

No. \_\_\_\_\_

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IN THE

# Supreme Court of the United States

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SKYLER THOMAS RICE,

*Petitioner,*

—v.—

ED GONZALEZ, SHERIFF OF HARRIS COUNTY,

*Respondent.*

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Petitioner Skyler Thomas Rice, proceeding *pro se*, sought immediate release from pretrial detention at the Harris County Jail in light of the danger of contracting COVID-19 at that facility. The district court construed Mr. Rice's claim as seeking relief under 42 U.S.C. § 1983 and dismissed the case, assessing a strike against Mr. Rice for purposes of the Prison Litigation Reform Act. Mr. Rice, still *pro se*, appealed the district court's judgment. The named defendant, the Harris County Sheriff, did not file a responsive brief.

Before the Fifth Circuit could rule on the appeal—indeed, seven weeks before it ruled—Mr. Rice was transferred to Texas Department of Criminal Justice custody at the Gist State Jail in Beaumont, Texas, in order to serve his sentence. Thus, his pretrial detention at the Harris County Jail was over, and his claim for release from that detention was moot. The Fifth Circuit, unaware of this development, issued a published opinion in which it construed Mr. Rice's claim as brought in habeas, and then held that habeas was unavailable for his claim. As the Fifth Circuit recognized, this decision created a circuit split with the Sixth Circuit.

After the Fifth Circuit issued its opinion but before the mandate issued, Mr. Rice retained counsel and notified the court that he had not been in Harris County custody at the time it issued its opinion. Accordingly, he indicated to the court of appeals, it lacked jurisdiction to decide the case when it issued its opinion. He therefore sought vacatur of the published opinion and dismissal of the appeal. Respondent did not oppose the request. Nonetheless, without

explanation, the court of appeals denied vacatur and dismissal.

The question presented is:

Whether the court of appeals' judgment should be vacated, where the appeal was moot at the time the opinion issued because Petitioner two months earlier had been transferred from the pretrial detention that was the only subject of his case.

## **PARTIES TO THE PROCEEDING**

Petitioner is Skyler Thomas Rice, formerly a pretrial detainee at the Harris County Jail in the custody of the Harris County Sheriff and now a prisoner at the Gist State Jail in the custody of the Texas Department of Criminal Justice.

Respondent is the Sheriff of Harris County.

## **STATEMENT OF RELATED PROCEEDINGS**

*Rice v. Gonzalez*, No. 4:20-cv-01356 (S.D. Tex. Aug. 6, 2020) (order dismissing Mr. Rice's habeas petition separately docketed by the Southern District of Texas).

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## **PETITION FOR A WRIT OF CERTIORARI**

Skyler Thomas Rice respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

### **INTRODUCTION**

The court below unknowingly issued a decision when it indisputably lacked Article III jurisdiction to do so. Mr. Rice’s lawsuit challenged his pretrial detention at the Harris County Jail. Yet he was no longer detained there or in the custody of the Respondent, the Harris County Sheriff, when the court below ruled. When Mr. Rice informed the court of its lack of jurisdiction, however, the court denied multiple requests to vacate its decision and dismiss the appeal, without explanation—even though the Respondent did not oppose vacatur. Because the court below exceeded its Article III authority, and then refused to vacate its decision and dismiss the appeal after learning of its error, Mr. Rice seeks this Court’s intervention.

The Fifth Circuit’s decision, which created a circuit split, was advisory on issuance. Under Article III, the courts have authority only to decide live cases or controversies, and the decision issued by the court of appeals came in a case that presented no such dispute. Moreover, Mr. Rice’s case became moot while it was on appeal, also warranting vacatur (of both the court of appeals’ and the district court’s decisions). Mr. Rice therefore respectfully requests that this Court grant certiorari, vacate the court of appeals’ decision, and remand for vacatur of the district court’s judgment and dismissal of the case without prejudice by the district court.

## **OPINIONS BELOW**

The court of appeals' opinion affirming the district court (Pet. App. 34a-36a) is reported at 985 F.3d 1069. The court of appeals' decision denying rehearing (Pet. App. 21a) is unreported. The court of appeals' decision denying Mr. Rice's unopposed motion for vacatur and dismissal (Pet. App. 4a) is unreported. The court of appeals' decisions denying Mr. Rice's unopposed motion to recall the mandate (Pet. App. 3a) and denying rehearing en banc as to that motion (Pet. App. 1a-2a) are likewise unreported.

The district court's opinion (Pet. App. 41a-44a) is unreported.

## **JURISDICTION**

The opinion affirming the district court was issued on February 2, 2021. The court of appeals denied: (i) rehearing on March 11, 2021; (ii) Mr. Rice's unopposed motion for vacatur and dismissal on March 22, 2021; and (iii) Mr. Rice's unopposed motion to recall the mandate on April 16, 2021. The court of appeals denied rehearing en banc as to Mr. Rice's unopposed motion to recall the mandate on May 7, 2021.

The Court has jurisdiction under 28 U.S.C. § 1254(1).

## **CONSTITUTIONAL PROVISIONS INVOLVED**

Article III, Section 2 of the United States Constitution delimits the scope of the federal judiciary's authority, including that “[t]he judicial Power shall extend to all Cases, in Law and Equity,

arising under this Constitution [and] the Laws of the United States . . . .”

The Fifth Amendment to the Constitution provides that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . . .”

Section 1 of the Fourteenth Amendment to the Constitution provides, in relevant part, “nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .”

### **STATEMENT OF THE CASE**

In April 2020, Mr. Rice was in pretrial custody at the Harris County Jail. He sought his immediate release from pretrial detention in two *pro se* filings, treated as distinct proceedings by the district court.

One of the two cases docketed by the district court’s clerk’s office was a *pro se* petition for writ of habeas corpus or, alternatively, a request for injunctive relief. *Rice v. Gonzalez*, No. 4:20-cv-01356, Dkt. 1 (S.D. Tex. Apr. 15, 2020). That case was adjudicated by Judge Vanessa D. Gilmore, who denied the petition and dismissed the case in August 2020. *Rice v. Gonzalez*, No. 4:20-cv-01356, 2020 WL 4569660 (S.D. Tex. Aug. 6, 2020). Mr. Rice did not appeal that decision.

This petition concerns the second case, docketed and adjudicated separately by the district court. This case was initiated by Mr. Rice’s *pro se* memorandum of law in support of a motion for a temporary restraining order and preliminary injunction, intended to accompany the habeas petition. The district court’s clerk’s office treated it as a distinct matter and assigned it to a separate judge, Judge David Hittner.

The second case challenged Mr. Rice’s pretrial confinement in the Harris County Jail and sought

“release . . . on his own recognizance for the pendency of his criminal proceedings.” Pet. App. 45a. His underlying claim was that his continued pretrial detention at the Harris County Jail violated the Fifth and Fourteenth Amendments’ Due Process Clauses. Pet. App. 45a-46a, 49a-51a. He alleged that he was at increased risk of a serious adverse health outcome were he to contract COVID-19 due to his underlying health conditions and that his pretrial detention at the Harris County Jail “exposed [him] to a substantial risk of serious harm.” Pet. App. 49a, 52a. In support of this contention, he highlighted specific risks he faced because of the unsafe conditions at the Harris County Jail. Pet. App. 49a. Mr. Rice alleged that his ongoing pretrial detention demonstrated that the Harris County Sheriff disregarded the risk that COVID-19 posed to Mr. Rice at the Harris County Jail. Pet. App. 52a-53a.

District Judge Hittner construed Mr. Rice’s case as brought pursuant to 42 U.S.C. § 1983 and not habeas corpus. Pet. App. 42a-43a. On April 28, 2020, Judge Hittner dismissed the case and assessed a strike against Mr. Rice for purposes of the Prison Litigation Reform Act. Pet. App. 44a. Mr. Rice then appealed *pro se* to the Fifth Circuit, which docketed his opening brief on October 1, 2020. Pet. App. 37a. The Sheriff of Harris County did not file a brief before the Fifth Circuit.

On December 15, 2020, some seven weeks before the Fifth Circuit ruled on his case, Mr. Rice’s detention at the Harris County Jail came to an end. He had been sentenced to incarceration by the state for possession of controlled substances. The Texas Department of Criminal Justice (“TDCJ”) therefore took custody of him for service of his sentence at the Gist State Jail in Beaumont, Texas, where he remains to this day.

On February 2, 2021, unaware that Mr. Rice was no longer in the custody of the Harris County Sheriff at the Harris County Jail, the Fifth Circuit issued a published opinion affirming the district court’s denial of relief. Pet. App. 34a-36a. The Fifth Circuit construed Mr. Rice’s claim as sounding in habeas and concluded that it “thus ha[d] jurisdiction over the case.” Pet. App. 35a. It mistakenly described Mr. Rice as “a detainee in the Harris County, Texas, jail awaiting trial.” Pet. App. 34a. But as noted above, at the time of the decision, Mr. Rice was in fact not a detainee in the custody of the Harris County Sheriff but was instead incarcerated in TDCJ custody at the Gist State Jail. TDCJ was not a respondent in the case, and the case made no mention of, much less any claims regarding confinement at, the Gist State Jail.

The Fifth Circuit ruled that habeas was not available as a vehicle to challenge Mr. Rice’s pretrial detention. Pet. App. 35a. It acknowledged that its published opinion created a circuit split with the Sixth Circuit. Pet. App. 36a n.2 (noting divergence from *Wilson v. Williams*, 961 F.3d 829 (6th Cir. 2020)).

Following issuance of the opinion, Mr. Rice retained counsel, who promptly sought rehearing, bringing to the Fifth Circuit’s attention that Mr. Rice had not been in the custody of the Harris County Sheriff, the only respondent, when the opinion issued. Pet. App. 22a-23a. The Fifth Circuit denied the petition for rehearing in a one-sentence order without explanation. Pet. App. 21a. Through counsel, Mr. Rice then moved, unopposed, for vacatur of the opinion and dismissal of the appeal as moot. Pet. App. 5a-20a. The court of appeals denied that motion in a brief order, without any explanation except a pincite to a federal courts treatise. Pet. App. 4a. Mr. Rice moved, unopposed, to recall the mandate, but the court of

appeals denied that motion without explanation as well. Pet. App. 3a. He then sought en banc rehearing of that motion, which the court also denied, again without offering any rationale. Pet. App. 1a.

## **REASONS FOR GRANTING THE PETITION**

This case was moot when the court of appeals decided it, and thus the court of appeals was without Article III jurisdiction to rule. Mr. Rice filed suit to challenge his pretrial detention by the Harris County Sheriff in the Harris County Jail, but by the time the court of appeals ruled, Mr. Rice was no longer in pretrial detention, no longer in the Harris County Jail, and no longer in the custody of the sole respondent, the Harris County Sheriff. There was therefore no case or controversy to be decided, and the court of appeals lacked jurisdiction over the appeal.

The court of appeals was initially unaware that it lacked jurisdiction. But even after it learned that Mr. Rice had not been in pretrial detention at the Harris County Jail at the time of its decision, it declined to vacate its published opinion and dismiss the appeal on four occasions—even though Respondent did not oppose Mr. Rice’s request. Because the case was moot when it was decided, and remains moot, Mr. Rice cannot seek review on the merits of the adverse ruling of the district court or court of appeals. Where a dispute has become moot while pending on appeal through no fault of the party who would seek review, the proper disposition is to vacate the opinion that can no longer be appealed. That is all the more necessary here, where the court below did not even have Article III jurisdiction to issue the opinion. Mr. Rice therefore

requests that this Court grant *certiorari*, vacate the court of appeals' opinion, and remand.<sup>1</sup>

Here, vacatur is justified for two independent reasons. First, the decision below is an advisory opinion, issued without Article III jurisdiction. Courts are necessarily limited by Article III, and the court below contravened those limits. Second, the fact that Mr. Rice cannot now seek review on the merits of the district court's or court of appeals' decisions, due to the case's mootness, independently warrants vacatur of both decisions. This rationale would apply even if the court of appeals had had jurisdiction to issue the underlying decision in the first place, and the case had become moot only thereafter.

Summary vacatur and remand are particularly warranted in this case as an exercise of this Court's supervisory power. The court of appeals repeatedly refused to vacate the advisory opinion, creating a circuit split in this indisputably moot case. This Court's intervention is needed to ensure compliance with the Article III limitations on the power of the federal judiciary.

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<sup>1</sup> A finding of cert-worthiness is not a prerequisite to vacatur in these circumstances. *See, e.g., Azar v. Garza*, 138 S. Ct. 1790 (2018) (per curiam) (vacating judgment on an issue of first impression in the court of appeals without discussing whether *certiorari* would have been warranted); Stephen M. Shapiro et al., *Supreme Court Practice* § 5.13, at 357–58 (10th ed. 2013). Mr. Rice notes, however, that the court below recognized that its decision created a circuit split as to whether claims seeking immediate release from incarceration or detention due to the danger of contracting COVID-19 are cognizable in habeas.

## **I. The Court of Appeals’ Decision Exceeded Its Authority Under Article III Because the Case Was Moot When the Court Ruled.**

The case was moot when the court of appeals issued its opinion and entered judgment on February 2, 2021. At the time, the court erroneously believed that Mr. Rice was in pretrial detention at the Harris County Jail. Pet. App. 34a (describing Mr. Rice as “a detainee in the Harris County, Texas, jail awaiting trial”). But seven weeks earlier, in December 2020, Mr. Rice had been sentenced and transferred to TDCJ custody to serve his sentence. As a result, his pretrial detention at the Harris County Jail was over. Mr. Rice’s habeas petition sought release only from the Harris County Jail on his own recognizance “for the pendency of his criminal proceedings,” in light of the specific danger posed by COVID-19 at the Harris County Jail. Pet. App. 45a. Because Mr. Rice was sentenced and the state took him into custody, he was no longer in the custody of the Respondent, the Harris County Sheriff, and there was no case or controversy left for the Fifth Circuit to adjudicate. Since Mr. Rice’s pretrial detention at the Harris County Jail had ended, the court of appeals’ jurisdiction over his habeas claim—over a controversy regarding “the restraint of which [the] petitioner complain[ed]”—had also ended. *See Ex parte Baez*, 177 U.S. 378, 390 (1900) (emphasis added).

It is universally recognized, including in the Fifth Circuit, that once a petitioner who has sought habeas relief in the form of release from pretrial detention has left pretrial custody, the litigation is moot. *See, e.g., Powers v. Schwartz*, 587 F.2d 783, 783-84 (5th Cir. 1979) (per curiam) (challenge to pretrial detention based on alleged unconstitutionality of the state’s bail scheme was mooted by the petitioner’s conviction and transfer out of pretrial detention); *Fassler v. United*

*States*, 858 F.2d 1016, 1018 (5th Cir. 1988) (per curiam) (“Because Fassler is now legally in federal custody, we must hold that his request for release from pretrial confinement is moot.”); *Jackson v. Clements*, 796 F.3d 841, 843 (7th Cir. 2015) (per curiam) (“Once Mr. Jackson was convicted, the claims concerning his pre-trial confinement became moot.”); *Thorne v. Warden, Brooklyn House of Det. for Men*, 479 F.2d 297, 299 (2d Cir. 1973) (“Since Thorne is now held as a convicted defendant rather than merely on a criminal charge not yet brought to trial, the issue as to the legality of his continued pretrial detention has been mooted.”); *Medina v. People of the State of Cal.*, 429 F.2d 1392, 1392-93 (9th Cir. 1970) (per curiam) (challenge to bail revocation mooted by conviction). Mr. Rice’s conviction and transfer out of pretrial detention at the Harris County Jail therefore mooted his challenge to that pretrial detention.

Indeed, even if the state had not assumed custody of Mr. Rice from the Harris County Sheriff, Mr. Rice’s mere transfer to a different facility would have mooted his claim, which was limited to his detention *at the Harris County Jail*. *E.g., Thompson v. Choinski*, 525 F.3d 205, 209 (2d Cir. 2008) (transfer from state prison to federal penitentiary mooted claim brought in habeas predicated on denial of kosher food and access to law library at state prison). Transfer to another place of detention or release from detention moots a claim arising from the initial detention location. *See, e.g., id.; Thompson v. Smith*, 719 F.2d 938, 940-41 (8th Cir. 1983) (per curiam) (transfer between prisons mooted habeas claim predicated on harassment, intimidation, and threats at original prison); *Corgain v. Miller*, 708 F.2d 1241, 1246 (7th Cir. 1983) (transfers to different prisons mooted claim predicated on inadequate library access at original place of

confinement); *Hernandez v. Garrison*, 916 F.2d 291, 293 (5th Cir. 1990) (per curiam) (habeas claims predicated on overcrowding, denial of medical treatment, and inadequate law library mooted by transfer). The rule is simple: “when a prisoner is moved from a prison, his action will usually become moot as to” the original place of confinement. *Nelson v. Heiss*, 271 F.3d 891, 897 (9th Cir. 2001).<sup>2</sup>

There was no remaining controversy between Mr. Rice and the Harris County Sheriff on February 2, 2021, when the court of appeals ruled. Article III requires that “[t]he parties must continue to have a personal stake in the outcome of the lawsuit” at all stages of the proceedings, including on appeal. *See Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477-78 (1990)) (internal quotation marks omitted). The Fifth Circuit therefore lacked jurisdiction to consider Mr. Rice’s claim on February 2, when it published its opinion and entered judgment. On that basis alone, grant, vacatur, and remand is warranted.<sup>3</sup>

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<sup>2</sup> Transfer between facilities also moots a claim for injunctive relief hinging on the location in which an individual is held. *E.g.*, *Nelson*, 271 F.3d at 897; *Rendelman v. Rouse*, 569 F.3d 182, 186 (4th Cir. 2009) (explaining that “as a general rule, a prisoner’s transfer or release from a particular prison moots his claims for injunctive and declaratory relief with respect to his incarceration there”); *Edwards v. Johnson*, 209 F.3d 772, 776 (5th Cir. 2000) (claims for injunctive relief moot on transfer); *Cooper v. Sheriff, Lubbock Cty., Tex.*, 929 F.2d 1078, 1084 (5th Cir. 1991) (per curiam) (same).

<sup>3</sup> The fact that Mr. Rice sought, as an ancillary aspect of his appeal, to vacate the “strike” the district court assessed against him under the PLRA in the course of dismissing his petition did not save the appeal from mootness, any more than an ancillary issue of attorneys’ fees would. “It is well established that a federal court may consider collateral issues after an action is no

## **II. Because the Case Was Moot When Decided, Dismissal and Vacatur Are Required.**

Because there was no live dispute between the parties to resolve when it issued its opinion, the court of appeals exceeded its authority under Article III. It did so unknowingly, but once it was informed of the fact, it refused to correct the error. Vacatur of the underlying advisory opinion is compelled by Article III.

Article III “require[s] that a case embody a genuine, live dispute between adverse parties” and consequently “prevent[s] the federal courts from issuing advisory opinions.” *Carney v. Adams*, 141 S. Ct. 493, 498 (2020). “A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it.” *St. Pierre v. United States*, 319 U.S. 41, 42 (1943) (per curiam). “It has long been settled that a federal court has no authority ‘to give opinions upon moot questions or . . . to declare principles or rules of law which cannot affect the matter in issue in the case before it.’” *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). “[T]he oldest and most consistent thread in the federal law of justiciability is

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longer pending,” including where the case has become moot or been dismissed due to lack of jurisdiction. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395-96 (1990) (citing, as examples, attorneys’ fees, costs, and contempt sanctions and holding that Rule 11 sanctions are also collateral). The “strike” stood or fell with the merits of the appeal, just as would an attorneys’ fees award. See *Muwakkil v. Robinson*, 143 F. App’x 512 (4th Cir. 2005) (unpublished) (holding that where a prisoner’s appeal became moot due to transfer following the district court’s entry of an order of dismissal, the appeal should be dismissed as moot and the filing should not be treated as a strike).

that the federal courts will not give advisory opinions.” *Flast v. Cohen*, 392 U.S. 83, 96 (1968); *see also California v. Texas*, 593 U.S. \_\_, \_\_, No. 19-840, slip op. at 9, 2021 WL 2459255 (U.S. June 17, 2021) (a federal court lacks jurisdiction “to issue . . . an advisory opinion without the possibility of any judicial relief” (internal quotation marks omitted)).

Absent “an injury that the defendant caused and the court can remedy, there is no case or controversy for the federal court to resolve.” *TransUnion LLC v. Ramirez*, 594 U.S. \_\_, \_\_, No. 20-297, 2021 WL 2599472, at \*6 (U.S. June 25, 2021) (quoting *Casillas v. Madison Avenue Assocs., Inc.*, 926 F.3d 329, 333 (7th Cir. 2019) (Barrett, J.)). And a federal court has an independent duty to ensure that it has jurisdiction over each case at the time it enters a decision, to “confine[] itself to its constitutionally limited role of adjudicating actual and concrete disputes, the resolutions of which have direct consequences on the parties involved.” *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 (2018).

“[W]hen an appeal is moot before issuance of the appellate court’s opinion, it is appropriate to vacate that opinion.” *Versata Software, Inc. v. Callidus Software, Inc.*, 780 F.3d 1134, 1135 (Fed. Cir. 2015) (collecting cases from the Second, Fifth, Seventh, and Ninth Circuits). Indeed, the Fifth Circuit itself has followed this procedure in other cases. For example, in *Shokeh v. Thompson*, 375 F.3d 351 (5th Cir. 2004) (per curiam), the Fifth Circuit vacated a published opinion upon learning of facts that rendered the appeal moot at the time of decision. In that case, the *pro se* petitioner challenged the requirement that his release from detention be conditioned on posting a bond. *Id.* at 351. Following publication of an opinion on the merits and prior to issuance of the mandate, the

Fifth Circuit learned that the *pro se* appellant had been released from detention almost two months before the opinion issued. *Id.* When it learned that the case was moot on issuance of its initial opinion, the court vacated the published opinion and the district court's judgment and dismissed the action under *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). *Shokeh*, 375 F.3d at 351-52. The same course of action was, and is, required here. *See also Walker v. Warden*, 593 F.2d 21 (5th Cir. 1979) (per curiam) (vacating opinion and dismissing appeal as moot upon court of appeals' discovery that the petitioner-appellant had died prior to the opinion's issuance); *United States v. Miller*, 685 F.2d 123, 124 (5th Cir. 1982) (per curiam) (vacating published opinion and district court's judgment when court of appeals learned after issuance of the opinion that the appeal was moot).

This Court and the courts of appeals have even recalled mandates to vacate opinions issued when the issuing court lacked jurisdiction. This Court has done so where "jurisdiction was not . . . presented to the court by the counsel" and "[t]he question was overlooked by all the members of the court." *Snow v. United States*, 118 U.S. 346, 354 (1886) (discussing *Cannon v. United States*, 116 U.S. 55 (1885)). In *Snow*, the Court recalled the mandate, vacated the judgment, and dismissed a prior case from that term, *Cannon*, "for want of jurisdiction, in order that the reported decision may not appear to be a precedent for the exercise of jurisdiction . . . in a case of this kind." *Snow*, 118 U.S. at 355. The Second, Fifth, Ninth, and Eleventh Circuits have all likewise recalled mandates to vacate opinions that were moot at the time of decision. *IAL Aircraft Holding, Inc. v. F.A.A.*, 216 F.3d 1304, 1306 (11th Cir. 2000) (collecting cases from the

Second and Ninth Circuits and recalling the mandate to vacate an opinion moot on issuance); *Ferrell v. Estelle*, 573 F.2d 867, 868 (5th Cir. 1978) (per curiam) (recalling mandate to vacate opinion issued in habeas case where petitioner had died by the time of decision).

Accordingly, because the court below acted without Article III jurisdiction, its decision must be vacated as moot.

### **III. The Underlying Decisions Also Require Vacatur Because Mr. Rice’s Case Became Moot While His Appeal Was Underway.**

Vacatur of the underlying district court and court of appeals decisions is also appropriate now because the case became moot while Mr. Rice’s appeal was underway.

Vacatur is appropriate when a case becomes moot while on appeal. Thus, when a case becomes moot “while on its way” to this Court, this Court’s “established practice” is to “vacate the judgment below and remand with a direction to dismiss.” *Munsingwear*, 340 U.S. at 39 & n.2 (1950); *see also*, *e.g.*, *Mayorkas v. Innovation Law Lab*, 594 U.S. \_\_, \_\_, No. 19-1212, 2021 WL 2520313 (U.S. June 21, 2021); *Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018) (per curiam); *Trump v. Hawaii*, 138 S. Ct. 377 (2017) (mem.); *Trump v. Int’l Refugee Assistance*, 138 S. Ct. 353 (2017) (mem.); *Karcher v. May*, 484 U.S. 72, 82 (1987); *Burke v. Barnes*, 479 U.S. 361, 365 (1987); *Duke Power Co. v. Greenwood Cty.*, 299 U.S. 259, 267 (1936) (per curiam). This Court has followed that approach in “countless cases,” *Great W. Sugar Co. v. Nelson*, 442 U.S. 92, 93 (1979) (per curiam), and it is the “normal” procedure regarding mootness unless the

losing party itself chooses to moot the case, *Camreta v. Greene*, 563 U.S. 692, 713 (2011).

The rule providing for vacatur serves important purposes: “A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance” . . . “ought not in fairness be forced to acquiesce in the judgment.” *U.S. Bancorp Mortg. Co. v. Bonner Mall P’ship*, 513 U.S. 18, 25 (1994). Vacatur under *Munsingwear* is appropriate when, as here, the party seeking vacatur is not responsible for causing the case to become moot and vacating the lower court decision serves the doctrine’s equitable purposes. *See, e.g., U.S. Bancorp Mortg Co.*, 513 U.S. at 24–25.

Thus, even where a court has jurisdiction when it issues an opinion, as the district court did here, vacatur is the appropriate remedy when the case becomes moot while on appeal through no fault of the appealing party. *Munsingwear* directs that when an appeal becomes moot, the “established practice” is to “vacate the judgment below and remand with a direction to dismiss.” 340 U.S. at 39. Such “[v]acatur is in order when mootness occurs through happenstance—circumstances not attributable to the parties.” *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 71 (1997). “A party who . . . is frustrated by the vagaries of circumstance[] ought not in fairness be forced to acquiesce” to an adverse decision. *U.S. Bancorp Mortg. Co.*, 513 U.S. at 25. Because Mr. Rice’s dispute with the Respondent has become moot as a result of the state’s interposition of his criminal sentencing and transfer out of pretrial detention, he was and is no longer able to pursue an appeal on the merits, and thus vacatur of the underlying opinions and dismissal of the appeal is the appropriate disposition—and would be even if the court of appeals had had jurisdiction when it issued its opinion.

#### **IV. Summary Vacatur and Remand is an Appropriate Exercise of This Court’s Supervisory Power.**

Summary vacatur and remand is particularly appropriate here as an exercise of this Court’s “broad” “supervisory power over the judgments of the lower federal courts.” *Munsingwear*, 340 U.S. at 40. This Court “ha[s] ample authority to control the administration of justice in the federal courts” pursuant to its supervisory authority. *Danforth v. Minnesota*, 552 U.S. 264, 289 (2008). Its “supervisory power over federal courts” allows it to act “to protect the integrity of the federal system.” *See Frazier v. Heebe*, 482 U.S. 641, 647 n.7 (1987). This Court regularly deploys that power to ensure moot opinions do not lead to legal consequences. *Munsingwear*, 340 U.S. at 40-41; *supra* Section II.

Here, the use of the supervisory power is even more appropriate than in a typical *Munsingwear* vacatur case. The court of appeals exceeded its authority under Article III in issuing its opinion, which created a circuit split on a novel and important question, and it then refused multiple unopposed requests to correct its own error. Only this Court can set matters right.

The Fifth Circuit acknowledged that its decision in this moot case created a circuit split with the Sixth Circuit. *Rice*, 985 F.3d at 1070 n.2.<sup>4</sup> It also has the potential to intersect with a broader circuit split: whether habeas is an appropriate vehicle for conditions of confinement claims as opposed to claims

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<sup>4</sup> The holding was also contrary to that of a prior Fifth Circuit panel in an unpublished decision. *See Cheek v. Warden of Fed. Med. Ctr.*, 835 F. App’x 737, 739 (5th Cir. 2020) (unpublished) (per curiam).

regarding the fact or duration of confinement. This Court has left that question open for more than four decades. *Bell v. Wolfish*, 441 U.S. 520, 526 n.6 (1979); *see, e.g., Aamer v. Obama*, 742 F.3d 1023, 1031-32, 1036-38 (D.C. Cir. 2014) (acknowledging lack of resolution in Supreme Court precedent, acknowledging circuit split, and holding that habeas was an appropriate vehicle to challenge conditions of confinement); *Spencer v. Haynes*, 774 F.3d 467, 470-71 (8th Cir. 2014) (acknowledging circuit split and applying circuit precedent in holding that habeas was not available as a vehicle to challenge conditions of confinement claims).

Moreover, the court of appeals below not only issued a published opinion in a moot case on this important issue, but it did so in a *pro se* case, in which the appellee never even filed a brief. Mr. Rice noted in his brief, “Appellant admits not being well lettered in the law or the terms.” Pet. App. 38a-39a. In fact, the *entirety* of Mr. Rice’s briefing on the habeas question consisted of three sentences and a citation to an out-of-circuit district court case. *Id.* The Fifth Circuit therefore decided a significant and contested question without meaningful briefing or adversarial proceedings, and then repeatedly refused multiple unopposed requests to vacate its decision when it learned that it did not have jurisdiction at the time it issued its original opinion.

The failure of the court below even to engage with the question of its own jurisdiction further supports vacatur. Mr. Rice brought mootness to the Fifth Circuit’s attention four times. The Fifth Circuit provided no meaningful explanation of its denial of vacatur and dismissal—only a citation to a section in Wright & Miller’s *Federal Practice and Procedure*

treatise titled “Mootness: Doctrinal Foundations.” Pet. App. 4a.

This case was indisputably moot at the time the court of appeals rendered its decision. Even after it learned of this fact, the Fifth Circuit kept in place its advisory opinion creating a circuit split on a complex and novel underlying question. This published advisory opinion has profound repercussions for litigants in the Fifth Circuit. Vacatur and remand for dismissal are necessary to ensure continued compliance by the courts of appeals with Article III’s constitutional limitations on their authority.

## CONCLUSION

The petition for writ of *certiorari* should be granted, the published opinion should be vacated, and the matter should be remanded to the court of appeals with instructions to vacate its judgment and remand to the district court for vacatur of its April 28, 2020, order of dismissal and final judgment, and for dismissal of the case without prejudice.

Respectfully submitted,

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Date: July 2, 2021

## **APPENDIX**

## APPENDIX A

UNITED STATES  
COURT OF APPEALS FOR THE FIFTH  
CIRCUIT  
NEW ORLEANS, LOUISIANA

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SKYLER THOMAS RICE, *Plaintiff—Appellant, versus*  
ED GONZALEZ, SHERIFF OF HARRIS COUNTY,  
*Defendant—Appellee.*

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Docket No. 20-20263

[Filed May 7, 2021]

### ON PETITION FOR REHEARING EN BANC

Before JONES, SMITH, and ELROD, *Circuit Judges.*

PER CURIAM:

(XX) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5<sup>TH</sup> CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5<sup>TH</sup> CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

/s/ Edith H. Jones  
EDITH H. JONES  
*United States Circuit Judge*

## APPENDIX B

UNITED STATES  
COURT OF APPEALS FOR THE FIFTH  
CIRCUIT  
NEW ORLEANS, LOUISIANA

---

SKYLER THOMAS RICE, *Plaintiff—Appellant, versus*  
ED GONZALEZ, SHERIFF OF HARRIS COUNTY,  
*Defendant—Appellee.*

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Docket No. 20-20263

[Filed April 16, 2021]

Before JONES, SMITH, and ELROD, *Circuit Judges.*

PER CURIAM:

IT IS ORDERED that Appellant's unopposed motion to recall this court's mandate is DENIED.

## APPENDIX C

UNITED STATES  
COURT OF APPEALS FOR THE FIFTH  
CIRCUIT  
NEW ORLEANS, LOUISIANA

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SKYLER THOMAS RICE, *Plaintiff—Appellant, versus*  
ED GONZALEZ, SHERIFF OF HARRIS COUNTY,  
*Defendant—Appellee.*

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Docket No. 20-20263

[Filed March 22, 2021]

Before JONES, SMITH, and ELROD, *Circuit Judges.*

PER CURIAM:

IT IS ORDERED that Appellant's unopposed motion on rehearing to vacate the Court's published opinion is DENIED. *See* 13B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3533.1, at 758 (3d ed. 2008).

IT IS FURTHER ORDERED that Appellant's unopposed motion on rehearing to dismiss the appeal as moot is DENIED. *See id.*

## APPENDIX D

UNITED STATES  
COURT OF APPEALS FOR THE FIFTH  
CIRCUIT  
NEW ORLEANS, LOUISIANA

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SKYLER THOMAS RICE, *Plaintiff—Appellant, versus*  
ED GONZALEZ, SHERIFF OF HARRIS COUNTY,  
*Defendant—Appellee.*

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Docket No. 20-20263

[Filed March 17, 2021]

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**UNOPPOSED MOTION TO VACATE THE PANEL  
OPINION AND DISMISS THE APPEAL AS MOOT**

### INTRODUCTION

Appellant Skyler Thomas Rice was no longer a pretrial detainee in custody at the Harris County Jail, or otherwise in Harris County custody, at the time this Court entered judgment and issued its opinion. Indeed, seven weeks before, Mr. Rice had been transferred to Texas Department of Criminal Justice (“TDCJ”) custody in Beaumont, Texas, to serve his sentence. This appeal of Mr. Rice’s habeas petition seeking pretrial release from the Harris County Jail on his own recognizance during the pendency of Mr. Rice’s criminal proceedings was therefore moot. Mr. Rice accordingly seeks vacatur of the panel opinion and dismissal of the appeal. Counsel has consulted with counsel for the Harris County Sheriff; the Sheriff

is not opposed to this motion.

Article III of the Constitution requires, for jurisdiction, a live case or controversy: it does not permit the issuance of an advisory opinion. Because this appeal is moot and was moot when the panel issued its decision, the published opinion must be vacated, and the appeal must be dismissed. Controlling Supreme Court and Fifth Circuit precedent, and the constitutional limitation of the federal judiciary's authority to the decision of actual cases or controversies, compel this result. The Court's duty to inquire into the basis of its jurisdiction persists throughout the litigation—including where “facts which render the case moot” come to the Court's attention after the opinion issues and prior to issuance of the mandate. *United States v. Miller*, 685 F.2d 123 (5th Cir. 1982) (per curiam). In such circumstances—including where the Court learns that a habeas petitioner was no longer in pretrial custody when the opinion issued, *Shokeh v. Thompson*, 375 F.3d 351 (5<sup>th</sup> Cir. 2004) (per curiam)—vacatur of the advisory opinion is constitutionally required. Vacatur of the published opinion and the judgment below is also appropriate under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). Because the litigation has become moot due to the passage of time rather than the actions of the parties, the district court's opinion can never be reviewed by this Court.

Further, on appeal, Mr. Rice sought to ensure that the dismissal of his case by the district court would not result in a strike against him under the Prison Litigation Reform Act. This Court may and should, for clarity, dispose of this matter ancillary to the substantive litigation in its order of dismissal. But Mr. Rice's concern regarding the strike does not save this

habeas litigation seeking only release from Harris County pretrial detention—relief a court can no longer provide—from mootness.

This appeal was moot when the Court entered judgment and issued its opinion. Mr. Rice could, at that time, no longer have been released from Harris County pretrial custody—and so there was no effective relief that a court could provide in this litigation. That information is now before this Court. Article III requires that the Court vacate its opinion and dismiss this case.

## **BACKGROUND**

When this Court entered judgment and issued its opinion on February 2, 2021, it believed Appellant Skyler Thomas Rice to be “a detainee in the Harris County, Texas, jail awaiting trial.” Doc. 515730526 at 1. But this was not so. Mr. Rice had at that time already been sentenced and, seven weeks before this Court’s decision, transferred to TDCJ custody. In fact, Mr. Rice’s mailing address on this Court’s docket is the Gist State Jail in Beaumont, Texas.

On April 15, 2020, Mr. Rice filed this lawsuit challenging his pretrial confinement in the Harris County Jail and seeking “release...on his own recognizance for the pendency of his criminal proceedings.” Record on Appeal (“ROA”) 4. Mr. Rice sought, as relief, either a writ of habeas corpus or an injunction ordering his immediate release. *Id.*

Mr. Rice’s underlying claim was that his continued confinement in pretrial detention at the Harris County Jail violated the Fifth Amendment’s Due

Process Clause. *Id.* at 4-8. He alleged that he was at increased risk of a serious adverse outcome were he to contract COVID-19 due to his underlying health conditions, including asthma and hypertension. *Id.* at 4, 6. He further alleged that his pretrial detention at the Harris County Jail “exposed [him] to a substantial risk of serious harm.” *Id.* at 7. In support of this contention, he highlighted specific risks he faced during his detention at the Harris County Jail. *Id.* at 6-7; *see also id.* at 11 (Mr. Rice’s declaration). Finally, Mr. Rice alleged that his ongoing detention by Harris County demonstrated that the Harris County Sheriff disregarded the risk that COVID-19 posed to Mr. Rice. *Id.* at 7-8.

On April 28, 2020, the district court dismissed with prejudice Mr. Rice’s complaint, which it construed as a civil rights complaint pursuant to 42 U.S.C. § 1983 and not a petition for a writ of habeas corpus. *Id.* at 18, 20, 23. This appeal followed in May 2020. *Id.* at 24. This Court docketed Mr. Rice’s opening brief in this appeal on October 1. The Sheriff of Harris County did not file a brief in response.

Mr. Rice was thereafter sentenced to state prison. He was transferred from Harris County Jail to TDCJ custody on December 15, 2020. Mr. Rice remains in TDCJ custody at the Gist State Jail in Beaumont, Texas. Mr. Rice’s address at the Gist State Jail is listed on this Court’s docket.

On February 2, 2021, this Court issued a published opinion in this litigation, affirming the district court’s denial of relief. Doc. 515730526 at 2. This Court construed Mr. Rice’s claim as sounding in habeas and concluded that the Court “thus ha[d] jurisdiction over

the case.” *Id.* This Court understood Mr. Rice to be, at the time the decision issued, “a detainee in the Harris County, Texas, jail awaiting trial.” *Id.* at 1. At that time, however, Mr. Rice was incarcerated in TDCJ custody at the Gist State Jail.

## **ARGUMENT**

### **I. This Appeal Was Moot When This Court Entered Judgment on February 2, 2021.**

#### **A. The Appeal Was Moot Because Mr. Rice Was No Longer in Pretrial Detention at the Harris County Jail on February 2.**

This appeal was moot at the time of the panel’s original decision, due to Mr. Rice’s transfer to TDCJ custody. As described above, the panel appears to have believed that Mr. Rice remained in pretrial detention at the Harris County Jail on February 2, 2021, the date that this Court issued its opinion and entered judgment. In fact, Mr. Rice had already been sentenced and transferred to TDCJ custody pursuant to that sentence, in December 2020. Mr. Rice, in his habeas petition, sought immediate release from the Harris County Jail on his own recognizance “for the pend[e]ncy of his criminal proceedings” in light of the danger posed by COVID-19. ROA 4. Because Mr. Rice could no longer be released from the Harris County Jail when the panel entered judgment and issued its opinion, there was no case or controversy for this Court to adjudicate.

Fifth Circuit precedent is clear: once a petitioner who has sought habeas relief in the form of release from pretrial detention has left pretrial custody, the

litigation is moot. For example, in *Powers v. Schwartz*, 587 F.2d 783 (5<sup>th</sup> Cir. 1979) (per curiam), this Court held that because the petitioner was “no longer a pretrial detainee,” her challenge to her pretrial detention predicated on the alleged unconstitutionality of the state’s pretrial bail scheme for certain detainees was moot. *Id.* at 783-84. Other Fifth Circuit decisions confirm that once pretrial detention ends, habeas claims stemming from that detention are moot. *Fassier v. United States*, 848 F.2d 1016, 1018 (5<sup>th</sup> Cir. 1988) (habeas request for pretrial release moot following conviction); *Yohey v. Collins*, 985 F.2d 222, 228-29 (5<sup>th</sup> Cir. 1993) (pretrial habeas claims mooted by conviction, citing case in which habeas appeal regarding bail revocation was mooted by conviction).<sup>1</sup> This is the rule in other circuits as well. *E.g., Jackson v. Clements*, 796 F.3d 841, 843 (7<sup>th</sup> Cir. 2015) (“Once Mr. Jackson was convicted, the claims concerning his pre-trial confinement became moot.”); *Thorne v. Warden, Brooklyn House of Detention for Men*, 479 F.2d 297, 299 (2d Cir. 1973) (“Since Thorne is now held as a convicted defendant rather than merely on a criminal charge not yet

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<sup>1</sup> Numerous unpublished Fifth Circuit decisions likewise confirm that pretrial habeas claims, including those seeking release from pretrial detention, become moot following conviction. *United States v. Route*, 65 F. App’x 508 (5th Cir. 2003) (unpublished op.) (appeal of pretrial detention order mooted by conviction); *United States v. Heard*, 192 F.3d 125 (unpublished op.) (same); *Henderson v. Criminal Dist. Ct. No. 3*, 210 F.3d 366 (5th Cir. 2000) (unpublished op.) (habeas request for pretrial “immediate release” moot following conviction); *Martinez v. Atkinson*, 678 F. App’x 218, 219 (5th Cir. 2017) (unpublished op.) (habeas request for pretrial release mooted by conviction); *United States v. Frazier*, 220 F. App’x 294, 295 (5th Cir. 2007) (unpublished op.) (same).

brought to trial, the issue as to the legality of his continued *pretrial* detention has been mooted.”). Mr. Rice’s conviction and transfer out of pretrial detention at the Harris County Jail, to incarceration by TDCJ to serve his sentence, mooted his case.

The Fifth Circuit has likewise held that transfer to another place of detention—even where such transfer is not between pretrial detention and post-conviction incarceration, and between detention systems—moots claims that arise based on the initial location of detention, including those brought in habeas. *Hernandez v. Garrison*, 916 F.2d 291 (5<sup>th</sup> Cir. 1990), for instance, held that claims brought in habeas regarding overcrowding, denial of medical treatment, and law library access at a particular federal prison became moot on transfer to a different prison. *Id.* at 293. This logic applies *a fortiori* to Mr. Rice’s transfer from pretrial detention at the Harris County Jail, in the custody of the Harris County Sheriff, to incarceration at a state prison, in the custody of TDCJ. *Cf. Rumsfeld v. Padilla*, 542 U.S. 426, 434-35 (2004) (holding that the immediate custodian is the appropriate respondent in habeas litigation).

In sum, because Mr. Rice’s pretrial detention at the Harris County Jail had ended, the Court’s jurisdiction over his habeas claim—over a controversy regarding “the restraint of which [the] petitioner complains”—had ended as well when the opinion issued. *Ex parte Baez*, 177 U.S. 378, 390 (1900) (emphasis added). There is no remaining controversy between Mr. Rice and the Harris County Sheriff, and there was no such controversy on February 2. After his sentencing and his transfer to TDCJ custody in December 2020, Mr. Rice could no longer be released from the Harris

County Jail; he could no longer be released for the pendency of his (now-decided) criminal proceedings; and he was (and is) no longer in the custody of the Harris County Sheriff. Whether a medically vulnerable pretrial detainee requires release in light of any heightened risk posed by COVID-19 at the Harris County Jail is now no more material to Mr. Rice than to the general public. *See id.* (explaining that because the habeas petitioner was “no longer a pretrial detainee,” she lacked “a personal stake in the outcome of the controversy as to assure...concrete adverseness” (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962))). And this has been true since December 15, 2020. Had Mr. Rice on February 2 filed a habeas petition seeking immediate release pretrial on his own recognizance from the Harris County Jail, the petition would have been dismissed—due to the lack of a genuine adversarial controversy or available relief.

This Court therefore lacks jurisdiction to consider Mr. Rice’s claim and lacked such jurisdiction on February 2, when it entered judgment. *Powers*, 587 F.2d at 784. The appeal is moot.<sup>2</sup>

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<sup>2</sup> This Court construed Mr. Rice’s claim as sounding in habeas. Were the Court to construe it as a claim for injunctive relief under 42 U.S.C. § 1983, the case would still be moot. Transfer between facilities moots a claim for injunctive relief hinging on the location in which an individual is held. *E.g., Herman v. Holiday*, 238 F.3d 660, 665-66 (5th Cir. 2001) (claim for injunctive relief in light of serious health risk posed by environmental conditions was moot, and the possibility of transfer back to the original institution was too speculative to provide relief); *Edwards v. Johnson*, 209 F.3d 772, 776 (5th Cir. 2000) (claims for injunctive relief moot on transfer); *Cooper v. Sheriff, Lubbock Cty., Tex.*, 929 F.2d 1078, 1084 (5th Cir. 1991) (per curiam) (same); *Vincent v. Stevenson*, 106 F.3d 397 (5th Cir.

## **B. Mr. Rice’s Concern About a Third Strike Does Not Keep This Appeal Alive.**

The only relief that Mr. Rice sought before the district court was release from the Harris County Jail on his own recognizance for the duration of his criminal proceedings. ROA 4. This Court’s “jurisdiction is...constrained to adjudicating actual, ongoing controversies between litigants.” *Herndon v. Upton*, 985 F.3d 443, 446 (5<sup>th</sup> Cir. 2021). Mr. Rice can no longer be granted “the sole relief sought in h[is] petition: release from confinement” at the Harris County Jail during the pendency of his criminal proceedings. *See id.*

Thus, now that Mr. Rice is no longer in Harris County pretrial detention, there is no case or controversy keeping this appeal alive. In his habeas petition, Mr. Rice sought only his release and did not seek money damages. As this Court is aware, on appeal Mr. Rice sought to ensure that the “strike” for purposes of the Prison Litigation Reform Act (“PLRA”) lodged against him by a district court would be reversed. Br. at 7; *see* 28 U.S.C. § 1915(g); *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1723 (2020) (describing the PLRA’s “three-strikes rule”). But that concern regarding an ancillary matter in the litigation does not affect this appeal’s mootness in light of Mr.

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1997) (unpublished op.) (claims premised on inadequate medical care at a particular prison and seeking injunctive relief were mooted because the plaintiff had been transferred to a different prison).

Rice's transfer to TDCJ custody, for two reasons.

First, "the PLRA does not apply to habeas petitions under 28 U.S.C. § 2254." *Carson v. Johnson*, 112 F.3d 818, 820 (5th Cir. 1997). This includes the PLRA's three-strikes provision. *Id.* As a result, this Court's construal of Mr. Rice's appeal as a habeas petition means this case could not subsequently qualify as a strike under the PLRA. *See Doc. 515735026 at 2* ("We construe Rice's petition, at his behest, as seeking habeas relief.").

Further, even *were* there a strike, its ultimate effect would occur in a hypothetical subsequent lawsuit in which Mr. Rice would seek to proceed *in forma pauperis* and be barred from doing so by the PLRA. The speculative possibility that Mr. Rice would be in a position to file another lawsuit, would need to do so *in forma pauperis*, and would be unable to do so in part due to the strike in this litigation is not enough to preserve this lawsuit in any event. The Fifth Circuit recently held that the possibility that an out-of-circuit sentencing court might decide to modify the plaintiff's supervised release did not create an ongoing controversy that saved the case from mootness. *Herndon*, 985 F.3d at 448. The same is true here, where at most a court in subsequent litigation *might* decide to construe this litigation as constituting a strike. Should that occur, Mr. Rice could litigate the issue in *that* case. *See, e.g., Lomax*, 140 S. Ct. at 1724 (petitioner's challenge to application of three-strikes rule arguing that prior cases did not qualify as strikes, on a later motion to proceed *in forma pauperis*). "That 'a favorable decision in this case might serve as a useful precedent for [the plaintiff] in a hypothetical lawsuit cannot save this case from mootness.'"

*Herndon*, 985 F.3d at 448 (quoting *United States v. Juvenile Male*, 564 U.S. 932, 937 (2011)).

However, the Court could, and should, both dismiss the appeal as moot and dispose of this ancillary matter. The Court has the authority, notwithstanding this appeal’s mootness, to correct the error of the district court in failing to construe the litigation as a habeas petition by “not[ing] that the district court’s dismissal should not count as a ‘strike’ for purposes of” the PLRA. *Muwakkil v. Robinson*, 143 F. App’x 512 (4<sup>th</sup> Cir. 2005) (unpublished op.). The Fourth Circuit has taken this course of action, in a case in which a prisoner’s appeal became moot due to transfer following the district court’s entry of an order of dismissal—dismissing the appeal while observing that the district court’s error meant there should be no strike. *Id.* While the Court has no authority to “consider [the] merits” of a moot case, it “may make such disposition of the whole case as justice may require.” *U.S. Bancorp Mortg. Co. v. Bonner Mall P’ship*, 513 U.S. 18, 21 (1994) (quoting *Walling v. James V. Reuter, Co., Inc.*, 321 U.S. 671, 677 (1944)). This includes “matters of judicial administration and practice reasonably ancillary to the primary, dispute-deciding function of the federal courts,” such as the award of costs and vacatur and remand for dismissal. *Id.* at 22. The Court retains authority “to enter orders necessary and appropriate to the final disposition” of the litigation, *id.*, and the best course of action to ensure clarity on this matter is—as the Fourth Circuit did in *Muwakkil*—to note that the district court dismissal is not a strike.

But disposing of this ancillary matter has no effect on the mootness of this appeal. The underlying case or

controversy—whether Mr. Rice should be released from pretrial detention at the Harris County Jail—can no longer be resolved in this litigation. Any subsequent concrete concern with whether this litigation qualifies as a strike must be saved for accompanying subsequent concrete litigation.

## **II. Because the Appeal Was Moot When Decided, This Court Must Vacate its Opinion as an Improvidently Issued Advisory Opinion.**

“A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it.” *St. Pierre v. United States*, 319 U.S. 41, 42 (1943). This principle is a, if not *the*, core limit on this Court’s and all federal courts’ authority: “the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions.” *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (quoting C. Wright, *Federal Courts* 34 (1963)). *See also Church of Scientology of Calif. v. United States*, 506 U.S. 9, 12 (1992).

If an appeal is moot, then any opinion is advisory, and a court has no power to issue one. As this Court has stated, “If a claim is moot, it ‘presents no Article III case or controversy, and a court has no constitutional jurisdiction to resolve the issues it presents.’” *Nat'l Rifle Ass'n of Am., Inc. v. McCraw*, 719 F.3d 338, 344 (5th Cir. 2013) (quoting *Goldin v. Bartholow*, 166 F.3d 710, 717 (5th Cir. 1999)). Habeas cases are no exception to this rule. *Jackson v. Vannoy*, 981 F.3d 408, 416 (5th Cir. 2020) (“Mootness, of course, is a fundamental bar to judicial review that

must be accounted for at all stages of a proceeding, and applies in habeas as in any other type of litigation.”).

Moreover, this Court must inquire into whether an appeal is moot, taking into account facts that have come to the Court’s attention—and even doing so *sua sponte* if necessary. The Court has an independent duty to ensure that it has jurisdiction over each case at the time it enters a decision, to “confine[] itself to its constitutionally limited role of adjudicating actual and concrete disputes, the resolutions of which have direct consequences on the parties involved.” *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 (2018); *Gulf Restoration Network v. Salazar*, 683 F.3d 158, 166 (5th Cir. 2012). “Before ruling on the merits of the case, it is imperative that the court first determine whether it has jurisdiction to hear the suit; if jurisdiction is lacking, then the court has no authority to consider the merits.” *Cook v. Reno*, 74 F.3d 97, 99 (5th Cir. 1996). As this Court explained less than two months ago, “Generally speaking, a court cannot assume that it has jurisdiction and proceed to resolve a case on the merits”—and “it is well-settled, that mootness is a threshold jurisdictional inquiry.” *Ermuraki v. Renaud*, 987 F.3d 384, 386 (5th Cir. 2021).

While the Court did not know that Mr. Rice was not a pretrial detainee in Harris County custody at the time that it issued the opinion and entered judgment, that information is now before the Court. The Court should take it into account, pursuant to its duty to independently inquire into the basis of its jurisdiction. That duty extends even *after* issuance of the opinion and entry of judgment. Where, as here, “[b]efore

issuance of the mandate...the parties have brought to the attention of the court facts which render the case moot" and the Court has issued a published opinion, disposition is straightforward. *Miller*, 685 F.2d at 124. The Court will vacate the published opinion and either dismiss the appeal or remand with instructions to dismiss. *Id.* at 124 (doing so); *Shokeh*, 375 F.3d at 351-52 (same).

To do otherwise would be to permit the issuance of an advisory opinion beyond this Court's authority. "It has long been settled that a federal court has no authority 'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" *Church of Scientology of Calif.*, 506 U.S. at 12 (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). The Court should vacate the published opinion.

### **III. Vacatur of This Court's Opinion, Vacatur of the District Court's Judgment, and Dismissal of the Action is Appropriate Under *Munsingwear*.**

Vacatur of this Court's published opinion as an advisory opinion is compelled by Article III of the Constitution. This Court should also vacate its published opinion, vacate the judgment below, and either dismiss outright or remand for dismissal under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). *Munsingwear* directs that when an appeal becomes moot, the "established practice" is to "vacate the judgment below." *Id.* at 39. As the Fifth Circuit has explained:

If a claim becomes moot after the entry of a district court's judgment and prior to the completion of the appellate review, we generally vacate the judgment and remand for dismissal. *Munsingwear*, 340 U.S. at 39 (observing that, where a case has become moot on appeal, '[t]he established practice . . . is to reverse or vacate the judgment below and remand with a direction to dismiss'). Vacatur of the lower court's judgment is warranted . . . where mootness has occurred through happenstance, rather than through voluntary action of the losing party. See *Arizonaans for Official English v. Arizona*, 520 U.S. 43, 71 (1997) ('Vacatur is in order when mootness occurs through happenstance—circumstances not attributable to the parties.').

*Murphy v. Fort Worth Indep. Sch. Dist.*, 334 F. 3d 470, 470-71 (5<sup>th</sup> Cir. 2003) (vacating district court's judgment where mootness occurred due to party's graduation from high school).

Mr. Rice's transfer from Harris County pretrial detention to TDCJ post-conviction incarceration is just the sort of "circumstance[] not attributable to the parties" that makes vacatur of the panel's decision and the lower court's judgment appropriate. There is no possibility for appellate review of Mr. Rice's habeas petition, because under the ordinary functioning of the criminal system Mr. Rice's underlying criminal case has been resolved and he is no longer in pretrial custody. Thus, through no fault of the parties, he cannot obtain any effective relief on the merits of his

claim—because he cannot be released.

In fact, the Fifth Circuit has taken precisely this course of action in a case identical in all relevant respects to this one, involving a habeas appeal by a *pro se* petitioner. The Fifth Circuit originally published an opinion in a *pro se* petitioner’s appeal of the denial of a habeas petition that sought his release without having to post a \$5,000 bond. *Shokeh*, 375 F.3d at 351. After the opinion was filed but before the mandate issued, the Court learned that two months before it had filed its opinion, the petitioner had been released without bond—meaning the case had been moot before the opinion was filed. *Id.* The Court therefore vacated its opinion and, pursuant to *Munsingwear*, vacated the district court’s ruling and dismissed the case. *Id.* at 351-52.

The same disposition as in *Shokeh* should obtain here. Not only should this Court vacate its published opinion that it lacked jurisdiction to issue, but pursuant to *Munsingwear*, the Court should also vacate the district court’s judgment and either dismiss outright or remand for dismissal.

## CONCLUSION

This Court should vacate its published opinion and dismiss this appeal.

Dated: March 17, 2021

## APPENDIX E

UNITED STATES  
COURT OF APPEALS FOR THE FIFTH  
CIRCUIT  
NEW ORLEANS, LOUISIANA

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SKYLER THOMAS RICE, *Plaintiff—Appellant, versus*  
ED GONZALEZ, SHERIFF OF HARRIS COUNTY,  
*Defendant—Appellee.*

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Docket No. 20-20263

[Filed March 11, 2021]

### ON PETITION FOR REHEARING

Before JONES, SMITH, and ELROD, *Circuit Judges.*

PER CURIAM:

IT IS ORDERED that the petition for rehearing is  
DENIED.

## APPENDIX F

UNITED STATES  
COURT OF APPEALS FOR THE FIFTH  
CIRCUIT  
NEW ORLEANS, LOUISIANA

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SKYLER THOMAS RICE, *Plaintiff—Appellant, versus*  
ED GONZALEZ, SHERIFF OF HARRIS COUNTY,  
*Defendant—Appellee.*

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Docket No. 20-20263

[Filed March 2, 2021]

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### PETITION FOR PANEL REHEARING

#### INTRODUCTION

This case concerns a *pro se* lawsuit against the Sheriff of Harris County, Texas, filed by Appellant Skyler Thomas Rice and challenging his then detention pretrial at the Harris County Jail—before his transfer to the custody of the Texas Department of Criminal Justice (“TDCJ”) in December 2020. Because Mr. Rice was transferred out of pretrial detention at the Harris County Jail two months before this Court entered judgment and issued its opinion, this case was moot and this Court lacked jurisdiction to take those steps. Mr. Rice respectfully requests rehearing by this panel in light of the jurisdictional defect and vacatur of the Court’s judgment and related opinion and of the underlying district court opinion.

In April 2020, Mr. Rice challenged his pretrial detention, seeking immediate release due to the danger posed by his continued pretrial detention at Harris County Jail in light of the COVID-19 pandemic. He appealed an adverse decision in May 2020. In October 2020, Mr. Rice was sentenced; in December 2020, he was transferred to TDCJ custody to serve out that sentence. In short, by the time this Court rendered its judgment in February 2021, Mr. Rice was no longer at the Harris County Jail, in the custody of the Harris County Sheriff, or otherwise in pretrial detention. As a result, his case was already moot.

Mr. Rice respectfully requests that, upon granting rehearing, the panel vacate its original published opinion for lack of jurisdiction. This is the Fifth Circuit’s approach to cases in which the Court discovers, prior to issuing the mandate, that the case was moot when the panel filed its initial opinion. Mr. Rice also respectfully requests that this Court vacate the district court’s judgment and cause the case to be dismissed. In the alternative, should this Court determine that the case is not moot, Mr. Rice respectfully requests that the Court order full briefing so that he may with the advantage of counsel have the opportunity to meaningfully confront the panel’s argument—which relied on cases that Mr. Rice never discussed in his initial pro se appellate brief.

## **PROCEDURAL HISTORY**

On April 15, 2020, Mr. Rice filed this lawsuit challenging his pretrial confinement in the Harris County Jail and seeking “release . . . on his own recognizance for the pendency of his criminal

proceedings.” Record on Appeal (“ROA”) 4. Mr. Rice sought, as relief, either a writ of habeas corpus or an injunction ordering his immediate release. *Id.*

Mr. Rice’s underlying claim was that his continued confinement in pretrial detention at the Harris County Jail violated the Fifth Amendment’s Due Process Clause. *Id.* at 4-8. He alleged that he was at increased risk of a serious adverse outcome were he to contract COVID-19 due to his underlying health conditions, including asthma and hypertension. *Id.* at 4, 6. He further alleged that his pretrial detention at the Harris County Jail “exposed [him] to a substantial risk of serious harm.” *Id.* at 7. In support of this contention, he highlighted specific risks he faced during his detention at the Harris County Jail. *Id.* at 6-7; *see also id.* at 11 (Mr. Rice’s declaration). Finally, Mr. Rice alleged that his ongoing detention by Harris County demonstrated that the Harris County Sheriff disregarded the risk that COVID-19 posed to Mr. Rice. *Id.* at 7-8.

On April 28, 2020, the district court dismissed with prejudice Mr. Rice’s complaint, which it construed as a civil rights complaint pursuant to 42 U.S.C. § 1983 and not a petition for a writ of habeas corpus. *Id.* at 18, 20, 23. This appeal followed in May 2020. *Id.* at 24. This Court docketed Mr. Rice’s opening brief in this appeal on October 1. The Sheriff of Harris County did not file a brief in response.

Mr. Rice was thereafter sentenced to state prison and transferred from Harris County Jail to TDCJ custody on December 15, 2020. Mr. Rice remains in TDCJ custody at the Gist State Jail in Beaumont, Texas. Mr. Rice’s address at the Gist State Jail is

listed on this Court’s docket.

On February 2, 2021, this Court issued a published opinion in this litigation, affirming the district court’s denial of relief. Doc. 00515730526 at 2. This Court construed Mr. Rice’s claim as sounding in habeas and concluded that the Court “thus ha[d] jurisdiction over the case.” *Id.* This Court understood Mr. Rice to be, at the time the decision issued, “a detainee in the Harris County, Texas, jail awaiting trial.” *Id.* at 1.

## ARGUMENT

### I. Rehearing Is Warranted Due to Mootness.

Rehearing is warranted because this appeal was moot at the time of the panel’s original decision, due to Mr. Rice’s transfer to TDCJ custody. As described above, the panel appears to have believed that Mr. Rice remained in pretrial detention at the Harris County Jail in February 2021. In fact, Mr. Rice had already been sentenced and transferred to TDCJ custody pursuant to that sentence, in December 2020. The appeal was therefore clearly moot at the time of decision. As a result, the appropriate course of action is for this Court to vacate its prior opinion, vacate the district court’s judgment, and remand the case with instructions for dismissal. *United States v. Miller*, 685 F.2d 123, 124 (5th Cir. 1982) (per curiam).

“Mootness . . . is a fundamental bar to judicial review that must be accounted for at all stages of a proceeding, and applies in habeas as in any other type of litigation.” *Jackson v. Vannoy*, 981 F.3d 408, 416 (5th Cir. 2020) (citation and internal quotation marks omitted). Because it is a jurisdictional matter, this Court *must* consider mootness, “on its own motion, if

necessary.” *Mosley v. Cozby*, 813 F.2d 659, 660-61 (5th Cir. 1987) (per curiam) (dismissing *pro se* appeal due to lack of jurisdiction); *United States v. Heredia-Holguin*, 823 F.3d 337, 340 (5th Cir. 2016) (mootness is jurisdictional).

This appeal is clearly moot. Mr. Rice is no longer a pretrial detainee at the Harris County Jail in the custody of the Harris County Sheriff. Instead, he is incarcerated at the Gist State Jail in Beaumont, Texas, in the custody of TDCJ—and has been since December 2020. In this litigation, Mr. Rice sought his immediate release only from the Harris County Jail in light of the danger posed by his continued detention in pretrial custody by the Harris County Sheriff notwithstanding the risk of contracting COVID-19. ROA 4. Mr. Rice is no longer detained there and, thus, is no longer challenging the fact of his detention there.

Fifth Circuit precedent is clear: once a petitioner who has sought habeas relief in the form of release from pretrial detention has left pretrial custody, the litigation is moot. For example, in *Powers v. Schwartz*, 587 F.2d 783 (5th Cir. 1979) (per curiam), this Court held that because the petitioner was “no longer a pretrial detainee,” her challenge to her pretrial detention predicated on the unconstitutionality of the state’s pretrial bail scheme for certain detainees was moot. *Id.* at 783-84. Other Fifth Circuit opinions confirm that once pretrial detention ends, habeas claims stemming from that detention are moot. *Fassier v. United States*, 848 F.2d 1016, 1018 (5th Cir. 1988) (habeas request for pretrial release moot following conviction); *Yohey v. Collins*, 985 F.2d 222, 228-29 (5th Cir. 1993) (pretrial habeas claims mooted

by conviction).<sup>1</sup> This is the rule in other circuits as well. E.g., *Jackson v. Clements*, 796 F.3d 841, 843 (7th Cir. 2015) (“Once Mr. Jackson was convicted, the claims concerning his pre-trial confinement became moot.”); *Thorne v. Warden, Brooklyn House of Detention for Men*, 479 F.2d 297, 299 (2d Cir. 1973) (“Since Thorne is now held as a convicted defendant rather than merely on a criminal charge not yet brought to trial, the issue as to the legality of his continued pretrial detention has been mooted.”). Mr. Rice’s conviction and transfer out of pretrial detention at the Harris County Jail to incarceration by TDCJ mooted his case.

The Fifth Circuit has likewise clearly held that transfer to another place of detention moots claims that arise based on the initial location of detention, including those brought in habeas. *Hernandez v. Garrison*, 916 F.2d 291 (5th Cir. 1990), for instance, held that claims brought in habeas regarding overcrowding, denial of medical treatment, and law library access at a particular federal prison became moot on transfer to a different prison. *Id.* at 293. This logic applies *a fortiori* to Mr. Rice’s transfer from

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<sup>1</sup> Numerous unpublished Fifth Circuit decisions likewise confirm that pretrial habeas claims, including those seeking release from pretrial detention, become moot following conviction. *United States v. Route*, 65 F. App’x 508 (5th Cir. 2003) (unpublished op.) (appeal of pretrial detention order mooted by conviction); *United States v. Heard*, 192 F.3d 125 (unpublished op.) (same); *Henderson v. Criminal Dist. Ct. No. 3*, 210 F.3d 366 (5th Cir. 2000) (unpublished op.) (habeas request for pretrial “immediate release” moot following conviction); *Martinez v. Atkinson*, 678 F. App’x 218, 219 (5th Cir. 2017) (unpublished op.) (habeas request for pretrial release mooted by conviction); *United States v. Frazier*, 220 F. App’x 294, 295 (5th Cir. 2007) (unpublished op.) (same).

detention at the Harris County Jail, in the custody of the Harris County Sheriff, to incarceration at a state prison, in the custody of TDCJ. *Cf. Rumsfeld v. Padilla*, 542 U.S. 426, 434-35 (2004) (holding that the immediate custodian is the appropriate respondent in habeas litigation).

In sum, because Mr. Rice’s pretrial detention at the Harris County Jail has ended, the Court’s jurisdiction over his habeas claim—over a controversy regarding “the restraint *of which [the] petitioner complains*”—has ended as well. *Ex parte Baez*, 177 U.S. 378, 390 (1900) (emphasis added). And once a habeas petitioner is transferred to a different facility, the habeas petition is likewise moot. This Court therefore lacks jurisdiction to consider Mr. Rice’s claim and lacked such jurisdiction on February 2, when judgment was entered. *Powers*, 587 F.2d at 784. Whether a medically vulnerable pretrial detainee requires release in light of the risk posed by COVID-19 at the Harris County Jail is now no more material to Mr. Rice than to the general public. *See id.* (explaining that because the habeas petitioner was “no longer a pretrial detainee,” she lacked “a personal stake in the outcome of the controversy as to assure . . . concrete adverseness” (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962))).<sup>2</sup>

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<sup>2</sup> This Court construed Mr. Rice’s claim as sounding in habeas. Were the Court to construe it as a claim for injunctive relief under 42 U.S.C. § 1983, the case would still be moot. Transfer between facilities moots a claim for injunctive relief hinging on the location in which an individual is held. *E.g., Herman v. Holiday*, 238 F.3d 660, 665-66 (5th Cir. 2001) (claim for injunctive relief in light of serious health risk posed by environmental conditions was moot, and the possibility of transfer back to the original institution was too speculative to provide relief); *Edwards v. Johnson*, 209 F.3d 772, 776 (5th Cir.

**II. The Appropriate Disposition is Vacatur of the Opinion, Vacatur of the District Court’s Judgment, and Dismissal of the Action.**

In these circumstances, vacatur of this Court’s published opinion, vacatur of the district court’s judgment, and dismissal of the action is the proper course of action. First, this Court was unaware at the time that the Court entered judgment and issued its opinion in February 2021 that the case had become moot. Where, as here, “[b]efore issuance of the mandate . . . the parties have brought to the attention of the court facts which render the case moot” and the Court has issued a published opinion, disposition is straightforward. *Miller*, 685 F.2d at 124. The Court will vacate the published opinion and either dismiss the appeal or remand with instructions to dismiss. *Id.* at 124 (doing so); *Shokeh v. Thompson*, 375 F.3d 351, 351-52 (5th Cir. 2004) (per curiam) (same).

Additionally, because mootness is due to Mr. Rice’s transfer from the Harris County Jail to TDCJ custody rather than Mr. Rice’s own subsequent actions, (1) vacatur of the district court’s judgment and (2) either dismissal of the case or remand with instructions to dismiss is appropriate under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). As the Fifth Circuit has explained:

If a claim becomes moot after the entry of a district court’s judgment and prior to

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2000) (claims for injunctive relief moot on transfer); *Cooper v. Sheriff, Lubbock Cty., Tex.*, 929 F.2d 1078, 1084 (5th Cir. 1991) (per curiam) (same).

the completion of the appellate review, we generally vacate the judgment and remand for dismissal. *Munsingwear*, 340 U.S. at 39 (observing that, where a case has become moot on appeal, '[t]he established practice . . . is to reverse or vacate the judgment below and remand with a direction to dismiss'). Vacatur of the lower court's judgment is warranted . . . where mootness has occurred through happenstance, rather than through voluntary action of the losing party. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997) ('Vacatur is in order when mootness occurs through happenstance—circumstances not attributable to the parties.').

*Murphy v. Fort Worth Indep. Sch. Dist.*, 334 F. 3d 470, 470-71 (5<sup>th</sup> Cir. 2003) (vacating district court's judgment where mootness occurred due to party's graduation from high school).

In fact, the Fifth Circuit has taken precisely this course of action in a case identical in all relevant respects to this one, involving a habeas appeal by a *pro se* petitioner. The Fifth Circuit originally published an opinion in a *pro se* petitioner's appeal of the denial of a habeas petition that sought his release without having to post a \$5,000 bond. *Shokeh*, 375 F.3d at 351. After the opinion was filed but before the mandate issued, the Court learned that two months before it had filed its opinion, the petitioner had been released without bond—meaning the case had been moot before the opinion was filed. *Id.* The Court therefore vacated its opinion and, pursuant to

*Munsingwear*, vacated the district court’s ruling and dismissed the case. *Id.* at 351-52.

The same disposition as in *Shokeh* should obtain here. This Court should vacate its published opinion that it lacked jurisdiction to issue. Pursuant to *Munsingwear*, the Court should also vacate the district court’s judgment and either dismiss outright or remand for dismissal.

### **III. The Appropriate Disposition is Vacatur of the Opinion, Vacatur of the District Court’s Judgment, and Dismissal of the Action.**

Finally, if the Court for any reason determines that Mr. Rice’s appeal is *not* moot, then rehearing with an order for full briefing and argument on the merits is warranted. Mr. Rice’s *pro se* appeal raises an important question on a novel issue in this Circuit: whether a pretrial detainee may obtain release in habeas where the custodian chooses to continue to hold that person in custody, exposing that person to the risk of COVID-19 in that particular jail, during the pandemic.

This question is also contested. An unpublished decision of this Court prior to this published opinion concluded that this kind of claim may be brought in habeas “because a favorable ruling . . . would accelerate . . . release.” *Cheek v. Warden of Fed. Med. Ctr.*, No. 20-10712, 2020 WL 6938364 at \*2 (5th Cir. Nov. 24, 2020) (unpublished op.). The *Cheek* panel reached a contrary conclusion to this one. In doing so, it directly cited two cases that this panel likewise did—*Carson v. Johnson*, 112 F.3d 818 (5th Cir. 1997),

and *Preiser v. Rodriguez*, 411 U.S. 475 (1973)—and one that this panel did not engage with—*Coleman v. Dretke*, 409 F.3d 665 (5th Cir. 2005). Additionally, as this Court’s published opinion notes, there is at least one fellow circuit that has likewise concluded that such claims may be brought in habeas. Doc. 00515730526 at 3 n.2 (citing *Wilson v. Williams*, 961 F.3d 829, 837-39 (6th Cir. 2020)); see also *Cheek*, 2020 WL 6938364 at \*2 (citing *Wilson* and also noting similar reasoning in *Medina v. Williams*, 823 F. App’x 674 (10th Cir. 2020)).

But, despite these contrary decisions both from this Court and from a fellow circuit implicating a circuit split, the stakes for those in pretrial detention who are vulnerable to severe illness or death from COVID-19, and the highly complex nature of the legal question involved, this Court lacked the benefit of meaningful briefing in reaching its decision in this litigation. Mr. Rice originally litigated this case pro se. As he noted in his brief, “Appellant admits not being well lettered in the law or the terms.” Br. at 4. Mr. Rice did not even cite in his briefing the cases with which the panel has engaged: *Pierre v. United States*, 525 F.2d 933 (5th Cir. 1976); *Preiser*; *Carson*; and *Orellana v. Kyle*, 65 F.3d 29 (5th Cir. 1995) (per curiam). In fact, the *entirety* of Mr. Rice’s briefing on whether this claim may be brought in habeas consisted of three sentences and a single citation to an out-of-circuit district court case. Br. at 4. Harris County, for its part, did not file a brief or even enter an appearance on behalf of the Sheriff. And, as explained above, the district court did not construe this case as arising under habeas; nor did it engage with the question of whether this kind of claim *could* be brought in habeas.

This petition for rehearing lacks sufficient space to do justice to the weighty and complex question presented here. Ordinarily, a principal brief has a maximum of 13,000 words, while the entirety of this petition for rehearing is limited to 3,900. *Compare* Fed. R. App. P. 32(a)(7)(B)(i) *with* Fed. R. App. P. 40(b)(1).

If the Court evaluates the merits of Mr. Rice's claim, it should do so with the benefit of a meaningful presentation, including a reply to any counterarguments presented. In these circumstances, the opportunity for full briefing on this important issue implicating a constitutional claim is warranted. *Cf. Garner v. Kennedy*, 713 F.3d 237, 244 (5th Cir. 2013) (holding that two prior circuit cases "are not controlling here" where the prior plaintiffs were *pro se* and had not put forward contrary evidence or the arguments proffered in the instant case).

## **CONCLUSION**

This Court should grant the petition for rehearing, determine that this case is moot, vacate the published opinion, vacate the district court's decision, and cause the action to be dismissed.

Dated: March 2, 2021

## APPENDIX G

UNITED STATES  
COURT OF APPEALS FOR THE FIFTH  
CIRCUIT  
NEW ORLEANS, LOUISIANA

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SKYLER THOMAS RICE, *Plaintiff—Appellant, versus*  
ED GONZALEZ, SHERIFF OF HARRIS COUNTY,  
*Defendant—Appellee.*

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Docket No. 20-20263

[Filed February 2, 2021]

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Before JONES, SMITH, and ELROD, *Circuit Judges.*  
EDITH H. JONES, *Circuit Judge:*

Appellant Rice, a detainee in the Harris County, Texas, jail awaiting trial, filed what he described as a petition for writ of habeas corpus seeking release from pretrial custody because, he contended, no conditions at the jail were sufficient to protect his constitutional rights in the midst of the COVID-19 crisis. Some confusion ensued when his petition and a separate memorandum in support of either “a writ of habeas corpus or an injunction” were mishandled in the clerk’s office. Ultimately, the district court denied relief regardless whether the petition was brought under federal habeas law, 28 U.S.C. § 2241, or civil rights law, 42 U.S.C. § 1983. Rice has appealed, insisting that his petition sounds in habeas. He contends he should be released from custody because,

given health problems including asthma and hypertension, he is at a high risk for contracting the virus, yet jail conditions make it exceedingly difficult, if not impossible, to practice proper hygiene and social distancing.<sup>1</sup>

We affirm the denial of relief on the following basis. We construe Rice's petition, at his behest, as seeking habeas relief, and thus have jurisdiction over the case. But we also conclude that the Great Writ does not, in this circuit, afford release for prisoners held in state custody due to adverse conditions of confinement. Rice has not stated a claim for relief. Fed. R. Civ. P. 12(b)(6).

In *Pierre v. United States*, 525 F.2d 933, 935-36 (5<sup>th</sup> Cir. 1976), this court held that, "[s]imply stated, habeas is not available to review questions unrelated to the cause of detention. Its sole function is to grant relief from unlawful imprisonment or custody and it cannot be used properly for any other purpose." See generally *Preiser v. Rodriguez*, 411 U.S. 475, 500, 93 S. Ct. 1827, 1841 (1973) ("[W]e hold today that when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus.") As we noted in *Carson v. Johnson*, "[i]f 'a favorable determination...would not automatically entitle [the prisoner] to accelerated release,'...the proper vehicle is a § 1983 suit." 112 F.3d 818, 820-21 (5th Cir. 1997) (quoting *Orellana v. Kyle*, 65 F.3d 29, 31 (5th Cir. 1995) (per curiam)). Both *Carson* and *Orellana* dealt with parole procedures

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<sup>1</sup> In fact, a few months after filing this petition, Rice contracted COVID-19, and he survived.

that, if modified by the courts, would enhance a prisoner's eligibility for release but not compel that result. Similarly, that Rice might more likely be exposed to COVID-19 during confinement, and that he may have certain common underlying health conditions, taken together do not impugn the underlying legal basis for the fact or duration of his confinement. Rice seeks an extension of federal habeas corpus law that this court is not authorized to grant.<sup>2</sup> AFFIRMED.

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<sup>2</sup> At least one other circuit court has held in a published opinion that Section 2241 provides jurisdiction and potential relief for federal prisoners to seek COVID-related release from custody. *Wilson v. Williams*, 961 F.3d 829, 837-39 (6th Cir. 2020). But this circuit's precedential, published case law is otherwise. In any event, COVID-19 relief claims in this circuit have been handled pursuant to 42 U.S.C. § 1983. *Valentine v. Collier*, 956 F.3d 797 (5th Cir. 2020) (*Valentine I*); *Valentine v. Collier*, 978 F.3d 154 (5th Cir. 2020) (*Valentine II*); *Marlowe v. LeBlanc*, 810 Fed. App'x 302 (5th Cir. 2020).

## APPENDIX H

UNITED STATES  
COURT OF APPEALS FOR THE FIFTH  
CIRCUIT  
NEW ORLEANS, LOUISIANA

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SKYLER THOMAS RICE, *Plaintiff—Appellant, versus*  
ED GONZALEZ, SHERIFF OF HARRIS COUNTY,  
*Defendant—Appellee.*

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Docket No. 20-20263

[Filed October 1, 2020]

### APPELLANT'S BRIEF

#### Statement of the Legal Issues

- (1) The District Court erred in construing Petitioner's Motion for Preliminary Injunction as a civil rights complaint.
- (2) The District Court erred in counting the dismissal of the misconstrued motion as a strike.
- (3) The District Court should have allowed Appellant the opportunity to withdraw or modify the misconstrued filing.

#### Statement of the Case

In this case Skyler Rice, Petitioner/Appellant filed a writ of habeas corpus pursuant to 28 § 2241 in the District Court along with a motion for a preliminary injunction. Somehow the Motion for Preliminary Injunction got filed as a separate cause and filed as a civil rights complaint pursuant 42 USC § 1983. The

Motion for Preliminary Injunction was a motion requesting immediate release from confinement due to their being no conditions of confinement that did not violate my constitutional rights. The 28 USC § 2241 was the only vehicle for which Petitioner sought relief (i.e. injunction relief).

### **ARGUMENT**

- (1) The District Court erred in construing Petitioner's Motion for Preliminary Injunction as a civil rights suit.

Petitioner filed a writ of habeas corpus pursuant to 28 U.S.C. § 2241 and included a motion for preliminary injunction seeking his immediate release from confinement, as there not being any condition of confinement that would not violate his due process rights or prevent irreparable constitutional injury. This being because Petitioner has underlying health conditions that make him extra vulnerable to loss of life or health from COVID-19. Petitioner's Motion for Preliminary Injunction was to be filed in conjunction with his 2241 as Petitioner sought release in the form of immediate release which is only cognizable through habeas corpus and not civil rights complaint. Therefore the District claims its "Order of Dismissal" the civil rights action was "dismissed for failing to state a claim for which relief may be granted." Had the District Court properly construed the filing as an application for writ of habeas corpus brought under 2241, the relief requested could have been granted, as in *Malam v. Adducci* 2020 US District LEXIS 59407 which Petitioner sought to follow. The 2241 and Motion for Preliminary Injunction were granted as well as several other interveing Plaintiff's request for the same relief. Appellant admits not being well

lettered in the law or the terms as a result used Plaintiff and Petitioner interchangeably.

- (2) The District Court erred in counting the dismissal of the Motion for Preliminary Injunction as a strike.

Petitioner did not file a civil rights complaint pursuant to 42 § 1983, but rather of writ of habeas corpus pursuant to 28 § 2241 and motion for preliminary injunction requesting relief in the form of immediate release. A strike was counted against Appellant in the instant case due to the misconstruing of this motion as a civil rights complaint. A strike is not normally counted against a Petitioner who proceeds via 2241. In *Heid v. Aderhold*, 2020 U.S. Dist. LEXIS 144656 it was stated “currently, the prevailing approach in the majority of circuits to have addressed the issue is not to count dismissals of habeas petitions as strikes.” See *Jones v. Smith*, 720 F.3d 142, 146-47 (2d Cir. 2013); *Paige v. Bacarisse*, 80 F. Appx 299, 300 (5<sup>th</sup> Cir. 2003); *Andrews v. King*, 398 F.3d 1113, 1122-23 (9<sup>th</sup> Cir. 2003); *Jennings v. Nationa Cty. Detention Ctr Med. Facility*, 175 F.3d 775, 779 (10<sup>th</sup> Cir 1999); *Mitchell v. Bureau of Prisons*, 587 F.3d 415, 418, 388 U.S. App D.C. 346 (D.C. Cir 2007). Habeas petitions are not included under the PLRA. See *Kincaid v. Sparkman*, 117 F.3d 949, 951 (6<sup>th</sup> Cir. 1997). In *Kincaid*, the Court held that the term “civilization” in § 1915 does not include habeas petitions. Therefore Appellant believes the District Court erred in counting the Dismissal as a strike against him.

- (3) The District Court should have allowed Appellant the opportunity to withdraw or modify the misconstrued filing.

The District Court immediately ordered a dismissal of Appellants suit, which was filed on April 15, 2020 and dismissed on April 28, 2020. The Court did not request any clarification or give Appellant an opportunity to refile the suit. Appellant wrote the District Court and requested the District Court reconsider dismissing the suit which the District Court denied.

### **CONCLUSSION**

Appellant respectfully request that the Order of Dismissal and the strike imposed be reversed that the Appellant's suit be withdrawn and he be allowed to refile his 2241 at a later time.

9/27/20

/s/ Skyler Rice

## APPENDIX I

UNITED STATES  
DISTRICT COURT FOR THE SOUTHERN  
DISTRICT OF TEXAS  
HOUSTON DIVISION

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SKYLER THOMAS RICE, *Plaintiff*, v. ED GONZALEZ,  
SHERIFF OF HARRIS COUNTY, *Defendant*.

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Docket No. 4:20-cv-01354

[Filed April 28, 2020]

### ORDER OF DISMISSAL

Plaintiff Skyler Thomas Rice filed a motion for a preliminary injunction. The Court construed the motion as a civil rights complaint under 42 U.S.C. § 1983 that seeks injunctive and equitable relief to secure his release, presumably on bond during the duration of the COVID-19 global pandemic.

Because he is an inmate who proceeds in *forma pauperis*, the Court is required by the Prison Litigation Reform Act (the “PLRA”) to scrutinize the complaint and dismiss the case, in whole or in part, if it determines that the action is frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. *See* 28 U.S.C. § 1915A(b); 28 U.S.C. § 1915(e)(2)(B). For the reasons below, Plaintiff’s request for preliminary injunctive relief is denied and the civil rights action dismissed for failing to state a claim for which relief may be granted.

## **I. Background**

As stated in his motion for a preliminary injunction, Plaintiff is confined at the Harris County Jail. *See* Dkt. #1 at 1. Plaintiff alleges that he remains in custody pursuant to charges for possession of a controlled substance. *Id.* Plaintiff alleges that he is asthmatic and has hypertension. *Id.* Plaintiff alleges that these conditions place him at a higher risk of death from the COVID-19 global pandemic. *Id.* Plaintiff alleges that the common preventative measures of social distancing and excessive hygiene are exceedingly difficult if not impossible to accomplish at the Harris County Jail because he shares toilets, sinks, phones, and showers with other inmates. *Id.* As stated above, Plaintiff seeks injunctive relief in the form of an order securing his immediate release from the jail. *Id.* at 6.

## **II. Discussion**

Title 42, section 1983, authorizes a “suit in equity, or other proper proceeding for redress” against any person who, under color of state law, “subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution.” *See Nelson v. Campbell*, 541 U.S. 637, 643 (2004). However, a civil rights complaint pursuant to § 1983 must yield to the more specific federal habeas statute, with its attendant procedural and exhaustion requirements, when an inmate seeks injunctive relief that challenges the fact of his conviction or the duration of his sentence. *Id.* These claims fall within the “core” of habeas corpus and are thus not cognizable when brought pursuant to § 1983. *Id.* Constitutional claims that merely challenge the conditions of a prisoner’s

confinement may brought pursuant to § 1983. *Id.*

As stated above, Plaintiff seeks injunctive relief that secures his relief from the Harris County Jail. This claim is at the “core” of habeas relief, and may not be brought under a civil rights complaint. While it is in the Court’s discretion to construe the complaint as a writ of habeas corpus, such construction would be inappropriate. First, Plaintiff has a pending writ of habeas corpus in Case No. 4:20-cv-1356. Second, in that writ, Plaintiff states that he filed a state application for a writ of habeas corpus that remains pending in the state courts. See *Rice v. Ed Gonzales*, Case No. 4:20-cv-1356, Dkt. #1 at 5. Therefore, construing the complaint as a writ of habeas corpus would be futile as Plaintiff has not exhausted his state remedies.

Moreover, even if these claims could be brought in a civil rights complaint under § 1983, to the extent that Plaintiff seeks injunctive relief, his civil rights claims are barred by the doctrine set out in *Younger v. Harris*, 401 U.S. 37, 43-45 (1971). *Younger* held that a federal court may not interfere in an ongoing state criminal proceeding unless extraordinary circumstances are present. See *Gates v. Strain*, 885 F.3d 874, 880 (5<sup>th</sup> Cir. 2018). Abstention is required when “(1) the federal proceeding would interfere with an ‘ongoing state judicial proceeding’; (2) the state has an important interest in regulating the subject matter of the claim; and (3) the plaintiff has ‘an adequate opportunity in the state proceedings to raise constitutional challenges.’” *Bice v. Louisiana Public Defenders Bd.*, 677 F.3d 712, 716 (5<sup>th</sup> Cir. 2012) (quoting *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass’n*, 457 U.S. 423, 432 (1982)).

All three criteria are met in this case. Public records reflect that Plaintiff is represented by counsel in his Harris County criminal charges and that the proceedings remain ongoing. Plaintiff also has filed a state application for a writ of habeas corpus that also remains pending, which shows that he has an adequate state avenue to litigate his claims. Finally, Plaintiff does not show that the state does not have an interest unifying their efforts in controlling COVID-19, rather than piecemeal court intervention for prisoners. Moreover, Plaintiff does not otherwise allege facts showing that his medical conditions make him so particularly vulnerable that extraordinary circumstances exist that warrant federal court intervention in his criminal proceedings. Therefore, for the reasons stated above, Plaintiff's complaint is dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B).

### III. Conclusion

Plaintiff's civil rights complaint under § 1983 is **DISMISSED** with prejudice. This dismissal acts as a "strike" for the purposes of 28 U.S.C. § 1915(g). The Clerk's Office will provide a copy of this order to Plaintiff. The Clerk will also provide a copy of this order to the Manager of the Three Strikes List for the Southern District of Texas at: [Three\\_Strikes@txs.uscourts.gov](mailto:Three_Strikes@txs.uscourts.gov).

SIGNED at Houston, Texas, on Apr 28, 2020.

/s/ David Hittner  
\_\_\_\_\_  
DAVID HITTNER  
United States District Judge

## APPENDIX J

UNITED STATES  
DISTRICT COURT FOR THE SOUTHERN  
DISTRICT OF TEXAS  
HOUSTON DIVISION

---

SKYLER THOMAS RICE, *Plaintiff*, v. ED GONZALEZ,  
SHERIFF OF HARRIS COUNTY, *Defendant*.

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Docket No. 4:20-cv-01354

[Filed April 15, 2020]

**MEMORANDUM OF LAW IN SUPPORT OF  
PETITIONER/PLAINTIFF'S MOTION FOR A  
TEMPORARY RESTRAINING ORDER AND  
PRELIMINARY INJUNCTION**

**Statement of the Case**

This is an emergency petition challenging detention because of danger posed to Petitioner Skyler T. Rice by the COVID-19 Pandemic. Petitioner pleads that the Court has subject matter jurisdiction over this case pursuant to Article 1, § 9, Cl 2 of the United States Constitution Suspension Clause; the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution; 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 1651 (All Writs Act); and 28 U.S.C. § 2241 (habeas corpus). Petitioner requests a TRO requiring that Respondents release him on his own recognizance for the pendency of his criminal proceedings. Petitioner is seeking emergency relief in either of two forms: a writ of

habeas corpus or an injunction ordering Respondent/Defendants to immediately release Petitioner with appropriate precautionary public health measures on the grounds that his continued detention violates the Due Process Clause of the Fifth and Fourteenth Amendments.

### **Statement of Facts**

As stated in the declarations submitted with this Motion, the Plaintiff/Petitioner is confined at the Harris County Jail on possession of a controlled substance charges. The Plaintiff has underlying health conditions that pose a significant risk of loss of health and life due to the COVID-19 pandemic. Petitioner is an asthmatic and has hypertension, both of which place Petitioner at a higher risk of death from the coronavirus (COVID-19). Social distancing and hygiene measures are Plaintiff's only defense against COVID-19. These protective measures are exceedingly difficult, if not impossible at the Harris County Jail where Petitioner shares toilets, sinks, phones, showers, eats in communal spaces, and is in close contact with the many other detainees and officers. Social distancing of six feet would be impossible at the Harris County Jail. This concession supports the conclusion of multiple doctors and public health experts that "the only viable public health strategy available is risk mitigation... The public health recommendation is to release all people with risk factors from custody given the heightened risk to their health and safety.

## **ARGUMENT**

### **POINT #1**

#### **THE PLAINTIFF IS ENTITLED TO** **A TEMPORARY RESTRAINING ORDER** **AND A PRELIMINARY INJUNCTION**

In determining whether a party is entitled to a temporary restraining order or a preliminary injunction, courts generally consider several factors: whether the party will suffer irreparable injury, the “balance of hardships” between the parties, the likelihood of success on the merits and the public interest. Each of these factors favors the grant of this motion.

#### **A. IRREPARABLE HARM**

Petitioner is likely to experience irreparable injury absent an injunction both in the form of loss of health and life, and in the form of an invasion of his constitutional rights.

##### **1. Loss of Health or Life from COVID-19**

The on-going COVID-19 Pandemic creates a high risk that absent an injunction by this Court, Petitioner will suffer irreparable harm in the form of loss of health or life as a result of contracting the COVID-19 virus.

On March 23, 2020, the Centers for Disease Control and Prevention (CDC) acknowledged that correctional and detention facilities “present unique challenges for control of COVID-19 transmission among incarcerated/detained persons, staff, and

visitors.” Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities. Centers for Disease Control (Mar. 23, 2020) <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>. Hereinafter “CDC Guidance 3/23/2020.” Specifically, the CDC noted that many detention conditions create heightened risk of danger to detainees, these include: low capacity for patient volume, insufficient quarantine space, insufficient on-site medical staff, highly congregational environments, inability of most patients to leave the facility, and limited ability of incarcerated/detained persons to exercise effective disease prevention measures (e.g., social distancing and frequent hand-washing).

Though the CDC has recommended public health guidance for detention facilities and though the Harris County Jail had indeed implemented measures designed to prevent spread of the disease, these measures are inadequate to sufficiently decrease the substantial likelihood that Petitioner will contract COVID-19. As prison officials are beginning to recognize around the country, even the most stringent precautionary measures – short of limiting detained population itself, – simply cannot protect detainees from the extremely high risk of contracting this unique and deadly disease. For example, on April 1, 2020, the Rikers Island Jail Complex’s Chief Physician acknowledged that “infections are soaring” despite the facility’s “following Centers for Disease Control and Prevention guidelines and having moved mountains to protect our patients.” Miranda Bryant, “Coronavirus spread at Rikers is a ‘public health disaster’, says jail’s top doctor.” The Guardian (April

1, 2020). <https://www.theguardian.com/us-news/2020/apr/01/rikers-island-jail-cornavirus-public-health-disaster>.

Petitioner is 37 years of age and suffers from the following conditions, all most all of which place him at an increased risk of dire outcome from contracting the COVID-19 virus: asthma, hypertension, PTSD, Depression, nicotine and opioid addiction.

*See* Centers for Disease Control, Groups at Higher Risk for Severe Illness, (Apr. 2, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html> (noting that “people of all ages with underlying medical conditions are at higher risk for severe illness, particularly if the underlying medical conditions are not well controlled”). Additionally, Respondents have confined Petitioner in an environment where he shares toilets, sinks, phones, and showers, eats meals in communal spaces, and is in close contact with the many other detainees, officers, and visitors. Petitioners involuntary interaction with purportedly asymptomatic guards who rotate shifts is also a significant factor. to exposure.

These are many of the conditions that the CDC has identified as being particularly likely to increase COVID-19 transmissions in detention facilities. CDC Guidance 03/23/2020. For these reasons the Petitioners confinement at the Harris County Jail renders him substantially likely to contract COVID-19 and his severe health conditions render him substantially likely to suffer irreparable harm or death as a result.

## **2. Violation of Constitutional Rights**

Petitioner's Fifth Amendment Claim triggers a finding that the Petitioner will suffer irreparable harm absent an injunction. Petitioner alleges that in subjecting him to detention conditions that amount to punishment and that fail to ensure his safety and health Respondents are subjecting him to a substantial risk of serious harm in violation of his rights under the Due Process Clause. The alleged violation of a Constitutional Right is sufficient for a court to find irreparable harm. *See Overstreet v. Lexington-Fayette Urban Cty, Gov.*, 305 F.3d 566, 578 (6<sup>th</sup> Cir. 2002) (citing *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6<sup>th</sup> Cir. 1998)). *See also Rhinehart v. Scott*, 509 Fed. Appx. 510, 514 (6<sup>th</sup> Cir. 2018) (suggesting that allegations of "continuing violation of Eighth Amendment Rights" would trigger a finding of irreparable harm). Petitioner is likely to succeed on the merits of this Fifth Amendment Claim. *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2<sup>nd</sup> Cir. 1984) (when an alleged deprivation of a Constitutional Right is involved, most courts hold that no further showing of irreparable injury is necessary.").

## **B. LIKELIHOOD OF SUCCESS ON THE MERITS**

Petitioner is likely to succeed on the merits of his claim that his continued detention during the COVID-19 Pandemic violates his Fifth Amendment rights. The Due Process Clause of the Fifth Amendment to the United States Constitution forbids the government from depriving a person of life, liberty, or property without due process of law. US Const. amend. V. The protection applies to all persons within

the United States. As it pertains to Petitioner, the Due Process Clause prohibits the government from imposing torture and cruel and unusual punishment and confinement conditions on non-convicted detainees. *See Bell v. Wolfish*, 441 US 520, 535, 99 S. Ct. 1861, Gov. Ed. 2d 447 (1979). Under the Due Process Clause a detainee may not be punished prior to an adjudication of guilt. “This type of Fifth Amendment claim is analyzed under the same rubric as Eighth Amendment claims brought by prisoners.” *Villegas v. Metropolitan Government of Nashville*, 709 F.3d 563, 565 (6<sup>th</sup> Cir. 2013). Eighth Amendment claims require a showing of deliberate indifference. *See Farmer v. Brennan*, 511 US 825, 835, 114 S. Ct. 1970, 128 L.Ed 2d 811 (1994), which has both an objective and a subjective component. *Villegas v. Metro. Gov’t. of Nashville*, 709 F. 3d 563, 568, (6<sup>th</sup> Cir 2013) (citing *Harrison v. Ash*, 539 F. 3d 510, 518 (6<sup>th</sup> Cir. 2008)).

### **1. Objective Component**

The objective component is satisfied by showing that, “absent reasonable precautions an inmate is exposed to a substantial risk of serious harm.” *Richko v. Wayne Cty.*, 819 F.3d 907, 915, (6<sup>th</sup> Cir. 2016) (citing *Amick v. Ohio Dep’t of Rehab. & Corr.*, 521 Fed. Appx. 354, 361 (6<sup>th</sup> Cir. 2013). A generalized risk is a substantial risk. As the Supreme Court explained in *Helling v. McKinney*, “We have a great difficulty agreeing that prison authorities may not be deliberately indifferent to an inmate’s current health problems but may ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year.” 509 US 25, 33, 11 S. Ct. 2475, 125 L.Ed. 2d 22 (1993).

“The Eighth Amendment protects against future harm to inmates is not a novel proposition.” *Id.* “It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them.” *Id.* The ever-growing number of COVID-19 outbreaks in prisons and detention facilities despite a range of precautionary measures demonstrates that the risk of a COVID-19 outbreak in Respondent’s facility is significant. By the time a case is conformed, it will almost certainly be too late to protect Petitioner’s constitutional rights. Petitioner, so long as he remains detained, is therefore exposed to a substantial risk of serious harm.

## **2. Subjective Component**

The subjective component is demonstrated by showing that “(1) the official being sued subjectively perceived facts from which to infer a substantial risk to the prisoner, (2) the official did in fact draw inference, and (3) the official then disregarded that risk.” 819 F.3d at 915-16 (citing *Rouster v. Cty. Of Saginaw*, 749 F.3d 437, 446 (6<sup>th</sup> Cir. 2014) “Because government officials do not readily admit the subjective component of this test, it may be demonstrated in the usual ways, including inference from circumstantial evidence.” *Richko*, 819 F.3d at 916 (citing *Dominguez v. Corr. Med. Servs.*, 555 F.3d 543, 550 (6<sup>th</sup> Cir. 2009)). Additionally “a fact-finder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.” *Farmer*, 511 U.S. at 842. Rightfully so: the above analysis pertaining to the risk of irreparable injury reveals that the substantial risk to Petitioner is obvious. *Farmer*, 511 U.S. at 842.

In light of Petitioner's underlying health conditions, he is not ensured anything close to "reasonable safety." *Farmer*, 511 U.S. at 844. The only reasonable response by Respondent is the release of Petitioner; any other response demonstrates a disregard of the specific, severe, and life-threatening risk to Petitioner from COVID-19.

For the same reasons, Petitioner's continued detention cannot "reasonably relate to any legitimate government purpose." *Bell v. Wolfish*, 441 U.S. 520, 536-39, 99 S. Ct. 1861, 60 L.Ed. 2d 447 (1979) (holding that pretrial detention not reasonably related to a legitimate government purpose must be considered punishment and therefore contrary to the Fifth Amendment). Petitioner faces significant risk of death due to COVID-19. Accordingly his continued detention at the Harris County Jail is both unrelated and contrary to the government purpose of carrying out his criminal proceedings. The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the movants will suffer absent the stay." *Northeast Ohio Coalition for Homeless and Service Employees Intern. Union, Local 1199*, 467 F.3d at 1009 (6<sup>th</sup> Cir. 2006). Given the risk and severity of irreparable harm to Petitioner and the weight of public health evidence indicating release as the only reasonable option under the facts Petitioner has met his burden with respects to the merits of his claim. As explained above, Petitioner has shown a likelihood of success on the merits of his action/claim that given the extraordinary nature of the COVID-19 pandemic, no set of possible conditions of confinement would be sufficient to protect his Fifth Amendment rights. Release from custody represents the only adequate remedy in this case, and it is within this

Court's broad equitable power to grant it. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15-16, 91 S. Ct. 1267, 28 L.Ed. 2d 554(1971) (once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.”).

### **3. Qualified Immunity**

Qualified immunity is unavailable as a defense in cases seeking injunctive relief. *See Pearson v. Callahan*, 555 U.S. 223, 242, 129 S. Ct. 808, 172 L.Ed. 2d 565 (2009) (noting that qualified immunity defense is not available in “suits against individuals where injunctive relief is sought in addition to or instead of damages”); *Harlow v. Fitzgerald*, 457 U.S. 800, 806, 102 S.Ct. 2727, 73 L.Ed. 2d 396 (1982) (describing qualified immunity as “immunity from suits for damages”). Because Petitioner here seeks only declaratory and injunctive relief, qualified immunity does not apply.

### **C. BALANCE OF EQUITIES AND PUBLIC INTEREST**

When the government opposes the issuance of a temporary restraining order the final two factors – The Balance of Equities and The Public Interest – merge, because “the government’s interest is the public interest.” *Pursuing America’s Greatness v. Fed. Election Comm’n*, 831 F.3d 500, 512, 425 U.S. App. D.C. 31 (D.C. Cir. 2016) (citing *Nken v. Holder*, 556 U.S. 418, 435, 129 S.Ct. 1749, 173 L.Ed. 2d 550 (2009)).

The public interest favors Petitioner’s release

because of the risk that Petitioner's constitutional rights will be deprived absent an injunction. "It is always in the public interest to prevent the violation of a party's constitutional rights." *GCV Lounge Inc. v. Mich. Liquor Control Comm.*, 23 F.3d 1071, 1079, (6<sup>th</sup> Cir. 1994).

Additionally, Petitioner's release will protect public health. Given the highly unusual and unique circumstances posed by the COVID-19 virus pandemic and ensuing crisis, "the continued detention of aging or ill detainees does not serve the public's interest." *Basank*, 2020 US Dist. LEXIS 53191, 2020 WL 1481503 at 6; *see also Fraihat v. U.S. Imm. and Customs Enforcement*, 5:19 Civ. 1546, ECF No. 81-11 (C.D. Cal. Mar. 24, 2020). ("the design and operation of detention settings promotes the spread of communicable diseases such as COVID-19"); *Castillo v. Barr*, CV-20-00605-TJH, 2020 US Dist. LEXIS 54425 (C.D. Cal. 2020). Protecting public health and safety is in the public interest. *See Neinast v. Bd. of Trustees*, 346 F.3d 585, 592 (6<sup>th</sup> Cir. 2003) (recognizing public health and safety as legitimate government interests).

The public interest and balance of equities demand that the Court protect Petitioner's constitutional rights and the public health over the continued enforcement of a detention provision that, as applied to Petitioner, is unconstitutional. The remaining factors counsel granting Petitioner relief.

## POINT II

### **THE PLAINTIFF/PETITIONER SHOULD NOT BE REQUIRED TO POST SECURITY**

Usually a litigant who obtains interim injunctive relief is asked to post security. Rule 65(c), Fed. R. Civ. P. However, the Plaintiff is an indigent prisoner and is unable to post security. The Court has discretion to excuse an impoverished litigant from posting security. *Elliott v. Kiesewetter*, 98 F.3d 47, 60 (3d Cir. 1996) (stating that district courts have discretion to waive the bond requirement contained in Rule 65(c) of the Federal Rules of Civil Procedure if “the balance of the equities weighs overwhelmingly in favor of the party seeking the injunction”); *Moltan Co. V. Eagle-Pitcher Industries, Inc.*, 55 F.3d 1171, 1176 (6<sup>th</sup> Cir. 1995). In view of the serious medical danger confronting the Plaintiff, the Court should grant the relief requested without requiring the posting of security.

### **CONCLUSION**

Because all factors weigh in favor of issuing emergency injunctive relief, Petitioner prays this Court GRANT his Motion for Temporary Restraining Order – ordering Petitioner’s immediate release from Respondent’s custody.

04/11/2020

/s/ Skyler T. Rice

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Skyler Thomas Rice #01956417  
Harris County Jail – 5H1  
1200 Baker St.  
Houston, TX 77002