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46 MAP 2020

# IN THE SUPREME COURT OF PENNSYLVANIA

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## No. 46 MAP 2020

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C.N., B.L., 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.,

*Appellants*,

v.

PENNSYLVANIA DEPARTMENT OF HUMAN SERVICES,

*Appellee.*

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# REPLY BRIEF OF APPELLANTS

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Appeal from the Orders of the Commonwealth Court of Pennsylvania
Entered on July 7, 2020, and July 22, 2020, at No. 268 M.D. 2020

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## I. INTRODUCTION

This is a case about young children and their parents in U.S. Immigration and Customs Enforcement ("ICE") detention during a COVID-19 pandemic, and Appellee Department of Human Services' ("Department" or "Respondent") refusal to protect them. An immediate risk to health or life exists at the Berks County Residential Center ("BCRC"), the facility in which Appellants, asylum-seeking children and their parents ("Petitioners"), are held. The Department has a regulatory responsibility to license and monitor the health and well-being of the children detained in this facility.

The COVID-19 global pandemic has already taken an incomprehensible number of lives across the world and continues to devastate. Since the filing of Petitioners' opening Brief, 20,000 more Americans have died.[1] Berks County, where BCRC is located, is once again experiencing a rapid rise in COVID cases and deaths. Daily increases in caseloads are "now comparable with what we saw in April," according to the Pennsylvania Department of Health.[2] The rate of infection

[1] https://coronavirus.jhu.edu/map.html

[2] John L. Micek, "4 takeaways from Monday's coronavirus briefing with Pa. Health Secretary Dr. Rachel Levine" (Pa. Capital-Star, October 26, 2020), https://www.readingeagle.com/coronavirus/4-takeaways-from-monday-s-coronavirus-briefing-with-pa-health-secretary-dr-rachel-levine/article_e4d3027e-17d1-11eb-a529-4b18a7fdbe7d.html

in Berks County is now 1 in every 50 residents.[3] And COVID-19 has, predictably and terribly, come to BCRC, in the form of an infected medical provider.[4]

The lives of the Petitioners are at risk. In such circumstances, quick and decisive action is required. Continuing to do nothing, and waiting until COVID-19 ravages the families held in BCRC, is unfathomable. Each family at BCRC has a family sponsor to whom they can, and should, be safely released. Urgent action is required to avert the risk to their health and well-being during this dangerous and unprecedented crisis.

The Commonwealth Court erred in affording the Department unfettered discretion to disregard known facts and refuse to engage in adequate fact-finding, when 55 Pa. Code § 20.37 requires the Department to perform the mandatory duty of issuing an emergency removal order upon a given state of facts, namely, an immediate and serious danger to Petitioners' life or health. At trial, Petitioners showed that they face such a danger. Petitioners' expert witness, Dr. Alan Shapiro, testified that COVID-19 is highly contagious and can be fatal to children, and the mitigation measures implemented by BCRC have been grossly inadequate. Dr. Shapiro and other witnesses testified that BCRC medical infrastructure is deficient, which would likely result in serious injury or death to children who fell ill with

[3] https://www.health.pa.gov/topics/disease/coronavirus/Pages/Coronavirus.aspx
[4] Laura Benshoff and Alanna Elder, "Employee at Berks County immigration detention center tests positive for COVID-19" (WHYY, October 23, 2020), https://whyy.org/articles/employee-at-berks-county-immigration-detention-center-tests-positive-for-covid-19/.

COVID-19. Because that evidence is determinative in whether the Department has a mandatory duty to issue an ERO, it was material and its exclusion by the Commonwealth Court was erroneous. The Commonwealth Court further erred in concluding that the Department's exercise of discretion was not arbitrary or based on a mistaken view of the law. The Department's oversight of BCRC has been deficient, both before and during the pandemic. No protocol for issuing an ERO exists apart from a vague "egregiousness" standard, and the Department has refused to even contemplate the possibility of an ERO during the pandemic.

The Commonwealth Court also erred in failing to grant a new trial based on after-acquired evidence that BCRC has resumed detaining new families since the Court's July 7, 2020 Order, a fact which impacts Petitioners' ability to practice social distancing and which is highly relevant to the Court's analysis of whether Petitioners have a legal right to an ERO.

Finally, the Department's Brief failed to address several of Petitioners' arguments, as follows:

- *That the Court's failure to consider Dr. Shapiro's expert opinion was an error warranting a new trial.*

Dr. Shapiro's medical opinions should have been considered and given appropriate weight as opinions of a medical expert. As a pediatrician with experience treating COVID-19 and recently arrived children, Dr. Shapiro's testimony went to the heart of the principal factual question: Are BCRC's

protective measures adequate to prevent Petitioners from exposure to COVID-19? By failing to consider Dr. Shapiro's testimony, the Court excluded perhaps the most relevant and material evidence in the proceeding. *Kuisis v. Baldwin-Lima-Hamilton Corp.,* 319 A.2d 914, 924-25 (Pa. 1974). This was an error warranting a new trial, and the Court's failure to grant one constituted further error.

Because the Department failed to contest this argument, the Court should find for Petitioners and direct the Commonwealth Court to grant a new trial on this basis.

- *That the Commonwealth Court abused its discretion in excluding testimony from Attorneys Cambria and Donohoe.*

The testimony of Attorneys Cambria and Donohoe constituted material evidence that is relevant to the issue of BCRC's ability to provide medical care during a pandemic. The Department does not rebut Petitioners' statement that "[t]he improper exclusion of relevant material evidence is ... grounds for a new trial." *Carpenter v. Pleasant*, 759A.2d 411, 414 (Pa.Cmwlth. 2000), *appeal denied*, 782 A.2d 549 (Pa. 2001). Here, Petitioners moved for a new trial based on the improper exclusion of relevant material evidence, which the Commonwealth Court denied in its July 22, 2020 Order. (R. 1202a-1223a); App. B.

Petitioners' argument stands: Cambria and Donohoe's testimony was relevant, it was material, and the Commonwealth Court's improper exclusion of it

was grounds for a new trial. Failure to grant a new trial was further error, and this Court should reverse on this basis.

## II. COUNTER-STATEMENT OF FACTS[5]

- BCRC is a "secure" facility; Petitioners are not free to leave. *Flores v. Sessions*, 394 F.Supp.3d 1041, 1069 (C.D. Cal. 2017).
    - Diane Edwards, the executive director of BCRC, stated that if any of the detained families were to leave the facility then ICE and local law enforcement would be notified and BCRC staff would follow and monitor the detainee. (R. 826a). She stated that if a detainee left the BCRC then ICE would re-apprehend them. *Id.*
    - Additionally, detainees have been prohibited from leaving the interior of the facility; even to wash their children's toys when they expressed fear about COVID-19 infection. (R. 1719a). BCRC staff conduct multiple detainee counts during the night, shining flashlights into private bedrooms and disrupting sleep. (R. 454a-55a). These bed checks follow DHS regulations for secure facilities and indicate that

[5] Petitioners' opening brief recounted only the facts related to the issues decided by the Commonwealth Court. Petitioners here address the Department's mischaracterizations of the record below. A more detailed recitation of the facts and where the Department gets them wrong was submitted in the Commonwealth Court. (R. 1091a-1119a, 1156a-1201a).

BCRC and/or the DHS consider BCRC to be operating a secure facility. 55 Pa. Code §3800.274(7).

- The BCRC building, and hence the square footage stated by the Department, includes not only the "program floors" where the Petitioners must remain, but also the BCRC administrative offices, the ICE Health Services department, as well as the ICE field office. The Petitioners are limited to two floors, one of which is primarily bedrooms. The square footage that Petitioners have access to is, thus, much less. (R. 1165a-66a).
    - Regardless of the acreage on which BCRC sits, Petitioners are limited to the playground and field. Petitioners may access the outdoor recreational area only when allowed by and accompanied by BCRC staff. Petitioners must remain within sight of a BCRC staff member at all times. They are watched by BCRC staff the entire time. (R. 1166a).
- Petitioner B.L. participates in the coercive work program to clean BCRC that pays a dollar a day, so that he can buy soup from the commissary since his son can't eat food from the cafeteria due to sores in his mouth from infection. (R. 422a-23a).
- Dr. Shapiro testified that BCRC's signage was not effective in communicating key concepts relating to COVID-19 prevention, including social distancing. (R. 506a-509a).

- After suspending new detention beginning March 18, 2020, ICE began detaining new families at BCRC on July 7, 2020. (R. 1226a).
- Detainees presenting with COVID-19 symptoms were not tested, including a one-year-old boy who had a fever and congestion that lasted for three days, and a two-year-old girl who had a fever for more than a week. (R. 414a-15a, 896a-98a, 900a-901a, 916a, 927a, 929a-31a, 1115a, 1281a, 1287a, 1303a, 1317a, 1328a, 1350a; 1387a, 1389a, 1391a).
- At least one BCRC staff member has tested positive for COVID-19.[6]

## III. ARGUMENT

### A. The Commonwealth Court Erred in Refusing to Consider the Testimony of Petitioners' Witnesses.

#### 1. The Commonwealth Court erred in refusing to consider the testimony of expert witness Dr. Alan Shapiro when he was qualified as an expert; the Department's proffered alternative grounds on which to affirm the ruling fail.

Petitioners clearly established Dr. Shapiro's field of expertise and Dr. Shapiro expressed his opinion with reasonable certainty, and the Commonwealth Court's refusal to consider his expert testimony was unreasonable and an abuse of discretion. *Grady v. Frito-Lay, Inc.*, 839 A.2d 1038, 1046 (Pa. 2003).

[6] Benshoff and Elder, "Employee at Berks County immigration detention center tests positive for COVID-19" (n. 4, *supra*).

### a) Counsel for Petitioners established Dr. Shapiro's expertise before he rendered his opinion.

Neither the Pennsylvania Rules of Evidence, nor the Federal Rules of Evidence set out any special procedure for determining whether the witness is qualified to testify as an expert. 1 Leonard Packel & Anne Bowen Boulin, West Pennsylvania Practice § 702-5 (4th ed. 2013). "'[M]agic words' need not be uttered by an expert in order for his or her testimony to be admissible." *Com. v. Miller*, 605 Pa. 1, 987 A.2d 638, 656 (Pa. 2009).

As the Superior Court has observed, no formal *voir dire* is required. *Com. v. Engelhardt*, 120 A.3d 1062 (Pa. Super. 2015) (finding the trial court properly admitted expert testimony when his qualifications were enumerated on direct examination). In *Engelhardt*, as here, the opposing party did not dispute the expert's credentials. *Id.* Nor did the Department ever dispute Dr. Shapiro's field of expertise. The Department did not file any motion *in limine* to exclude Dr. Shapiro's testimony.

Petitioners showed that Dr. Shapiro was qualified to express an opinion on whether COVID-19 posed a threat to the families detained at Berks. He is an expert in pediatrics with a specialty in family detention.[7] The Department did not

[7] It is unfortunate that any doctor would have a specialty in "family detention," but if any can be said to, it is Dr. Alan Shapiro.

call a competing expert to contradict Dr. Shapiro's testimony, and indeed one would be difficult to find.

The cases cited by the Department are unavailing. In *Donaldson*, testimony by a doctor was excluded because he was not qualified; however, the Court did not elaborate on what is required to qualify an expert. *Donaldson v. Maffucci*, 156 A.2d 835 (Pa. 1959). The court cited *Kriner*, a case in which a milling engineer was called upon to testify to, among other things, the value of a piece of property. His testimony was excluded because "appellant made no attempt to show that he was qualified to express an opinion on the point." *Kriner v. Dinger*, 297 Pa. 576, 147 A. 830, 832 (1929). The Department cites *Wright v. Residence Inn by Marriott*, 207 A.3d 970, 976 (Pa. Super. 2019) for the proposition that "[t]here is no presumption that a medical doctor can opine on any medical subject." Resp't's Br. at 29. Here, however, Petitioners did not offer Dr. Shapiro as an expert on "any medical subject"; they offered him as an expert on COVID-19 and family detention, both areas in which he had substantial experience.

The Department cites *Commonwealth v. Duffey* for the proposition that the requirement to establish the disputed field cannot be satisfied by having the expert simply testify to the expert's education and experience. Resp't's Br. at 29-30. In *Duffey*, the issue was whether a police officer was qualified to testify regarding stab wounds. *Com. v. Duffey*, 548 A.2d 1178, 1186 (Pa. 1988). The court

concluded that he was not because, *inter alia*, he had not been listed as an expert going into trial. *Id.* Here, however, Dr. Shapiro was listed as an expert. Therefore, the instant case is distinguishable from *Duffey*.

Petitioners clearly and repeatedly indicated in what areas Dr. Shapiro would be offering expert testimony:

> As an expert witness, Dr. Shapiro will testify that COVID-19 is highly contagious and widespread in the community. He will further testify that COVID-19 can be transmitted during its incubation period and shed in asymptomatic persons. He will also testify about new scientific evidence pointing to risk to children, especially the very young. Dr. Shapiro will testify to Petitioners' inability to social distance, self-quarantine/isolate, and other impossibilities for properly dealing with COVID-19 at the BCRC. He will testify as to the inconsistent and inadequate healthcare in family detention centers including BCRC and the severely detrimental effects that he has observed detention to have on children and their parents. He will testify that the steps taken in response to COVID-19 at the BCRC thus far are wholly inadequate to protect the health of the Petitioners during this pandemic. (R. 293a-294a).
>
> Our expert will testify that COVID-19 is a highly contagious and potentially life-threatening disease. He will testify to that in detail. And he will refer to the latest research and information that is showing that even previously healthy children are now falling ill from COVID associated syndrome. You know, it had previously been thought to be more of a disease affecting older people, but that is changing as the fuller specific picture emerges. (R. 397a-398a).

Given the foregoing, Respondent's claim that Petitioners failed to distinguish in which areas Dr. Shapiro was being offered as an expert is disingenuous.

For the above reasons, the Commonwealth Court's refusal to consider Dr. Shapiro's expert testimony was unreasonable and an abuse of discretion.

**b) Dr. Shapiro had the proper factual basis for his opinion.**

Dr. Shapiro had more than enough knowledge about the unique challenge of COVID-19 at BCRC, having had direct and painful experience of treating COVID-19 on the front lines in the Bronx this spring, *and* having repeatedly visited BCRC, knowing the layout and how the facility functions. He didn't need to be at BCRC during the COVID pandemic to be able to judge based on their stated mitigation protocols whether those protocols were sufficient. He reviewed the Department inspector's declaration (R. 1267a-73a) as well as CDC health alerts, and journal articles on the latest COVID-19 research, and articles which Dr. Shapiro himself authored on the health of immigrant children in detention. (R. 291a-329a).

Petitioners included in their Pretrial Statement a declaration of Dr. Shapiro that outlined his education and experiences. (R. 301a-328a). Dr. Shapiro's declaration described his experience caring for individuals who have contracted COVID-19 and his experience visiting detained immigrant families and children. *Id.* In his declaration, Dr. Shapiro stated he had visited BCRC and that he had authored the American Academy of Pediatrics' policy statement on the detention of immigrant children. *Id.* During trial, Petitioners questioned Dr. Shapiro extensively on his qualifications and offered his CV into evidence. (R. 466a-76a, 1229a-33a).

Dr. Shapiro has made multiple visits to family detention centers including BCRC, where he has seen the medical facilities and interviewed medical and mental health staff. *Id.* The purpose of the visits was to identify what kind of health services existed for children and families in those facilities. *Id.*

To reiterate, Dr. Shapiro is a pediatrician treating COVID-19 in the Bronx, who specializes in children in detention. He is eminently qualified to render an opinion on the adequacy of BCRC's COVID-19 prevention efforts.

**c) Dr. Shapiro's opinion was sufficiently definite.**

Dr. Shapiro testified that the threat from COVID-19 within BCRC is immediate. He noted that children have unique medical needs requiring specialized treatment, especially since they get sick very quickly, and testified that COVID-19 is an extremely contagious disease that has rapidly spread to more than five million people worldwide. (R. 487a, 493a). He noted that regarding BCRC, one in 109 people in Berks County were infected,[8] and it is impossible to keep the virus from coming in with staff members. (R. 513a-521a).

Dr. Shapiro cited a CDC study showing how quickly COVID can ravage a detained population. Between April 22 and 28, more than 5,000 incarcerated people became infected with COVID-19, and more than 2,700 staff members became infected. Of those, there were 88 deaths amongst the incarcerated and 15

[8] As noted above, the infection rate is currently approximately 1 in 50 people.

deaths among the staff. (R. 504a). That was over a six-day period, going to the immediacy of the threat at BCRC. Dr. Shapiro testified that BCRC's signage was not effective in communicating key concepts relating to COVID-19 prevention, including social distancing. (R. 506a-509a). He also testified that self-reporting protocols are ineffective given that a majority of infected people are asymptomatic or have only mild symptoms, and that taking temperatures before mealtime is an ineffective screening tool due to variability in different types of thermometers and the possibility of asymptomatic carriers. (R. 514a, 524a-25a).

Dr. Shapiro concluded that the only way to protect Petitioners in this pandemic would be either to have an entirely closed facility, with no one coming in or going out, or to release Petitioners from BCRC. (R. 513a, 532a-33a). As he wrote in his Declaration included with Petitioners' Pretrial Statement:

> From both a humanitarian and public health perspective, the only ethical decision that can be made at this time is to safely release families living in [BCRC] to their loved ones around the country. The children and their parents living in the immigration detention center have fled unspeakable violence. I have cared for hundreds of them and have heard their stories of trauma and resilience. Living in the community they will be able to access the medical and mental health care they need and deserve. Release of families from detention will significantly decrease their risk of acquiring COVID-19.

(R. 325a).

In sum, Dr. Shapiro's testimony was crucial to Petitioners' argument in support of their right to an ERO. Because the Court excluded Dr. Shapiro's

testimony, Petitioners were unable to prove they had a clear legal right and the Department had a mandatory duty to issue an ERO. Therefore, the Commonwealth Court's failure to consider Dr. Shapiro's expert testimony constitutes reversible error.

### 2. The Commonwealth Court erred in excluding testimony from Attorneys Bridget Cambria and Carol Anne Donohoe as hearsay, when their testimony fell under the hearsay exception in Pa.R.E. 803(4).

The Commonwealth Court erred in excluding the testimony of Attorneys Cambria and Donohoe, and Respondent's argument to the contrary directly contradicts case law.

The statements made by Petitioners were not made for the purposes of litigation. As Petitioners and their witnesses testified, it is extremely difficult for them to obtain adequate medical treatment at BCRC. Dr. Shapiro testified that BCRC did not provide adequate behavioral and mental health services to detained children (R. 485a); that BCRC did not provide adequate treatment to detained children experiencing medical problems, (R. 486a); and that detention causes toxic stress with severe health effects, including suicidal ideation, in children. (R. 482a, 485a).

Petitioner B.L. testified that his one-year-old son, B.K.L.N., contracted a virus that led to sores around his mouth and made it so that he could not eat. He also had fever and congestion lasting for three days. B.K.L.N. has not been able to

eat for months and has had diarrhea from the food at BCRC. (R. 414a-15a, 418a). B.L. further testified that when his young son fell and hit his head, and afterward was unable to sleep, he was given Tylenol by the medical staff and was told that the child was just having nightmares. But B.L. never knew B.K.L.N. to have nightmares or trouble sleeping before. B.L. does not believe his child received appropriate treatment or diagnosis by the medical staff at BCRC. (R. 417a-18a).

Two-year-old Petitioner H.M.N. had a fever for more than a week. During that time she would not eat and would cry if given food. BCRC staff gave her Tylenol. Her father, P.M., does not believe that if his family were to get sick with COVID-19, that they would receive appropriate medical treatment at BCRC. (R. 451a-52a, 454a; 1275a-1385a).

Attorney Donohoe testified that over four years of representing hundreds of detained families, BCRC's standard response to requests for medical assistance by detained parents, including serious issues, was to take Tylenol and drink water, and that complaints made to the Department about medical neglect of clients detained at BCRC were often met with no response. (R. 606a, 613a-14a). Attorney Cambria testified, *inter alia*, that BCRC failed to provide adequate supplies for the care of a three-month old infant until she herself complained to the Department. (R. 566a-67a).

In short, Petitioners did not expect their attorneys to sue to obtain treatment. They simply *could not reach anyone else who had the power to obtain treatment for them*.

The situation is on all fours with *Belknap*, in which the hearsay statements were made to a police officer who declarants believed could get their friend the medical attention he needed. *Com. v. Belknap*, 105 A.3d 7, 10 (Pa. Super. 2014). Here, the statements were made by detained people to their immigration attorneys, not for the purpose of litigation, but for the purpose of receiving urgently needed medical treatment due to BCRC's consistent refusal to pay attention to the clients' needs. (R. 554a-58a, 618a-21a).

### B. Section 20.37 embodies a mandatory duty, the Department arbitrarily or mistakenly exercised its discretion, and detained families have a clear right to an ERO

#### 1. The Department's duty to issue an ERO is mandatory "upon a given state of facts."

In Pennsylvania, "[a] mandatory duty is 'one which a public officer is required to perform upon a given state of facts and in a prescribed manner in obedience to the mandate of legal authority.'" *See Sanders v. Wetzel*, 223 A.3d 735, 739 (Pa. Cmwlth. 2019), citing *Filippi v. Kwitowski*, 880 A.2d 711, 713 (Pa. Cmwlth. 2005). In the present matter, the Department was required to issue an ERO "upon a given state of facts," those facts being ample record evidence of a high risk of minor Petitioners' infection with COVID-19. This record evidence

demonstrated conditions likely to constitute an immediate and serious danger to life or health of Petitioners.

At the outset, in its brief, the Department omitted without notation portions of language it cited from Petitioners' brief in a way that mischaracterizes Petitioners' argument. *See* Resp't's Br. at 19. The full text from Petitioners' brief reads: "The Department must be afforded some level of discretion *to engage in factfinding consistent with its obligations under state law*. But that discretion does not extend to denying the truth of proven objective facts. The Department cannot turn a blind eye to evidence and information of which it has clear knowledge." Petitioners' Br. at 36 (emphasis added, text partially cited in Resp't's Br. at 19). The Department omitted the text in italics without using an ellipsis or otherwise indicating that the text had been modified. Whether or not the omission was intentional, the effect was to misquote Petitioners and mischaracterize their actual argument. The omitted clause "to engage in factfinding consistent with its obligations under state law" emphasizes that discretion in factfinding must be grounded in objective reality. Any discretion involved in ascertaining objectively observable facts does not extend to ignoring or disregarding known, provable facts, which is what the Department has done in refusing to issue an ERO.

If the facts indisputably support the existence of the predicate condition—evidence of gross incompetence, negligence, or misconduct in operating the

facility "likely to constitute an immediate and serious danger to the life or health of the clients"—then according to the plain language of 55 Pa. Code § 20.37, the Department's duty to act is mandatory. That predicate condition has been met here. Given the high stakes during the lethal COVID-19 pandemic and the unique circumstances of the "clients" in this matter—young children who are forcibly and indefinitely detained—mandamus must remain as the final remaining check on an agency that has turned a blind eye to the risk of serious injury or death to the child Petitioners.

### 2. The Department arbitrarily exercised its discretion, and Petitioners have a clear right to an ERO.

The Commonwealth Court erred in concluding that the Department's exercise of discretion was not arbitrary or based on a mistaken view of the law, when Petitioners have shown that their life or health is in immediate and serious danger due to the COVID-19 pandemic and that existing safety protocols at BCRC are insufficient to protect them from contracting COVID-19. BCRC's COVID-19 mitigation measures are not adequate to protect the child Petitioners from "an immediate and serious danger to [their] life or health," and consequently, Petitioners have a clear right to issuance of an ERO.

The Department argues that Inspector Roman conducted her monitoring inspections earlier this year remotely out of concern for the safety of the child Petitioners. Resp't's Br. at 21. While that was the *post hoc* rationale that Inspector

Roman offered at trial, the primary and overriding reason that she did not want to conduct an in-person inspection was because she did not want to expose herself or her family to COVID-19. That was the reasoning she used in a contemporaneous email refusing to comply with Department Secretary Miller's clear instructions to continue on-site monitoring of BCRC. (R. 1450a-51a). Inspector Roman wrote, "Sending our department to BCRC to complete a monitoring visit without justification is in direct contradiction to the Governor's orders and I will not make myself available to put myself, my family, or others in harm's way to conduct a monitoring visit." *Id.* Inspector Roman's legitimate concern for her family's safety prevailed, and the Department permitted her to conduct a remote inspection. But the Department has not been willing to offer Petitioners the same level of protection that it extended to Inspector Roman's own family, ensuring through its failure to issue an ERO that the families have remained detained at BCRC through the entirety of the pandemic.

As evidence of the success of BCRC's protective measures, the Department relied heavily on BCRC's assurance that it had terminated admissions during the pandemic and that no cases of COVID-19 had been detected at BCRC. *See* Resp't's Br. at 23, 25. Neither of those conditions now apply. As Petitioners noted in their Motion for Post-Trial Relief, the same day the Commonwealth Court denied relief to Appellants, BCRC resumed admitting new families to the facility.

(R. 1225a-26a). This is salient because newly admitted families could bring COVID-19 into the facility, and greater numbers of people detained at BCRC leaves less room for Appellants to socially distance. In addition, an employee at BCRC subsequently tested positive for COVID-19. *See* Note 4, *supra*. These two developments thoroughly undermine the factual basis for the Commonwealth Court's conclusion that BCRC's mitigation protocols are adequate to protect Petitioners' life and health.

In addition, the CDC guidelines cited by the Department are intended for incarcerated adults and do not contemplate detained children, who cannot comply with social distancing and hygiene protocols due to their young age. (R. 126a). Indeed, CDC guidelines have proven inadequate to stop the rampant spread of COVID-19 in ICE detention centers. (R. 542a).

Tellingly, the fact that BCRC did not terminate its pre-existing coercive "dollar per day" work program (used as an exploitative cost-saving measure so that BCRC does not have to pay outside contractors to clean the facility) during the pandemic demonstrates the prioritization of profit to the County over the health of detained families. (R. 940a). Cleaning the facility is inherently dangerous because it could expose the cleaners to COVID-19; coercing detained parents into cleaning the building in which they are detained so they can feed their children edible food from the commissary is unconscionable. (R. 423a).

While the Department claims that social distancing information was provided to Petitioners (Resp't's Br. at 24-25), it was often not provided in the Petitioners' native language. (R. 892a-93a). In addition, the Department's reliance on BCRC's protocol for conducting temperature checks of staff upon entry into BCRC fails because temperature checks will not detect asymptomatic carriers. (Resp't's Br. at 24; R. 491a, 497a).

The Department wrongly asserts that if an ERO were to be issued, Petitioners would necessarily remain in ICE custody. Resp't's Br. at 26. As Petitioners noted in their opening brief, discharge from BCRC would likely lead to their parole to sponsoring family members. *See* Pet'rs' Br. at 12 ("Petitioners have family members ready to receive them upon release from BCRC, and families previously released from Berks have gone to live with family members in the United States. (R. 568a-69a, 576a-77a). Regardless, the Department's responsibility is to comply with Pennsylvania law governing the care and protection of children, not to speculate about what other government agencies might or might not do in response.

### C. The Commonwealth Court's error in concluding that minor Petitioners' failure to adhere to social distancing and masking was due to choice and not lack of ability, when combined with the other failures in BCRC's COVID-19 mitigation, should result in reversal.

The Department concedes that if the Commonwealth Court was referring to minor Petitioners in finding that any lack of social distancing and wearing masks was a matter of choice rather than ability, then it committed error. Resp't's Br. at 38. The Department asserts that the Commonwealth Court meant to refer only to adult Petitioners, but that assertion is not supported by a plain reading of the court's decision. While on its own, the error might not warrant reversal, taken together with the other errors committed by the court and the significant changes in BCRC's COVID-19 mitigation protocols (including a COVID-positive employee and resumption of new admissions), remand for a new trial is an appropriate remedy.

### D. The Commonwealth Court erred in failing to grant a new trial based on BCRC's detention of new families because this fact would likely compel a different result.

The Commonwealth Court erred in failing to grant a new trial based on after-acquired evidence that BCRC has resumed detaining new families since the Court's July 7, 2020 Order. That BCRC is now detaining new families would certainly affect whether the Department has a duty to issue an ERO. It impacts Petitioners' ability to practice social distancing and is highly relevant to the

Court's analysis. The key issue in the case is whether there is an imminent danger to life or health of the detained families during the COVID-19 pandemic, which compels the Department to issue an ERO. Yet the Department argues that the detention of new families does not factor into this analysis. Among the facts cited by the Department in support of their position are the following:

> "9. On the last day of trial, May 29, 2020, BCRC's total census was 13 individuals.[] ...
>
> "12. As of May 29, 2020, each family unit at BCRC had its own bedroom.[] ...
>
> "35. BCRC has removed some tables from the dining room and assigned each family unit to a particular table.[]
>
> "61. As of March 18, 2020, BCRC suspended: all new admissions to the facility[] ...
>
> "90. Based on the March/April Inspection, Ms. Roman made the following conclusions: ... (b) that BCRC residents could adequately social distance due to the number of residents and size of the facility[] ...
>
> "93. On May 6, 2020, BCRC's total resident census was 16 residents -- 10 adults and 6 children.[]
>
> "While BCRC can accommodate up to 96 residents, it currently only houses 13 residents and each family has its own bedroom."

Appendix A at 11-28.

The concept that BCRC was adequately mitigating the danger of COVID-19 because of detainees' ability to social distance is especially not the case now that BCRC is detaining new families. There were 13 people detained at BCRC at the

time of the Commonwealth Court's decision. App. A at 28. As of July 27, according to ICE, there were 21 detainees being held at BCRC. (R. 1226a). Currently, the exact number of people at BCRC is unknown as new arrivals are held in quarantine up to 20 days with no ability to contact legal counsel. The Commonwealth Court should have granted a new trial based on after-acquired evidence that BCRC was detaining new families, and its failure to do so constituted error.

## IV. CONCLUSION

For the foregoing reasons, this Honorable Court should reverse the decision of the Commonwealth Court.

Dated: October 26, 2020

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

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

Furthermore, I certify that the Brief of Appellants complies with the length requirements of Pa.R.A.P. 2135. Excluding the parts of the Brief that are exempted by Pa.R.A.P. 2135(b), there are 5,402 words in the Brief, as counted through the use of Microsoft Word.

Date: October 26, 2020 /s/Karen Hoffmann
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