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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

C.N., L.B., and minor child B.K.L.N.;
J.A.R., E.G.M., and minor child J.G.;
M.N., P.M., and minor child H.M.N.;
M.C., G.S.C., and minor children
G.R.S.C. and N.B.T.; M.E.L., E.O.E.,
and minor child J.O.E.,

Petitioners,

Case No. _____

**EMERGENCY PETITION FOR
ISSUANCE OF A WRIT OF
MANDAMUS**

v.

Pennsylvania Department of Human
Services,

Respondent.

NOTICE TO DEFEND

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the Plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER. IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

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I. INTRODUCTION

1. Petitioners, detained immigrant children as young as one year old and their parents, call upon the Court to direct the Pennsylvania Department of Human Services (“Department”) to issue an emergency order removing them from Berks County Residential Center (“BCRC”) to avoid potentially deadly infection during the COVID-19 pandemic.

2. Petitioners are at high risk of contracting COVID-19 while in custody. Social distancing is not possible in the enclosed conditions of the detention center; U.S. Immigration and Customs Enforcement (“ICE”) and BCRC personnel are not providing adequate safety precautions to prevent detainees from contracting and spreading COVID-19; and employees come and go from their home and their communities¹ The only viable way to protect the children and families at BCRC is for them to be removed from the center and released to their sponsors.

3. There is an urgent need for the Department to take immediate action: The COVID-19 crisis is sweeping ICE detention centers in Pennsylvania.² The greater

¹ U.S. Immigration and Customs Enforcement (“ICE”) provides payments to Berks County in exchange for detaining immigrant families at BCRC.

² Jeff Gammage, *Activists fear many more ICE detainees are infected with the coronavirus than limited testing shows*, Philadelphia Inquirer (Apr. 21, 2020), <https://www.inquirer.com/news/ice-detention-centers-coronavirus-testing-immigration-immigrants-20200421.html> (“The total number of confirmed detention-center cases spiked on Tuesday, reaching 220. The new figure includes 11 cases at the Pike County Correctional Facility in northeast Pennsylvania, which had seven last week, according ICE.”).

Philadelphia area, of which Berks County is commonly considered a part,³ has been called an “emerging hot spot” and “area of particular concern” by the White House.⁴ One Penn Medicine model predicts a COVID-19 “tsunami” hitting the region in mid-May.⁵ The Chair of the Berks County Commissioners recently stated, “The numbers are bleak in Berks County. And if we don't get serious fast these numbers are going to get a lot worse.”⁶

4. Yet the Department has refused to act, stating that it cannot remove families from BCRC without “an immediate threat to health and safety.”⁷ Meanwhile, evidence of the rampant spread of COVID-19 inside immigration detention facilities, including those containing children, continues to mount. On April 14,

³ See https://en.wikipedia.org/wiki/Delaware_Valley.

⁴ WPVI, *Vice President Pence says Philadelphia is area of ‘particular concern’ amid COVID-19 outbreak* (Apr. 9, 2020), available at <https://6abc.com/coronavirus-philadelphia-news-philly-white-house/6086927/> (“[O]ur message to the people of the Philadelphia area is now more than ever, practice the social distancing so that Philadelphia and to some extent, even Pittsburgh, do not have to endure what other communities before them have had to endure.”).

⁵ Stephanie Stahl, *Penn Medicine Model Warns Of Coronavirus Tsunami To Hit Philadelphia In Mid-May*, CBS 3 (Apr. 14, 2020), <https://philadelphia.cbslocal.com/video/4494007-penn-medicine-model-warns-of-coronavirus-tsunami-to-hit-philadelphia-in-mid-may>.

⁶ Karen Shuey, *Berks County officials warn coronavirus cases may surge if recommendations ignored*, Reading Eagle (Apr. 16, 2020), https://www.readingeagle.com/news/local/berks-county-officials-warn-coronavirus-cases-may-surge-if-recommendations-ignored/article_d0fcea42-7ff8-11ea-9f91-776cb4fb57c1.html.

⁷ Jeff Gammage, *Five migrants test positive for COVID-19 in ICE detention centers in Pennsylvania*, Philadelphia Inquirer (April 4, 2020), <https://www.inquirer.com/news/ice-immigration-migrant-detention-center-first-coronavirus-in-pennsylvania-20200404.html>

2020, reports broke that a COVID-19 outbreak at a child migrant facility in Chicago had infected 37 children.⁸

5. On April 8, 2020, Petitioners filed an Application for Extraordinary Relief Under the Court's King's Bench Jurisdiction at the Pennsylvania Supreme Court. *C.N. et al. v. Pa. Dep't of Human Services*, No. 76 MM 2020. On April 16, 2020, the Supreme Court denied the Application without prejudice and directed:

If an action is filed in the Commonwealth Court, either in its original jurisdiction or as an appeal from an administrative agency, pursuant to Rule of Judicial Administration 1952(A) and the Pennsylvania Supreme Court's constitutionally conferred general supervisory and administrative authority over all courts and magisterial district judges, see PA.CONST. art V, § 10(a), this Court DIRECTS that the Commonwealth Court shall establish an expedited schedule for such matter and shall move expeditiously to resolve the matter so as to prevent further potential harm to Petitioners.

Exh. K (Order) at 1-2.⁹

6. The Department has not taken action to protect the children and families in BCRC during this unprecedented crisis. Therefore, Petitioners respectfully request this Court issue a writ of mandamus compelling the Department to take immediate action to remove Petitioners from BCRC.¹⁰

⁸ Camilo Montoya-Galvez, *Chicago coronavirus outbreak infects dozens of migrant children in U.S. custody*, CBS News (April 14, 2020), <https://www.cbsnews.com/news/chicago-coronavirus-outbreak-infects-dozens-of-migrant-children-in-us-custody/>.

⁹ Pursuant to the order, Petitioners attach a Proposed Expedited Scheduling Order.

¹⁰ In her supplemental declaration, attorney Bridget Cambria provides information regarding the Petitioner families' situations and sponsors to whom they could be released. See Exh. I, Cambria Supp. Decl. ¶¶ 38(a-f).

II. PARTIES

8. All Petitioners are families that are currently detained at BCRC.
9. Petitioners C.N. and L.B. (a mother and father) and their minor child B.K.L.N. (age 1) from Haiti are in civil immigration detention at BCRC.
10. Petitioners J.A.R. and E.G.M. (a mother and father) and their minor child J.G. (age 1) from Mexico are in civil immigration detention at BCRC.
11. Petitioners M.N. and P.M. (a mother and father) and their minor child H.M.N. (age 2) from Haiti are in civil immigration detention at BCRC.
12. Petitioners M.C. and G.S.C. (a mother and father) and their minor children G.R.S.C. (age 3) and M.N.B. (age 11) and from Haiti are in civil immigration detention at BCRC.
13. Petitioners M.E.L. and E.O.E. (a mother and father) and their minor child J.O.E. (age 5) from Ecuador are in civil immigration detention at BCRC.
14. Respondent, Pennsylvania Department of Human Services, is responsible for overseeing the care and protection of children within the Commonwealth.

III. STATEMENT OF JURISDICTION

15. This Court has original jurisdiction pursuant to 42 Pa. C.S. § 761 over all civil actions against the Commonwealth of Pennsylvania. This Court has the legal authority to order the requested relief. “[O]nly the Commonwealth Court is imbued with the authority to issue writs of mandamus or prohibition to other government

units, including administrative agencies.” *McCray v. Pa. Dep’t of Corrections*, 872 A.2d 1127, 1130 (Pa. 2005).

IV. FACTS AND PROCEDURAL HISTORY

A. Living in detention creates an exponential risk of COVID-19 infection beyond that experienced by the general public.

16. The COVID-19 global pandemic presents a severe danger to public health.¹¹ The virus “cause[s] clusters of fatal pneumonia;”¹² those infected “might develop acute respiratory distress syndrome, have a high likelihood of admission to intensive care, and might die.”¹³ There is no vaccine against COVID-19, and there is no known cure. Thus far, more than 2.5 million people worldwide have been diagnosed with COVID-19 and 177,415 people have died.¹⁴ In the United States, 824,438 cases of infection have been confirmed and 45,039 people have died.¹⁵ In Pennsylvania alone, 34,528 cases have been reported and 1,564 people have died.¹⁶

¹¹ World Health Organization, Q&A on Coronaviruses (COVID-19), Mar. 9, 2020, <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses>.

¹² Chaolin Huang, et al., *Clinical Features of Patients Infected with 2019 Novel Coronavirus in Wuhan, China*, 395 *The Lancet* 497 (2020), [https://doi.org/10.1016/S0140-6736\(20\)30183-5](https://doi.org/10.1016/S0140-6736(20)30183-5) (also available at <https://www.sciencedirect.com/science/article/pii/S0140673620301835>).

¹³ *Id.*

¹⁴ As of April 21, 2020 at 10:40 pm EST. See Coronavirus COVID-19 Global Cases, *Johns Hopkins University Coronavirus Resource Center* (April 21, 2020), <https://coronavirus.jhu.edu/map.html>.

¹⁵ *Id.*

¹⁶ As of 2:00 pm on April 21, 2020. Pennsylvania Department of Health, *COVID-19 Data for Pennsylvania* (Apr. 21, 2020), <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx>.

17. Known infections in Berks County have skyrocketed to 1,988, and 82 people have died.¹⁷ Across the street from BCRC, two County staff members in the Berks Heim nursing home have tested positive for COVID-19.¹⁸

18. While older individuals face greater chances of serious illness or death from COVID-19, it is now known that the younger population is just as susceptible to contracting the virus and also faces serious threats to life and health.¹⁹ The World Health Organization (“WHO”) has warned that younger people make up a “significant proportion” of patients requiring hospitalization, sometimes for weeks and sometimes resulting in their deaths.²⁰ The largest study of pediatric COVID-19 patients to date shows that approximately 6% of infected children and 11% of infected infants have suffered severe or critical cases,²¹ and U.S. data shows a growing number of pediatric cases requiring intensive care.²² Children and infants have suffered from respiratory failure, shock, encephalopathy, heart failure, coagulation dysfunction, acute kidney injury, and life-threatening organ

¹⁷ *Id.*

¹⁸ 69 NEWS, 2 *Berks Heim employees test positive for coronavirus* (Apr. 9, 2020), https://www.wfmz.com/health/coronavirus/2-berks-heim-staff-members-test-positive-for-covid-19/article_adb6fd22-7ac4-11ea-bf65-87bf6a9b9b1e.html.

¹⁹ See Exhibit A, Declaration and CV of Dr. Julie DeAun Graves ¶ 3; see also Stephanie Nebehay, *WHO Message To Youth on Coronavirus: ‘You Are Not Invincible’*, *Reuters* (Mar. 20, 2020), <https://reut.rs/343yLvg>.

²⁰ See Nebehay, n. 19, *supra*.

²¹ See Yuanyuan Dong et al., *Epidemiological Characteristics of 2143 Pediatric Patients With 2019 Coronavirus Disease in China* (2020), *Am. Acad. of Pediatrics*, <https://bit.ly/39hz1Yz>.

²² Virtual Pediatric Sys., *COVID-19 Data: North American Pediatric Intensive Care Units* (Mar. 31, 2020), <https://covid19.myvps.org/>.

dysfunction.²³ Even when asymptomatic, these younger individuals still pose a very serious risk of transmission to those with whom they come in contact, including older, more vulnerable adults.²⁴

19. COVID-19 is extremely infectious. It can be “transmitted from person to person by breathing in air that contains the droplets they’ve coughed or the virus they’ve shed, or by touching a surface with the virus on it, unless there is full personal protective equipment: mask, gloves, gown, plus thorough handwashing before putting on the equipment and after removing it.” Exhibit A, Declaration of Dr. Julie De Aun Graves ¶ 6.

20. As detained children and their parents, Petitioners face an elevated risk of contracting COVID-19 simply because they are detained. Experts warn that in the enclosed environment of a detention facility, both those incarcerated and those who watch over them are at risk for airborne infections. Because the virus is transmitted through droplets, through the air, and on surfaces, and because asymptomatic carriers can transmit the virus to others, even one infected person in a facility, whether a detainee or a staff member, can infect the majority of people in the facility. Exhibit A, Declaration of Dr. Julie De Aun Graves ¶ 11. Medical experts fear the exceptionally rapid transmission of COVID-19 in detention

²³ See Dong, *supra* n. 21.

²⁴ See Guoqing Qian et al., *A COVID-19 Transmission Within a Family Cluster by Presymptomatic Infectors in China* (2020), *Clinical Infectious Diseases*, <https://bit.ly/2R2tjmY>.

facilities, because medical resources such as physicians, testing kits, and protective equipment are constrained; people are unable to practice social distancing; shared facilities are not frequently or properly sanitized; soap and hand sanitizer are not provided or easily accessible to detainees; quarantine or isolation units are scarce; and there are frequent opportunities for an infected person to enter or leave the facility. *See* Exhibit B, Declaration of Dr. Jaimie Meyer ¶¶ 8–15.

21. Even medical experts for the U.S. Department of Homeland Security have urged release of immigrant detainees to curb the spread of COVID-19 in detention facilities.²⁵ In a public letter to Congress, Dr. Scott Allen and Dr. Josiah Rich argued that because the “social distancing” practices recommended by public health authorities are impossible to implement in detention settings, immigrant detainees who don’t pose a risk to public safety should be released so as to avoid the overloading of local health facilities caused by a rapidly spreading outbreak within the ICE detention system.²⁶

²⁵ Catherine Shoichet, *Doctors Warn of ‘Tinderbox Scenario’ if Coronavirus Spreads in ICE Detention*, CNN Health, (March 20, 2020).

²⁶ Dr. Scott Allen and Dr. Josiah Rich, Letter to Congress re: Coronavirus and Immigrant Detention (March 19, 2020), <https://www.documentcloud.org/documents/6816336-032020-Letter-From-Drs-Allen-Rich-to-Congress-Re.html>; *see also* Dr. Allen S. Keller and Dr. Benjamin D. Wagner, *COVID-19 and immigration detention in the USA: time to act*, The Lancet (March 31, 2020), [https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667\(20\)30081-5/fulltext](https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667(20)30081-5/fulltext).

B. The children and families at BCRC are “sitting ducks.”

22. Amidst this crisis, the eyes of Pennsylvanians, the nation, and the world are on Berks County.²⁷ On April 3, 2020, the *Washington Post* Editorial Board wrote of the situation at BCRC: “Subjecting children to a heightened risk of being exposed to a widening pandemic is beyond irresponsible. . . . The urgency is real.”²⁸ On March 31, 2020, the WHO, Office of the United Nations High Commissioner for Human Rights, United Nations High Commissioner for Refugees, and International Organization for Migration issued a joint statement calling for the immediate release of migrant children and their families.²⁹ On April

²⁷ Michala Butler, *Immigration activists call on Wolf to release detainees from ICE center in Berks County*, Pennsylvania Capital-Star (Apr. 1, 2020), <https://www.penncapital-star.com/civil-rights-social-justice/immigration-activists-call-on-wolf-to-release-detainees-from-ice-center-in-berks-county/> (“Pennsylvania state Rep. Chris Rabb, D-Philadelphia, and Philadelphia City Councilmember Helen Gym, reiterated the health and safety dangers facing migrants detained at BCRC. ‘I feel compelled to speak out even though this is 75 miles out of my jurisdiction,’ Rabb said. ‘This immigration issue is not connected just to one community.’ Only Governor Wolf has the power to release those migrants, Rabb said, adding that ‘It has taken a pandemic to do what should have been done years ago.’”); Cheri Gregg, *Federal judge releases more immigrants detained in ICE facilities in Pennsylvania*, KYW News Radio (April 7, 2020), <https://kywnewsradio.radio.com/articles/news/judge-releases-more-immigrants-detained-in-ice-facilities> (“six Philadelphia City Councilmembers wrote to Gov. Tom Wolf, asking him to use executive powers to close the county-owned, federally-run facility in Berks County, where families are being held indefinitely.”)..

²⁸ Washington Post Editorial Board, *Detained migrant children are sitting ducks. Accelerate their release*, Washington Post (April 3, 2020), https://www.washingtonpost.com/opinions/detained-migrant-children-are-sitting-ducks-accelerate-their-release/2020/04/02/b58d8232-738a-11ea-a9bd-9f8b593300d0_story.html; see also Shalyn Fluharty, *Let these children go*, Washington Post (April 6, 2020), <https://www.washingtonpost.com/opinions/2020/04/06/let-these-children-go/>.

²⁹ Office of the United Nations High Commissioner for Human Rights, *The rights and health of refugees, migrants and stateless must be protected in COVID-19 response: A joint statement by UNHCR, IOM, OHCHR and WHO* (March 31, 2020), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx>.

7, 2020, Amnesty International issued a report calling for the release of children and families in BCRC.³⁰

23. At BCRC, it is impossible to implement standard procedures like “shelter in place,” household self-quarantines, or even basic social distancing.³¹ Both the Centers for Disease Control and Prevention (“CDC”) and WHO recommend maintaining at least six feet between all individuals, even those with no symptoms.³²

24. At BCRC, detained parents and children are forced to live in close quarters and required to congregate. Living space at BCRC is limited to two floors of a single building, where detainees share common areas, sleeping quarters, bathrooms, and a dining area. See Exhibit C, Declaration of Bridget Cambria ¶ 15. Families at BCRC sleep in rooms with six beds to a room placed less than half a

³⁰ Amnesty International, *We are adrift, about to sink’: The looming COVID-19 Disaster in United States Immigration Detention Facilities* (April 7, 2020), available at <https://www.amnesty.org/download/Documents/AMR5120952020ENGLISH.PDF>.

³¹ See CDC, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities* (March 23, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html> (“CDC Detention Guidelines”) (“Although social distancing is challenging to practice in correctional and detention environments, it is a cornerstone of reducing transmission of respiratory diseases such as COVID-19.”).

³² *Id.*; see also WHO, *Preventing COVID-19 outbreak in prisons: a challenging but essential task for authorities* (March 23, 2020), <http://www.euro.who.int/en/health-topics/health-determinants/prisons-and-health/news/news/2020/3/preventing-covid-19-outbreak-in-prisons-a-challenging-but-essential-task-for-authorities>.

meter apart.³³ The BCRC Resident Handbook states that “you will be living in close proximity with other families” and “due to the communal nature of the Center . . . children from different families may room together, and non-related adults room together.” *See* Exh. D, BCRC Handbook at 9, 13. The Handbook further states, “Residents are expected to share common equipment such as telephones, televisions, tables, recreational games and other equipment.” *Id.* at 9. In BCRC, toilets, sinks, and showers are shared, without disinfection between each use and are used constantly by large numbers of people. *See id.* Detainees report that they are forced to remain in close contact with each other when eating together in the shared cafeteria and when in their shared bedrooms. Cambria Decl. at ¶¶ 15-18; Exh. E, Declaration of P.M. at ¶¶ 13-14 (“We hear about social distancing, but how can we do that when we are all detained together in one building? We all eat all our meals together in the same room. We spend our time together in the same few spaces. The staff, who come and go from the facility, are always around us. We cannot even take a shower without one of them sitting outside the door.”).

25. Detainees report that numerous parents and children in the facility are sick with cold-like symptoms, such as coughs, congestion and fever. Cambria Decl. at ¶¶ 26, 31, 32; P.M. Decl. at ¶¶ 4, 9; Exhibit F, Declaration of G.S.C. at 9 (“Many

³³ *Id.* Even if families are housed in separate rooms due to low population at the center, the situation will likely return to the status quo as soon as ICE begins to bring more families back into the facility.

people are still sick inside the facility. One of the families that are staying here with us, their child is severely sick and feverish. We are not well and we are scared.”). Detainees have observed that numerous staff members are exhibiting similar cold-like symptoms. Cambria Decl. at ¶ 31. Despite this, when detainees request medicine for their children they are not provided medicine for days or weeks, if at all. P.M. Decl. at ¶¶ 4-5. Food preparation and service is communal with little opportunity for surface disinfection. Cambria Decl. at ¶ 18. The entire detained population at Berks as well as the staff eat together at the same time in the cafeteria during mealtime. *Id.*; P.M. Decl. at ¶ 13. The areas where they eat create dangerous situations for the spread of COVID-19. *Id.*

26. Each day, the children and parents are exposed to new potential virus vectors because BCRC staff, ICE staff, medical staff come and go as shifts change. *See* Cambria Decl. at ¶ 14. ICE staff have contacts with those not only within the facility but multiple detention centers, medical staff contact a large number of detained families, and employees come and go from their home and their communities. *Id.* at ¶¶ 6, 10, 14, 19.

27. BCRC lacks adequate medical infrastructure to address the spread of infectious disease and treatment of people most vulnerable to illness in detention. Cambria Decl. at ¶ 19, 36 (BCRC has no pediatrician or gynecologist in its medical unit, and there is no full-time onsite doctor). The families at BCRC have not been

briefed on COVID-19 by the staff, ICE or any other operator of BCRC, either about the fact that there is global pandemic or what precautions they should be taking to prevent the spread of the virus. *Id.* at ¶ 27; P.M. Decl. at ¶ 13. Petitioners are aware of COVID-19 only from the news on the television. *Id.* BCRC relies on the detained civil population as their cleaning staff for the detainee residential areas pursuant to a “voluntary” work program paying \$1 per day, and there has been no change to this policy in light of the recent pandemic. Cambria Decl. at ¶ 29. Detainees are not provided gloves unless they participate in a work program to clean the facility or are cleaning their rooms. Cambria Decl. at ¶ 29; P.M. Decl. at ¶ 7. Appropriately sized protective masks for children have not been provided. Detainees also report that there are broken soap dispensers in their rooms that have not been fixed despite their requests. Cambria Decl. at ¶ 28.

28. Parents cannot control the health decisions of themselves or their children. For example, they cannot ask to go to a hospital to request a COVID-19 test.

29. Petitioners cannot rely on ICE to enforce state law regulating the care of children in state-licensed facilities. On March 28, 2020, federal Central District of California judge Dolly Gee found that the *Flores* settlement agreement requires ICE to protect detained accompanied children like minor child Petitioners from COVID-19 by making continuous efforts toward their release. *Flores v. Barr*, No. 2:85-cv-04544-DMG-AGR (C.D. Ca. 2020). On March 30, 2020, federal district

court judge for the District of Columbia James Boasberg extended those same *Flores* protocols to parents detained with their children. *O.M.G. et al. v. Wolf et al.*, No. 1:20-cv-00786 (D.D.C. 2020). However, Petitioner families remain detained at BCRC. As outlined below, ICE has persistently violated the *Flores* settlement agreement with impunity.

30. BCRC staff and the surrounding community are also at risk. If there is an outbreak of COVID-19 in BCRC, families and staff who require hospitalization could overwhelm the nearby hospitals, putting Berks County--and surrounding counties--at risk. ICE officials have conceded that they have no contingency plan for coronavirus treatment if local hospitals become overwhelmed and cannot treat detainees.³⁴

31. The lack of access to proper sanitation at BCRC, combined with shared bathrooms and sinks and regular close contact with other families and staff creates an intolerably high risk of infectious spread. Each of the individual petitioners and their young children faces immediate and serious danger to their life or health from the COVID-19 pandemic due to failure of BCRC to implement adequate social distancing and other protective measures and failure of the Department to remove them from the facility. The only viable way to protect the children and families at

³⁴ House Oversight Committee Letter to DHS (April 7, 2020), https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2020-04-07.CBM%20JR%20to%20DHS%20re%20Protecting%20Immigrants_0.pdf.

BCRC from COVID-19 is to release them to their sponsors.³⁵ *See, e.g.*, P.M. Decl. at 20 (“We have close family in the United States who will receive us, I do not know why our lives are being risked at this moment.”).

C. The Department’s long-deficient oversight of BCRC has now reached a crisis point.

32. Despite these documented risks to the life or health of Petitioners, the Department has not improved or increased its inspections of BCRC. In fact, due to the virus, the Department has cut back on inspection protocols and is not even conducting on-site visits.

33. The Department is mandated by regulation “to protect the health, safety and well-being of children receiving care in a child residential facility through the formulation, application, and enforcement of minimum licensing requirements.” 55 Pa. Code § 3800, et seq. Concomitant with this mandate is the duty to conduct inspections.³⁶ When the Department finds evidence of “gross incompetence,

³⁵ Attempts at protective measures within facilities have not proven successful; just two weeks after New York’s Department of Correction implemented an “action plan” for sanitizing and maintaining social separation in jail facilities, infection rates at Rikers Island and other facilities skyrocketed. Jan Ransom and Alan Feuer, *‘We’re Left for Dead’: Fears of Virus Catastrophe at Rikers Jail*, New York Times (March 30, 2020), available at <https://www.nytimes.com/2020/03/30/nyregion/coronavirus-rikers-nyc-jail.html>. The infection rate in Philadelphia’s jails is 4.71 times the rate of Philadelphia as a whole and over 11 times the rate of Pennsylvania. In fact, the Philadelphia jails now have a higher infection rate than New York City, Lombardy, Italy and Wuhan, China. Defender Association of Philadelphia, *COVID-19 in Philly’s Jails*, available at <https://www.philadefender.org/covid-philly-jails/> (accessed April 7, 2020).

³⁶ Each facility must be individually inspected at least once per year, and the Department issues a certificate for compliance for each physical structure within a facility that qualifies for a certificate. 55 Pa. Code § 3800.4. The Department’s issuance of the certificate of compliance to a

negligence, [or] misconduct in operating the facility or agency, or mistreatment or abuse of clients, likely to constitute an immediate and serious danger to the life or health of the clients,” the Department *must* take immediate action to remove the clients from the facility. 55 Pa. Code § 20.37.

34. This is not the first time the Department has ignored its own regulations to the detriment of BCRC detainees. The Department revoked BCRC’s license in 2016 because BCRC does not meet the definition of “child residential facility” by housing adults together with children, 55 Pa. Code § 3800.5, and BCRC’s appeal is pending;³⁷ yet despite revoking the license, the Department has made annual stipulations in Commonwealth Court to allow BCRC to continue to operate using an expired license. *See J.S.C. et al. v. Pa. Dept. of Human Svcs. et al.*, No. 678 MD 2019 (Pa. Cmwlth. 2019).

35. In addition, the Department has allowed BCRC to continue to operate despite housing children under nine years of age in violation of 55 Pa. Code § 3800.283(7). Infants have been detained at BCRC; in 2019, a three-month-old

facility indicates that the facility follows all applicable statutes, ordinances, and regulations. 55 Pa. Code § 20.53. The Department has the authority to conduct additional announced and unannounced inspections including inspections in response to complaints. 55 Pa. Code § 20.33.
³⁷ *County of Berks v. Dallas*, No. 8 MD 2017 (Pa. Cmwlth. 2017). BCRC has also sued the Department because of its failure to grant its applications for subsequent one-year licenses. *County of Berks v. Miller*, No. 13 MD 2018 (Pa. Cmwlth. 2018). In 2018, detained families petitioned to intervene in the licensing matter before the Department’s Bureau of Hearings and Appeals (BHA). That petition was granted on appeal to the Commonwealth Court and remanded to the BHA on January 21, 2020, where it remains pending. *See D.G.A. et al. v. Dept. of Human Svcs.*, No. 1059 CD 2018 (Pa. Cmwlth. 2018).

infant was detained in unsanitary conditions for weeks. BCRC also operates in violation of 55 Pa. Code § 3800.271 by housing children in a secure facility who have not first been alleged or adjudicated delinquent. Despite years of calls for the Department to take emergency action to remove children from highly harmful conditions,³⁸ including nightly sleep deprivation,³⁹ severe medical neglect, an institutional sexual assault,⁴⁰ and the potential lifelong trauma of confinement of very young children,⁴¹ the Department has refused to act. Indeed, there have been no publicly reported inspections of BCRC by the Department since 2018.⁴²

³⁸ Pittsburgh Post-Gazette Editorial Board, *Shut it down: ICE facility in Pa. is immoral and perhaps illegal*, Pittsburgh Post-Gazette (Dec. 31, 2019), <https://www.post-gazette.com/opinion/editorials/2019/12/31/div-class-libPageBodyLinebreak-Shut-it-down-div/stories/201912130054> (“A Berks County facility that rakes in millions of federal dollars annually to function as a jailhouse for federally detained children and parents should be shut down. Today . . . ‘No one being held at the Berks facility is facing any criminal charges, but the center still essentially functions as a jail in which adults and children, sometimes mere babies, are detained,’ [Pennsylvania Auditor General Eugene] DePasquale commented.”).

³⁹ Katherine R. Peeler *et al.*, *Sleep Deprivation of Detained Children: Another Reason to End Child Detention*, Health and Human Rights Journal (January 20, 2020), <https://www.hhrjournal.org/2020/01/sleep-deprivation-of-detained-children-another-reason-to-end-child-detention/> (“At Berks County Family Residential Center in PA, an official bed check policy occurs every 15 minutes throughout the night. . . . Families detailed how children at Berks exhibited mental health and behavioral problems associated with sleep deprivation, such as withdrawal from family members, self-injurious behaviors, and suicidal ideation.”).

⁴⁰ Allie Miller, *Woman sexually assaulted during ICE detention paid \$75,000 settlement by Berks County*, PhillyVoice (January 24, 2020), <https://www.phillyvoice.com/berks-county-ice-immigrant-detention-sexual-assault-settlement-woman/>.

⁴¹ See Human Rights First, *Treatment of Children in Family Detention Centers* (Aug. 2018), available at https://www.humanrightsfirst.org/sites/default/files/Treatment_Children.pdf.

⁴² Pennsylvania Department of Human Services, *Inspection/Violation Reports for Berks County Residential Center* (last accessed April 7, 2020), <http://services.dpw.state.pa.us/dhs/ViolationReport.aspx?reportid=14386&fac=BERKS%20COUNTY%20RESIDENTIAL%20CENTER> (“BCRC Inspection Report”).

36. Even before the coronavirus pandemic, these conditions constituted “gross incompetence, negligence, [or] misconduct in operating the facility or agency, or mistreatment or abuse of clients, likely to constitute an immediate and serious danger to the life or health of the client.” Yet the Department never mentioned any of the aforementioned harmful conditions in its reports.⁴³ The Department turned a blind eye to gross incompetence, negligence, misconduct, and mistreatment of children at BCRC, just as it had for years at the Glen Mills Schools.⁴⁴ This history of administrative neglect has set the stage for the current critical situation: Children are detained unprotected from infection by a highly contagious virus.

V. ARGUMENT

A. The Court should compel the Department to issue an emergency removal order.

i. Petitioners have a legal right to mandamus relief.

37. Mandamus is “designed to compel a public official’s performance of a mandatory duty, and may issue only where (1) ‘the petitioner has a clear legal right to enforce the performance of an act, (2) the defendant has a corresponding duty to perform the act and (3) the petitioner has no other adequate and appropriate remedy.’” *Garber v. Pennsylvania Dept. of Corrections Secretary*, 851 A.2d 222,

⁴³ *Id.*

⁴⁴ See Lisa Gartner, *On their own: How Pennsylvania failed to protect boys from abuse at Glen Mills and other state-licensed juvenile programs*, Philadelphia Inquirer (Oct. 3, 2019), <https://www.inquirer.com/news/a/pennsylvania-reform-school-abuse-scandal-dhs-oversight-glen-mills-20191003.html>.

225 (Pa. Cmwlth. 2004); *see also Coady v. Vaughn*, 770 A.2d 287, 289 (Pa. 2001).

In other words, mandamus is used “when the tribunal or agency has been ‘sitting on its hands.’” *Chanceford Aviation Properties, L.L.P. v. Chanceford Tp. Bd. of Supervisors*, 923 A.2d 1099, 1108 (Pa. 2007).

38. Petitioners have a legal right to mandamus relief, as they are the individuals most directly impacted by BCRC’s compliance or noncompliance with the Department’s licensing regime. The purpose of the applicable regulation, 55 Pa. Code § 3800, *et seq.*, is “to protect the health, safety and well-being of children receiving care in a child residential facility through the formulation, application and enforcement of minimum licensing requirements.” 55 Pa. Code § 3801.

39. The Commonwealth Court recently found in the context of a petition to intervene in BCRC’s appeal of the Department’s revocation of its child care license that the detained families “are the ones personally suffering any negative consequences to their health, safety, and well-being posed by the Center operating contrary to law such that their direct interest could diverge from DHS’s more general interest in confirming that the Center operates lawfully.” *D.G.A. v. Dept. of Human Svcs.*, No. 1059 CD 2018, 2020 WL 283885 at 7 (Pa. Cmwlth. 2020).

While the standard for the right to intervene differs slightly from the standard for the right to enforce an action in mandamus, the Commonwealth Court’s reasoning in *D.G.A.* is instructive here.

40. The child Petitioners are the individuals most directly impacted by BCRC’s “gross incompetence, negligence, [or] misconduct in operating the facility”; it is literally their life or health which the Department is charged with protecting through the state licensing scheme. While they are involuntarily detained at BCRC during this pandemic, Petitioners have a clear and direct interest in whether or not the facility is in compliance with the state’s licensing standards.

ii. Conditions at BCRC constitute an immediate and serious danger to Petitioners’ life or health, triggering the Department’s duty to issue an emergency removal order

41. The Department has a duty to protect Petitioners, but is refusing to do so. Because of the COVID-19 pandemic, the Department’s long-deficient oversight of BCRC has now reached a crisis point, necessitating emergency intervention by this Court. If the Department finds evidence of “gross incompetence, negligence, [or] misconduct in operating the facility or agency, or mistreatment or abuse of clients, likely to constitute an immediate and serious danger to the life or health of the clients,” the Department must take immediate action to remove the clients from the facility. 55 Pa. Code § 20.37.

42. Other situations in which the Department has issued emergency removal orders include: a child daycare center that was not adequately caring for the children under its supervision, *Walnut Grove Assembly of God v. Dep’t of Pub. Welfare*, No. 919 C.D. 2010, 2010 WL 5604585 (Pa. Cmwlth. 2010), and a

personal care home where two staff members were arrested for stealing residents' medication and the facility could not provide documentation that another qualified administrator was available to oversee the facility's operation. *Liberty Manor Pers. Care Home v. Dep't of Pub. Welfare*, 979 C.D. 2014, 2015 WL 5432471 (Pa. Cmwlth. 2015).

43. Additionally, other situations in which this Court has upheld findings of “gross incompetence, negligence, [or] misconduct” include: leaving infants unsupervised (*Winston v. Dep't of Public Welfare*, 675 A.2d 372 (Pa. Cmwlth. 1996)); five violations at a daycare center in five months, including allowing a child to leave unsupervised (*Aggie v. Dep't of Public Welfare*, 484 C.D. 2014 (Pa. Cmwlth. 2014)); “consistent and repeated violations of [Department] regulations,” including refusal to grant immediate access to the inspectors, excessive numbers of children per age group and unhealthy/unsafe conditions (*Soriano Family Day Care v. Dep't of Public Welfare*, 833 C.D. 2007 (Pa. Cmwlth. 2008)); and nine repeat violations in an inspection (*Lil Shining Stars, Inc. v. Dep't of Human Servs.*, 140 A.3d 83 (Pa. Cmwlth. 2016)).

44. In *Colonial Manor*, this Court noted that either “gross incompetence, negligence or misconduct in operating the facility” or “mistreating or abusing individuals cared for by the facility”—or both—were implicated in its decision in *Pine Haven*. In that case, the Court upheld revocation of the license of a personal

care home where there were “various deficiencies including bathroom tiles needing to be replaced, menus not posted, insufficient closet space, and inadequate record keeping with respect to the dispensing of medication.” This Court noted that “[a]ny one of the above violations would be sufficient grounds for refusal to issue a license.” *Colonial Manor Pers. Care Boarding Home v. Com., Dep’t of Pub. Welfare*, 551 A.2d 347, 353 (Pa. Cmwlth. 1988) (emphasis in original), quoting *Pine Haven Residential Care Home v. Dep’t of Public Welfare*, 512 A.2d 59, 61 (Pa. Cmwlth. 1986) .

45. Here, BCRC’s response to the COVID-19 health crisis has demonstrated its incompetence, negligence, or misconduct in operating the facility. BCRC’s failure to adequately protect Petitioners from infection by a contagious and deadly disease is likely to constitute an immediate and serious danger to their life or health. BCRC has not implemented health and safety measures which are reasonably likely to protect Petitioners from exposure to the novel coronavirus.

46. The Department’s guidelines on COVID-19 are insufficient. On March 11, 2020, the Department issued general COVID-19 guidance,⁴⁵ not clearly applicable to 55 Pa. Code 3800 licensees, which did not include any instructions relating to

⁴⁵ See Exhibit G, Jonathan Rubin, Deputy Secretary for Children, Youth and Families, Pennsylvania Department of Human Services, *Guidance from the Department of Human Services, Office of Children Youth and Families regarding Coronavirus Disease 2019 (COVID-19)* (March 11, 2020).

CDC-recommended testing, social distancing inside facilities, or the use of personal protective equipment.⁴⁶ On March 26, 2020, the Department issued guidance to 55 Pa. Code 3800 licensees, but again it was deficient, relating only to visitors, trainings and meetings, and off-campus trips.⁴⁷ The guidance again omitted mention of any rules or practices for operating licensed facilities in compliance with CDC standards for social distancing, sanitation, testing, or personal protective equipment.

47. Available evidence indicates that BCRC remains incapable of combating an all-but-inevitable COVID-19 outbreak at the facility since BCRC is “a single building and congregate care facility for children, with no ability to leave the facility.” Exh. I, Supplemental Declaration of Bridget Cambria, Esq. ¶ 17.

Attempts to create social distancing therefore are not sufficient to ensure that no family contracts COVID-19. *Id.* “Every common area is a commingling area, every bathroom is a commingling area, the cafeteria is a commingling area.” *Id.* at ¶ 24.

Meals are still provided in the cafeteria for all families at the same time. *Id.* at ¶ 32.

Petitioners are still required to clean not only their own rooms, but the communal bathrooms and children’s playroom as well. *Id.* at ¶ 28. Moreover, the detained

⁴⁶ See generally *id.*; CDC Detention Guidelines (n. 31, *supra*).

⁴⁷ See Exhibit H, Jonathan Rubin, Deputy Secretary for Children, Youth and Families, Pennsylvania Department of Human Services, *Visitor, Meeting and Travel Guidance During Coronavirus Disease 2019 (COVID-19)* (March 26, 2020).

families are still at risk because BCRC continues to host County, ICE, and medical staff, who come and go from the facility. *Id.* at ¶ 19.

48. Beginning April 7, 2020, in response to a County-issued order, adult-sized masks were provided to children as young as one year old. *Id.* at 27. Families reported that the masks were so big as to cover the entire face of a child, making it difficult for the children to breathe. Many of the children have already broken the masks. Detained Petitioners were provided one mask only and have not been provided replacements. *Id.*

49. Petitioners have not been instructed in a language they understand what policies are being implemented to protect them, or the nature of the COVID-19 pandemic in this country. Cambria Supp. Decl. ¶ 30. Petitioners speak Haitian Creole and Spanish. *Id.* There are no news services available in Creole nor any on-site interpreters in Creole; few BCRC staff members are bilingual even in Spanish. *Id.* As a result, Petitioner families are “completely isolated and trapped in an institutional setting during a pandemic” and feel “helpless.” *Id.*

50. Social distancing alone, in the absence of other intensive precautionary measures, is not effective to prevent the spread of COVID-19 within the confines of a detention center. Exh. B (Meyer Decl.) ¶ 10. Isolation of people who are ill is an ineffective way to prevent transmission of the virus through droplets to others because, except in specialized negative pressure rooms (rarely in medical units if

available at all), air continues to flow outward from rooms to the rest of the facility. Risk of exposure is thus increased to other people in BCRC and staff. *Id.*

51. Family residential centers like BCRC are congregate facilities, with shared bedrooms, bathrooms, dining facilities, hallways, lounges, and recreational areas. Exh. J, Declaration of Dr. Alan Shapiro ¶ 10. These congregate facilities are not designed in a way that permits appropriate preventative steps to avoid the spread of COVID-19. *Id.* In recent weeks, federal courts around the country have ordered the release of inmates or detainees from prisons and detention centers for that very reason. *See, e.g., United States v. Harris*, 2020 U.S. Dist. LEXIS 53632, 6 (D.D.C. March 27, 2020) (“‘Infections that are transmitted through droplets,’ like COVID-19, ‘are particularly difficult to control in detention facilities, as 6-foot distancing and proper decontamination of surfaces is virtually impossible.’”); *Basank v. Decker*, 2020 U.S. Dist. LEXIS 53191, 17-18 (S.D.N.Y. March 26, 2020) (“Respondents represented that...detention facilities...are taking certain measures to prevent the spread of virus: screening detainees upon intake for risk factors, isolating detainees who report symptoms, conducting video court appearances with only one detainee in the room at a time, providing soap and hand sanitizer to inmates, and increasing the frequency and intensity of cleaning jail facilities. These measures are patently insufficient to protect Petitioners”); *United States v. Fellela*, 2020 U.S. Dist. LEXIS 49198 (D. Conn. March 20, 2020) (“All levels of

government nationwide have recently taken drastic measures in light of the COVID-19 pandemic to promote ‘social distancing’ and to prohibit the congregation of large numbers of people with one another. But, as is true for most jails and prisons, the conditions of confinement at Wyatt are not compatible with these safeguards.”); *United States v. Kennedy*, 2020 U.S. Dist. LEXIS 53359, 5 (E.D. Mich. March 27, 2020) (“Even if all CDC’s interim recommendations are followed...the Court is concerned that such measures will prove insufficient to stem deadly outbreaks”); and *United States v. Nkanga*, 2020 U.S. Dist. LEXIS 56188 (S.D.N.Y. March 31, 2020) (“Realistically, the best – perhaps the only – way to mitigate the damage and reduce the death toll is to decrease the jail and prison population by releasing as many people as possible.”).

52. Most importantly, social distancing rules and other measures to prevent exposure to and spread of COVID-19 by adults are necessarily not applicable to a facility in which children are detained. Children--especially very young children--cannot be expected to observe the same rules and norms of social distancing that are expected of adults. As Dr. Alan Shapiro states, “It is imperative to understand that children’s developmental and cognitive limitations make consistent social distancing between different families and meticulous hand-washing impossible in congregate settings. Nor is it possible to prevent children from touching commonly used surfaces, from rubbing their eyes, nose, and mouth, from uncovered coughs or

sneezes, or, for young children, from putting toys and other shared objects in their mouth.” Exh. J, Shapiro Decl. ¶ 11. This is in part why schools around the country, and the world, have closed. *Id.* at ¶ 12. The American Academy of Pediatric goes further in their recommendation and asks parents not to have their children participate in “play-dates” because social distancing would be breached.⁴⁸

53. Children in detention are likely to act as children do elsewhere--they play together, approach one another unannounced, run from place to place, and disobey their parents’ instructions. It is impossible to maintain social distancing procedures inside crowded schools, resulting in a high likelihood of transmission of COVID-19 among children and later to their homes. That is why, a day after Petitioners filed their Application, Governor Tom Wolf ordered Pennsylvania schools closed until the end of the academic year.⁴⁹

54. The children at BCRC are functionally detained inside their school building 24 hours a day, seven days a week. For these reasons, the likelihood of COVID-19

⁴⁸ *Id.*; Corinn Cross, *Social Distancing: Why Keeping Your Distance Helps Keep Others Safe*, Am. Acad. of Pediatrics (Mar. 31, 2020), <https://www.healthychildren.org/English/health-issues/conditions/chest-lungs/Pages/Social-Distancing-Why-Keeping-Your-Distance-Helps-Keep-Others-Safe.aspx>. In effect, the Department is urging the Court to disregard the public safety rationale used by school districts throughout the Commonwealth to justify school closure, simply because BCRC houses noncitizen child residents of the state living in ICE custody.

⁴⁹ WPVI, *Pennsylvania schools ordered to remain closed until end of academic year due to coronavirus pandemic* (April 9, 2020), available at <https://6abc.com/health/pa-schools-ordered-to-remain-closed-until-end-of-academic-year/6089382/>.

transmission is significantly higher in BCRC than in congregate settings involving only adults. Shapiro Decl. ¶ 13.

55. Evidence of the rampant spread of COVID-19 inside immigration detention facilities, including those containing children, continues to mount. On April 14, 2020, it was reported that a COVID-19 outbreak at a child migrant facility in Chicago had infected 37 children.⁵⁰ ICE's reports of low numbers of infected detainees stem largely from its refusal to test detained people in its custody, including families at BCRC.⁵¹ The consequences of the unchecked spread of COVID-19 in detention centers in Pennsylvania was tragically highlighted earlier this month when two inmates from the Pike County Correctional Facility, which houses both immigrant detainees and inmates in criminal custody, died after being infected with COVID-19.⁵²

⁵⁰ Camilo Montoya-Galvez, *Chicago coronavirus outbreak infects dozens of migrant children in U.S. custody*, CBS News (April 14, 2020), <https://www.cbsnews.com/news/chicago-coronavirus-outbreak-infects-dozens-of-migrant-children-in-us-custody/>.

⁵¹ Eric Kiefer, *Cutting-Edge Coronavirus Tests To Be Used At Essex County Prison*, Patch.com (April 14, 2020), <https://patch.com/new-jersey/newarknj/cutting-edge-coronavirus-tests-be-used-essex-county-prison>. Prior to rollout of wide-scale testing at the Essex County Correctional Facility in New Jersey, authorities reported only two infected ICE detainees out of a population of 533, or a rate of infection of 0.37%. When testing of detainees began at scale at the facility, 15 of the 22 ICE detainees who received testing were found to test positive, for an infection rate of 68%. *Id.* This indicates that infection levels within immigration detention centers are much higher than ICE has publicly acknowledged.

⁵² Joseph Kohut, *Two Pike County Inmates Die from Coronavirus; Seven Staff Members, Five Other Inmates Test Positive*, Times Tribune (April 8, 2020), <https://www.thetimes-tribune.com/coronavirus/two-pike-county-inmates-die-from-coronavirus-seven-staff-members-five-other-inmates-test-positive-1.2615732>.

56. Once COVID-19 infection is introduced into BCRC, it will inevitably spread within the facility to detained families and staff, and from those infected staff members to the local communities. Shapiro Decl. ¶ 25. This raises serious concerns about a surge in the need for emergency department services, personal protective equipment, hospital beds, intensive care units, and critical equipment such as ventilators. *Id.* Not only are local hospital systems likely to be overwhelmed caring for COVID-19 infected patients, but they will also be unable to meet the needs for non-COVID-19 patients as services become inundated. *Id.* The high risk of overwhelming small local hospital systems such as those found in Berks County endangers detainees, staff, and the public. *Id.*

57. Keeping families in BCRC during this novel and rapidly spreading pandemic is particularly concerning. Shapiro Decl. at ¶ 28. The added restrictions of confinement and isolation will significantly increase existing stress on children and their families. *Id.* The stress this can cause in the developing child is known as “toxic stress” and can lead to short and long-term adverse consequences on a child’s growth, development and psychological well-being.⁵³

⁵³ *Id.* at ¶ 29 (“Knowing the harm that detention causes on the health and the wellbeing of children and their parents in the best of times, it is inconceivable to me as a pediatric specialist why children and their parents should remain in detention during this unprecedented and highly dangerous pandemic.”); Institute of Medicine and National Research Council, *From Neurons to Neighborhoods: The Science of Early Childhood Development* (Nat’l Academies Press 2000).

58. BCRC’s persistently deficient provision of medical care at the facility puts Petitioners at especial risk of “serious danger to their life or health” if they become infected.

59. Even if the child petitioners are at a lower risk of death or permanent injury from COVID-19 than their parents, the higher risk that their parents—their primary caretakers—will fall seriously ill and potentially die independently constitutes an immediate and serious danger to the children’s life or health.

iii. Petitioners have no other adequate and appropriate remedy.

60. Given the urgency of this moment, Petitioners have no other adequate and appropriate remedy. Calls for the Department to issue an emergency removal order have grown more urgent given that COVID-19 is spreading like wildfire through ICE detention centers in Pennsylvania.⁵⁴ The Department cannot claim that it is unaware of the need for immediate action to protect children at BCRC under these emergency circumstances.⁵⁵ Yet it has refused to act. On April 4, 2020, in response to renewed calls given the news that five ICE detainees in Pennsylvania have

⁵⁴ See Cheri Gregg, *Federal judge releases more immigrants detained in ICE facilities in Pennsylvania*, KYW News Radio (April 7, 2020), <https://kywnewsradio.radio.com/articles/news/judge-releases-more-immigrants-detained-in-ice-facilities> (“six Philadelphia City Councilmembers wrote to Gov. Tom Wolf, asking him to use executive powers to close the county-owned, federally-run facility in Berks County, where families are being held indefinitely. ‘We need to free our families. They came here for a better life and it shouldn’t be a death sentence,’ said Councilmember Helen Gym.”).

⁵⁵ Due to ongoing litigation and consistent public attention to family detention at BCRC, the Department is familiar with the parameters of 55 Pa. Code 3800, *et seq.*, as applied at BCRC.

tested positive for COVID-19, Respondent stated that “the Wolf administration cannot unilaterally shut down this facility without immediate threat to health and safety.” *Id.* The threat of a virulent and deadly pandemic in close quarters must meet that standard.

61. Waiting for resolution of the pending licensing matters before the Department’s Bureau of Hearings and Appeals and the Commonwealth Court could be too late for the children now detained at BCRC, who could be exposed to COVID-19 at any time, if they have not already been exposed. BCRC’s well documented failure to provide adequate medical care to detained children could lead to dire results if children or their parents become infected with COVID-19.

B. The Department’s exercise of discretion was arbitrary or based on an erroneous interpretation of law.

62. On the evidence and information before the Court, DHS is obligated to issue an emergency removal order because the available evidence leaves no room for a contrary interpretation. By now there is no shortage of expert guidance regarding the precautions necessary to prevent infection with and spread of COVID-19. The consequences of exposure to the virus--including potential lifelong harm to health or death--are well known to BCRC and the Department. The high rate of COVID-19 infection in ICE detention centers has now been widely publicized. Yet BCRC continues to disregard the health experts and news reports, instead knowingly exposing Petitioners to a high risk of serious harm. This decision--made on an

institutional level--constitutes “gross incompetence, negligence, or misconduct . . . likely to constitute an immediate and serious danger to the life or health of the clients.” *See* 55 Pa. Code § 20.37.

63. Because the conditions which trigger the Department’s obligation to take immediate action are present, agency action in this matter is not discretionary; it is mandatory. Detaining children in an enclosed space without adequate social distancing and other necessary safety precautions during the COVID-19 pandemic meets the threshold at which immediate action is compulsory. If “bathroom tiles needing to be replaced, menus not posted, insufficient closet space, [or] inadequate record keeping with respect to the dispensing of medication” can constitute “gross incompetence, negligence, or misconduct,” then surely that standard is met when very young children are knowingly placed in an environment where they are likely to be exposed to COVID-19. *See Colonial Manor Pers. Care Boarding Home v. Com., Dep’t of Pub. Welfare*, 551 A.2d 347, 353 (Pa. Cmwlth. 1988), quoting *Pine Haven Residential Care Home v. Department of Public Welfare*, 512 A.2d 59, 61 (Pa. Cmwlth. 1986).

64. If the Court determines that the Department’s assessment of whether conditions at BCRC meet the threshold to trigger immediate action is discretionary, Petitioners submit that the agency’s discretion cannot be absolute

and unchecked. If arbitrarily exercised or based on a mistaken view of the law, it is reviewable by this Court.

65. Mandamus is a tool to be used “when the tribunal or agency has been ‘sitting on its hands.’”⁵⁶ This Court has noted that mandamus is only used when the actor has refused to perform or act.⁵⁷ Mandamus may lie to compel the performance of a legal duty, “even where the existence and scope of such duties must be found and defined in the course of the mandamus action itself.”⁵⁸ Further, mandamus will lie to compel action by an official where his refusal to act in the requested way stems from his erroneous interpretation of the law.⁵⁹

66. Where the agency action sought to be compelled is discretionary, “courts will review the exercise of the actor’s discretion where it is arbitrary or fraudulently exercised or is based upon a mistaken view of the law.” *Banfield v. Cortes*, 631 Pa. 229, 110 A.3d 155, 175 (2015); *Pa. State Ass’n of Cty. Comm’rs v. Commonwealth*, 681 A.2d at 702 (mandamus will not lie to control discretionary acts, but “courts will review the exercise of the actor’s discretion where it is arbitrary or fraudulently exercised or is based upon a mistaken view of the law”); *Camiel v. Thornburgh*, 507 Pa. 337, 489 A.2d 1360, 1362 n.2 (1985) (“Mandamus

⁵⁶ *Chanceford Aviation Properties, L.L.P. v. Chanceford Tp. Bd. of Supervisors*, 923 A.2d 1099, 1108 (Pa. 2007).

⁵⁷ *Coady v. Vaughn*, 770 A.2d 287, 290 (Pa. 2001).

⁵⁸ *Del. River Port Auth. v. Thornburgh*, 508 Pa. 11, 493 A.2d 1351, 1355 (1985).

⁵⁹ *Fagan v. Smith*, 615 Pa. 87, 41 A.3d 816, 821-22 (2012); *Volunteer Firemen’s Relief Ass’n of City of Reading v. Minehart*, 415 Pa. 305, 203 A.2d 476, 479-80 (1964).

does not lie to compel the performance of discretionary acts except where the exercise or non-exercise of discretion is arbitrary, fraudulent, or based upon a mistaken view of the law.”).

67. Justice Wecht, in his dissent in *Brown v. Wetzel*, articulated a key rationale for the judicial safeguard of mandamus to check arbitrary, fraudulent, or legally erroneous agency action:

Deference to the discretionary functions of administrative agencies and lower tribunals is a core principle in our law. Nonetheless, “discretion” and “deference” cannot be elevated to talismanic status such that they become “magic words,” the invocation of which forces a reviewing court to close its eyes to arbitrary or vindictive decisions. Nor can such words insulate those decisions from judicial scrutiny, “render[ing] appellate review a mere empty formality.”

177 A.3d 200, 207 (Pa. 2018) (dissenting opinion), *citing Pittman v. Pa. Bd. of Prob. & Parole*, 159 A.3d 466, 474 (Pa. 2017).


68. The Department’s determination that the conditions at BCRC are not likely to constitute an immediate and serious danger to the life or health of Petitioners represents an arbitrary exercise of its discretion, or one based on a mistaken interpretation of the legal standard set forth in 55 Pa. Code § 20.37. The Department has ignored voluminous evidence to the contrary presented by Petitioners. Because Petitioners have a right to relief and because the Department’s exercise of discretion was arbitrary or based on an erroneous interpretation of law, this Court should grant their Emergency Petition.

VI. RELIEF REQUESTED

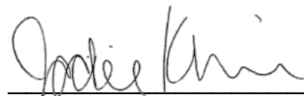
WHEREFORE, Petitioners respectfully request that the Court issue a writ of mandamus compelling the Department to take immediate action to remove Petitioners from BCRC pursuant to 55 Pa. Code § 20.37.

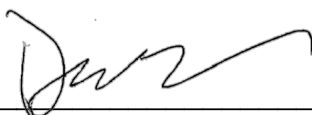
Dated: April 22, 2020

Respectfully submitted,

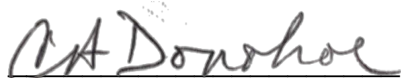

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Counsel for Petitioners

VERIFICATION

I, Bridget Cambria, hereby certify that the facts in the foregoing Emergency Petition for Issuance of a Writ of Mandamus are true and correct to the best of my knowledge and belief. I make this statement subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Dated: April 22, 2020

A handwritten signature in black ink, appearing to read "B. Cambria", written over a horizontal line.

Bridget Cambria, Esq.

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Date: April 22, 2020

/s/Karen Hoffmann
Karen Hoffmann, Esq.

CERTIFICATE OF SERVICE

I, Karen Hoffmann, hereby certify that I caused a copy of Petitioners' Emergency Petition for Issuance of a Writ of Mandamus, and accompanying documents, to be served upon the following by e-mail because regular mail is not accepted by their office due to the COVID-19 shutdown:

Pennsylvania Department of Human Services
Ra-pwdhs-ogc-mail@pa.gov

Date: April 22, 2020

/s/Karen Hoffmann
Karen Hoffmann, Esq.