

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

OSCAR SANCHEZ, MARCUS WHITE,
TESMOND MCDONALD, MARCELO
PEREZ, ROGER MORRISON, KEITH
BAKER, PAUL WRIGHT, TERRY
MCNICKELS, JOSE MUNOZ, KIARA
YARBOROUGH, OLIVIA WASHINGTON,
and IDEARE BAILEY; *on their own and on
behalf of a class of similarly situated persons;*

Petitioners/Plaintiffs,

v.

DALLAS COUNTY SHERIFF MARIAN
BROWN, *in her official capacity*; DALLAS
COUNTY, TEXAS;

Respondents/Defendants

Civil Action No. 20-cv-832

**NOTICE RE: PETITIONER/PLAINTIFFS' SECOND AMENDED [PROPOSED]
ORDER GRANTING PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING
ORDER, MOTION FOR A PRELIMINARY INJUNCTION, AND PETITION FOR
WRIT OF HABEAS CORPUS**

In light of *Valentine v. Collier*, No. 20-20207 (5th Cir. April 22, 2020), and the evidence adduced at the hearing in the above-captioned case, Plaintiffs submit a second amended proposed order. *See* Exhibit 1. Key provisions in the amended proposed order are described below:

1. In Paragraphs 4–5, the Order provides more detail regarding the process Plaintiffs propose for granting habeas relief, or alternatively enlargement,¹ to members of the Medically-Vulnerable Subclasses. Plaintiffs do not seek the habeas release of non-Medically-Vulnerable

¹ *See* Doc. No. 47 at 25 (“[I]t is within the inherent power of a District Court of the United States to enlarge a state prisoner on bond pending hearing and decision on his application for a writ of habeas corpus.” *In re Wainwright*, 518 F.2d 173, 174 (5th Cir. 1975). Release pending a district court’s ruling on habeas is appropriate where a petitioner “raise[s] substantial constitutional claims upon which he has a high probability of success,” and “extraordinary and exceptional circumstances exist which make the grant of bail necessary to make the habeas remedy effective.” *Calley v. Callaway*, 496 F.2d 701, 702 (5th Cir. 1974)).

persons. This Court has broad discretion to craft equitable relief, and although Plaintiffs propose one such process in the Second Amended Proposed Order—that the Court start by releasing people who are in jail *only* because they are awaiting placement in a treatment center—there are other options. For example, the Court could start by granting habeas relief to everyone in the Medically Vulnerable Subclasses who is required to pay a secured money bail amount of \$10,000 or less (i.e. people who could be released if they could pay, at most, \$1,000 to a bonding company), or who is charged with non-violent offenses, or who is over age 70.²

Plaintiffs’ proposed mechanism in their second amended proposed order provides one path for the Court in balancing relevant interests, but the law affords this Court broad discretion to craft equitable relief. Further, in fashioning an equitable remedy, this Court is not bound by Texas bail statutes or other state laws; rather, this Court may exercise its discretion in sequencing its release decisions and weighing relevant factors upon a finding that the federal constitutional rights of Petitioners has been violated.

Moreover, the Court is free to enlist a Magistrate or Special Master to oversee the process and ensure it is expeditious and efficient.

Other courts that have considered habeas petitions on behalf of medically-vulnerable detainees have fashioned relief similar to what Plaintiffs seek here:

- **Ordering release or transfer of medically vulnerable to other places of custody, including home confinement:**
 - *Wilson v. Williams*, 20-cv-794 (N.D. Ohio. April 22, 2020) Doc. No. 22 at 20–21 (ordering Respondents to evaluate medically-vulnerable class members’ eligibility for compassionate release or transfer to home confinement, parole or

² Another option would be to convert any secured pretrial bonds to unsecured bonds via the enlargement process. The Fifth Circuit in *ODonnell* upheld Chief Judge Lee H. Rosenthal’s factual findings that unsecured bonds are equally effective at reasonably assuring appearance and community safety. *ODonnell v. Harris Cty.*, Texas, 251 F. Supp. 3d 1052, 1144 (S.D. Tex. 2017), *aff’d as modified sub nom. ODonnell v. Harris Cty.*, 892 F.3d 147 (5th Cir. 2018) (“[T]he record evidence shows that secured money bail is not more effective at increasing the likelihood of appearance or law-abiding behavior before trial than release on an unsecured or nonfinancial condition.”).

community supervision, furlough, or to another facility where social distancing would be possible, in order of medical need);

- **Ordering Defendants to provide a list of medically vulnerable people and to state any objections to releasing those people:**

- *Cameron v. Bouchard*, 20-cv-10949 (E.D. Mich. April 17, 2020) at Doc. 12, at 7 (ordering Defendants to the federal action to lodge their objections to the release of persons on a medically-vulnerable subclass list); Doc. 29 (noting that the list may be provided after habeas releases deemed appropriate).

- **Granting “enlargement” pending a habeas decision:**

- *Savino v. Souza*, 20-cv-10617, 2020 WL 1703844, at *9 (D. Mass. April 8, 2020). Finding “extraordinary circumstances” in “this nightmarish pandemic,” the court opted to “diligently entertain[] bail applications while the petitions for habeas corpus are pending.” *Id.* at *9. The district court requested and rapidly considered an initial list of 50 detainees for bail, and has since considered class members’ applications for bail-pending-habeas in groups of ten. Order, *Savino v. Souza*, No. 20-10617-WGY, Doc. No. 44, at 3 (Apr. 4, 2020); *see id.*, Doc. No. 45 at 1-3 (listing class members in groups of 10 for bail consideration); *id.*, Doc. No. 77 at 1-3 (Apr. 10, 2020) (same);

- **Granting habeas relief:**

- *Wolf v. Hernandez*, 20-cv-768 (C.D. Ca. April 23, 2020), Doc. No. 55 (ordering Immigration and Customs Enforcement center to “reduce the detainee population... to such a level that would allow the remaining detainees to maintain a social distance of 6 feet from each other at all times and at all places, including while sleeping, eating, showering, and going about other daily activities, except when there is a medical necessity or a safety emergency.”) The *Wolf* case left it up to the Defendant to determine “which detainees are released, deported, or transferred.”
- *Fraihat v. Immigration and Customs Enforcement*, 19-cv-1546 (C.D. Ca. April 20, 2020), Doc. No. 132 p. 38 (requiring Defendant to “identify and track” all detainees with medical risk factors, and “make timely custody determinations” upon considering their home release plans).

2. The Order removes epilepsy, adds obesity (defined as a body mass index (BMI)

of forty or more), and defines “developmental disability” in Paragraphs 2 and 12, consistent with medical expert testimony during the hearing.

3. The Order modifies the requested injunctive relief in Paragraph 8 to more closely reflect the public health, staffing, and training protocols that the record reflects are deficient at the Dallas County Jail, based on the CDC Guidelines for Correctional and Detention Facilities. Neither *Valentine*³ nor the CDC Guidelines⁴ constrain this Court's ability to require social distancing: in *Valentine*, the evidence showed that social distancing was occurring to a much greater degree in the Pack Unit, and the CDC Guidelines recognize that social distancing is the "cornerstone" of preventing the spread of COVID-19, meaning that without social distancing, the entire edifice of prevention collapses.

Further, the CDC guidelines are not co-extensive with the appropriate constitutional remedy: courts have dismissed similar arguments as "absurd," *Gates v. Cook*, 376 F.3d 323, 337 (5th Cir. 2004) and "simply ludicrous." *Boulies v. Ricketts*, 518 F. Supp. 687, 689 (D. Colo. 1981); *see also Grenning v. Miller-Stout*, 739 F.3d 1235, 1241 (9th Cir. 2014) (rejecting argument that ACA accreditation meant prison conditions were constitutional); *LaMarca v. Turner*, 662 F. Supp. 647, 655 (S.D. Fla. 1987) (ACA accreditation has "virtually no significance" because accredited prisons have been found unconstitutional); *Morales Feliciano v. Rossello Gonzalez*, 13 F.Supp.2d 151, 158 n. 3 (D.P.R. 1998) (prison medical care found unconstitutional despite recent accreditation by National Commission on Correctional Health Care); *Bell v. Wolfish*, 441 U.S. 520, 543 n. 27 (1979). It is for this Court to determine whether the conditions at the Dallas County Jail comply with federal law and to fashion appropriate remedies if they are not, including upon review of the stay order in *Valentine*. Alternately, the

³ The *Valentine* record reflected that social distancing was being achieved to a much higher degree than in the Dallas County Jail. *See Valentine v. Collier* Preliminary Injunction Hearing Transcript at 69 (describing housing in single "cubicles" spaced 8–10 feet apart), 115 (social distancing measures taken during transport), 116 (staggered meals to enhance social distancing), 116 (social distancing enforced during movement).

⁴ The CDC Guidelines are clear that correctional facilities need to implement social distancing measures. *Guidelines* at 4 ("Although social distancing is challenging to practice in correctional and detention environments, *it is a cornerstone of reducing transmission of respiratory diseases such as COVID-19.*").

Court may choose to issue injunctive relief solely in the form of the public health expert plan contemplated in Paragraph 10(a).

4. The Order clarifies the nature of the public health plan contemplated in Paragraph 10. Courts evaluating similar challenges have ordered such a facility-specific approach and required a qualified expert to examine the facility in question. *Banks v. Booth*, 20-cv-849 (D.D.C. April 19, 2020) at Doc. 47 (expert report) *Swain v. Junior*, 20-cv-21457 (S.D. Fla. April 21, 2020), Doc. Nos. 69–70 (inspection report); *Chunn v. Edge*, 20-cv-1590 (E.D.N.Y. April 15, 2020), Doc. No. 45 (ordering an inspection). An expert inspection and plan is crucial for several reasons. First, it will promote transparency and accountability, allowing the Court and Parties to assess compliance with any Order issued by this Court. Second, appointment and inspection are in line with CDC Guidelines, which recommend facility-specific public health plans. Third, the inspection and report will promote efficient use of the Court’s and Parties’ resources by streamlining the process of generating the information the Court will need to assess the merits of Plaintiffs’ claims and to craft permanent equitable relief as the case proceeds. Fourth, appointing a public health expert to inspect the jail and submit a plan will allow the Court to craft narrowly-tailored relief that will remedy the constitutional violations while intruding as minimally as possible into the jail’s operations.

Plaintiffs are prepared to provide any additional information or clarification regarding the contours of the relief they seek.

Dated: April 26, 2020.

Respectfully submitted,

/s/ Andrea Woods

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**N.D. Texas admission application forthcoming

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served via the Court's CM/ECF system on all counsel registered with that system, and via email, on April 26, 2020.

/s/ Andrea Woods
Andrea Woods

**UNITED STATES DISTRICT COURT
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Petitioners/Plaintiffs,

v.

DALLAS COUNTY SHERIFF MARIAN
BROWN, *in her official capacity*; DALLAS
COUNTY, TEXAS;

Respondents/Defendants

Civil Action No. 20-cv-832

**SECOND AMENDED [PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION FOR
A TEMPORARY RESTRAINING ORDER, MOTION FOR A PRELIMINARY
INJUNCTION, AND PETITION FOR WRIT OF HABEAS CORPUS**

The Plaintiffs' Motion for Temporary Restraining Order, Motion for a Preliminary Injunction, and
Petition for Writ of Habeas Corpus are GRANTED:

1. *Provisional class certification.* As discussed in the accompanying memorandum
opinion, the Court hereby provisionally certifies the Pre-Adjudication Class, Post-Adjudication
Class, and the Medically-Vulnerable Subclasses as defined in Plaintiffs' Amended Complaint and
Motion for Class Certification.

Habeas Release for the Medically Vulnerable

2. *List of medically-vulnerable persons.* Pursuant to the Court's § 2241 authority, it is
ORDERED that within six hours of this order (by _____ [a.m./p.m.] today), Defendants shall

provide the Plaintiffs and this Court with a list of all individuals who are currently detained at the Dallas County Jail who meet any of the following criteria¹:

- Have lung disease, including asthma, chronic obstructive pulmonary disease (e.g. bronchitis or emphysema), or other chronic conditions associated with impaired lung function;
- Have heart disease, such as congenital heart disease, congestive heart failure and coronary artery disease;
- Have chronic liver or kidney disease (including hepatitis and dialysis patients);
- Have diabetes or other endocrine disorders;
- Have hypertension;
- Have a compromised immune system (such as from cancer, HIV, receipt of an organ or bone marrow transplant, as a side effect of medication, or other autoimmune disease);
- Have blood disorders (including sickle cell disease);
- Have inherited metabolic disorders;
- Have a history of stroke;
- Have a developmental disability such that they have trouble understanding information or practicing preventive measures, or difficulty communicating symptoms²;
- Are now or have been pregnant within the last two weeks;
- Have a BMI (body mass index) of 40 or more;³
- Are [50] years of age or older; and/or
- Have any other condition identified either now or in the future as being a particular risk for severe illness and/or death caused by COVID-19.

¹ Plaintiffs have removed epilepsy from this list based on medical expert testimony that it should no longer be included.

² <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-disabilities.html>

³ Based on medical expert testimony that obesity at this level causes additional medical vulnerabilities when exposed to COVID-19.

3. *Contents of list.* The list must contain the following information for each person: current charge, criminal history, active holds, bond amount, age, status if awaiting transfer to other facility.

4. *Habeas release of persons awaiting transfer for treatment.* Within 24 hours after that list has been submitted (by _____ [a.m./p.m.] tomorrow), Defendants shall release all persons on the list who are in the custody of the Dallas County Jail awaiting transfer to a treatment facility (e.g., Wilmer drug treatment facility, Intermediate Sanctions Facility, or Substance Abuse Felony Punishment facility) as a condition of their probation. The petitioners shall be subject to the terms of their probation while released. When a space becomes available at the treatment facility a petitioner was waiting for, they shall be ordered to report to the treatment provider. After 24 hours have passed from submission of the list, if any individual on the list remains in custody, Defendants must identify such individuals, show cause why the deadline was not met, and state when such persons will be released.

5. *Process for habeas release of other medically-vulnerable persons.* The process for releasing the remaining people on the “medically vulnerable” list in Paragraph 2 is as follows:

a. Defendants or State Intervenors must lodge their objections to releasing any individual on the list within [five] days of this order and provide those objections to Plaintiffs’ counsel and the Court. The only objections the Court will entertain are objections based on a risk of flight from prosecution or a risk of danger to the community that cannot be mitigated through conditions less-restrictive than continued confinement.⁴

b. The Parties must meet and confer regarding Defendants’ objections no later than 24 hours of receiving Defendants’ objections.

⁴ If Defendants or State Intervenors have *non-speculative* evidence that a petitioner would likely fail to follow self-isolation and quarantine protocols, the Court may consider that as a public safety threat.

c. If Defendants continue to object to release of any persons on the list, Plaintiffs' counsel must provide the Court with a list of Petitioners whose release they seek, and Defendants may provide a one-page written explanation of the basis of their objection within 24 hours of receipt of Plaintiffs' list.

d. Within [seven] days of receiving both Plaintiffs' list and Defendants' written objections, the Court will issue habeas relief on the basis of the written information before the Court, or if additional information is needed, will conduct a hearing to determine whether habeas relief or enlargement is appropriate. The Court may enlist a Magistrate Judge and/or a Special Master to assist with this process. The Court, Magistrate, or Special Master will be authorized to impose conditions of release to mitigate any risk of flight or danger to the community.

e. In determining relief for individual Petitioners, the Court shall consider both the deprivation of the petitioners' federal rights posed by the COVID-19 outbreak and any competent evidence that the individual poses a serious risk of flight or danger to others. The Court shall grant the petitions, or enlargement pending a ruling on the habeas petition, of Medically-Vulnerable Subclass Members absent clear and convincing evidence that they pose a risk of flight or danger that no other conditions can mitigate, and that that risk outweighs the threat to their health and safety posed by their exposure to COVID-19 in the Dallas County Jail. The Court will exercise its discretion regarding presentation of evidence and arguments in connection with any hearings on individual petitions.

6. *Educational resources for releasees.* Defendants shall provide all persons released with educational resources on COVID-19 including instructions that they should self-isolate for the CDC-recommended period of time (currently 14 days) following release.

7. *No constraint on voluntary release.* Nothing in the preceding paragraphs shall prevent Defendants from voluntarily releasing any person or group of people currently incarcerated at the Dallas County Jail.

Injunctive Relief Pursuant to § 1983

8. *Mitigation of ongoing threats to health and safety.* Pursuant to the Court's authority under 42 U.S.C. § 1983, Defendants are ordered to immediately begin and continue to do the following:

- a. Provide unrestricted access to cleaning supplies for each housing area, including bleach-based cleaning agents and CDC-recommended disinfectants in sufficient quantities to facilitate frequent cleaning, including in quantities sufficient for each inmate to clean and disinfect the floor and all surfaces of his own housing cubicle. Defendants shall ensure that cleaning supplies are readily available, and that staff are trained on the way to restock supplies that are missing in their units⁵;
- b. Provide sufficient personal protective equipment (PPE) for all detainees, including the ability to replace daily and if a mask becomes dirty or breaks, and appropriate gloves and gowns during work placements including laundry, cleaning, or food service;⁶
- c. Provide sufficient PPE for all staff, including the ability to replace daily and if a mask becomes dirty or breaks, and appropriate eye protection, gloves, and

⁵ CDC *Guidelines* p. 7.

⁶ See Table 1 of CDC *Guidelines* for Correctional & Detention Facilities.

gowns during activities for which that equipment is recommended by the Centers for Disease Control and Prevention (CDC);⁷

- d. Clean and sanitize common surfaces in housing areas, bathrooms, day rooms, recreational areas, the booking area, kitchen, and any dining areas no fewer than [seven]⁸ times between 7 a.m. to 10 p.m. with bleach-based cleaning agents or comparable anti-viral cleaning agents, including table tops, telephones, door handles, kiosks, and restroom fixtures;
- e. Clean and sanitize bunks thoroughly between occupants;⁹
- f. Inform, in a manner accessible to non-English speakers, persons with low-literacy levels, and persons who are intellectually disabled, deaf, blind, or low-vision,¹⁰ that all co-pays for medical calls related to COVID-19 have been suspended¹¹;
- g. Provide consistent and reliable access to legal calls, personal telephone calls, daily showers, and clean clothing and clean linens to all inmates on isolation status;
- h. Provide detainees with up-to-date information about the transmission and risks of COVID-19, including in a manner available to non-English speakers, persons with low-literacy levels, and persons who are intellectually disabled, deaf, blind, or low-vision;

⁷ See Table 1 of CDC Guidelines for Correctional & Detention Facilities.

⁸ The CDC recommends all “frequently touched” surfaces and objects be cleaned and disinfected “several times per day.” *Guidelines for Correctional & Detention Facilities*, p. 9.

⁹ The CDC recommends this intervention and there is evidence in the record that it is not occurring in the Dallas County Jail.

¹⁰ CDC *Guidelines* p. 6.

¹¹ CDC *Guidelines* p. 9.

- i. Train Jail staff on protocols around the transmission of COVID-19, how to identify symptoms of COVID-19, and how to ensure sufficient sanitation and hygiene supplies are stocked in all units at all times;
- j. Ensure that staff are encouraged to stay home when sick, and ensure sufficient staffing levels to allow staff to stay home when sick;¹²
- k. Provide appropriate and consistent implementation of social distancing policies, ensuring detainees and staff are able to maintain a six foot or more distance at all times, including by physically rearranging housing space, and addressing limitations in current staffing levels;¹³ and
- l. Establish protocols for detainees to report symptoms and receive health screenings.

10. *Submission of plan.* The Court orders a plan, to be submitted to the Court in three (3) days from the date of this Order and overseen by a qualified public health expert agreed upon by the parties or ordered by the Court pursuant to Fed. R. Evid. 706, which outlines:

- a. Any additional, specific mitigation efforts needed to prevent, to the degree possible, contraction of COVID-19 by all Class Members not immediately released;
- b. A housing and/or public support plan for any released Class or Subclass Members who do not readily have a place to self-isolate for the CDC-recommended period of time (currently 14 days).

¹² CDC Guidelines p. 6.

¹³ CDC Guidelines pp. 4, 8, 11, 22 (social distancing is the “cornerstone of reducing transmission,” is “critical,” and correctional facilities are instructed to “increase the physical space between ... all individuals.”); 4-24 Tr. 108:6-08:7 (P. Jones) (agreeing that ineffective social distancing would pose substantial risk of serious harm and death to persons in Dallas County Jail); 4-22 Tr. 82:20-25, 83:21-25 (well known that social distancing is important to stop the spread of COVID-19, that congregate environments are particularly dangerous); Doc. No. 47-2 (Supp. Cohen Dec.) at ¶28 (explaining why the CDC does not explicitly address the need for downsizing to effectuate social distancing, but that social distancing is “clearly supported by the science and epidemiology”); 4-23 Tr. 209:3-19 & 222:25-224:1 (Dr. Nijhawan testimony).

- c. An evaluation of whether the release of the Subclass Members permits adequate social distancing and whether other categories of prisoners must be released,¹⁴ and/or other physical and/or staffing arrangements implemented, to provide for compliance with CDC guidelines, particularly social distancing.

11. *Compliance with plan.* For the pendency of this case, Defendants shall be ordered to abide by the plan set forth in Paragraph 10(a)-(b) and the injunction detailed in Paragraph 9. The Rule 706 expert shall be authorized to make unannounced visits to the Dallas County Jail to inspect practices, and provided unfettered access when inspecting.

Reporting

12. *Weekly report.* Each Monday, no later than 1 pm. Central Time, Defendants must submit to Plaintiffs and the Court a list of any persons who are in custody of the Dallas County Jail who meet any of the following criteria, along with the basis of their objection to their release:

- Have lung disease, including asthma, chronic obstructive pulmonary disease (e.g. bronchitis or emphysema), or other chronic conditions associated with impaired lung function;
- Have heart disease, such as congenital heart disease, congestive heart failure and coronary artery disease;
- Have chronic liver or kidney disease (including hepatitis and dialysis patients);
- Have diabetes or other endocrine disorders;
- Have hypertension;
- Have a compromised immune system (such as from cancer, HIV, receipt of an organ or bone marrow transplant, as a side effect of medication, or other autoimmune disease);
- Have blood disorders (including sickle cell disease);
- Have inherited metabolic disorders;
- Have a history of stroke;

¹⁴ This order only requires the 706 expert's evaluation as to what population numbers, physical and staffing arrangements would need to be implemented in order to facility social distancing. This order does not require the release of any person outside the Medically-Vulnerable Subclass described in paragraphs 2–4.

- Have a developmental disability, such that they have trouble understanding information or practicing preventive measures, or difficulty communicating symptoms;
- Are now or have been pregnant within the last two weeks;
- Have a BMI (body mass index) of 40 or more;¹⁵
- Are [50] years of age or older; and/or
- Have any other condition identified either now or in the future as being a particular risk for severe illness and/or death caused by COVID-19.

18 U.S.C. § 3626(a)(1)(A) Findings

13. *Memorandum opinion.* For the reasons explained in the accompanying memorandum opinion, the Court finds that the preliminary injunctive relief ordered here is narrowly drawn, extends no further than necessary to correct the harm this Court finds requires preliminary relief, and is the least intrusive means necessary to correct the harm. Further, this Court has reached its conclusion after giving substantial weight to any possible adverse impact on public safety and the operation of the criminal legal system that could possibly be caused by preliminary relief.

14. *Reservation of authority.* The Court may modify injunctive and other relief provided for in this order as circumstances may warrant and additional information becomes available.

DONE AND ORDERED this ____ day of April 2020.

United States District Judge

Copies furnished to: All Counsel of Record

¹⁵ Based on medical expert testimony that obesity at this level causes additional medical vulnerabilities when exposed to COVID-19.