil actions discussed in this brief, the Center has represented individual defendants in criminal cases and habeas actions, including seeking release of people detained solely because they could not afford bail.

⁵⁵ *Final Settlement Agreement*, No. 1:99-CV-900 (Jan. 25, 2000) (Shoob, J.) (adopting settlement agreement as court order).

Foster litigation. In May 2004, after his eighteenth visit to the jail in five years, Dr. Griefinger reported that the jail was “in a state of crisis, necessitating immediate action to reduce the inmate population, increase the security staffing, and repair and maintain the basic systems required for basic health and safety.”⁵⁶ The following month, the Southern Center filed a class-action complaint on behalf of all Fulton County Jail detainees in *Harper v. Bennett*.⁵⁷ The *Harper* litigation was resolved by a consent order entered in December 2005.⁵⁸ The order addressed chronic understaffing and overcrowding at the jail, as well as sanitation, maintenance of the jail’s failing physical plant, medical and mental health care, and other issues. The consent order remained in effect for nearly ten years, finally terminating in May 2015.⁵⁹

In April 2019, the Southern Center and the Georgia Advocacy Office filed *Georgia Advocacy Office v. Jackson*⁶⁰ on behalf of people with psychiatric disabilities held in the Fulton County Jail’s South Annex, a facility in Union City

⁵⁶ Report of Dr. Greifinger, May 31, 2004, attachment to Amended Complaint, No. 1:04-CV-1416 (N.D. Ga. June 22, 2004) (Doc. 4 at 27-32).

⁵⁷ No. 1:04-CV-1416 (N.D. Ga.). The *Harper* case was originally filed by pro se detainee Frederick Harper in May 2004.

⁵⁸ Consent Order, *Harper v. Bennett*, No. 1:04-CV-1416 (N.D. Ga. Dec. 21, 2005) (Doc. 89).

⁵⁹ Order, *Harper v. Bennett*, No. 1:04-CV-1416 (N.D. Ga. May 12, 2015).

⁶⁰ No. 1:19-CV-1634 (N.D. Ga.).

used to hold Fulton County’s women detainees. Among other things, the *Georgia Advocacy Office* case challenges the jail’s practice of holding mentally ill women in solitary confinement under unsanitary conditions. In July 2019, the federal court presiding over that litigation entered a preliminary injunction ordering the Fulton County Sheriff to provide increased out-of-cell time to those women and to develop a plan for improving sanitation and activities for women held in mental health housing.⁶¹

Though the *Foster*, *Harper*, and *Georgia Advocacy Office* cases differed in certain ways, each case reveals problems that have persisted over time. These problems are concerning under any circumstances. In the context of the current public health crisis, they are virtually certain to overwhelm the jail’s capacity to provide for detainees’ basic needs.

1. Overcrowding

The Fulton County Jail—which includes a main facility at 901 Rice Street and smaller annexes in Atlanta, Alpharetta, and Union City—has long operated in excess of its design capacity. Regarding the Rice Street facility, “the original design capacity of the jail was only 1,332.”⁶² After the jail was designed but before construction was completed, Fulton County decided to designate 918 cells

⁶¹ Order, No. 1:19-CV-1634 (N.D. Ga. July 23, 2019) (Doc. 65).

⁶² *Foster v. Fulton County*, 223 F. Supp. 2d 1301, 1304 n.4 (N.D. Ga. 2002).

originally designed for single-person occupancy into two-person cells.⁶³ On paper, this change resulted in a nominal jail capacity of 2,250. However, “jail capacity is not simply a matter of counting beds,” and planners failed to improve the capacity of “plumbing, heating, ventilation, and air conditioning systems” designed for 1,332 rather than 2,250 people.⁶⁴

In an order entered in 2002, the federal court overseeing the *Foster* case noted that “jail overcrowding strains the systems of ventilation, sanitation, and plumbing at the jail.”⁶⁵ There were “frequent floods and sewage leaks” and “inoperable toilets, showers, and sinks” despite renovations.⁶⁶ Moreover, “crowding *promotes transmission of communicable diseases*, especially air-borne diseases such as tuberculosis,” “impedes the effectiveness mental health medication,” “interferes with delivery of medical care,” and “makes sanitary food preparation very difficult.”⁶⁷

In connection with the 2005 consent decree entered in the *Harper* case, the jail was required to improve some of the plumbing, ventilation, and maintenance

⁶³ *Id.* at 1304 n.4.

⁶⁴ *Id.*

⁶⁵ *Id.* at 1302 n.1.

⁶⁶ *Id.* at 1300, 1302 n.1.

⁶⁷ *Id.* at 1302 n.1 (emphasis added).

issues⁶⁸ that had brought the jail’s systems to the verge of “collapse[.]”⁶⁹ However, those improvements did not change the fact that well over 2,000 inmates continued to be held in a jail originally designed for around 1,300. Under the *Harper* consent decree, the main jail population was ultimately capped at 2,500 detainees⁷⁰—nearly double the jail’s original design capacity. Because Fulton County often holds around 3,000 or more detainees, the *Harper* consent decree’s population cap necessitated removal of many detainees from the main jail to other jails, often through agreements to house Fulton County inmates in other jurisdictions. Fulton County eventually purchased a former municipal jail in Union City (the “South Annex”), which has a design capacity of 260 beds.⁷¹ Fulton County also operates a facility on Marietta Street (the “Marietta Annex”) with a design capacity of 96 beds, and a facility in Alpharetta (the “Alpharetta Annex”) with a design capacity of 36 beds.⁷² Together with the main jail, these four facilities have a design

⁶⁸ See, e.g., Consent Order at 13-21, *Harper v. Bennett*, No. 1:04-CV-1416 (N.D. Ga. Dec. 21, 2005) (Doc. 89).

⁶⁹ *Foster*, 223 F. Supp. 2d at 1304 n.4.

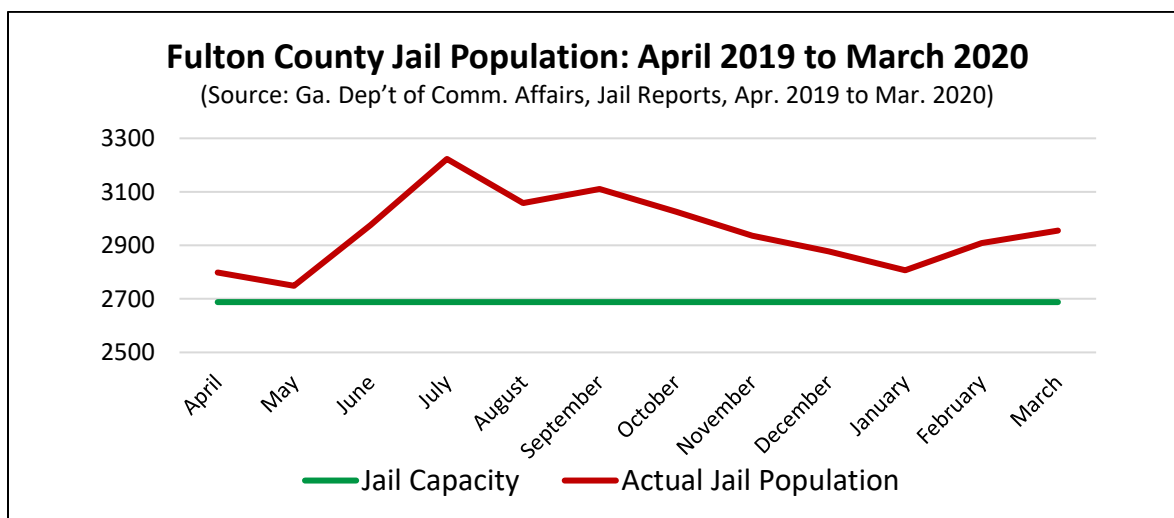
⁷⁰ Order, *Harper v. Bennett*, No. 1:04-CV-1416 (N.D. Ga. Apr. 29, 2010) (Doc. 247). The consent decree originally capped the population at 2,250 detainees.

⁷¹ CGL Companies, *Fulton County, Georgia, Staffing Analysis & Assessment* 3-8 (Dec. 2015), available at <https://bit.ly/39FNvkY>.

⁷² *Id.* On April 3, 2020, the Fulton County Sheriff’s Office announced that it planned to close the Alpharetta Annex indefinitely beginning on April 5. Other recent news reports indicate that the Alpharetta Annex closed before that. See, e.g., Everett Catts,

capacity rating of around 2,596 detainees, and an operational capacity of 2,207 detainees under normal conditions.⁷³

The jail system frequently operates at or above design, operational, and bed capacity. This was true during the *Foster* and *Harper* cases, during which the jail frequently reached the point where inmates were forced to sleep “on the floors of their housing units in large numbers.”⁷⁴ And overcrowding remains the norm today. In fact, in each month from April 2019 through March 2020, the jail has exceeded capacity⁷⁵:



Fulton County Jail's Coronavirus Cases Sound Alarm for Officials and Residents, The Neighbor, Apr. 1, 2020, available at <https://bit.ly/2V0WhVp>.

⁷³ CGL Companies, *Staffing Analysis & Assessment* at 3-8.

⁷⁴ See, e.g., Calvin A. Lightfoot, *Twenty-Eighth Quarterly Report of the Court Monitor* 2-3, No. 1:04-CV-1416 (N.D. Ga. Oct. 21, 2013) (Doc. 303) (noting over 4,000 instances where detainees were required to sleep on the floor of the jail due to lack of available beds).

⁷⁵ Ga. Dep't of Comm. Affairs, *Monthly Jail Reports*, available at <https://bit.ly/2JEILSg>.

As of March 5, 2020, the jail held 2,955 detainees.⁷⁶ That population is greater than the populations of over half the cities in Georgia⁷⁷ but is concentrated inside a few buildings, principally the Rice Street jail.

Even under normal conditions, the jail’s frequent overcrowding raises constitutional concerns by placing “enormous strain” on the jail’s resources.⁷⁸ In 2002, the federal court presiding over the *Foster* litigation recognized the especially high risk of contagion and compromised medical care that result from overcrowding. The Court found that the crowding back then “adversely affect[ed] living conditions at the jail, increase[ed] the risk of exposure to dangerous diseases, and interfere[ed] with the provision of adequate medical care.”⁷⁹ Those same concerns continue today. Just last year, overcrowding in the jail resulting in “a critical situation for Fulton County,” with “about 180 inmates . . . sleeping on mattresses on the floor in open areas.”⁸⁰ Fulton County Chief Jailer Mark Adger

⁷⁶ Ga. Dep’t of Comm. Affairs, *County Jail Inmate Population Report* 9, Apr. 1, 2020, available at <https://bit.ly/2xIGNah>.

⁷⁷ Ga. Governor’s Office of Planning and Budget, *Population Estimates, City and Town Population Estimates 2018*, available at <https://bit.ly/2V0eBOn>.

⁷⁸ *Foster*, 223 F. Supp. 2d at 1314-15.

⁷⁹ *Id.* at 1302; see also *Foster v. Fulton County*, 223 F. Supp. 2d 1292, 1294 (N.D. Ga. 2002) (noting that “overcrowding causes a myriad of problems that increase the likelihood of disease and interfere with the delivery of adequate medical care” and describing the jail’s conditions as “totally unacceptable”).

⁸⁰ Areielle Kass, *Population in Fulton County Jails Surges Again*, Atlanta J.-Const., June 19, 2019, available at <https://bit.ly/2JGKwhu>.

noted in particular that “medical services [were] being stressed” due to the jail’s massive inmate population.⁸¹

In short, the Fulton County Jail’s inmate population surpasses design capacity, places considerable strain on the jail’s systems, and frequently pushes those systems to the limit under ordinary conditions. The significant additional strain of a global pandemic reaching the jail can be expected to push those systems well beyond the breaking point.

2. Understaffing

The second entrenched problem in the Fulton County Jail is understaffing, particularly with respect to detention officers. Understaffing is exacerbated by the jail’s perennial overcrowding problem, as overcrowding greatly “increases the demands placed on correctional officers.”⁸² In testimony last year, Chief Jailer Adger explained that detainees in jails are unusually dependent on detention officers to meet their basic needs because “[i]n jails everything is pushed to the inmates”:

The medication is delivered to the inmates in their housing unit. Their meals are delivered to them in their housing units. Their linen exchange, their commissary, their mail is all delivered to them in the housing unit, so there’s a

⁸¹ Kass, *Population in Fulton County Jails Surges Again*.

⁸² *Foster*, 223 F. Supp. 2d at 1312.

hierarchy of activities that have to occur in an orderly manner.⁸³

For the past 20 years, the jail has struggled to recruit and retain enough officers to provide basic needs to detainees, and the consequences of jail's failures in that regard have fallen disproportionately on people with special medical needs. In *Foster*, for example, the district court found that “the number of inmates who are HIV-positive or have other health problems” was so high that “even if *all* positions were filled, there would still not be sufficient staff to assure inmates timely access to medical care.”⁸⁴ Understaffing continued to plague the jail throughout the 11 years of the *Harper* litigation.⁸⁵ In the court-appointed monitor's last quarterly report concerning implementation of the consent decree, the monitor observed that staffing was the “[t]he only item left” that the jail had

⁸³ Tr. of Hr'g 91, July 19, 2019, *Georgia Advocacy Office v. Jackson*, No. 1:19-CV-1634 (N.D. Ga. Jul. 29, 2019) (Doc. 69).

⁸⁴ *Foster*, 223 F. Supp. 2d at 1297.

⁸⁵ See, e.g., Calvin A. Lightfoot, *Thirteenth Quarterly Report of the Court Monitor 5, Harper v. Bennett*, No. 1:04-CV-1416 (N.D. Ga. Jan. 19, 2010) (Doc. 238) (noting “drastic reduction in compliance” with staffing requirements); Calvin A. Lightfoot, *Eighteenth Quarterly Report of the Court Monitor 5, Harper v. Bennett*, No. 1:04-CV-1416 (N.D. Ga. Apr. 13, 2011) (Doc. 252) (noting one of the “major items that remain out of compliance” was “staffing” the jail); Calvin A. Lightfoot, *Twenty-First Quarterly Report of the Court Monitor 5, Harper v. Bennett*, No. 1:04-CV-1416 (N.D. Ga. Jan. 9, 2012) (Doc. 262) (noting the jail's “staffing difficulties”); Calvin A. Lightfoot, *Twenty-Fourth Quarterly Report of the Court Monitor 5, Harper v. Bennett*, No. 1:04-CV-1416 (N.D. Ga. Oct. 9, 2012) (Doc. 277) (noting “staffing jail mandated post[s]” was one of “the remaining Consent Decree items to be complied with”).

never been able to comply with.⁸⁶ The lack of adequate staff so compromised the jail's ability to deliver minimally adequate medical care that in 2014 the National Commission on Correctional Health Care (NCCHC) "voted to withdraw the facility" from NCCHC's accreditation program after a team of NCCHC auditors "identified officer staffing as *the most important deficiency* in the operation of the jail's medical services."⁸⁷

The lack of staffing became a central issue again in the *Georgia Advocacy Office* case, which sought to end the jail's practice of holding seriously mentally ill women in prolonged solitary confinement. During that case, jailers explained that "the main challenge is staffing."⁸⁸ The amount of time that women were confined to their cells was "determined by staffing," because the jail needed "enough staff available to supervise the activities that normally occur."⁸⁹ However, the jail was frequently "short-staffed" to the point that senior jail administrators "worked as line staff"⁹⁰ in the jail, filling in for absent line officers, and it was "not unusual" for officers to fail to perform such basic tasks as security rounds in the housing

⁸⁶ Calvin A. Lightfoot, *Thirty-Fourth Quarterly Report of the Court Monitor 6, Harper v. Bennett*, No. 1:04-CV-1416 (N.D. Ga. Apr. 14, 2015) (Doc. 363).

⁸⁷ Lightfoot, *Thirty-Fourth Quarterly Report 7* (emphasis added).

⁸⁸ Tr. of Hr'g 177 (testimony of Detention Captain Tyna Taylor).

⁸⁹ *Id.* at 87 (testimony of Chief Jailer Adger).

⁹⁰ *Id.* at 178 (testimony of Captain Taylor).

areas.⁹¹ The staffing problems show no sign of improving. As Fulton County Chief Jailer Mark Adger recently testified, “The jail was short-staffed when I got there in 1986, and it’s still short-staffed today. And that’s regardless of the efforts that we’ve undertaken.”⁹²

Like the jail’s overcrowding issues, understaffing causes the jail to operate at and in some cases well beyond the line of what is constitutionally permissible. A pandemic that heightens the medical needs of many detainees while crippling the staff on which detainees depend to meet those needs will likely cause detainees to experience unnecessary illness, suffering, and death.

3. Poor Sanitation

The third recurring problem at the jail concerns unsanitary living conditions. Less than two months after entry of the *Foster* consent decree in 2000, the court-appointed monitor, Dr. Greifinger, submitted a report outlining systemic problems, particularly with regard to “unhygienic” medical areas and housing units “predisposing to the transmission of disease.”⁹³ After reviewing that report, the district court lamented “the deplorable conditions at the Jail” and encouraged

⁹¹ *Id.* at 118 (testimony of Chief Jailer Adger).

⁹² *Id.* at 103-04.

⁹³ *Report on Medical Care for HIV-Infected Inmates at Fulton County Jail: Initial Assessment* 13, No. 1:99-CV-900 (N.D. Ga. Mar. 2, 2000) (also noting “inadequate hand washing facilities throughout the medical and dental units”).

Fulton County to remedy them “promptly and expeditiously.”⁹⁴ Two years later, however, the district court found conditions “totally unacceptable” due to, among other problems, inadequate sanitation brought on by overcrowding.⁹⁵

Poor sanitation became a focus again in the 2004 *Harper* case, which coincided with a report by Dr. Greifinger detailing the jail’s “dismal environmental conditions”—conditions that “substantially increase[d] the risk of transmission of illness among inmates and staff.”⁹⁶ The environment was “hot, wet, crowded, [and] tense,” with “leaking pipes throughout the facility, broken or missing security cameras, damaged ceiling tiles and overflowing toilets” and a laundry system “in crisis.”⁹⁷ One unit had “mold like a fur carpet on the ceiling.”⁹⁸ Two months later, after returning to the jail, Dr. Greifinger reported “no improvement in the environmental conditions.”⁹⁹ The district court appointed a receiver to “immediately take every step reasonably necessary to correct the conditions

⁹⁴ *Foster v. Fulton County*, No. 1:99-CV-900, 2000 WL 34016360, at *2 (N.D. Ga. Apr. 11, 2000).

⁹⁵ *Foster*, 223 F. Supp. 2d at 1294.

⁹⁶ Report of Dr. Greifinger 1, May 31, 2004.

⁹⁷ *Id.* at 2-3.

⁹⁸ *Id.* at 2.

⁹⁹ Report of Dr. Greifinger 2, July 12, 2004, *Harper v. Bennett*, No. 1:04-CV-1416 (N.D. Ga. July 12, 2004) (Doc. 35).

described” in Dr. Greifinger’s reports.¹⁰⁰ The case was ultimately resolved with a consent order addressing environmental conditions in the jail.¹⁰¹

Significant sanitation problems arose yet again in connection with the *Georgia Advocacy Office* litigation. Through visits to the South Annex in 2018 and inspections of that facility in 2019, investigators with the Southern Center and the Georgia Advocacy Office found deplorable conditions in housing units used for seriously mentally ill women. Entering the housing units, one was met with “the intense smell of bodily fluids and body odor,”¹⁰² and the units often reeked “overwhelmingly of feces.”¹⁰³ Rust and mold were apparent throughout the jail, toilet water and urine pooled on the floor, and walls were smeared with feces. Shortly after the suit was filed, the district court held a three-day evidentiary hearing concerning conditions at the jail. After hearing the evidence, the court found that the squalor in which women in the jail lived should provoke “a

¹⁰⁰ Order Appointing Receiver 3, *Harper v. Bennett*, No. 1:04-CV-1416 (N.D. Ga. July 13, 2004) (Doc. 41).

¹⁰¹ Consent Order 13-22, *Harper v. Bennett*, No. 1:04-CV-1416 (N.D. Ga. Dec. 21, 2005) (Doc. 89).

¹⁰² Tr. of Hr’g 53, July 15, 2019, *Georgia Advocacy Office v. Jackson*, No. 1:19-CV-1634 (N.D. Ga. Jul. 17, 2019) (Doc. 62).

¹⁰³ Ltr. from S. Ctr. for Hum. Rts. to Sheriff Jackson and Judge Bessen 1, Aug. 17, 2018, *Georgia Advocacy Office v. Jackson*, No. 1:19-CV-1634 (N.D. Ga. May 7, 2019) (Doc. 16-19 at 4-13).

repulsive reaction for anyone who’s aware of it” and that the officials responsible “really ought to have a hard time sleeping at night.”¹⁰⁴

4. Solitary Confinement

The most recent case concerning the jail focuses on the effects of months-long solitary confinement, particularly with respect to individuals with mental illness. As psychiatrist Dr. Jeffery Metzner¹⁰⁵ testified last year, there is now a medical consensus “that it’s harmful to place people with serious mental illness in restricted housing.”¹⁰⁶ Another psychiatrist, Dr. Kelly Coffman,¹⁰⁷ agreed that “solitary confinement is known to exacerbate mental illness.”¹⁰⁸ Even “if someone has not had a previous episode of psychosis or doesn’t have a primary psychotic disorder, they are actually more prone to developing psychotic symptoms, as well, simply from the isolation.”¹⁰⁹ Investigation and litigation has revealed example after example of the concrete harms caused by prolonged solitary confinement of

¹⁰⁴ Tr. of Hr’g 54, July 23, 2019, *Georgia Advocacy Office v. Jackson*, No. 1:19-CV-1634 (N.D. Ga. Jul. 30, 2019) (Doc. 73).

¹⁰⁵ Dr. Metzner has over 40 years of experience in correctional psychiatry. He has consulted with the Georgia Department of Corrections for approximately 20 years.

¹⁰⁶ Tr. of Hr’g 84, July 15, 2019.

¹⁰⁷ Dr. Coffman is an assistant professor of psychiatry at Emory University and serves as director of the Fulton County Jail’s competency restoration program and director of forensic services at Grady Memorial Hospital.

¹⁰⁸ Tr. of Hr’g 26-27, July 18, 2019, *Georgia Advocacy Office v. Jackson*, No. 1:19-CV-1634 (N.D. Ga. Jul. 29, 2019) (Doc. 68).

¹⁰⁹ *Id.* at 27 (testimony of Dr. Coffman).

mentally ill people, including decompensation, self-harm, suicide attempts, and even death.¹¹⁰

Many detainees in the Fulton County Jail are at risk of being harmed by solitary confinement if it is widely imposed. Approximately half of all Fulton County detainees need mental health services, making the Fulton County Jail “the largest de facto mental health facility in Georgia.”¹¹¹ Moreover, even people without preexisting mental disorders can experience profound psychological harm when subjected to prolonged solitary confinement.¹¹² “Nearly every scientific inquiry into the effects of solitary confinement over the past 150 years has concluded that subjecting an individual to more than 10 days of involuntary segregation results in a distinct set of emotional, cognitive, social, and physical pathologies.”¹¹³ As a result of that research, prisons and jails have moved away from any use of prolonged solitary confinement,¹¹⁴ which is defined as more than

¹¹⁰ See, e.g., Addendum Order 12-16, *Georgia Advocacy Office v. Jackson*, No. 1:19-CV-1634 (N.D. Ga. Sept. 23, 2019) (Doc. 94) (describing evidence presented at preliminary injunction hearing).

¹¹¹ Super. Ct. of Fulton Cty., *Accountability Courts—Behavioral Health Treatment Court*, available at <https://bit.ly/2RdjS4h>.

¹¹² See Craig Haney, *Mental Health Issues in Long-Term Solitary and ‘Supermax’ Confinement*, 49 *Crime & Delinquency* 124, 130-31 (2003).

¹¹³ David H. Cloud *et al.*, *Public Health and Solitary Confinement in the United States*, 105 *Am. J. of Pub. Health* 18, 21 (2015).

¹¹⁴ See, e.g., United Nations, *Standard Minimum Rules for the Treatment of Prisoners*, Rule 43(b) (2015).

15 days with less than 22 hours per day of meaningful human contact.¹¹⁵

Importantly, the Fulton County Jail’s principal reason for isolating mentally ill women is that “[s]taffing constraints” allegedly require it.¹¹⁶ This rationale is significant in light of the current public health crisis, which risks crippling the jail’s chronically strained ability to staff the jail with correctional officers. Any effort at social distancing in the jail would require significant amounts of in-cell confinement and carefully supervised out-of-cell time to prevent spread of the virus. As detention officers are required to miss work due to illness or contacts with infected people, the limited number of officers available to work the jail can be expected to simply leave detainees in their cells around the clock.

C. Petitioners’ Detention for Inability to Afford Bail

Each of the Petitioners is a pretrial detainee who has not yet been convicted of crime. Each Petitioner has been determined fit for release from jail upon payment of a certain bond amount, meaning that their release from jail is consistent with the public interest. However, Petitioners cannot afford bail. Therefore, each Petitioner is currently being detained in the jail solely because she or he cannot afford to bond out. As a result, Petitioners face a serious risk of contracting Covid-19 only because they are indigent.

¹¹⁵ *Standard Minimum Rules for the Treatment of Prisoners*, Rule 44.

¹¹⁶ *See, e.g.,* Defs.’ Resp. in Opp’n to Mot. for Prelim. Inj. 7, *Georgia Advocacy Office v. Jackson*, No. 1:19-CV-1634 (N.D. Ga. May 21, 2019) (Doc. 26).

ARGUMENT

The Court should grant the writ and release Petitioners for four reasons.

First, the Fulton County Jail cannot meet detainees' basic needs with its current overpopulation and understaffing.

Second, Petitioners have all been determined fit for release. Detaining them solely for failing to pay money they do not have violates equal protection and due process principles under any circumstances and rises to the level of conscience-shocking disregard for Petitioners' safety in light of the current pandemic.

Third, a significant reduction in the jail's population is necessary to protect not only Petitioners but also those who will remain in the jail. Unless Petitioners are released, the people currently incarcerated in the Fulton County Jail will continue to be exposed to an unacceptably high risk of infection, as well as near-certain solitary confinement for the foreseeable future. This Court is the only government entity with the power to take the decisive action needed to reduce the jail population.

Fourth, the Court's habeas jurisdiction includes the power to order conditions on Petitioners' release. Appropriate nonfinancial conditions—such as an order to remain at home and report periodically to pretrial supervision officers—can accommodate the interests that the State might have in continuing to detain them.

I. There Is No Prospect That the Fulton County Jail Can Safely Hold Its Current Population of Detainees During a Pandemic.

Under the best of circumstances, perennial overcrowding and understaffing in the Fulton County Jail cause conditions in the jail to push the limits—and in some cases cross the line—of what is constitutionally permissible. Despite improvements to the Fulton County Jail’s four facilities, the conditions in the jail today are not dissimilar from the conditions that federal courts found “deplorable” in 2000,¹¹⁷ “totally unacceptable” in 2002,¹¹⁸ a “crisis” in 2011,¹¹⁹ “a significant threat of serious harm” in 2013,¹²⁰ or “repulsive” in 2019.¹²¹ Overcrowding and understaffing continue to overburden the jail’s ability to provide for detainees’ basic needs.

There may be room for debate about whether the Fulton County Jail’s chronic crowding and understaffing are severe enough to violate the rights of many or most detainees under normal circumstances. But the jail, like the rest of the

¹¹⁷ *Foster v. Fulton County*, No. 1:99-CV-900, 2000 WL 34016360, at *2 (N.D. Ga. Apr. 11, 2000).

¹¹⁸ *Foster v. Fulton County*, 223 F. Supp. 2d 1292, 1294 (N.D. Ga. 2002).

¹¹⁹ Order 6, *Harper v. Bennett*, No. 1:04-CV-1416 (N.D. Ga. Sept. 1, 2011) (Doc. 256).

¹²⁰ Order 12, *Harper v. Bennett*, No. 1:04-CV-1416 (N.D. Ga. Jan. 29, 2013) (Doc. 288).

¹²¹ Tr. of Hr’g 54, July 23, 2019, *Georgia Advocacy Office v. Jackson*, No. 1:19-CV-1634 (N.D. Ga. Jul. 30, 2019) (Doc. 73).

nation, has never faced a crisis like the current pandemic. For three reasons, the current crisis will aggravate problems in the jail and gravely undermine its ability to provide safe and humane living conditions.

First, the principal way to avoid widespread infection is for each individual inmate to distance herself or himself from others.¹²² But social distancing and similar protective measures are impossible in the South Fulton Jail or its annexes. With inmates filling most of the jail's beds and confined to tight quarters—sharing the same air and common areas for days, weeks, or months, and with limited opportunities for personal hygiene—it is difficult to imagine a setting more prone to the spread of communicable disease or less consistent with the advice of public health officials. The risk of contagion is further exacerbated by the likelihood of new admissions to the jail and detainees' reliance on detention officers and other staff members to bring them what they need. Frequent contacts between staff members and detainees create numerous pathways for the virus to enter the housing units from outside of the jail and spread widely once inside.

Second, the pandemic is certain to weaken staffing levels at the jail. Detention officers will be taken out of service due to infection or contact with

¹²² See, e.g., Ctrs. for Disease Control & Prevention, *How to Protect Yourself & Others*, Apr. 4, 2020, available at <https://bit.ly/2yBZm6U> (“The best way to prevent illness is to avoid being exposed to this virus.”).

infected individuals.¹²³ Officers who are able to work will be diverted to tasks such as providing security during medical encounters, staying with hospitalized detainees, maintaining personal hygiene, and so forth. The foreseeable result will be disruptions in providing for detainees' basic needs.

Finally, shortages in personal protective equipment, medical devices, and hygiene supplies can be expected to affect the jail just as they have affected other parts of society. If, for example, detention officers cannot obtain facemasks, detainees cannot obtain soap, or medical personnel cannot obtain the equipment or medication they need to treat patients, the likely result will be an inability to provide the "minimal civilized measure of life's necessities" required by the Eighth and Fourteenth Amendments. *See Thomas v. Bryant*, 614 F.3d 1288, 1304 (11th Cir. 2010) (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)).

¹²³ *See, e.g.*, Christian Boone, *Second Lee State Inmate Dies of COVID-19*, Atlanta J.-Const., Apr. 5, 2020, available at <https://bit.ly/2V0ix1I> (noting 24 known infected staff members in Georgia prisons); *Cook County Jail Now Reports 234 Inmates Have Tested Positive for Coronavirus*, NBC Chicago, Apr. 5, 2020 (noting 78 known infected staff members at Chicago's Cook County Jail); Erin Doherty & Kelly Cannon, 'We Need Help': *Inmates Describe Prison System Unprepared for Coronavirus*, ABC News, Apr. 5, 2020, available at <https://abcn.ws/3aMgHs2> (noting 273 known infected jail staff members in New York City); Katie Benner, *Barr Expands Early Release of Inmates at Prisons Seeing More Coronavirus Cases*, N.Y. Times, Apr. 3, 2020, available at <https://nyti.ms/2JHvXKJ> (noting 50 known infected staff members in federal Bureau of Prisons).

II. Jailing Petitioners for Inability to Afford Bail Violates the Fourteenth Amendment.

Each of the Petitioners would be entitled to immediate release from jail if she or he were wealthy, but each remains incarcerated solely for inability to afford the bail set in their respective cases. This violates the Fourteenth Amendment in two ways. First, irrespective of the pandemic, Petitioners' continued confinement violates the Equal Protection and Due Process Clauses because they are being deprived of liberty on account of lack of wealth. Second, detention of Petitioners under these circumstances is unnecessary and shocks the conscience, violating their right to substantive due process.

A. Detaining Petitioners Solely Because They Cannot Afford Bail Is Impermissible Wealth-Based Detention.

It is well established that “the state may not treat criminal defendants more harshly on account of their poverty.” *Jones v. Governor of Fla.*, 950 F.3d 795, 818 (11th Cir. 2020); *id.* at 817 (noting “wealth classifications require more searching review” when they involve “the administration of criminal justice”). “Claims of unlawful discrimination against the indigent in criminal proceedings have a long pedigree in Fourteenth Amendment case law,” *Walker v. City of Calhoun*, 901 F.3d 1245, 1259 (11th Cir. 2018), and the “passage of time has heightened rather than weakened” the rule against “disparate treatment of indigents in the criminal process,” *Williams v. Illinois*, 399 U.S. 235, 241 (1970). This is particularly true

when criminal defendants are detained for failure to make a payment. *See Bearden v. Georgia*, 461 U.S. 660, 664-66 (1983) (holding probationer who failed to make court-ordered payments could not have probation revoked absent finding that nonpayment was willful and less-restrictive alternatives to incarceration would not serve state's legitimate interests); *see also Tate v. Short*, 401 U.S. 395, 396 (1971); *Williams v. Illinois*, 399 U.S. at 237; *Frazier v. Jordan*, 457 F.2d 726 (5th Cir. 1972).

The rule against wealth-based detention has “broader effects and constitutional implications” with respect to bail decisions. *Pugh v. Rainwater*, 572 F.2d 1053, 1057-58 (5th Cir. 1978) (en banc). As applied to an indigent person, any “pretrial confinement for inability to post money bail would constitute imposition of an excessive restraint” if appropriate nonfinancial conditions of release were available. *Id.*; *see also State v. Blake*, 642 So. 2d 959, 968 (Ala. 1994) (“Putting liberty on a cash basis was never intended by the founding fathers as the basis for release pending trial.”).

In light of the long line of cases prohibiting wealth-based detention, Petitioners are being detained under an unconstitutional regime whereby “[t]hose with means avoid imprisonment” while “the indigent cannot escape imprisonment.” *Frazier*, 457 F.2d at 728-29. For this reason alone, the Court should grant a writ of habeas corpus.

B. Subjecting Petitioners to a High Risk of Infection Solely Because They Cannot Afford Bail Shocks the Conscience.

Apart from the general rules against wealth-based detention, continued incarceration of Petitioners shocks the conscience and thus violates their substantive rights under the Due Process Clause. The substantive component of the Due Process Clause is violated by government action that “can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.” *County of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 128 (1992)); see, e.g., *Rochin v. California*, 342 U.S. 165, 172 (1952); see also *United States v. Plummer*, 221 F.3d 1298, 1308-09 (11th Cir. 2000) (noting “unlawfully arbitrary” government action violates substantive due process). Though there is “no calibrated yard stick” for what constitutes conscience-shocking conduct, the standard is less stringent where “the State takes a person into its custody,” officials have the opportunity for “actual deliberation” about what course of action to take, and officials knowingly expose people to a risk of harm. *Lewis*, 523 U.S. at 850-51 (citation omitted).¹²⁴

Keeping Petitioners in custody under these circumstances would constitute arbitrary and conscience-shocking conduct “in a constitutional sense.” See *Lewis*,

¹²⁴ By contrast, where a government actor is involved in circumstances requiring “instant judgment,” such as attempting to apprehend a suspected felon, malicious intent may be required. See *id.* at 853-54.

523 U.S. at 847. Petitioners are in government custody involuntarily, and “the Constitution imposes upon [the State] a corresponding duty to assume some responsibility for [their] safety and general well-being.” *DeShaney v. Winnebago Cty. Dep’t of Social Serv.*, 489 U.S. 189, 199-200 (1989). Moreover, the State, acting through this Court, has time for “actual deliberation” regarding how to respond to the significant risk that holding Petitioners in jail will result in their serious illness or death. *See Lewis*, 523 U.S. at 847. And Petitioners’ fundamental rights are at stake. Those rights include not only Petitioners’ general interest in being released from custody but also their strong interest in not being exposed to a virus that could result in serious illness or death, implicating their fundamental liberty interest in “bodily integrity.” *See Washington v. Harper*, 494 U.S. 210, 237 (1990) (noting an invasion of a person’s bodily integrity “is particularly intrusive if it creates a substantial risk of permanent injury and premature death”); *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982) (“[T]he right to personal security constitutes a ‘historic liberty interest’ protected substantively by the Due Process Clause.” (quoting *Ingraham v. Wright*, 430 U.S. 651, 673 (1977))).

On the other hand, the government’s interest in continuing to detain Petitioners is exceedingly weak. The government, in setting bail, determined that Petitioners’ release is consistent with the public interest. Each Petitioner remains in custody only for failure to pay bail, but the only legitimate interest served by

requiring the “deposit of a sum of money subject to forfeiture” is that doing so “serves as additional assurance *of the presence of an accused.*” *Stack v. Boyle*, 342 U.S. 1, 4 (1951); *see United States v. Rose*, 791 F.2d 1477, 1480 (11th Cir. 1986) (“The purpose of bail is to secure the presence of the defendant.” (quoting *United States v. Powell*, 639 F.2d 224, 225 (5th Cir. 1981))).

The State’s generalized interest in guaranteeing Petitioners’ appearance at trial cannot justify exposing Petitioners to a substantial risk of serious illness or death. The State’s interest can be served by other means and, moreover, is not sufficient in this instance to override Petitioners’ far weightier interest in avoiding detention in an overcrowded, understaffed facility where their likelihood of being infected with a deadly virus is unusually high. As demonstrated by governmental edicts in Georgia and across the country shutting down businesses despite extraordinary economic consequences, a broad societal consensus has emerged that preventing the spread of the virus, and potentially saving lives, outweighs significant financial costs later. The mere possibility that certain individuals might abscond if released—a possibility that, as discussed below, can be addressed through nonfinancial conditions of release—does not justify requiring all Petitioners to remain in jail after the State has determined that they would be fit for pretrial release but for their failure to produce a certain amount of money. *Cf., e.g., Guertin v. State*, 912 F.3d 907, 926 (6th Cir. 2019) (holding that “acting merely

upon a government interest does not remove an actor's decision from the realm of unconstitutional arbitrariness"). Therefore, failing to grant the writ and release Petitioners would violate Petitioners' substantive due process rights.

III. The State and Its Judiciary Have a Duty to Mitigate the Substantial Risk of Harm Faced by All Jail Detainees.

Failing to release Petitioners would constitute deliberate indifference not only to Petitioners but to all current Fulton County Jail detainees. Courts committed each current detainee to the jail, and this Court is the only entity with the power to take prompt and effective action to reduce the jail population and mitigate the risk of harm before conditions in the jail spiral out of control. The relief sought by Petitioners is appropriate given the threat to the thousands of people working in and detained in the Fulton County Jail if the jail population remains at present levels. For this reason as well, the Court should grant the petition.

The Eighth and Fourteenth Amendments prohibit cruel and unusual punishments. *See Thomas v. Bryant*, 614 F.3d 1288, 1303 (11th Cir. 2010) (quoting *Hudson v. McMillian*, 503 U.S. 1, 5 (1992)). That prohibition is predicated on the idea that incarcerated people "retain the essence of human dignity inherent in all persons" and are entitled to living conditions that comport with contemporary standards of decency. *Brown v. Plata*, 563 U.S. 493, 510-11 (2011). Because our institutions are founded on respect for human dignity,

“integrity of the criminal justice system depends on full compliance with the Eighth Amendment.” *Johnson v. California*, 543 U.S. 499, 511 (2005). Pretrial detainees have an equally strong interest that is “protected to the same extent as prisoners by the Fourteenth Amendment’s due process clause.” *Taylor v. Hughes*, 920 F.3d 729, 732-33 (11th Cir. 2019) (citing *Cook ex rel. Estate of Tessier v. Sheriff of Monroe Cty.*, 402 F.3d 1092, 1115 (11th Cir. 2005)) (emphasis added).

A. The Eighth and Fourteenth Amendments Require the State to Take Reasonable Steps to Reduce the Substantial Risk of Covid-19 Infections.

The government violates the Eighth and Fourteenth Amendments when officials are deliberately indifferent to “an objectively ‘unreasonable risk of serious damage to [a detainee’s] future health.’” *Brooks v. Warden*, 800 F.3d 1295, 1303 (11th Cir. 2015) (quoting *Chandler v. Crosby*, 379 F.3d 1278, 1289 (11th Cir. 2004)). Deliberate indifference includes action that is an “objectively insufficient response” to the risk facing detainees. *See Farrow v. West*, 320 F.3d 1235, 1243 (11th Cir. 2003) (quoting *Taylor v. Adams*, 221 F.3d 1254, 1258 (11th Cir. 2000)); *Marsh v. Butler Cty.*, 268 F.3d 1014, 1034 (11th Cir. 2001) (holding “it is an unreasonable response for an official to do nothing” when confronted with a risk of serious harm to detainees). In other words, when government actors are aware of a substantial risk of harm to detainees, they must take “steps aimed at reducing the

likelihood of the risk.” *Rodriguez v. Secretary for Dep’t of Corr.*, 508 F.3d 611, 617 n.12 (11th Cir. 2007).

Here, the Covid-19 pandemic plainly constitutes a substantial risk of serious harm, including serious illness and potentially death. *See Helling v. McKinney*, 509 U.S. 25, 33 (1993) (noting that inmates “crowded into cells” where some “had infectious maladies such as hepatitis and venereal disease” was the type of condition “for which the Eighth Amendment required a remedy”); *see also, e.g., Fruit v. Norris*, 905 F.2d 1147, 1150-51 (8th Cir. 1990) (noting work detail conditions that required prisoners to work without protective equipment could violate the Eighth Amendment by exposing prisoners to infectious diseases). That the potential harm might not “occur immediately” and “might not affect all of those exposed” is not dispositive. *See Helling*, 509 U.S. at 33. The question is “whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk.” *Id.* at 36. As reflected in numerous public acts in Georgia and across the nation aiming to increase separation between people and reduce opportunities for transmission of the virus, society plainly regards the risk of Covid-19 as too great to inflict on people involuntarily. Therefore, the Eighth and Fourteenth Amendments require “steps aimed at reducing the likelihood of the risk” of Covid-19. *See Rodriguez*, 508 F.3d at 617 n.12.

B. Nothing Short of Significantly Reducing the Jail's Inmate Population Will Reasonably Mitigate the Risk of Harm.

Dramatically and immediately reducing the jail's population is the only feasible way to reduce the risk of harm. As discussed above, the Fulton County Jail confines thousands of people in space originally designed for far fewer inmates, and those inmates are almost entirely dependent on short-staffed correctional officers to meet their basic needs. These circumstances ensure that rapid transmission of the virus is likely if the jail's population is not dramatically reduced, and that staffing will be inadequate due to officer attrition and competing duties. There is no time to expand the capacity of the jail or hire new detention officers. The only effective measure to reduce the harm is to release a significant number of detainees.

To date, the State has failed take meaningful steps to reasonably reduce the jail population. As of April 1, only 52 detainees had been released to relieve overcrowding.¹²⁵ This response is objectively insufficient. Dr. Robert Greifinger, an expert in correctional medicine who monitored conditions in the Fulton County Jail for years, recommends a reduction of around 800 detainees to reduce the risk of transmission to tolerable levels.¹²⁶ The need to act is urgent. As Dr. Greifinger

¹²⁵ See Christian Boone, *Expert to Fulton Jail: Release 800 or Risk 'Disaster'*, Atlanta J.-Const., Apr. 1, 2020, available at <https://bit.ly/2V7oz0m>.

¹²⁶ *Id.*

explained, “Every hour inmates are not released is going to exact a cost in human life.”¹²⁷

Releasing Petitioners will not cure the jail’s overcrowding problems entirely, but it will constitute a significant step toward reducing the jail population to acceptable levels. And, for the reasons discussed above, releasing Petitioners will also prevent their further detention solely for wealth-based reasons, avoiding further violations of Petitioners’ rights to due process and equal protection. Thus, granting Petitioners a writ of habeas corpus is a straightforward and reasonable response to the crisis facing staff members and detainees in the Fulton County Jail.

C. Releasing Petitioners Will Also Avoid Unnecessary Solitary Confinement.

Apart from the risk of Covid-19 transmission, any effort to practice social distancing at the jail is likely to amount to solitary confinement of detainees, many of whom suffer from mental illness. Courts have recognized that “[l]ong periods of lock up in a confined space, limited contact with others, continued and unexpected surveillance and limited exercise eventually take a serious toll on the mental health of the inmates.” *Hardwick v. Ault*, 447 F. Supp. 116, 125 (M.D. Ga. 1978). The risk of psychological harm from solitary confinement is even greater for mentally ill detainees. Courts have held that placing seriously mentally ill

¹²⁷ *Id.*

prisoners in segregation “amounts to denial of minimal care.” *See, e.g., Braggs v. Dunn*, 257 F. Supp. 3d 1171, 1246-47 (M.D. Ala. 2017); *Madrid v. Gomez*, 889 F. Supp. 1146, 1265 (N.D. Cal. 1995) (noting solitary confinement of seriously mentally ill detainees “is the mental equivalent of putting an asthmatic in a place with little air to breathe.”).

By granting the writ, the Court will ensure that Petitioners are not subjected to solitary confinement. In turn, the release of Petitioners will reduce strain on staff and space, making it more likely that those detainees who remain in the jail will have sufficient opportunities for out-of-cell time to prevent excessive isolation and resulting psychological harm.

IV. The Court Can Promote Governmental Interests Through Conditional Release.

Any interests that the State has in continuing to hold Petitioners can be achieved by imposing conditions on their release. Habeas courts have broad authority in that regard. Under O.C.G.A. § 9-14-48, a habeas court that finds in favor of the petitioner “shall enter an appropriate order with respect to the judgment or sentence challenged in the proceeding and such supplementary orders as to . . . custody, or discharge *as may be necessary and proper.*” O.C.G.A. § 9-14-48(d) (emphasis added). The Georgia code also authorizes a habeas court to “discharge, remand, or admit the person in question to bail . . . as the principles of law and justice may require.” O.C.G.A. § 9-14-19; see also *Hogan v. Nagel*, 276

Ga. 197, 198 (2003) (habeas court, in releasing petitioner, had authority to fashion a remedy with equitable features). The United States Supreme Court has held that nearly identical language in federal habeas statutes gives courts “broad discretion in conditioning a judgment granting habeas relief.” *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987) (federal courts are authorized to dispose of habeas corpus matters “as law and justice require” under 28 U.S.C. § 2243). Thus, this court has statutory and inherent authority to shape habeas relief through the imposition of reasonable release conditions.

When courts grant habeas relief short of releasing the petitioner outright, they often do so through a conditional writ, ordering the prisoner to be released unless the State takes some action, such as resentencing or granting a new trial or a new appeal. *See State v. Hernandez-Cuevas*, 202 Ga. App. 861, 861 (1992) (“[T]he habeas court has the authority to order that the defendant be remanded to the custody of the trial court, and that unless this transfer is accomplished within a reasonable time the defendant may be released from his present confinement.” (citing O.C.G.A. § 9-14-48(d))); *Balkcom v. Vickers*, 220 Ga. 345, 346 (1964) (judgment granting writ of habeas corpus for denial of counsel at sentencing contained provision that defendant be released from present confinement if trial court did not take custody of him within ten days); *see also Hall v. State*, 304 Ga.

281, 284, 818 S.E.2d 527, 530 (2018) (“The usual way federal courts grant habeas relief short of releasing the prisoner outright is a conditional writ”).

In the context of the Covid-19 crisis, many courts granting relief similar to that sought by Petitioners have exercised their authority to impose conditions on release, including home confinement orders. *See, e.g., Francisco Hernandez v. Wolf*, No. 5:20-CV-617 (C.D. Cal. Apr. 1, 2020), (releasing detainee on conditions including home confinement); *Avedaño Hernandez v. Decker*, No. 1:20-CV-1589, 2020 WL 1547459 (S.D.N.Y. Mar. 31, 2020) (releasing detainee with reasonable conditions, with direction for parties to propose such conditions by 2:00 PM the next day.); *Frailhat v. Wolf*, No. 2:20-CV-590 (C.D. Cal., Mar. 30, 2020) (holding detainee’s detention violated substantive due process rights and ordering release the next day on conditions including home confinement); *Coronel v. Decker*, No. 1:20-cv-2472, 2020 WL 1487274 (S.D.N.Y. Mar. 27, 2020) (ordering detainee’s release on reasonable conditions).

Therefore, the Court can preserve governmental interests while also protecting Petitioners’ strong interest in avoiding being placed in conditions that pose substantial risks to their health solely because they lack funds to purchase their release. Releasing Petitioners is consistent with the best interests of the detainees currently confined to the jail, the jail’s staff, and the public. The Court should accordingly grant a writ of habeas corpus.

CONCLUSION

The Court should grant the petition for a writ of habeas corpus.

Respectfully submitted,

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April 7, 2020

CERTIFICATE OF SERVICE

I certify that I served the foregoing on Respondents by depositing a true and correct copy with the United States Postal Service, first-class postage prepaid, in an envelope addressed as follows:

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/s/ Ryan Primerano

April 7, 2020