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**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF ILLINOIS**
**URBANA DIVISION**

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| JUAN MANUEL HERNANDEZ, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | Case No. 20-cv-2088-SLD |
| | ) | |
| CHAD KOLITWENZEW, | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |
| | ) | |
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Interested Party. | ) | |

**ORDER**

Now before the Court is Petitioner Juan Manuel Hernandez's Emergency Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 and Complaint for Injunctive Relief (Doc. 1). Petitioner alleges his detention violates his Fifth Amendment substantive due process rights in light of the COVID-19 pandemic and that his $2000 bond order violates his procedural due process rights in light of his inability to pay. On April 9, 2020, pursuant to the Court's inherent power in habeas corpus petitions and/or pursuant to Fed. R. Civ. P. 65(b), this Court granted Petitioner's immediate release pursuant to the conditions of his bond as entered by the immigration judge aside from the financial condition that he pay a bond. For the reasons below, the Court now GRANTS Petitioner's Petition for Writ of Habeas Corpus (Doc. 1) and orders his continued release from custody. However, this Order does not restrict the Government from seeking reasonable non-monetary conditions of release from the immigration judge in the future. As the Court has granted Petitioner's Petition, the Court finds no further order is needed

regarding the Temporary Restraining Order issued on April 9, 2020 pursuant to Fed. R. Civ. P. 65(b), which is now moot.

## I. BACKGROUND

### A. Procedural History

Petitioner filed this Emergency Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 (Doc. 1) on April 8, 2020. At the time of filing the Petition, he was detained as a civil immigration detainee by Immigration and Customs Enforcement (ICE) at the Jerome Combs Detention Center (JCDC) in Kankakee, Illinois. He alleges his detention violates his Fifth Amendment right to substantive due process due to conditions of confinement he faced, as well as the Government's failure to provide adequate medical care. His claims relate to the COVID-19 pandemic and his particular risk of serious illness or death should he be infected. Additionally, Petitioner asserted that his detention and the bond order of the immigration judge violated his Fifth Amendment right to procedural due process because the monetary bond amount was set without consideration of his financial circumstances and he is unable to post the bond.

Given the emergency nature of the petition and the rapidly spreading COVID-19 virus, the Court found that the Petitioner was implicitly seeking temporary injunctive relief in the form of immediate release from detention. The Court held a hearing on April 9, 2020. After considering the arguments of both parties, the Court found it had authority to grant Petitioner's release pending the decision in his habeas case, *see Cherek v. United States*, 767 F.2d 335, 337 (7th Cir. 1985), as well as authority to grant temporary injunctive relief in the form of immediate release pursuant to Fed. R. Civ. P. 65(b). Further, the Court found that Petitioner had shown that he would suffer irreparable harm if he was not immediately released, that he was likely to

succeed on his claims, and that his release was in the public interest. Accordingly, the Court ordered Petitioner's immediate release. The parties have now submitted further briefing on the merits. *See* Gov't Resp. (Doc. 10); Pet. Reply (Doc. 11).

**B. The COVID-19 Pandemic and Jerome Combs Detention Center's Response**

The COVID-19 pandemic is well-known to the parties and likely all Americans and its rapid and deadly development has been well-documented in court filings and other sources. *See, e.g., Basank v. Decker***,** No. 20 CIV. 2518 (AT), 2020 WL 1481503 (S.D.N.Y. Mar. 26, 2020); *Castillo, et. al, v. Barr, et al.*, No. CV2000605TJHAFMX, 2020 WL 1502864 (C.D. Cal. Mar. 27, 2020). On March 9, 2020, the Illinois Governor issued a disaster proclamation regarding COVID-19. On March 13, 2020, the President of the United States declared a national state of emergency in response to the COVID-19 outbreak. While the first cases of COVID-19 in the United States were only confirmed in February, the World Health Organization, reports there are now over 800,000 confirmed cases of COVID-19 in the United States and over 40,000 deaths. *Coronavirus (COVID-19)*, WHO, https://covid19.who.int/region/amro/country/us (last visited Apr. 23, 2020). In Illinois, there have been over 35,000 confirmed positive cases and 1,565 deaths. *Coronavirus Disease 2019 (COVID-19) in Illinois Test Results*, Ill. Dep't of Pub. Health, https://www.dph.illinois.gov/covid19 (last visited Apr. 22, 2020). And, in Kankakee County, since Petitioner's Petition was filed on April 8, 2020, the positive cases have grown from 107 to 285 and there are now 14 deaths. *Id.*

The U.S. Center for Disease Control (CDC) reports that COVID-19 appears to spread from person-to-person, mainly through respiratory droplets produced when an infected person coughs, sneezes, or talks. *Coronavirus Disease 2019 Basics* (Apr. 14, 2020) https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Coronavirus-Disease-2019-Basics (last

visited Apr. 22, 2020). The virus spreads very easily through what is called "community spread." *Id.* While infected individuals are thought to be most contagious when they are showing symptoms, the virus also appears to be spread by asymptomatic individuals. *Id.*; *see also Transmission*, CDC (Apr. 15, 2020), https://www.cdc.gov/coronavirus/2019-ncov/hcp/faq.html#Transmission (last visited Apr. 23, 2020) ("The onset and duration of viral shedding and the period of infectiousness for COVID-19 are not yet known.")

The symptoms of COVID-19 vary greatly from person-to-person. In many people, COVID-19 causes some combination of fever, cough, shortness of breath, chills, muscle pain, headache, sore throat, and a new loss of taste or smell. *Coronavirus Symptoms* (March 20, 2020), https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html (last visited Apr. 22, 2020). In others, however, it can result in serious illness or death. *Id.* While people of all ages face the possibility of serious illness or death should they contract the virus, older adults and those with certain medical conditions face a much higher risk. *See, e.g., Groups at a Higher Risk for Severe Illness*, CDC, (Apr. 17, 2020) https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html (last visited Apr. 23, 2020). Notably for this Petitioner, the mortality rate for individuals with underlying health conditions is much higher. Preliminary mortality rate analyses from a February 29, 2020 WHO-China Joint Mission Report indicated a mortality rate for individuals with cardiovascular disease at 13.2%, 9.2% for diabetes, 8.4% for hypertension, and 8.0% for chronic respiratory disease. *Age, Sex, Existing Conditions of COVID-19 Cases and Deaths* (Feb. 29, 2020), https://www.worldometers.info/coronavirus/coronavirus-age-sex-demographics/ (data analysis based on WHO- China Joint Mission Report) (last visited Apr. 23, 2020).

There is currently no cure or vaccine for COVID-19 and the only way to control the virus is to prevent its spread. In addition to frequent handwashing, the CDC recommends "social distancing" or "physical distancing" from others by maintaining at least 6 feet away from other people, avoiding gathering in groups, and staying out of crowded places. *Prevent Getting Sick*, CDC (April 8, 2020), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html (last visited Apr. 22, 2020). Additionally, the CDC recommends face masks be worn at all times in settings where social distancing is not possible. *Id.* The majority of states, including Illinois, have initiated lockdown and stay at home measures to stop the spread of the virus. In Illinois, the stay at home order is currently in place until April 30, 2020. Many other states have already extended their stay-at-home orders until mid-May.

Detention facilities, and other congregate settings, present an increased danger for the spread of COVID-19 if it is introduced into the facility as infectious diseases communicated by air or touch are more likely to spread in these environments. *See also, Castillo v. Barr*, No. CV2000605TJHAFMX, 2020 WL 1502864, at *5 (C.D. Cal. Mar. 27, 2020) ("[T]he Government cannot deny the fact that the risk of infection in immigration detention facilities – and jails – is particularly high if an asymptomatic guard, or other employee, enters a facility."); *Coreas v. Bounds*, No. CV TDC-20-0780, 2020 WL 1663133, at *6 (D. Md. Apr. 3, 2020) (relying on expert opinions to conclude that it was implausible to claim "someone will be safer from a contagious disease while confined in close quarters with dozens of other detainees and staff than while at liberty"). Maintaining social distancing is often not possible. In neighboring Cook County, Illinois, the danger has already manifested in a jail setting, with 398 Cook County jail detainees testing positive for COVID-19 and six detainee deaths, as well as at least 185 corrections officers testing positive and two corrections officer deaths. *See*

*Correctional Officer, 2 Inmates at Cook County Jail die from COVID-19*, WGNTV, https://wgntv.com/news/coronavirus/sheriffs-officer-correctional-officer-both-die-from-covid-19/ (last visited Apr. 22, 2020); *see also, Mays v. Dart*, No. 20 C 2134, 2020 WL 1812381, at *2 (N.D. Ill. Apr. 9, 2020) (addressing the conditions at the Cook County Jail and the particular challenges of reducing the spread of the virus in jails and prisons). Many other jails and detention centers have already seen dangerous outbreaks of COVID-19 and the difficulty in containing its spread within a facility. *See, e.g., United States v. Scparta*, No. 18-CR-578 (AJN), 2020 WL 1910481, at *1 (S.D.N.Y. Apr. 20, 2020) (discussing outbreak of COVID-19 at FCI Butler).

Petitioner, at the time of filing his Petition, was housed at the Jerome Combs Detention Center (JCDC), which has a contract with ICE to house ICE detainees. At the time of filing his Petition, he reported that the facility has not informed him or, to his knowledge, other detainees about the COVID-19 pandemic or given any information about what it is or how it spreads. Pet. Ex. A. Declaration of Juan Manuel Hernandez ¶ 6 (Doc. 1-1). As recently as April 2, 2020, Petitioner observed approximately 20 new detainees arrive into the facility. *Id.* ¶ 7. And, while these new detainees were provided facemasks, they have not been instructed to or required to wear them, so the detainees have removed the masks. Staff have not given gloves, masks, or hand sanitizer to any of the detainees who arrived prior to the start of pandemic. *Id.* ¶ 8-9. Petitioner reports a lack of social distancing, as detainees are still required to line up for meals, usually back-to-front, and most detainees eat at tables where everyone is close together. *Id.* ¶ 14. Further, detainees continue to play basketball together, play cards, and engage in other communal activities, as there has been no mandatory restrictions on these activities. *Id.* ¶ 16-17. While Petitioner himself stated he was eating his meals alone in his cell and taking the measures

he could to socially distance, he could not avoid frequently being near other detainees. Notably, his cellmate sleeps in a bunk only two feet above him. *Id.* ¶ 18.

Petitioner also reported that medical staff checked all detainee's temperatures on April 1, 2020, but he has not observed any other measures being put in place. He has observed that approximately half the detainees in his unit (22 out of 48) were showing symptoms of COVID-19, including either a cough or a fever, but had not been isolated. *Id.* ¶ 22.

The Government disputes some of Petitioner's allegations and reports that JCDC has initiated the following measures in response to the COVID-19 pandemic:

> *Detainees Entering the Facility*. The Jerome Combs Detention Center houses both state and federal detainees but over the past several weeks, fewer detainees have been entering the facility. Jerome Combs Detention Center has suspended accepting inmates sentenced to weekends, work release, or any intermittent sentence.
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> *Screening Procedures*. In the few instances in which a new detainee enters Jerome Combs Detention Center, he or she is screened for symptoms and must complete the risk assessment questionnaire. The screening process includes taking the detainee's temperature. All new inmates remain in a separate pod from 5-14 days until cleared by medical.
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> *Sanitation and Hygiene*. Detainees are provided with soap to wash their hands at any time throughout the day. Bottles of disinfectant are also stocked in all housing units. In addition, the Jerome Combs Detention Center conducts a daily disinfection routine three times a day, which includes door handles, toilets, showers and tables. Hand sanitizer is stocked in every housing unit. Detainee restraints are disinfected after each use. Hot water, soap and towels are stocked by every sink in both cells and common areas.
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> *Quarantine*. The Jerome Combs Detention Center follows the CDC guidelines regarding testing for COVID-19 and isolation of individuals with symptoms and/or risk exposure factors. Should a detainee exhibit flu-like symptoms, that detainee will be isolated. If a detainee exhibits COVID-19 symptoms, he will be isolated in a negative pressure room (air is not circulated to the other parts of the facility) for further observation and treatment by the facility's medical staff. Asymptomatic inmates with exposure risk factors are quarantined.
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> *Correctional Officers*. Although correctional officers will need to enter and re-enter the facility, they have been ordered to stay home if they have any symptoms

> of the disease. Enhanced health screening of staff has been implemented in areas with "sustained community transmission," as determined by the CDC. Beginning March 13, 2020, screening of all staff and officers entering the facility has included self-reporting and temperature checks. Correctional officers and health care workers wear masks and detainees are issued masks when they go to court and to medical.
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> *Medical Services.* This facility has one doctor who comes three days a week, a physician's assistant and a nurse practitioner who both come five days a week and all three are on call seven days a week. Should a detainee wish to see a medical specialist for any reason including fear of COVID-19, a detainee can request to do so and he will be put on the list of detainees to see a medical specialist. In addition, a nurse comes to detainees twice a day to dispense medicine and the nurse can triage any medical question including questions regarding COVID-19.
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> *ICE Detainee Unit*. Health care workers wearing masks visit the ICE detainee unit twice a day to check detainees for Covid-19 symptoms. Correctional officers visit the ICE detainee unit every 25 minutes and check for any possible Covid-19 symptoms such as sneezing or coughing. To date, they have not noted any detainee exhibiting such symptoms. While it is true that detainees share a cell, the two detainees in each cell are assigned to the cell only after being cleared by medical personnel. When trays come into the housing unit, detainees line up. They are reminded to remain six feet from the detainee in front. Trays are dispensed by a detainee wearing gloves, a hair net and face mask. Detainees can eat in their cells or sit at tables. Whiles detainees can choose to eat at tables there are posted reminders to remain six feet from others when eating at a table.
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> *COVID-19 Information Provided to Detainees.* Staff began informing detainees nearly four weeks ago by means by posting CDC guidelines that discuss sanitary guidelines such as social distancing and washing hands regularly. This facility has posted the CDC health guidelines in both Spanish and English. Reminders for clean hands and social distancing also appear by means of demonstrative pictures which show the best and most protective practices. The facility provides plenty of soap and hand sanitizer; it is at every sink both in cells and common areas; also there is hot water and towels by every sink in both cells and common areas.

Gov't Resp. at 16-18 (Doc. 10), Ex. 1 at ¶5 (Doc. 10-1). The Government also reports that as of April 15, 2020, no staff or inmates at JCDC had tested positive for COVID-19.

**C. Petitioner and His Confinement History.**

Petitioner is a 46-year-old undocumented individual who has resided in the United States since 1988. He is married to a U.S. citizen who currently resides in a nursing home in Burbank,

Illinois, due to her medical condition and need for care. He is currently in removal proceedings. The Government reports that his next immigration hearing was scheduled for April 13, 2020, but did not occur due to his release from detention, as immigration hearings are only proceeding for detained individuals. According to the Government, Petitioner is seeking relief from removal through cancellation of removal for certain non-permanent residents, pursuant to 8 U.S.C. § 1229(b)(2). Gov't Resp. at 21 (Doc. 10). The Government also alleges that Petitioner has a felony conviction for possession of controlled substances and at least twenty arrests dating back to 1992. The Government also speculates in its brief that if one of his arrests—that for obstruction of justice—was actually a conviction, he may be found ineligible for cancellation of removal. Gov't Resp. at 22 (Doc. 10). However, Petitioner has not had an opportunity to present his case to the immigration judge and the immigration judge has made no such findings.

Petitioner suffers from chronic health conditions that make him particularly susceptible to serious illness or death if he contracts COVID-19, including diabetes, high blood pressure, and high cholesterol. Pet. at ¶ 10, 14 (Doc. 1), Pet. Ex. A. Declaration of Juan Manuel Hernandez, ¶ 23-24. Additionally, Petitioner has previously had a heart attack and suffers from breathing issues due to smoke inhalation from a fire in his home. *Id.; Groups at Higher Risk for Severe Illness*, CDC (Apr. 17, 2020) https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html (last visited Apr. 22, 2020).

Petitioner was originally detained by ICE in May 2019. On August 14, 2019, an immigration judge granted Petitioner's request for release from custody under a $5000 bond, pursuant to 8 C.F.R. § 236.1(c). *See* Pet. Ex. E. (Doc. 1-5). On August 30, 2019, the immigration judge reduced the bond amount to $2000. *Id.* Petitioner states that he does not have the financial means to post the bond.

The Government contends, however, that this bond order no longer applies due to an intervening criminal matter in Kankakee County Circuit Court. The Court takes judicial notice of Petitioner's state court criminal records in Case No. 2017 CF 000070 in Kankakee County Circuit Court, Illinois. *See Ennenga v. Starns*, 677 F.3d 766, 774 (7th Cir. 2012). The record indicates that a Petition for Revocation of Probation was filed in his criminal case on July 11, 2019 and that a Bench Warrant was served on October 2, 2019. The criminal docket indicates that a $10,000 bond at 10% was posted on December 10, 2019. However, the criminal docket also shows that a "Mittimus for Failure to Give Bail" was filed on December 12, 2019. On December 30, 2019, Petitioner admitted to the allegations in the Petition to Revoke and was "given credit for time served from 6-13-2019 thru present." The Government alleges, supported only by the Declaration of Deportation Officer Eliu Fontanez, that from roughly October 2, 2019 to December 10, 2019, Petitioner was in the custody of Kankakee County. Accordingly, the Government argues that the bond order of the immigration judge was no longer valid as of the time of his reentry into ICE custody on December 10, 2019.

In reply, Petitioner has submitted a declaration from Petitioner's immigration attorney asserting that both the immigration judge and the ICE Trial Attorney believed the bond order to still be in effect at his removal hearing on February 20, 2020. Pet. Reply, Ex. A, Fernandez Decl. ¶¶ 4-6 (Doc. 11). Further, it is undisputed that Petitioner has remained in custody at the Jerome Combs Detention Center either under the primary authority or ICE or Kankakee County since May 2019.

On March 25, 2020, Petitioner submitted a request to ICE for parole or release on recognizance pursuant to INA § 212(d)(5)(A) (8 U.S.C. § 1182(d)(5)(A)) and INA § 236(a) (8 U.S.C. § 1226(a)). His request was denied on April 3, 2020. Shortly after this denial, on April

8, 2020, Petitioner filed the instant habeas petition, which, for the reasons below, the Court now grants.

## II. DISCUSSION

Petitioner argues his civil detention by ICE is unconstitutional because his conditions of confinement and the Government's related failure to provide adequate medical care violate his substantive due process rights under the Fifth Amendment in light of COVID-19, his underlying health conditions, and the response of JCDC. He also claims that the $2000 bond amount by the immigration judge violates his Fifth Amendment right to procedural due process because he cannot afford the bond and he is being held solely based on his indigence.[1] The Government argues that Petitioner's claims are not properly brought in a habeas petition, have not been administratively exhausted, and, with regards to his substantive due process claim, fails on the merits. As explained below, the Court finds that Petitioner's Petition is properly brought in habeas and that no further exhaustion is required for the Court to consider his claims. Moreover, on the merits, the Court finds that Petitioner is entitled to relief on his claims.

### A. Petitioner is Entitled to Relief on his Fifth Amendment Substantive Due Process Claims Regarding His Conditions of Confinement and Medical Care.

Petitioner argues that his substantive due process rights under the Fifth Amendment are being violated due to the conditions of confinement and/or inadequate medical care due to the COVID-19 pandemic and his individual health risks. As an initial matter, the Government contends that Petitioner's claims are not properly brought in habeas and that Petitioner has failed to exhaust his administrative remedies. The Court disagrees on both counts.

[1] Additionally, while not expressly included in his initial petition, Petitioner's reply asserts that he also seeks to bring a claim related to the reasonableness of his prolonged detention. *See* Reply at 3 (Doc. 11). As the Government has not had a chance to respond to this claim and as the Court is granting Petitioner's Petition on other grounds, the Court declines to address Petitioner's prolonged detention claim at this time.

A federal court may grant the writ of habeas corpus if a detainee "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(a), (c)(3); *see INS v. St. Cyr*, 533 U.S. 289, 305 (2001). A petition seeking habeas corpus relief is appropriate under 28 U.S.C. § 2241 when a petitioner is challenging the fact or duration of his confinement. *Preiser v. Rodriguez*, 411 U.S. 475, 490, 93 S.Ct. 1827 (1973); *Waletzki v. Keohane*, 13 F.3d 1079, 1080 (7th Cir. 1994). Habeas corpus has been recognized as an appropriate vehicle through which noncitizens may challenge the fact of their civil immigration detention. *See Zadvydas v. Davis*, 533 U.S. 678, 688 (2001); s*ee generally Jennings v. Rodriguez*, 138 S. Ct. 830 (2018) (ruling on merits of habeas petition challenging validity of indefinite mandatory detention).

The Government argues, however, that the Petitioner's claim cannot be brought in a petition for habeas corpus, but should, instead, be brought in a civil rights action. The Seventh Circuit has generally found that "habeas corpus is not a permissible route for challenging prison conditions." *Robinson v. Sherrod*, 631 F.3d 839, 841 (7th Cir. 2011). However, the Seventh Circuit has also noted that "the Supreme Court [has] left the door open a crack for prisoners to use habeas corpus to challenge a condition of confinement." *Id.* at 840 (internal quotation marks omitted) (citing *Glaus v. Anderson*, 408 F.3d 382, 387 (7th Cir.2005); *Nelson v. Campbell*, 541 U.S. 637, 644–46 (2004); *Bell v. Wolfish*, 441 U.S. 520, 526 n.6 (1979); *Preiser v. Rodriguez*, 411 U.S. 475, 499–500 (1973)). And, the Supreme Court has repeatedly said that a petition seeking habeas corpus relief is appropriate under 28 U.S.C. § 2241 when a petitioner is challenging the fact or duration of his confinement. *Preiser v. Rodriguez*, 411 U.S. 475, 490, 93 S.Ct. 1827 (1973); *Waletzki v. Keohane*, 13 F.3d 1079, 1080 (7th Cir. 1994). While a "run-of-the-mill" condition of confinement claim may not touch upon the fact or duration of

confinement, here, Petitioner is seeking immediate release based upon the claim that there are essentially no conditions of confinement that are constitutionally sufficient given the facts of the case. Notably, in the past month, courts across the country have found that petitioners raising similar COVID-19-based claims for release from immigration custody can proceed in a habeas petition. *See, e.g., Thakker, et. al, v. Doll***,** No. 1:20-CV-480, 2020 WL 1671563 (M.D. Pa. Mar. 31, 2020); *Coreas v. Bounds*, No. CV TDC-20-0780, 2020 WL 1663133 (D. Md. Apr. 3, 2020). Accordingly, the Court finds that because Petitioner is challenging the fact of his confinement through his conditions of confinement and it can be brought in a habeas corpus petition.

Next, the Government argues that Petitioner was first required to exhaust his administrative remedies by seeking a bond hearing or a bond reduction in the immigration courts. Habeas corpus petitions under 28 U.S.C. § 2241 have no express exhaustion requirements, but courts have generally found it prudent to require direct appeals and administrative remedies to be exhausted before entertaining a habeas petition. *See, e.g., Kane v. Zuercher*, 344 F. App'x 267, 269 (7th Cir. 2009) (While "there is no express exhaustion requirement in 28 U.S.C. § 2241, a district court is entitled to require a prisoner to exhaust the administrative remedies that the BOP offers before it will entertain a petition."); *United States v. Robinson*, 8 F.3d 398, 405 (7th Cir. 1993) ("The well established general rule is that, absent extraordinary circumstances, the district court should not consider § 2255 motions while a direct appeal is pending."). However, exhaustion may be excused where: (1) requiring exhaustion of administrative remedies causes prejudice, due to unreasonable delay or an indefinite timeframe for administrative action; (2) the agency lacks the ability or competence to resolve the issue or grant the relief requested; (3) appealing through the administrative process would be futile because the agency is biased or has predetermined the issue; or (4) where

substantial constitutional questions are raised. *Gonzalez v. O'Connell*, 355 F.3d 1010, 1016 (7th Cir. 2004).

The Court finds that further exhaustion on Petitioner's claims under the Fifth Amendment of substantive due process violations is not required. These claims exceed the jurisdictional limits of the Immigration Court and the Board of Immigration Appeals and it would be futile to require Petitioner to pursue them in the immigration courts. *See Yanez v. Holder*, 149 F. Supp. 2d 485, 489 (N.D. Ill. 2001). *See also*, *Castillo v. Barr*, No. CV2000605TJHAFMX, 2020 WL 1502864, at *4 (C.D. Cal. Mar. 27, 2020) (citing *Garcia-Ramirez v. Gonzales*, 423 F.3d 935, 938 (9th Cir. 2005)). And, while ICE has discretionary authority to release Petitioner on parole pursuant to INA § 212(d)(5)(A) (8 U.S.C. § 1182(d)(5)(A)) and INA § 236(a) (8 U.S.C. § 1226(a)), the parties do not dispute that Petitioner made a parole request and it was denied on April 3, 2020.

Finding that the Government's procedural arguments are without merit, the Court now turns to the merits of Petitioner's substantive due process claim. Whenever the government detains or incarcerates someone, it has an affirmative duty to provide conditions of reasonable health and safety. As the Supreme Court has explained, "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989). As a result, the government must provide those in its custody with "food, clothing, shelter, medical care, and reasonable safety." *Id.* at 200.

As a federal civil detainee, Petitioner's due process claim is rooted in the Fifth Amendment of the Constitution, rather than the Eighth Amendment. *See Belbachir v. Cty. of*

*McHenry*, 726 F.3d 975, 979 (7th Cir. 2013) (ICE detainees are entitled to "at least as much protection as," and "probably more" than, "convicted criminals are entitled to under the Eighth Amendment. . .—namely protection from harm caused by a defendant's deliberate indifference to the detainee's safety or health" (citations omitted)); *Smith v. Dart*, 803 F.3d 304, 309 (7th Cir. 2015) ("In the context of a conditions of confinement claim, a pretrial detainee is entitled to be free from conditions that amount to 'punishment,' while a convicted prisoner is entitled to be free from conditions that constitute 'cruel and unusual punishment.'" (citations omitted)); *Hardeman v. Curran*, 933 F.3d 816, 821 (7th Cir. 2019) ("Pretrial detainees are in a different position, because their detention is unrelated to punishment."). Civil detainees are entitled to more considerate treatment and conditions of confinement than convicted prisoners. *Youngberg v. Romeo*, 457 U.S. 307, 322 (1982); *Hughes v. Scott*, 816 F.3d 955, 956 (7th Cir. 2016) ("Remember that he's not a prison inmate but a civil detainee.").

The Seventh Circuit has held that for a pretrial detainee to establish constitutionally deficient conditions of confinement, he must prove that the conditions are "objectively unreasonable." *See Hardeman*, 933 F.3d at 822-23 (citing *Kingsley v. Hendrickson*, 576 U.S. 389, 135 S. Ct. 2466, 2472 (2015)). As civil immigration detainees are in substantially the same position, the Court finds that the same standard applies. Accordingly, under Seventh Circuit law, the analysis of a due process challenge to conditions of confinement for a civil detainee involves two steps. First, the Court must determine whether the Government's conduct was purposeful, knowing, or "perhaps even reckless" with respect to the consequences of his conduct, and the conditions created must be objectively serious. *See Miranda v. County of Lake*, 900 F.3d 335, 350-51 (7th Cir. 2018); *see also Castro v. County of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016). Second, the Court must assess the objective reasonableness of the Government's conduct

in light of the "totality of facts and circumstances" facing the Government. *McCann v. Ogle County*, 909 F.3d 881, 886 (7th Cir. 2018). The reasonableness of the Government's conduct is measured objectively "without regard to any subjective belief held by the [Government]." *Id.*

Here, the Government does not appear to dispute that it has knowledge of the conditions created by detaining Petitioner, an individual at a high risk of serious illness or death if he contracts COVID-19, during the COVID-19 pandemic. Nor does it argue that Petitioner would have a substantial risk of suffering serious harm or death should he contract the virus. Its argument, rather, is that the facility's precautionary measures have been objectively reasonable with regard to Petitioner, such that he is not at a substantial risk of suffering serious harm.

While the facility has taken a number of measures, as detailed above, to prevent the spread of the virus, Petitioner maintains that even in light of these measures, to the extent they have been implemented, Petitioner is still at a substantial risk of suffering serious harm by remaining in detention. The Court agrees. The Government does not argue that the facility is enforcing social distancing among the detainees or that they are providing cloth masks to detainees, even though the CDC recommends both of these measures. Rather, they appear to primarily be relying on the voluntary actions of new detainees to wear masks and the detainees as a whole to practice social distancing in a confined environment. Notably, they do not allege that any testing has taken place, only that new detainees are screened for symptoms. Screening measures, while good, are only so effective. Screening will only allow the facility to identify individuals with active symptoms, not those asymptomatic individuals who can nevertheless spread the virus undetected. The Government's response does not address the potential for asymptomatic spread and does not appear to be mandating use of masks by its staff or detainees that would help to contain any asymptomatic spread. Additionally, as Petitioner argues, while

the Government asserts that "[a]symptomatic inmates with exposure risk factors are quarantined," Petitioner, who has exposure risk factors, was not quarantined. Petitioner also refutes that hand sanitizer and other disinfectants are readily available to the detainees. Regardless, sanitizing practices are of limited effectiveness when detainees are housed in close proximately to each other. In light of the seriousness of the pandemic, the Court finds these precautions are insufficient address Petitioner's medical needs and conditions of confinement. *See Fraihat, et al. v. U.S. Immigration & Customs Enf't, et al.,* No. EDCV191546JGBSHKX, 2020 WL 1932570, at *26 (C.D. Cal. Apr. 20, 2020) ("During a pandemic such as this, it is likely punitive for a civil detention administrator to fail to mandate compliance with widely accepted hygiene, protective equipment, and distancing measures until the peak of the pandemic, and to fail to take similar systemwide actions as jails and prisons. Here, the protective actions taken by comparable prison and jail administrators have been as favorable or more favorable than Defendants'.").

Moreover, the Court finds that the measures cannot be seen as objectively reasonable in light of the Government's interest in detaining Petitioner. As an immigration judge has already determined that Petitioner is not a danger to the community, the Government's only legitimate interest in detaining Petitioner is to ensure his presence at his removal proceedings. The Government has the discretion to release Petitioner through parole, but has declined to do so, despite his high risk of serious illness or death from COVID-19 and despite the immigration judge's previous finding that he was not a flight risk or danger to society. Petitioner's continued detention under these conditions is not objectively reasonable nor is it logically related to the Government's interest in ensuring Petitioner's presence at his removal hearing when there are "a plethora of means *other than* physical detention at [the Government's] disposal by which they

may monitor civil detainees and ensure that they are present at removal proceedings, including remote monitoring and routine check-ins." *Thakker, et. al, v. Doll,* No. 1:20-CV-480, 2020 WL 1671563 (M.D. Pa. Mar. 31, 2020); *see also Fraihat*, 2020 WL 1932570 at *26 ("[A]ttendance at hearings cannot be secured reliably when the detainee has, is at risk of having, or is at risk of infecting court staff with a deadly infectious disease with no known cure. Participation in immigration proceedings is not possible for those who are sick or dying, and is impossible for those who are dead.").

The Government also argues that Petitioner's claim cannot succeed because he has submitted no evidence of actual exposure at the facility. *See Helling v. McKinney*, 509 U.S. 25, 32 (1993) (remanding for consideration of whether prisoner might potentially prove an Eighth Amendment violation because of his ongoing exposure to actual tobacco smoke from his cellmate); *see also, Dawson, et al., v. Asher, et al.*, 2020 WL 1704324 (W.D. Wash. Apr. 8, 2020) (denying request for temporary injunction based on finding that there was no evidence that COVID-19 was at the facility and the facility's precautionary measures were sufficient). The Government relies on the Supreme Court's decision in *Helling,* which addressed a condition of confinement claim under the Eighth Amendment. The Supreme Court held that to succeed on his conditions of confinement claim based on exposure to the toxin ETS, the inmate must show that defendant had, with deliberate indifference, exposed him to levels of ETS that pose an unreasonable risk of serious damage to his future health. *Id.* at 35. Accordingly, the Government claims that Petitioner's claim must fail because he has provided no evidence that COVID-19 is in the facility.

However, unlike the toxin in *Helling*, the Court finds that any amount of exposure to COVID-19 would pose an unreasonable risk of serious damage to Petitioner's health.

Petitioner's detention in a highly confined setting "[i]n the face of a deadly pandemic with no vaccine, no cure, limited testing capacity, and the ability to spread quickly through asymptomatic human vectors" in and of itself creates a substantial risk of Petitioner catching the virus and suffering serious illness or death. *Malam v. Adducci, et al.*, No. 20-10829, 2020 WL 1672662, at *9 (E.D. Mich. Apr. 5, 2020), *as amended* (Apr. 6, 2020). *See also, Bent v. Barr*, No. 19-CV-06123-DMR, 2020 WL 1812850, at *3 (N.D. Cal. Apr. 9, 2020) ("Given the exponential spread of the virus, the ability of COVID-19 to spread through asymptomatic individuals, and the inevitable delays of court proceedings, effective relief for Bent and other detainees may not be possible if they are forced to wait until their particular facility records a confirmed case."); *United States v. Kennedy*, 2020 WL 1493481, at *5 (E.D. Mich. Mar. 27, 2020) ("[W]aiting for either Defendant to have a confirmed case of COVID-19, or for there to be a major outbreak in Defendant's facility, would render meaningless this request for release."); *Thakker*, 2020 WL 1671563, at *2 ("Respondents would have us offer no substantial relief to Petitioners until the pandemic erupts in our prisons. We reject this notion."). While the Government claims that no staff or detainees have tested positive for COVID-19, they do not allege that any staff or detainees have been tested *at all* for COVID-19. The facility certainly cannot be faulted for this, as nationwide testing is limited. However, looking at the totality of the circumstances—which include Petitioner's heightened risk of serious illness or death from COVID-19, the inability of other jails and detention centers to control the spread of the virus once it enters the facility, and the limits of the precautionary measures taken by the facility and that could conceivably be taken at the facility in light of the potential for asymptomatic spread—the Court finds that Petitioner's continued detention under these conditions is objectively unreasonable and violates his

substantive due process rights under the Fifth Amendment. Accordingly, at least during the pendency of the COVID-19 pandemic, the Court orders that Petitioner must remain released.

**B. Petitioner's Bond Order Violates His Fifth Amendment Right to Procedural Due Process.**

Petitioner argues, separately from the circumstances of the COVID-19 pandemic, that his due process rights were violated when the immigration judge entered a bond order without considering his financial ability to pay. Petitioner is detained pursuant to 8 U.S.C. § 1226(a). Pursuant to regulations interpreting this statute, the DHS district director makes an initial custody determination as to each non-citizen, including the setting of a bond. 8 C.F.R. § 236.1(d). The noncitizen may then appeal the custody decision to the immigration judge, who "is authorized to exercise the authority in section 236 of the Act [8 U.S.C. § 1226] . . . to detain the alien in custody, release the alien, and determine the amount of bond, if any, under which the respondent may be released." 8 C.F.R. § 236.1(d)(1).

The Government first argues that Petitioner has not exhausted his administrative remedies. The Government claims that Petitioner was not in fact being held pursuant to a $2000 bond order because his bond order had expired or was otherwise made ineffective when he was temporarily taken into Kankakee County custody to address a pending criminal matter. It is unclear why this would be the case and the Government has provided no legal basis for why the Immigration Judge's bond order would expire. Further, in Petitioner's reply, Petitioner's immigration attorney asserts that both the immigration judge and the ICE Trial Attorney believed the bond order to still be in effect at his removal hearing on February 20, 2020. Pet. Reply, Ex. A, Fernandez Decl. ¶¶ 4-6 (Doc. 11). Given the lack of support for the Government's assertion that the immigration judge's bond order expired, and the immigration judge's and ICE Trial

Attorney's beliefs that the order was still in effect, the Court is hesitant to agree with the Government.

Curiously, however, the parties both agree that the immigration judge does not have the statutory authority to set the bond lower than $1,500. If this is the case, then further exhaustion—whether or not there is currently an effective bond order—is plainly futile as the immigration judge will continue to set the bond beyond Petitioner's financial ability to pay without the ability to consider the financial circumstances of Petitioner. However, while the immigration judge may not have authority to set a monetary bond lower than $1,500, from the statutory and regulatory language quoted above, it appears straightforward that an immigration judge does have the statutory authority to release Petitioner on conditional parole. At least one district court has held that an immigration judge does have the authority to grant release on conditional parole as an alternative to release on a monetary bond. *Rivera v. Holder*, 307 F.R.D. 539, 553 (W.D. Wash. 2015). In *Hernandez v. Sessions*, 872 F.3d 976, 1000 (9th Cir. 2017), the Ninth Circuit also assumed that an immigration judge could consider "whether non-monetary alternative conditions of release would suffice to ensure his future appearance," and addressed instead "the government's policy of allowing ICE and IJs to set immigration bond amounts without considering the detainees' financial circumstances or alternative conditions of release." *Hernandez*, 872 F.3d at 1000.

Still, as the Ninth Circuit found in *Hernandez*, further exhaustion is not necessary, as regardless of this Court's findings regarding the immigration judge's authority, further administrative review would be futile. This is because the Board of Immigration Appeals has already held in numerous cases that a noncitizen's ability to pay the bond amount is not a relevant bond determination factor. *See Hernandez v. Sessions*, 872 F.3d 976, 989 (9th Cir. 2017)

(citing *In Re Guerra*, 24 I. & N. Dec. 37, 38 (BIA 2006); *In re Castillo-Cajura*, 2009 WL 3063742, *1 (B.I.A. Sept. 10, 2009) (unpublished); *In re Serrano–Cordova*, 2009 Immig. Rptr. LEXIS 2444, *2 (B.I.A. June 17, 2009) (unpublished); *In re Sandoval–Gomez*, 2008 WL 5477710, *1 (B.I.A. Dec. 15, 2008) (unpublished); *In re Castillo-Leyva*, 2008 Immig. Rptr. LEXIS 10396, *1 (B.I.A. Sept. 18, 2008)(unpublished)). Accordingly, the Court finds that any further exhaustion available must be excused as it will not lead to a different result.

The Court also notes the Government's reliance on *Hmaidan v. Ashcroft*, 258 F.Supp.2d 832 (N.D. Ill. 2003), is inapposite. The petitioners in that case were subject to indefinite detention pending their removal from the country. In response to the Supreme Court's decision in *Zadvydas v. Davis*, 533 U.S. 678, 121 S. Ct. 2491 (2011), which held that such detention was subject to an implicit reasonableness restriction, the Attorney General had offered some petitioners release but only upon posting bonds between $20,000 and $25,000. In that case, Government had pointed to an INS policy that allowed the petitioners to seek relief by the Attorney General by showing that they did not have sufficient funds to post a monetary bond set by the Attorney General. *Id.* at 840. Accordingly, this case does not support the argument that a further bond hearing would be necessary or appropriate to exhaust Petitioner's remedies. The Government has given no indication that such a policy applies to Petitioner or how Petitioner would exhaust such an administrative remedy. Further, to any extent that there is an applicable informal policy like the one mentioned in *Hmaidan*, it would appear that the Government could have addressed it when Petitioner made his parole request pursuant to INA § 212(d)(5)(A) (8 U.S.C. § 1182(d)(5)(A)) and INA § 236(a) (8 U.S.C. § 1226(a)).

Again, finding no jurisdictional bars, the Court proceeds to the merits of Petitioner's claim. Petitioner argues that due process requires an immigration judge to consider a

noncitizen's ability to pay a bond before imposing one. Notably, the Government has offered no defense on the merits this claim. Civil immigration detention requires adequate due process safeguards to ensure that the Government's justification for confinement "outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'" *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (citations omitted); *see also Singh v. Holder*, 638 F.3d 1196, 1203 (9th Cir. 2011) ("due process requires 'adequate procedural protections' to ensure that the government's asserted justification for physical confinement 'outweighs the individual's constitutionally protected interest in avoiding physical restraint.'"). The Supreme Court has long recognized that "imprisoning a defendant solely because of his lack of financial resources" violates the Due Process Clause. *Bearden v. Georgia*, 461 U.S. 660, 661 (1983); *see also Turner v. Rogers*, 564 U.S. 431, 447-48 (2011) (holding that due process requires specific findings as to individual's *ability* to pay before incarcerating him for civil contempt); *Pugh v. Rainwater*, 572 F.2d 1053, 1058 (5th Cir. 1978) (en banc) (holding a pretrial detainee solely due to his " inability to post money bail would constitute imposition of an excessive restraint.").

Addressing this issue, the Ninth Circuit has concluded that due process likely requires "consideration of the detainees' financial circumstances, as well as of possible alternative release conditions . . . to ensure that the conditions of their release will be reasonably related to the governmental interest in ensuring their appearance at future hearings." *Hernandez v. Sessions*, 872 F.3d 976, 990-91 (9th Cir. 2017). The plaintiffs in *Hernandez* had already been determined to not be dangerous or a flight risk. Accordingly, the Ninth Circuit concluded that "consideration of the detainees' financial circumstances, as well as of possible alternative release conditions [is] necessary to ensure that the conditions of their release will be reasonably related to the governmental interest in ensuring their appearance at future hearings." *Id.* at 991.

Here, the Government has not submitted any argument to the contrary. Like the plaintiffs in *Hernandez*, by issuing the bond order in August 2019, and reasserting its validity on February 20, 2020, the immigration judge has already made the determination that Petitioner is not a flight risk or danger to the community. *See* 8 C.F.R §§ 236.1(c); 12326.1(d)(1). At the bond hearing, the ICE trial attorney was free to present any and all of the arrest and conviction information the Government now presents to this Court, and Petitioner asserts that this information was, in fact, before the immigration judge. Despite this information, the immigration judge found that Petitioner was not a flight risk or a danger and the Government has given this Court no reason or basis to second-guess the immigration judge's decision. Accordingly, this Court agrees with the Ninth Circuit and finds that Petitioner's due process rights were violated when his financial circumstances and ability to pay were not considered when his bond amount was set.

On this claim alone, however, the proper remedy may not be immediate release. Given the Court's ruling on Petitioner's COVID-19 related claims, the Court continues to find that Petitioner's immediate and continued release is constitutionally required. However, in lieu of the monetary bond, the Government has clearly expressed its desire to seek non-monetary conditions of release. Accordingly, the Court's order will not impede the Government from seeking a bond order before the immigration judge that would impose reasonable non-monetary conditions of release. However, Petitioner shall remain released solely on his own recognizance unless and until a further bond order is entered by the immigration judge. Nor shall the conditions of his bond restrict his ability to protect himself from the COVID-19 pandemic through measures including, but not limited to, social distancing.

## III. CONCLUSION

For the reasons stated above, Petitioner Juan Manuel Hernandez's Emergency Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 and Complaint for Injunctive Relief (Doc. 1) is GRANTED. The Court ORDERS Petitioner's continued release from custody. However, this Order does not restrict the Government from seeking reasonable non-monetary conditions of release from the immigration judge in the future. Petitioner shall remain released solely on his own recognizance unless and until a further bond order is entered by the immigration judge. The conditions of his bond restrict may not restrict Petitioner's ability to protect himself from the COVID-19 pandemic through measures including, but not limited to, social distancing. As the Court has granted Petitioner's Petition, the Court finds that the Temporary Restraining Order issued on April 9, 2020 pursuant to Fed. R. Civ. P. 65(b) is now moot and no further order is necessary. This Case is CLOSED. The Clerk is directed to prepare the Judgment in favor of the Petitioner.

ENTERED on this 23rd day of April 2020.

/s/ Sara Darrow
Sara Darrow
Chief United States District Judge