IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
GREENBELT DIVISION

KEITH SETH, *et al.*, Individually and on behalf of a class of similarly situated persons,	)	
Plaintiffs-Petitioners,	)	
v.	)	Case No.
MARY LOU MCDONOUGH, In her official capacity as Director of the Prince George's County Department of Corrections,	)	
Defendant-Respondent.	)	

PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Plaintiffs respectfully move this Court for the entry of a temporary restraining order and preliminary injunction. As more fully articulated in the attached memorandum, Defendant's actions in response to the COVID-19 pandemic have violated their rights under the Eighth and Fourteenth Amendments of the United States Constitution.

Further, a subset of Plaintiffs, all of whom are medically vulnerable persons, petitions this Court for writs of habeas corpus under 28 U.S.C. § 2241.

Respectfully submitted on April 20, 2020,

By *s/Elizabeth Rossi*
Elizabeth Rossi
Bar No. 19616
Katherine Chamblee-Ryan
application to the Bar of this Court pending
Olevia Boykin
application forthcoming
Ryan Downer
application pending

CIVIL RIGHTS CORPS
1601 Connecticut Ave. NW, Suite 800
Washington, D.C. 20009
katie@civilrightscorps.org
610-931-7715

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2020 I caused the foregoing document to be electronically transmitted to the Clerk's Office using the CM/ECF System for filing. This Emergency Motion for Temporary Restraining Order and Preliminary Injunction will be served in accordance with the Federal Rules of Civil Procedure.

Date: Apr. 21, 2020

/s/Elizabeth Rossi

Elizabeth Rossi

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
EASTERN DIVISION

KEITH SETH, *et al.*, Individually and on behalf of a class of similarly situated persons, Plaintiffs-Petitioners, v. MARY LOU MCDONOUGH, In her official capacity as Director of the Prince George's County Department of Corrections, Defendant-Respondent.	)	Case No.

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION

PRELIMINARY STATEMENT

There is currently an uncontrolled outbreak of COVID-19 at the Prince George's County Jail ("the Jail"). The Jail[1] is accelerating this outbreak, creating an unacceptable risk that the people imprisoned there will contract the disease and that those who do will become seriously ill or die.[2] It has ignored the guidance of public health officials. For example, the Jail charges money for bars of soap (and limits prisoners to one bar per week); some prisoners trade their meals for it, and some go without it for days at a time. The Jail does not, as public health experts recommend, sanitize common surfaces or enact meaningful social distancing.

Those who test positive for the disease fare no better: patients with COVID-19 can decompensate quickly, but the Jail barely monitors COVID-positive prisoners. Instead, it holds them in unsanitary cells where trashbags overflow with spit and vomit because corrections staff are afraid to enter the cell to remove them. The walls of medical isolation cells are covered in feces, mucus, and blood.

Prisoners observe sick people everywhere: coughing, shaking, sweating, and struggling to breathe. "I feel like everyone in the unit is catching it," one said. "[I]t seems like almost everyone is sick." Ex. 10, Decl. 10 ¶12.[3] Medical care is inaccessible, even for those with symptoms of COVID-19. Sick call costs $4, and those who cannot afford it go without medical treatment. Prisoners who do request medical care often wait a week or more before anyone responds.

[1] Since Defendant McDonough is being sued in her official capacity, "Defendant McDonough" and "the Jail" are used interchangeably in this motion.

[2] The majority of Named Plaintiffs and class members are pretrial detainees, but some are held post-conviction. Plaintiffs seek to certify a class for both categories.

[3] The numbered exhibits cited in this memorandum are attached to Plaintiffs' Complaint. The lettered exhibits are attached to Plaintiffs' Emergency Motion for a Temporary Restraining Order and Preliminary Injunction.

Prisoners with COVID-19 symptoms—fever, chills, shortness of breath, diarrhea—who seek medical care are told by the medical staff to return to general housing because they are not sick enough, or because the Medical Unit is full. This happens even to those with medical conditions (like asthma, chronic bronchitis, and HIV) that make them more vulnerable to COVID-19.

Named Plaintiffs and putative class members are already in danger. Six of the Named Plaintiffs have pre-existing conditions that make them especially vulnerable to severe illness and death if they are infected. Five of them have symptoms of COVID-19. They—along with approximately 600 other prisoners—are trapped in a Jail that endangers the sick. Absent this Court's intervention, many will suffer and some will die.

In addition, although the Jail has refused to adopt basic measures to slow the outbreak within its walls, the Jail refuses to release COVID-positive prisoners until it deems them no longer contagious, even when it has no legal authority to hold them (because, for example, they have paid bail). One prisoner who tested positive for COVID-19 on the same day that he paid his bail was illegally held for fourteen days.

These conditions violate Named Plaintiffs' and putative class members' rights under the Eighth and Fourteenth Amendments to the U.S. Constitution. They seek emergency relief under 42 U.S.C. § 1983 to bring the Jail's conditions in line with basic public health standards. Plaintiffs also ask this Court under § 1983 to enjoin Defendants McDonough from illegally detaining COVID-positive prisoners. In addition, a subclass of medically vulnerable prisoners (the "Medically Vulnerable Subclass) ask this Court to release them under 28 U.S.C. § 2241 because the Jail is too dangerous for them to remain there.

STATEMENT OF FACTS

I. There Is a Current COVID-19 Outbreak at the Prince George's County Jail

There is an ongoing outbreak of COVID-19 at the Prince George's County Jail ("the Jail").[4] As many as 77 prisoners may have confirmed cases. Compl. ¶ 77. According to Dr. Jaimie Meyer, an infectious disease expert and assistant professor at Yale Medical School, this is likely "a gross underestimate by at least three-fold." Ex. 30,[5] Meyer Decl. ¶ 41.[6] If Dr. Meyer is correct, then COVID-19 has already infected nearly half of the Jail's approximately 600 prisoners.

COVID-19 is highly infectious. Compl. ¶¶ 27-29. Up to sixteen percent of those who contract it will suffer severe illness. Ex. 30, Meyer Decl. ¶ 9. In the United States, the mortality rate is 3.2 percent. Ex. 32, Benninger Decl. ¶ 2(G). Twenty percent of those who contract COVID-19 will need hospitalization, and five percent will need intensive care. *Id*. ¶ 2(F). Those who survive may suffer long-term damage to the heart, liver, and lungs. Compl. ¶ 34. Certain preexisting conditions—including asthma, chronic lung disease (like bronchitis), heart disease, and diabetes intensify the risk of severe illness and death. *Id.* ¶ 35.

The Prince George's County Department of Corrections reported its first case of COVID-19 on March, 30, 2020. Compl. ¶ 68. In an interview with the *Washington Post*, Defendant DOC Director Mary Lou McDonough said she was certain that more would follow. "I expect we'll have

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[4] The Jail is also sometimes referred to as the "Prince George's County Detention Center" or the "Upper Marlboro Detention Center."

[5] All exhibits referenced in this motion are attached to the Complaint.

[6] Expert declarations are included from Dr. Meyer, as well as Dr. Kristen Benninger, a hospitalist who is currently treating patients for COVID-19 and has experience as a prison physician, and Dr. Craig Haney, a psychology professor and expert in prison isolation. *See* Ex. 30 (Meyer Declaration); Ex. 31 (Meyer Curriculum Vitae); Ex. 32 (Benninger Declaration); Ex. 33 (Benninger Curriculum Vitae); Ex. 34 (Haney Declaration); Ex. 35(Haney Curriculum Vitae). Each expert assessed the conditions at the Jail based on multiple prisoners' declarations, which are also included as exhibits to the Complaint. Exs. 1–27.

more before this is over," McDonough said, comparing jails to "cruise ships without the views or the amenities." *Id.* ¶ 69. "A jail is a pretty transitory place," she continued. "People are close together. You're all breathing the same air." *Id.* ¶ 69. Four days later, on April 3, three prisoners and a corrections officer tested positive for COVID-19. *Id.* ¶ 71.

The DOC has not since disclosed the number of COVID-19 cases at the Prince George's County Jail. But the people imprisoned there have observed its spread. Plaintiffs are aware of cases in at least half of the Jail's ten adult housing units. *Id.* ¶ 76. Every day, prisoners see evidence of illness: people sick and coughing, or reporting to medical and not coming back. *Id.* ¶ 76 n. 52; *id.* ¶ 130 n. 75. One prisoner said, "I have told my family that I love them because I feel sure I am going to get the virus in here." Ex. 17, Decl. 17 ¶ 7.

II. The Jail Has Failed to Adopt Measures to Prevent the Spread of COVID-19.

A. The Jail Disregards the CDC's Guidance on Containing COVID-19.

In jails and prisons, COVID-19 is both more likely to spread and more likely to result in severe illness and death when it does. *See* Ex. 30, Meyer Decl. ¶¶ 13–24; Ex. 32, Benninger Decl. ¶ 3; Compl. ¶ 59-67. Recognizing this risk, on March 23, 2020, the U.S. Centers for Disease Control and Prevention ("CDC") issued guidance for correctional facilities to "reduce the risk of transmission and severe disease from COVID-19." *See* Ex. 36, U.S. Centers for Disease Control and Prevention, Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities (March 23, 2020), at 2. This guidance includes "detailed recommendations" about preventing transmission, including hygiene and cleaning practices, social distancing, evaluating symptoms, and the use of medical isolation and quarantine.

The Jail has disregarded nearly all of the CDC's recommendations. Prisoners do not have liquid soap, which the CDC states should be provided to them at no cost. Ex. 36, CDC at 10; *but see*

Compl. ¶ 84. The jail charges money for bars of soap, and it only allows prisoners one bar each week. *Id.* ¶ 85. Prisoners who cannot afford it have no soap at all, although some trade their food to get it. *Id*. ¶ 86. Jail staff do not regularly clean or sanitize shared amenities or surfaces, including the phones inmates must use to call their families and lawyers. *Id*. ¶ 87-88; *but see* Ex. 36, CDC at 9 (stating that jail staff should "clean and disinfect surfaces and objects that are frequently touched in common areas several times each day.").[7]

The CDC recommends that corrections facilities "[c]reate and test communications plans to disseminate critical information to incarcerated/detained persons, staff, etc. as the pandemic progresses." Ex. 36, CDC at 5. But the jail has not provided prisoners with information about COVID-19, its symptoms, or how to protect themselves from it. Compl. ¶ 81.

In the general population housing units, the jail has not enacted (or explained) effective social distancing measures, which require "increasing the space between individuals," ideally by at least six feet, and decreasing the frequency of contact between them. Ex. 36, CDC at 4. Prisoners are deprived of the opportunity to socially distance—regularly remaining less than six feet apart from their cellmates, prisoners in other cells, prisoners using phones, and guards taking the count. Compl. ¶¶ 93-96. Since jail staff has not informed prisoners about what social distancing entails, many have no idea that they should be keeping their distance from one another. Plaintiff Keith Seth, upon learning about the recommended six feet of distancing from his attorney, realized that he had been within a foot of a sick prisoner earlier that day:

> "Earlier today the person in the cell next to me had to go to the medical unit because he was sneezing, shaking, and sweating. I was just talking to him yesterday, and when I was talking with him I was within a foot of him. I did not know that I was being unsafe in talking to him so closely because I have not been told by anybody

[7] *See* Ex. 30, Meyer Decl. ¶ 29 ("Inconsistent access to hygiene and disinfection measures will result in widespread infection throughout the facility.").

> to stay away from other inmates. The only information I received is to stay six feet away from the officer's desk.

Ex. 1, Seth Decl. ¶ 9.

The Jail's limited attempts at social distancing measures are markedly careless: the Jail has staggered prisoners' recreation in groups of 10, but the same group of prisoners does not always take recreation together each day. Compl. ¶ 99. Thus, infected prisoners can infect a new set of other prisoners at recreation each day, and then those prisoners can infect still more. *Id*. ¶ 100; *see* Ex. 30, Meyer Decl. ¶ 30 (noting that while staggered recreation can be an effective social distancing strategy, it is "not useful to prevent the spread of disease if recreation is staggered with different individuals each day (i.e. different groups of 10).").

When prisoners show symptoms of COVID-19, Jail staff do not (as the CDC recommends) place them in medical isolation. *See* Ex. 36, CDC Guidance at 10 ("As soon as an individual shows symptoms of COVID-19, they . . . should be immediately placed under medical isolation in a separate environment from other individuals").[8] Instead, once seen by medical staff, symptomatic prisoners are often sent back to their cells in general housing, where they will inevitably infect others. Prisoners have visited the medical unit with fevers, shortness of breath, coughing, chills, headaches, and fluid in the chest, and medical staff have sent them back to their housing units with Claritin[9] or Tylenol. Compl. ¶¶ 101-03. Some prisoners—including those who later tested positive for COVID-19—have been sent back and forth between the medical unit and general housing as often as four or five times. *Id*. ¶¶ 105-17; *but see* Ex. 36, CDC Guidance at 15 ("Keep the

[8] Ex. 30, Meyer Decl. ¶ 27 ("One of the most critical infection control measures in correctional settings is to accurately identify people who are ill and medically isolate them from the general population.").

[9] Ex. 30, Meyer Decl. ¶ 31 (observing that "prisoners [at the Jail] are given Claritin – a decongestant that is entirely useless for COVID-19").

[symptomatic] individual's movement outside the medical isolation space to an absolute minimum.").

In early April, the jail began twice daily temperature checks for prisoners. *Id*. ¶ 122. But the checks are not conducted in every housing unit. *Id*. And as implemented, even this practice is an opportunity for infection. The temperature reader is not cleaned between uses, and the medical staff do not change their gloves. *Id*.[10] Even when prisoners do have a fever, jail staff may fail to quarantine them. Compl. ¶¶ 124-26. One prisoner, who suffers from high blood pressure and seizures, was told to remain in general housing despite having a fever. Ex. 11, Decl. 11 ¶¶ 9–10. By early evening, he "started to have real difficulty breathing." *Id.* But he was told to wait for the next temperature check at 9:00 pm. *Id.* By then, his temperature was 104 degrees. *Id.* He later tested positive for COVID-19. *Id.* ¶ 2.

When a prisoner tests positive for COVID-19, the CDC recommends that every person who has been within six feet of that prisoner be placed in quarantine for fourteen days. Ex. 36, CDC at 14. But the jail has failed even to inform prisoners who have had close contact with a positive case—even when the infected person was the prisoner's cellmate. Compl. ¶ 129. Nor do they disinfect cells where COVID-positive prisoners have lived. *Id.* ¶ 130.

B. The Limited Containment Methods Adopted by the Jail Are Ineffective and Counterproductive.

Instead of implementing the CDC's recommendations to prevent COVID-19, the Jail has resorted to methods of its own. Its principle strategy has been to implement a universal, preemptive

[10] Ex. 23, Benninger Decl. ¶ 2(E) ("When performing temperature checks on multiple individuals, a clean pair of gloves should be used for each individual and the thermometer should be thoroughly cleaned between each check."); Ex. 30, Meyer Decl. ¶ 27(b) ("[T]here is high likelihood that nurses' gloves, thermometer covers, and door slots are contaminated and can themselves be a vehicle for transmission from person to person.").

lockdown of all prisoners. Compl. ¶ 132. Prisoners are confined to their cells 23 hours per day. *Id*. ¶ 133. They have one hour of out-of-cell time. *Id*. ¶ 134. This hour (which may be at 1:30 am or some other odd hour) is prisoners' only chance to shower, go outside, or use the phones to call their attorneys or their families (if they are awake). *Id*.; *see* Ex. 7, John Doe No. 4 Decl. ¶ 14 ("You can't really talk to your family at 1 o'clock in the morning, my kids are asleep."). The lockdown appears to have no end date short of the pandemic's end. Compl. ¶ 136.

The CDC does not recommend preemptive lockdowns.[11] Rather, it recommends that housing units "quarantine in place" when there is "contact with a case from the same housing unit" and that all quarantines—including this sort—last for just 14 days. Ex. 36, CDC at 19. Public health experts warn that preemptive lockdowns like that at Prince George's County Jail are both ineffective and counterproductive at preventing the virus's spread. Instead, consistent with the CDC Guidance, these experts recommend that lockdowns be time-limited and used only as necessary for quarantine or contact tracing.[12]

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[11] Instead, the CDC's social distancing guidance includes suggestions like "[r]earranging seating in the dining hall so that there is more space between individuals," and "[c]onsider[ing] alternatives to existing group activities, in outdoor areas or other areas where individuals can spread out." Ex. 36, CDC at 11.

[12] Ex. 30 , Meyer Decl. ¶ 30 ("Lockdown can be important from a public health standpoint to enable social distancing during a pandemic but should be used only as a last resort and in a time-limited way (CDC recommends quarantines last no longer than 14 days) that is communicated clearly to the residents"); David Cloud, Dallas Augustine, Cyrus Ahalt and Brie Williams, *The Ethical Use of Medical Isolation—Not Solitary Confinement—to Reduce COVID-19 Transmission in Correctional Settings*, Amend 3 (Apr. 9, 2020), *available at* https://amend.us/wp-content/uploads/2020/04/Medical-Isolation-vs-Solitary_Amend.pdf [hereinafter *"Medical Isolation—Not Solitary*"] ("Corrections officials should only require people on an entire housing unit to stay in their cells ("Lockdown") if medical professionals determine a symptomatic persons resides or works on that unit or contract tracing flags a confirmed or suspected case. In this event, time-limitations must be clearly communicated to residents and staff."); Ex. 34, Haney Decl. ¶ 29 ("[T]he Jail should institute … lockdowns only where medically necessary to resolve discrete issues, such as sanitizing dorms or contact tracing of an infected prisoner. If the [Jail] resorts to these lockdowns, it should do so in a reasonably time-limited manner and communicate that time-limit to the prisoners who are affected.").

Indeed, on lockdown, as a structural matter, opportunities for infection abound. Most prisoners live with cellmates in poorly ventilated cells. *Id*. ¶ 143. Even prisoners in different cells are less than six feet apart. *Id*. Thus, perversely, the lockdown policy—especially in combination with the jail's failure to medically isolate those with symptoms of COVID-19—traps prisoners in close proximity to people who may be sick. *Id.* ¶ 144; *see* Ex. 36, CDC at 19 (warning that quarantining prisoners together "could transmit COVID-19 from those who are infected to those who are uninfected."); Ex. 30, Meyer Decl. ¶ 30 (stating that sustained lockdowns are "particularly problematic when inmates are locked down in poorly ventilated spaces that are shared closely with others, which may contribute to disease transmission from people who are infected with COVID-19 but have not yet developed or reported symptoms.").

For example, Plaintiff John Doe No. 2, who has severe asthma for which he has previously been hospitalized, is locked down with his cellmate, who has lost his sense of smell and taste (a symptom of COVID-19). Compl. ¶ 145; *see also, e.g*. Ex. 17, Decl. 17 ¶ 6 ("My cellmate has been coughing and sneezing. They have us locked in 23 hours a day. . . . There is no way for my cellmate and I to distance ourselves from each other."); Ex. 7, John Doe No. 4 Decl. ¶ 14 ("[I]t's really bad when you can't get come out of a cell for 23 hours I'm really scared now because my cellie has been sick.").

The Jail's preemptive lockdown is counter-productive in other ways as well. Because prisoners' one hour of out-of-cell time is their only chance to call their attorneys and families, they congregate by the phones (which are rarely, if ever, cleaned).[13] *Id*. ¶ 146. The lockdown also

[13] Ex. 30, Meyer Decl. ¶ 30 (observing that under the Jail's preemptive lockdown policy, "[w]ith only 1 hour per day to use phones, it may be hard to enforce social distancing since prisoners need to congregate to use this precious resource"); Ex. 34, Haney Decl. ¶ 16 ("During th[e] limited one hour of out-of-cell time [under the Jail's preemptive lockdown policy], prisoners crowd together

"decreases the interactions that prisoners have with correctional and healthcare staff members, compromising the latter's ability to identify symptoms," further ensuring that infected prisoners will remain in general population where they can spread the virus. Ex. 34, Haney Decl. ¶ 25.[14]

III. The Jail's Conditions Increase the Risk of Severe Illness and Death.

The conditions at the Prince George's County Jail not only amplify the risk of infection. They also greatly increase the risk that prisoners who are infected with COVID-19 will suffer serious illness, permanent physical damage, and death.

Prisoners whom the Jail decides to test for COVID-19[15] are moved to Medical Unit's isolation cells, where they remain for two to five days, awaiting their test results. Compl. ¶ 167. The walls of the cells are covered in feces, mucus, and blood. *Id*. Prisoners there are not allowed to shower. *Id*. ¶ 170. They cannot change their clothes, even when they are soaked in sweat. *Id*. They are often denied soap and a toothbrush. *Id*. They have no access to phones, so they cannot contact their families or their attorneys. *Id*. ¶ 171.

Once a prisoner tests positive for COVID-19, he is moved into a 10-man cohorted isolation[16] cell for COVID-positive prisoners in the Medical Unit or to a isolation cell in Housing Unit 6 (H-

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to use the limited shared resources. . . . As a result, they are unable to maintain the recommended six feet of social distancing.").

[14] *See Medical Isolation—Not Solitary*, *supra* note 12, at 2 (warning that "preemptively placing entire units on 'lockdown' for indefinite amounts of time" will likely mean that "interactions with correctional staff an healthcare staff often become less frequent and people with symptoms may go undetected").

[15] As described above, this does not include every prisoner with symptoms of the virus; many symptomatic prisoners are not medically isolated or even evaluated by medical staff, let alone tested. *See supra* at 6–7.

[16] "Cohorted isolation" is the practice of medically isolating prisoners with symptoms or confirmed cases of COVID-19 together. The CDC recommends that cohorting "should only be practiced if there are no other options." Ex. 36, CDC at 19.

6). *Id*. ¶ 174. The 10-man cell is filthy. *Id*. ¶ 175. For fear of contracting COVID-19, corrections officers will not remove the overflowing trash bags, which are filled with vomit and spit. *Id*. Sick prisoners—who may be vomiting, sweating, and have diarrhea and high fevers—lack access to basic hygiene products. *Id*. ¶ 177. Many do not have soap. *Id*. Some have not had toothbrushes for over a week. *Id*. They are still not allowed to shower (which means that some go without bathing for more than two weeks). *Id*. All of the sick men share a single, mildewed sink. *Id*. Prisoners may go five or six days without being able to change their clothes or underwear. *Id*.

These conditions have consequences. As Dr. Meyer explains,

> "Medical isolation units should be hygienic and safe . . . . In contrast, the prisoners describe unsafe isolation cells, at times without staff present inside the housing unit, and filthy living conditions, including dried blood and feces on the walls and floors of isolation cells. Some describe not having access to clean sheets and one described having to pull his used sheets out of a red biohazard bag for reuse. These conditions are not only inhumane but also unhealthy. In addition to spread of COVID-19, people in these medical isolation units are therefore at risk of exposure to other diseases, including HIV and Hepatitis C."

Ex. 30, Meyer Decl. ¶ 33.[17]

Moreover, medical and mental health experts warn that punitive isolation conditions can cause prisoners to downplay their symptoms to avoid them.[18] At the Prince George's County Jail,

[17] *See* Ex. 32, Benninger Decl. ¶ 3 (observing that the isolation cells "are not in accordance with recommended hygiene and sanitation standards, as prisoners report they have a significant amount of body fluids on the walls, including 'mucous, feces, blood, old food, urine, spit', 'around the walls, 360 degrees'"); *Id*. ¶ 3(D) ("Body fluids should absolutely be cleaned from any surfaces.").

[18] Ex. 30, Meyer Decl. ¶ 31 ("The[] conditions [in the isolation units] deter other individuals from reporting symptoms for fear they may end up in isolation."); Ex. 34, Haney Decl. ¶ 25 ("[T]he even more onerous conditions that the Prince George's County Jail imposes on prisoners who are placed in medical isolation likely serve as a disincentive for inmates to report their own symptoms. Prisoners understandably do not want to be placed in insect-infested, dirty cells where they will spend two weeks without access to telephones or showers."); *Medical Isolation—Not Solitary*, *supra* note 12, at 2 ("Fear of being placed in solitary will deter people from reporting symptoms to correctional staff. Experts and advocates are deeply concerned that incarcerated people, many of whom will go to great pains to avoid solitary confinement . . . will not come forward with symptoms of COVID-19 because they do not want to be placed in such conditions.").

prisoners regularly do this. Compl. ¶ 169; Ex. 12, Decl. 12 ¶14 (stating that many prisoners are "more afraid of how they'll be treated in the medical unit than they are of their symptoms."). This "result[s] in their increased risk of severe disease and death and ongoing spread to others." Ex. 30, Meyer ¶ 19; *see Medical Isolation—Not Solitary*, *supra* note 12, at 2 ("Th[e] avoidance of reporting symptoms of illness [to avoid punitive isolation conditions] will not only accelerate the spread of infection within facilities, but also increase the likelihood of prisoner deaths due to lack of treatment.").[19]

The Jail also provides inadequate medical monitoring of sick prisoners in isolation. People in medical isolation for suspected COVID-19 should be "diligently monitored for clinical worsening." Ex. 30, Meyer ¶ 32. This is necessary because "[p]rogression of respiratory symptoms in COVID-19 can be extremely rapid." *Id.*; *see* Ex. 32, Benninger Decl. ¶ 2(F) ("[P]ersons infected with COVID-19 have the ability to rapidly decompensate from a respiratory standpoint once showing symptoms, sometimes requiring mechanical ventilation at an emergent pace.").

But prisoners in the medical isolation cells and cohorted isolation are barely monitored at all. Contact with medical staff (or any other staff) is limited to a nurse that briefly visits approximately three times each day to take temperatures, give medications, and deliver food. Compl. ¶ 172.[20] The prisoners in these cells do not know how they would get help in a medical emergency. *Id*.; *see* Ex.

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[19] To avoid deterring prisoners from reporting their symptoms, experts recommend that medical isolation not replicate the punitive conditions of disciplinary solitary confinement. For example, prisoners in isolation should have free access to reading material, outdoor exercise, and phones. *See Medical Isolation—Not Solitary*, *supra* note 12, at 2, 4; *see* Ex. 34, Haney Decl. ¶ 30.

[20] *See* Ex 30, Meyer Decl. ¶ 32 ([T]he prisoners' declarations in the Prince George's County Jail describe a lack of medical attention that is highly concerning and suggests that medical staff do not have the necessary staffing, training, or resources to identify when people require hospitalization."); *see also id.* ¶ 19 ("[I]solation of people who are ill in solitary confinement results in decreased medical attention and increased risk of death.").

12, Decl. 12 ¶ 9 (stating that, in the isolation cells, "there was no way for us to notify someone if we were having an emergency, except to get up and bang on the door and hope that someone could hear you"). In H-6, cells are equipped with buzzers, but they do not always seem to work. *Id*. ¶ 180-81. A prisoner who is isolated for COVID-19 in H-6 said:

> "I have a seizure disease. If I were to have a seizure, I wouldn't be able to push the button. No COs are in the housing unit, so no one would hear what was going on. I'm afraid that if I have a seizure in here, no one will hear it and I will die. . . . They're not really doing anything to protect any of us in here."

Ex. 9, Decl. 9 ¶¶ 31–32.

Sick prisoners who remain in general population (there are many) also lack access to adequate medical care. Requesting medical attention ("sick call") costs $4, which some cannot afford. Compl. ¶ 150. Some housing units have run out of sick call slips entirely. *Id*. Prisoners who make a sick call may wait a week or more before they are seen. *Id*. ¶ 157.[21] Jail staff have told prisoners that medical care is reserved for emergencies and that the Medical Unit is full. *Id*. ¶ 156; Ex. 5, John Doe No. 2 Decl. ¶ 20 ("I told them that I needed medical attention [for COVID-19 symptoms], and they said there aren't enough beds in medical, it's full over there.").

Prisoners—including those with pre-existing conditions that increase their risk of complications and death—routinely visit the medical unit with clear symptoms of COVID-19 and are told to return to their housing units. *Id*. ¶¶ 103-18. In one representative example, a prisoner with HIV made a sick call because he had a fever, body pain, a cough, and a sore throat. Ex. 26, Decl. 26 ¶ 4. Medical staff did not see him until ten days later; they then told the prisoner that his case "was not serious enough to have additional care," and that "the Medical Unit is only seeing

[21] Ex. 32, Benninger Decl. ¶ 3(F) ("In the setting of COVID-19, delays in medical care can cost inmates their lives as we have seen relatively rapid respiratory decompensation in patients.").

emergencies." *Id.* ¶¶ 4–6. These barriers to medical care further increase the risk that prisoners infected with COVID-19 will become severely ill and die.[22]

The cost of sick call and the Medical Unit's reputation for not assisting prisoners with symptoms of COVID-19 has led some high-risk, symptomatic prisoners to forego care. Compl. ¶¶ 149-53. For example, Plaintiff Seth, who has chronic bronchitis for which he was hospitalized last year, has had symptoms of COVID-19 since late March. Ex. 1, Seth Decl. ¶ 9. He is currently coughing up mucus and has shortness of breath. *Id.* ¶ 9. He recently had diarrhea, and he has lost his sense of smell and taste. *Id*. ¶ 10. On April 17, he woke up with a nosebleed.[23] *Id*. ¶ 9. But Mr. Seth has not made a sick call because he does not have the $4 to pay for it. *Id*. ¶ 10. He has also heard that the Medical Unit will not do anything to help: "I know one guy who had a fever and they kept him for three days and sent him back. Another guy I know lost his sense of taste and his stomach hurt, but medical sent him back." *Id*. ¶ 11.

Medical care for anything other than COVID-19—including underlying health conditions like asthma and bronchitis—has stalled or stopped. Jail staff has told prisoners that they cannot receive medical care because the Medical Unit is locked down. *Id*. ¶ 158. Prisoners who have made sick calls that were not about COVID-19 have been told by corrections officers "that if it's nothing relating to Corona not to write to medical." *Id*. ¶ 159. And many prisoners have been unable to obtain or change their medications—including prisoners with pre-existing conditions like asthma. *Id*. ¶ 161. As Dr. Meyer warns: "Failure to provide individuals adequate medical care for their

[22] Ex. 30, Meyer Decl. ¶ 32 (stating that the barriers to adequate care in the Jail, including the cost of sick call and delayed care, "may result in preventable deaths and undue harm").

[23] Nosebleeds may be "signs of complicated COVID-19 disease." Ex 30, Meyer Decl. ¶ 32.

underlying chronic health conditions results in increased risk of COVID-19 infection and increased risk of infection-related morbidity and mortality if they do become infected." Ex. 30 ¶ 35.

Prisoners' mental health is also at great risk. Dr. Craig Haney, a psychologist and expert on prison isolation, has concluded that the punitive isolation methods that dominate the Jail's approach to COVID-19 "greatly increase the psychological stress under which prisoners live, potentially leading to mental and physical deterioration, interpersonal conflicts, and self-harm and suicidality." Ex. 34, Haney Decl. ¶ 20.[24] As Dr. Haney explains, "The Prince George's County Jail lockdown units are now being used in ways that are essentially identical to the solitary confinement-type housing that has been shown to place prisoners at significant risk of grave harm (including damage that is permanent, even fatal)." Ex. 34, Haney Decl. ¶ 21.[25] Moreover, the Jail has discontinued mental health services.[26] This places prisoners with mental illness who are isolated "at grave risk of decompensation." Ex. 34, Haney Decl. ¶ 24.[27] These policies also threaten

[24] *See also Medical Isolation—Not Solitary*, *supra* note 12, at 3 ("Research shows that keeping people socially isolated in a closed cell without a meaningful opportunity to communicate with family, friends, and loved ones or to participate in exercise, education, and rehabilitative programming (solitary confinement) causes immense, and often irreparable, psychological harm."); Ex. 32, Benninger Decl. ¶ 3(J) ("I have concern that there has not been sufficient acknowledgement of or attention to the inmates' mental health under the stressors of pandemic and confinement.").

[25] Ex. 34, Haney Decl. ¶ 20 ("The fact that prisoners are double-celled during these lockdowns [in the general housing units] does not mitigate the negative effects of their essentially around-the-clock in-cell confinement. In fact, double-celling may exacerbate these effects because of the interpersonal tensions and stressors that such unavoidably close around-the-clock contact generates.").

[26] Ex. 30, Meyer Decl. ¶ 36 ("People with underlying chronic mental health conditions need adequate access to treatment for these conditions throughout their period of detention.").

[27] Even in less extreme forms of isolation than those imposed at the Jail, the CDC Guidance recommends efforts to mitigate the mental health consequences of any necessary medical isolation. *See, e.g.*, Ex. 36, CDC at 12 ("[I]f group activities are discontinued, it will be important to identify alternative forms of activity to support the mental health of incarcerated/detained persons."); *id.* at 13 ("Consider increasing incarcerated/detained persons' telephone privileges to promote mental health."); *id.* at 13–14 (recommending that, since "visitation is important to maintain mental

physical harm; "the extraordinary added stress of social isolation under these especially onerous conditions" may "depress prisoners' immune systems and render them even more vulnerable to COVID-19 virus, and less able to combat it if and when they contract it." Ex. 34, Haney Decl. ¶ 26; *see also* Ex. 30, Meyer Decl. ¶ 36 ("Failure to provide adequate mental health care . . . as appears to be the case at the Prince George's County Jail, will result in poor health outcomes.).

IV. The Jail Maintains a Policy of Overdetention for COVID-19 Positive Inmates

"Prisons and jails are not isolated from communities,"[28] and Prince George's County is the "epicenter of [the COVID-19 epidemic in] the state." Compl. ¶ 44. It is therefore critical that the Jail control the COVID-19 outbreak within its walls to protect people outside of them.

The Jail has not done this. As described above, it has flouted the most basic public health recommendations to prevent the virus's spread. However, the Jail has instituted its own method of infection control: it detains people with COVID-19 even when it has no legal authority to do so. Specifically, the Jail refuses to release COVID-positive prisoners who have paid bail until it deems them non-contagious. Compl. ¶ 183. Accordingly, one prisoner who paid his bond on April 3, 2020—but tested positive for COVID-19 on the same day—was illegally imprisoned in the cohorted isolation cell in the Jail for fourteen days. *Id.* ¶ 184. Had he been released when he paid his bond on April 3rd, he would have sought treatment for COVID-19 at a local hospital. *Id.* ¶ 186.

ARGUMENT

Plaintiffs seek a temporary restraining order (TRO) and preliminary injunction to address unconstitutional conditions of confinement at the Prince George's County Jail, as well as the Jail's

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health," if visitation is suspended, "facilities should explore alternative ways for incarcerated/detained persons to communicate with their families, friends, and other visitors in a way that is not financially burdensome for them."). The Jail has done none of this.

[28] Ex. 30, Meyer Decl. ¶ 15; *see id.* (explaining the negative health implications of COVID-19 outbreaks within prisons upon surrounding communities).

policy of unlawfully detaining COVID-positive prisoners. To obtain a TRO or a preliminary injunction, Plaintiffs must show the following: (1) Plaintiffs are likely to succeed on the merits, (2) they are likely to suffer irreparable harm absent preliminary relief, (3) the balance of equities tips in Plaintiffs' favor, and (4) an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 20, (2008); *Montgomery v. Hous. Auth. of Bal. City*, 731 F. Supp. 2d 439, 441 (D. Md. 2010). Plaintiffs satisfy all four requirements on both claims.

I. A Temporary Restraining Order Should Issue to Address the Jail's Unconstitutional Conditions.

In recent weeks, federal district courts have granted temporary restraining orders to remedy constitutionally inadequate conditions that increase the threat of COVID-19, ordering jails to comply with the CDC Guidance and take other necessary measures to protect prisoners from infection, serious illness, and death.[29] Because the conditions in the Prince George's County Jail create a substantial risk of serious future harm to the prisoners' health, this Court should do the same.

A. Plaintiffs Are Likely to Succeed on the Merits of Their Eighth And Fourteenth Amendment Claims.

The Eighth and Fourteenth Amendments prohibit state actors from exposing incarcerated people to conditions of confinement that threaten their health and safety. *Helling v. McKinney*, 509 U.S.

[29] *See, e.g.*, Ex. A, Order (Doc. 48), *Banks v. Booth*, 1:20-cv-849 (D.D.C. Apr. 19, 2020) (granting temporary restraining order to Plaintiffs and putative class of prisoners at the D.C. jail); Ex. B, Order (Doc. 12), *Cameron v. Bouchard*, No. 2:20-cv-10949-LVP-MJH, at 4-7 (E.D. Mich. Apr. 17, 2020) (granting temporary restraining order to Plaintiffs and putative class of pretrial and post-conviction prisoners at the Oakland County Jail); Ex. C, Order (Doc. 40), *Valentine v. Collier*, No. 4:20-CV-1115 (S.D. Tex. Apr. 16, 2020) (granting temporary restraining order to Plaintiffs and putative class of prisoners at geriatric prison); Ex. D, Order (Doc. 25), *Swain v. Junior*, No. 1:20-cv-21457-KMW, at 2-5 (S.D. Fla. Apr. 7, 2020) (granting temporary restraining order to Plaintiffs and putative class of putative class of pretrial and post-conviction prisoners at Metro West Detention Facility in Miami, Florida).

25, 33 (1993); *see Raynor v. Pugh*, 817 F.3d 123, 127 (4th Cir. 2016) (stating that prison officials must "take reasonable measures to guarantee the safety of the inmates"). While the Eighth Amendment secures the right of people convicted of a crime to be free from exposure to serious harm, *Helling*, 509 U.S. at 33, the Due Process Clause of the Fourteenth Amendment affords at least as much protection to pretrial detainees, *City of Revere v. Mass. General Hosp.*, 463 U.S. 239, 244 (1983).

Under these Amendments, an official is liable if she displays "deliberate indifference" to "a condition of confinement that is sure or very likely to cause serious illness and needless suffering" to someone detained, which includes "exposure of inmates to a serious, communicable disease." *Helling*, 509 U.S. at 33 (1993). In the Fourth Circuit, the same deliberate indifference test that applies to convicted prisoners applies to pretrial detainees as well, and it includes both objective and subjective components.[30] *See Shakka v. Smith*, 71 F.3d 162, 166 (4th Cir. 1995) (explaining this standard); *Hill v. Nicodemus*, 979 F.2d 987, 991-92 (4th Cir. 1992) (applying the deliberate indifference standard to pretrial detainees). Here, there is a substantial risk of harm, and both the objective and subjective deliberate indifference tests are satisfied.

1. The Jail's Conditions Create a Substantial Risk of Serious Harm.

To meet the objective component of the deliberate indifference standard, a detainee must show that he faces "a substantial risk of . . . serious harm resulting from the prisoner's unwilling exposure

[30] After the U.S. Supreme Court's decision in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), some circuits have concluded that pretrial detainees need not prove the subjective component of the deliberate indifference standard. *See Miranda v. Cty. of Lake*, 900 F.3d 335, 352 (7th Cir. 2018); *Gordon v. Cty. of Orange*, 888 F.3d 1118, 1124-25 (9th Cir. 2018); *Darnell v. Pineiro*, 849 F.3d 17, 33–35 (2d Cir. 2017). However, the Fourth Circuit has not yet addressed the question of whether *Kingsley* alters the deliberate indifference inquiry for pretrial detainees. Therefore, at present, pretrial detainees must satisfy both the objective and subjective components to prevail. *See Coreas v. Bounds*, No. CV TDC-20-0780, 2020 WL 1663133, at *8 (D. Md. Apr. 3, 2020).

to the challenged conditions." *Shakka*, 71 F.3d at 166.[31] Plaintiffs easily do so. COVID-19 is highly communicable, and the Jail's conditions have amplified its spread. Compl. ¶¶ 27-29, 79-147. There is already a severe outbreak of COVID-19 at the Prince George's County Jail: nearly half of its approximately 600 prisoners may already be infected. *Id*. ¶¶ 68-78.[32] And the harm Plaintiffs face is serious. In the United States, the mortality rate is 3.2 percent. Ex. 32, Benninger Decl. ¶ 2(G)(i). Twenty percent of those infected with COVID-19 will need hospitalization, and five percent will need intensive care. Ex. 30, Meyer Decl. ¶ 31; Ex. 32, Benninger Decl. ¶ 2(F). Survivors may suffer long-term physical damage. Compl. ¶ 34.

Because of the Jail's conditions, there is also a substantial risk that infected prisoners will become seriously ill, suffer long-term physical damage, and die. Symptomatic and COVID-positive prisoners and are not adequately monitored for signs of serious illness, and the medical

[31] Since Plaintiffs' claims involve inadequate medical treatment, and since a subclass of them is medically vulnerable due to pre-existing conditions, Plaintiffs could also frame these claims in terms of "deliberate indifference to serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *see Coreas*, No. CV TDC-20-0780, 2020 WL 1663133, at *9 (assessing medically vulnerable detainees' conditions claim through this lens). However, since the Jail's dangerous conditions include both failures in medical care and other basic safety precautions and imperil prisoners both with and without pre-existing conditions, Plaintiffs' claims are best characterized as a challenge to conditions that create a substantial risk of "serious illness and needless suffering." *Helling*, 509 U.S. at 33. Regardless, "'[w]hether one characterizes the treatment received by [the prisoner] as inhuman conditions of confinement, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the 'deliberate indifference' standard.'" *Id.* at 32 (quotations omitted).

[32] The high risk of COVID-19 infection in the Jail alone is sufficient to create a significant risk of serious harm, regardless of whether that harm has or will affect all of the prisoners exposed to it. *See Helling*, 509 U.S. at 33 (stating that the Eighth Amendment "required a remedy" where prisoners were crowded with others who had infectious diseases, even where "it was not alleged that the likely harm would occur immediately and even though the possible infection might not affect all of those exposed"); *id.* ("We would think that a prison inmate also could successfully complain about demonstrably unsafe drinking water without waiting for an attack of dysentery."); *see also* Ex. E, Order (Doc. 23) *Malam v. Adduci*, No. 20-10829, at 29 (E.D. Mich. Apr. 6, 2020) ("In the face of a deadly pandemic with no vaccine, no cure, limited testing capacity, and the ability to spread quickly through asymptomatic human vectors, a generalized risk is a "substantial risk" of catching the COVID-19 virus for any group of human beings in highly confined conditions.").

attention they do receive is limited or misguided. *Id*. ¶¶ 105-18, 148-57, 167-82. Meanwhile, the Jail's many barriers to care "will result in ongoing transmission within housing units and high risk for complications of COVID-19 among those who are infected, including death." Ex. 30, Meyer Decl. ¶ 27(a); Compl. ¶¶ 149-66.

At baseline, prisoners with certain pre-existing conditions are in greater danger from COVID-19, "including a meaningfully higher risk of death." Ex. 30, Meyer Decl. ¶ 40.[33] The Jail's conditions have intensified these risks. Jail staff do not specially monitor these prisoners to protect them from infection, and when they show symptoms of COVID-19, they are regularly turned away from care. Compl. ¶¶ 154, 173; *see* ¶¶ 106-11, 126-27, 151-53, 157. The Jail is also failing to provide medical care for anything other than COVID-19, including long-term chronic conditions (like asthma). *Id.* ¶¶ 158-61. As a result medically vulnerable prisoners are at even greater risk of serious illness and death.[34]

Other conditions at the Jail further enhance the risk the virus poses to all prisoners. Medical isolation cells are unsanitary: there is feces and mucus on the walls. Thus, "[i]n addition to spread

[33] *See Coreas*, No. CV TDC-20-0780, 2020 WL 1663133, at *11 ("For individuals in high risk categories such as Petitioners, the available data shows that the death rate for those with COVID-19 is between 15 percent and 20 percent.").

[34] *See* Ex. 30, Meyer Decl. ¶ 35 ("Failure to provide individuals adequate medical care for their chronic health conditions results in increased risk of COVID-19 infection and increased risk of infection-related morbidity and mortality if they do become infected."); Ex. 32, Benninger Decl. ¶ 3(C) ("During this pandemic, inmate reports . . . show that inmates with medical conditions that put them at increased risk of infection and disease, are not being cared for appropriately"); *see also Coreas*, No. CV TDC-20-0780, 2020 WL 1663133, at *11 ("[T]he Court finds a major deficiency in the lack of any procedures to address the heightened risk to detainees with certain medical conditions. . . . For individuals in high risk categories such as Petitioners, the available data shows that the death rate for those with COVID-19 is between 15 percent and 20 percent. While adequate treatment for Coreas's condition would necessarily require separation from, or at least minimization of contact with, other detainees, Respondents have taken no general or specific steps to meet this medical need for distancing, whether by providing Coreas with his own cell and otherwise distancing him from other detainees.").

of COVID-19, people in these medical isolation units are therefore at risk of exposure to other diseases, including HIV and Hepatitis C." Ex. 30, Meyer Decl. ¶ 33. Prisoners are locked down in poorly ventilated cells for 23 hours per day with symptomatic cellmates, "contribut[ing] to disease transmission." *Id*. ¶ 30. Prisoners both in lockdown and medical isolation are denied access to basic accommodations to mitigate psychological stress, and the Jail has halted mental health services entirely. This is already inflicting grave harm to prisoners' mental health[35] and may "depress prisoners' immune systems and render them even more vulnerable to COVID-19 virus, and less able to combat it if and when they contract it." Ex. 34, Haney Decl. ¶ 26.

These conditions satisfy the objective test. *See* Ex. B, Order (Doc. 12), *Cameron v. Bouchard*, No. 2:20-cv-10949-LVP-MJH, at 3 (E.D. Mich. Apr. 17, 2020) ("It cannot be disputed that COVID-19 poses a serious health risk to Plaintiffs and the putative class," which included all pretrial detainees at the Oakland County Jail).[36] Indeed, a court in this district has so found in much less extreme circumstances than these. In *Coreas v. Bounds*, No. TDC-20-0780, 2020 WL 1663133 (D. Md. Apr. 3, 2020), the court found that detainees at two different ICE facilities had shown a substantial risk of serious harm, even though there were no confirmed cases on COVID-19 at those facilities. *Id.* at *9-10; *see also Jones v. Wolf*, No. 20-CV-361, 2020 WL 1643857, at *9 (W.D.N.Y. Apr. 2, 2020) (finding that the risk of COVID-19 in an immigration detention facility satisfied the objective factor even through there were no reported cases there).[37]

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[35] *See, e.g.*, Compl. ¶ 14 (stating that Mr. Seth, who is on 23-hour lockdown and no access to mental health services, has bipolar disorder).

[36] *See also, e.g.*, Ex. C, Order (Doc. 40), *Valentine v. Collier*, No. 4:20-CV-1115, at 1 (Apr. 16, 2020) (finding that Named Plaintiffs representing a class of prisoners "face[d] a high risk of serious illness or death from exposure to COVID-19").

[37] In other factual contexts, courts have found that far more attenuated dangers than the immediate threats here could satisfy the objective test. *See, e.g.*, *Helling*, 509 U.S. at 35 (affirming circuit court's holding that second-hand smoke posed an unreasonable risk of serious harm to a prisoner's

Here, an outbreak is already in progress. And the Jail has intensified the risks of COVID-19 by (for example) suspending mental health care and exposing prisoners to extreme psychological distress through the use of punitive lockdowns and isolation conditions. *See* Ex. F, Order (Doc. 27), *Doe v. Barr*, 20-cv-2141-LB (Apr. 12, 2020), at 16 (finding that "petitioner's other diagnoses of chronic PTSD and depression compound his susceptibility" to a COVID-19 infection); *see id.* at 6–7 (detailing evidence that mental illness can depress the immune response and lead to an increased risk of infections). Further, although Plaintiffs' claims address the risk of harm imposed by the sum total of the Jail's inadequate conditions, some of the Jail's conditions may independently create a substantial risk of serious harm. *See, e.g.*, *Porter v. Clarke*, 923 F.3d 348, 357 (4th Cir. 2019*), as amended* (May 6, 2019) (finding that conditions wherein prisoners spent "between 23 and 24 hours a day 'alone in a small . . . cell' with 'no access to congregate religious, education, or social programming'—pose[d] a 'substantial risk' of serious psychological and emotional harm.") (quotations omitted); *McBride v. Deer*, 240 F.3d 1287, 1292 (10th Cir. 2001) (finding deliberate indifference where a prisoner was forced to live in a feces-covered cell for three days).

To address the objective component, courts must also "assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency

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future health); *Johnson v. Epps*, 479 Fed. App'x 583, 590-91 (5th Cir. 2012) (finding that prison policy under which prisoners use unsterilized barbering instruments, which could expose them to communicate diseases, posed an unreasonable risk of future harm), *Brown v. Bargery*, 207 F.3d 863, 865, 867-68 (6th Cir. 2000) (finding that improperly installed prison bunks that created a danger that inmates could slide off of them and onto the concrete floor, as well as protruding anchor bolts "which could potentially cause an injury," could constitute a risk to their future health under the objective prong); *DeGidio v. Pung*, 920 F.2d 525, 527, 529 (8th Cir. 1990) (affirming district court's conclusion that a "serious risk to the inmates' health existed where a prison had an inadequate response to a tuberculosis outbreak even though [o]nly a few infected individuals develop active tuberculosis" and the rest are asymptomatic).

to expose *anyone* unwillingly to such a risk." *Helling*, 509 U.S. at 36. Society has deemed the risk posed by COVID-19 intolerable: there have been unprecedented changes to American life to avoid it. Compl. ¶¶ 38-40.

2. Defendants Knew of and Disregarded the Excessive Risk to Prisoners' Health and Safety Posed by COVID-19, Particularly Absent Appropriate Precautions.

To satisfy the subjective component of deliberate indifference, a plaintiff must show that prison officials "kn[ew] of and disregard[ed] an excessive risk to [the plaintiff's] health or safety." *Farmer v. Brennan,* 511 U.S. 825, 837 (1994). "[T]he test is whether the [prison officials] kn[ew] the plaintiff inmate faces a serious danger to his safety and they could avert the danger easily yet they fail to do so." *Brown v. N.C. Dep't of Corr.*, 612 F.3d 720, 723 (4th Cir. 2010) (quotations omitted).

Defendants knew the dangers imposed by COVID-19. When the Jail reported its first case of COVID-19 on March 30, 2020, Defendant McDonough publicly predicted that this number would grow, specifically citing the challenges of containing a virus in a jail. Compl. ¶¶ 69-70 (Defendant McDonough comparing jails to "cruise ships without the views or the amenities," observing that "[a] jail is a pretty transitory place" where "[p]eople are close together" and "breathing the same air," and that she "expect[ed]" more cases of COVID-19 in the Jail); *see Makdessi v. Fields*, 789 F.3d 126, 141 (4th Cir. 2015) (stating that when a particular danger has been "expressly noted by prison officials," this can prove that official's actual knowledge under the subjective test).[38]

[38] The Prince George's County Department of Corrections has also tweeted about COVID-19, often noting the very facts that make the Jail's conditions so dangerous. *See, e.g.*, Prince George's County Department of Corrections (@PGCorrections), Twitter (Apr. 8, 2020, 12:32 PM), https://twitter.com/PGCorrections/status/1247925269765197830 ("Having a chronic disease like diabetes can put you at higher risk for severe illness from viruses. See our attached fact sheet about caring for yourself, managing your diabetes, and COVID-19."); *Id.* (Apr. 6, 2020, 10:04 AM), https://twitter.com/PGCorrections/status/1247163379954974720 (posting pictures of a "social distancing farewell lunch" at which corrections officers are clearly less than six feet apart); *Id.*

Aside from this, the risks imposed by Defendants' failures are obvious (especially during an active outbreak). It is not challenging to predict the grim results of denying prisoners soap, neglecting to sanitize common surfaces, locking medically vulnerable prisoners in cells with symptomatic cellmates for 23-hours per day, and failing to monitor and treat symptomatic prisoners during a pandemic. *See Porter*, 923 F.3d at 348, 361 ("[A]n obvious risk of harm justifies an inference that a prison official subjectively disregarded a substantial risk of serious harm to the inmate.") (quotations omitted); *Makdessi*, 789 F.3d at 136 (stating that subjective test can be satisfied where the risk of harm "was so obvious that it had to have been known"). Moreover, the CDC's Guidance for correctional and detention facilities, issued on March 23, 2020, explicitly warns of the specific dangers COVID-19 imposes in these institutions. Ex. 36, CDC Guidance at 2 (describing "unique challenges for control of COVID-19 transmission among incarcerated/detained persons, staff, and visitors," and advising that "[c]onsistent application of specific preparation, prevention, and management measures can help reduce the risk of transmission and severe disease from COVID-19").[39]

Defendants disregarded this risk. They failed to implement the CDC Guidance on almost every score. [40] *See* Ex. B, *Cameron*, No. 2:20-cv-10949-LVP-MJH, at 3 (finding that Plaintiffs and putative class of prisoners at a jail were likely to succeed on their Eighth and Fourteenth

(Apr. 6, 2020, 9:05 AM), https://twitter.com/PGCorrections/status/1247148491631140867 (warning that "the coronavirus can cause stress, fear, and anxiety," and posting a flyer with "things you can do to help," including "exercise," "talk[ing] with people you trust about how you are feeling," and "call[ing] loved ones just to say hi").

[39] The CDC Guidance also warns that "[i]ncarcerated/detained persons and staff may have medical conditions that increase their risk of disease from COVID-19," and provides a link to a list of those conditions. Ex. 36, CDC at 2.

[40] The CDC Guidance warned about the likely effects of certain ill-advised policies the Jail has adopted. *See* Ex. 36, CDC at 2 ("Incarcerated persons may hesitate to report symptoms of COVID-19 or seek medical care due to co-pay requirements and fear of isolation").

Amendment claims where the jail "ha[d] not imposed even the most basic safety measures recommended by heath experts, the Centers for Disease Control and Prevention, and Michigan's Governor to reduce the spread of COVID-19 in detention facilities"). The predictable result of the Jail's conditions is the proliferation of an outbreak in a facility that is also failing to meet infected prisoners' medical needs. Under these circumstances, Plaintiffs have satisfied the subjective factor and shown deliberate indifference.

B. Plaintiffs Will Suffer Irreparable Harm Absent Immediate Relief

Without this Court's relief, Plaintiffs will suffer irreparable harm for two reasons. First, "the denial of a constitutional right . . . constitutes irreparable harm." *Ross v. Meese*, 818 F.2d 1132, 1135 (4th Cir. 1987). Second, the Jail's conditions subject Plaintiffs to an increased risk that they will contract COVID-19 and that they will suffer serious illness, physical damage, and death if they do. This, of course, is irreparable harm as well.[41]

C. The Balance of Equities and the Public Interest Favor the Requested Relief

The balance of equities favors Plaintiffs. Plaintiffs face infection and sickness in a Jail that cannot protect them; they seek this injunction to avoid serious illness, long-term physical damage, and death. The Jail need only comply with basic public health measures. The relief that Plaintiffs seek is also in the public interest. The Jail is not an isolated environment. Uncontrolled infection within the Jail risks the health and safety of every person connected directly or indirectly to the many correctional officers, healthcare workers and others who enter and leave the Jail environment

[41] *See, e.g.*, Ex. B, *Cameron*, No. 2:20-cv-10949-LVP-MJH, at 3 (finding that prisoners at a jail would suffer irreparable harm absent an injunction because "they face a heightened risk of contracting this life-threatening virus simply as incarcerated individuals and even more so without the imposition of these cautionary measures"); *see also Coreas*, No. CV TDC-20-0780, 2020 WL 1663133, at *13 (finding that, if there were any COVID-19 cases in the immigration facilities at issue, it would find that petitioners faced "a significant risk of death or serious illness," and that this constitutes irreparable harm).

every day. *See* Ex. 30, Meyer Decl. ¶ 15 ("Prison health is public health."); Ex. 32, Benninger Decl. ¶ 3(L) ("[B]y supporting inmate health, we are supporting public health."). Therefore, any remedy that will protect the Plaintiffs benefits the wider community.[42]

II. A Temporary Restraining Order Should Issue to Enjoin the Jail's Unlawful Detention Policy.

When the basis for a person's detention has ended, she is entitled to release. Therefore, Plaintiffs ask this Court to enjoin the Prince George's County Jail from detaining COVID-positive prisoners who are legally entitled to release. Compl. ¶¶ 183-87. Plaintiffs satisfy all four factors necessary for the grant of a temporary restraining order. *See Winter*, 555 U.S. at 20.

Plaintiffs are likely to succeed on the merits. Pretrial detainees have a liberty interest in paying bail and being released after paying bail.[43] And post-trial detainees "clearly [have] a Fourteenth Amendment right to be released from service of a sentence upon expiration of its unequivocal term." *See Perkins v. Peyton*, 369 F.2d 590, 592 (4th Cir. 1966); *see also Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause."). Thus, the government infringes on an individual's due process rights when it continues to detain a person after the legal basis for detention has ended.

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[42] *See Ortuno v. Jennings,* 2020 U.S. Dist. LEXIS 62030, 14 (N.D. Ca. April 8, 2020); ("The public interest in promoting public health is served by efforts to contain further spread of COVID-19, particularly in detention centers, which typically are staffed by numerous individuals who reside in nearby communities."); *Castillo v. Barr*, No. CV2000605TJHAFMX, 2020 WL 1502864, at *6 (C.D. Cal. Mar. 27, 2020) ("[T]he emergency injunctive relief sought, here, is absolutely in the public's best interest. The public has a critical interest in preventing the further spread of the coronavirus. An outbreak at Adelanto would, further, endanger all of us.").

[43] *See Steele v. Cicchi*, 855 F.3d 494, 502 (3d Cir. 2017) (identifying a "constitutionally protected liberty interest in exercising [a] bail option, once bail had been set") (quotations omitted)); *Lynch v. City of New York*, 335 F. Supp. 3d 645, 654 (S.D.N.Y. 2018) ("Plaintiffs have identified a liberty interest in paying bail once it is fixed and in being released once bail is paid.").

Courts have analyzed overdetention claims in terms of substantive due process. *See, e.g.*, *Lynch v. City of New York*, 335 F. Supp. 3d 645, 653 (S.D.N.Y. 2018).[44] An infringement of an individual's substantive due process rights violates the Fourteenth Amendment when it is "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Hawkins v. Freeman*, 195 F.3d 732, 738 (4th Cir. 1999) (quoting *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8, (1998)). In a "custodial situation," "deliberate indifference" can satisfy this standard. *Cty. of Sacramento*, 523 U.S. at 851, 852. Deliberate indifference requires showing that "defendants actually knew of and disregarded a substantial risk of serious injury to the detainee." *Young v. City of Mount Ranier*, 238 F.3d 567, 576 (4th Cir. 2001).

Here, Defendants are responsible for effectuating prisoners' release. They are surely aware that detainees who post bail are entitled to release, and that a convicted prisoner is entitled to release when her sentence expires. Subjecting prisoners to as many as 14 additional days in jail because they are COVID-positive constitutes deliberate indifference. *See Hawkins*, 195 F.3d at 738; *White by White v. Chambliss*, 112 F.3d 731, 737 (4th Cir. 1997) (stating that when an official "[chooses] to ignore the danger" of constitutional violations, this amounts to deliberate indifference).

The remaining three factors for a temporary restraining order are also met. Constitutional violations constitute irreparable harm, as do deprivations of liberty. *See Ross*, 818 F.2d at 1135; *Jarpa v. Mumford*, 211 F. Supp. 3d 706, 711 (D. Md. 2016) ("[B]ecause the harm is loss of liberty,

[44] Some courts assess pretrial detainees' claims under the Fourth Amendment and post-conviction detainees' claims under the Eight Amendment. *See, e.g.*, *Morales v. Chadbourne*, 793 F.3d 208, 217 (1st Cir. 2015) (conducting Fourth Amendment analysis on claim from a plaintiff "kept in custody for a new purpose after she was entitled to release"); *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985) (applying Eighth Amendment analysis to an overdetention claim). The Fourth Circuit has not explicitly prescribed a constitutional framework for overdetention claims. However, *Perkins* suggests that in this circuit, the Fourteenth Amendment applies. *See Perkins*, 369 F.2d at 592. Regardless, Plaintiffs would also prevail under the Fourth and Eighth Amendment analysis.

it is quintessentially the kind of harm that cannot be undone or totally remedied through monetary relief"). The balance of equities favor relief; the Jail has many options for resolving the risks of releasing COVID-positive prisoners. Indeed, hospitals "release" such individuals every day. But Plaintiffs risk being detained while sick with COVID-19 in a facility that is dangerously ill-equipped to treat them. Finally, the requested relief is in the public interest, as it requires Defendants to comply with basic liberty protections.

If the Jail is concerned about the release of COVID-positive prisoners into the community, the CDC Guidance recommends that it "contact public health to arrange for safe transport and continuation of necessary medical care and medical isolation as part of release planning." CDC Guidance at 17. For infectious prisoners, this transition may be challenging, and the Jail should develop an appropriate solution. Illegal detention in squalid conditions is not that solution. This Court should grant relief.

III. This Court Should Order Release of the Medically Vulnerable Subclass of Pretrial Detainees Under 28 U.S.C. § 2241

The Jail is in the midst of an uncontrolled outbreak of COVID-19.[45] The members of the Medically Vulnerable Subclass—all of whom are pretrial detainees not convicted of any crime—each have medical conditions that worsen the effects of COVID-19.[46] For them, exposure to COVID-19 brings a meaningfully higher risk of permanent organ damage and death.[47] The Jail

[45] Ex. 30, Meyer Decl. ¶ 26 ("[I]t is my professional judgment that this facility is dangerously under-equipped and ill-prepared to prevent and manage the spread of COVID-19, which is already spreading throughout the jail.").

[46] *See* U.S. Centers for Diseases Control, "People Who Are At High Risk [for severe illness from COVID-19]," https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html (last reviewed Apr. 15, 2020).

[47] Ex. 30, Meyer Decl. ¶ 40 ("[I]ndividuals with preexisting conditions (e.g., heart disease, chronic lung disease, chronic liver disease, suppressed immune system, diabetes, mental health conditions) or older age. . . are in even greater danger in [correctional/detention] facilities,

has no plan to protect these prisoners. Compl. ¶¶ 154, 173, 174. Like all prisoners at the Jail, they are locked down with symptomatic cellmates, denied medical care (even COVID-19 symptoms), and, once infected, isolated in unsanitary conditions where they are almost never monitored. *See, e.g.*, *id*. ¶¶ 106-11, 126-27, 151-53, 157. These conditions are dangerous for everyone; for medically vulnerable prisoners, even more so.[48]

COVID-19 can escalate rapidly,[49] and many vulnerable prisoners are already sick. For example, six of the Named Plaintiffs have pre-existing conditions that make them especially vulnerable to severe illness and death if they are infected with COVID-19. Five of them have symptoms of COVID-19. *Id*. ¶¶ 14, 15, 17, 18, 19, 21.

Defendants cannot remedy the Jail's many failures in time to protect these prisoners' lives. Therefore, their continued detention is unconstitutional, and this Court should release them

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including a meaningfully higher risk of death."); *see Coreas*, No. CV TDC-20-0780, 2020 WL 1663133, at *11 ("For individuals in high risk categories such as Petitioners, the available data shows that the death rate for those with COVID-19 is between 15 percent and 20 percent.").

[48] Ex. 30, Meyer Decl. ¶ 27(a) (stating that the Jail's delays in medical care "will result in . . . a high risk for complications of COVID-19 among those who are infected, including death"); *id.* ¶ 31 (finding that "not even th[e] minimal amount of [medical] care" is being provided to prisoners who are sick with COVID-19); *Id.* ¶ 32 (stating that, given the disease's rapidly progression, "people in medical isolation [for COVID-19] need to be diligently monitored for clinical worsening," but prisoners' accounts demonstrate "a lack of medical attention that is highly concerning and suggests that medical staff do not have the necessary staffing, training, or resources to identify when people require hospitalization"); *id.* (observing that the Jail's nurses appear to "ignor[e] . . . medical issues . . . that may be signs of complicated COVID-19 disease); *id.* ¶ 35 (stating that the Jail's "[f]ailure to provide individuals adequate medical care for their underlying chronic health conditions results in increased risk of COVID-19 infection and increased risk of infection-related morbidity and mortality."); Ex. 32, Benninger Decl. ¶ 9 ("[I]nmates with medical conditions that put them at increased risk of infection and disease, are not being cared for appropriately.").

[49] Ex. 30, Meyer Decl. ¶ 32 ("Progression of respiratory symptoms in COVID-19 can be extremely rapid."); *see* Ex. 34, Benninger Decl. ¶ 3 ("In my clincal experience, persons infected with COVID-19 have the ability to rapidly decompensate from a respiratory standpoint once showing symptoms, sometimes requiring mechanical ventilation at an emergent pace.").

pursuant to a writ of habeas corpus under 28 U.S.C. § 2241.[50] In recent weeks, multiple federal courts have done this where there was no other way to protect imprisoned people's rights (and lives) from COVID-19.[51]

If this Court is not inclined to release the Medically Vulnerable Subclass as a whole, it can, as other federal courts have, order Defendants to produce a list of the members of that subclass and any other information this Court requires to make appropriate determinations as to them. *See, e.g.*, Ex. B, *Cameron v. Bouchard*, No. 2:20-cv-10949-LVP-MJH, at 7 (E.D. Mich. Apr. 17, 2020) (ordering Defendants to "[p]romptly provide Plaintiffs and the Court with a list of all individually who are in the Medically Vulnerable Subclass . . . which includes their location, charge and bond status," and "a list of any individuals in the Medically Vulnerable Subclass who Defendants object to releasing and the basis for that objection"); Ex. D, *Swain v. Junior*, No. 1:20-cv-21457-KMW,

[50] Because the Medically Vulnerably Subclass members are pretrial detainees, they may bring this action under § 2241. *In re Wright,* 826 F.3d 774, 782 (4th Cir. 2016) (explaining that prisoners in . . . pre-conviction custody . . . or other forms of custody that are possible without a conviction are able to take advantage of § 2241 relief) (quotations omitted).

[51] *See, e.g.*, Ex. E, Order (Doc. 23), *Malam v. Adducci*, 20-10829, at 39-40 (releasing immigration detainee under § 2241 because, given the "risk and severity of irreparable harm to the Petitioner and the weight of public health evidence," release was "the only reasonable option"); *Thakker v. Doll*, No. 1:20-CV-480, 2020 WL 1671563, at *5-6, 9 (M.D. Pa. Mar. 31, 2020) (finding that conditions of confinement at an immigrant detention facilities created serious risks for medically vulnerable detainees where, as here, there were unsanitary conditions, prisoners were forced to buy their own soap and share cleaning supplies, the facilities did not provide information on COVID-19 prevention, and detainees shared cells with other inmates who showed symptoms of COVID-19); *Basank v. Decker*, 20 Civ. 2518 (AT), 2020 WL 1481503, at *4-6 (S.D.N.Y. Mar. 26, 2020) (ordering release of ten immigration detainees with underlying medical conditions including diabetes, heart disease, obesity, and asthma because it could not ensure social distancing and had not taken specific steps to protect medically vulnerable detainees, although, in contrast to this case, the ICE detention facility was providing soap and hand sanitizer and substantially increased cleaning); *see also Coreas*, No. CV TDC-20-0780, 2020 WL 1663133, at *12-13 (stating that the court would release the medically vulnerable immigration detainees under § 2241 if there were any cases of COVID-19 at the facilities that held them and ordering the facilities to certify that they have obtained and will administer tests for COVID-19 for all symptomatic detainees).

at 2-5 (S.D. Fla. Apr. 7, 2020) (ordering Defendants to file, within two days, a list of Medically Vulnerable Subclass Members under seal and to also "file a notice describing the measures being employed to protect these individuals from the risk of COVID-19.").[52]

IV. Additional Interim Remedies Are Available to This Court.

Courts of equity operate with flexibility, especially in emergencies of great consequence. "The horizon of risk for COVID-19 in this facility is a matter of days, not weeks." Ex. 30, Meyer Decl. ¶ 41. Therefore, this Court may need to pursue interim remedies to protect prisoners from serious harm while it considers their constitutional claims. First, this Court can transfer prisoners to home detention or another appropriate facility if necessary to protect their rights under the Eighth and Fourteenth Amendments. Second, this Court can release members of the Medically Vulnerable Subclass on non-monetary bond while it considers their habeas petition under § 2241.

A. This Court Has and Should Exercise the Authority to Transfer Prisoners to Home Detention or Another Appropriate Facility to Remedy the Constitutional Violations or Protect Prisoners From Additional Constitutional and Physical Harms.

Plaintiffs ask this Court to order Defendants to remedy the conditions at the Prince George's County Jail so that they do not impose a substantial risk of serious harm on the people imprisoned there. However, as the CDC and other experts recognize, it may be impossible to carry out some of these measures and to protect certain vulnerable prisoners without transferring at least some prisoners.[53] Accordingly, Plaintiffs ask this Court to order that, to the extent Defendants cannot

[52] In addition, as described below, this Court has and should exercise the authority to release members of the Medically Vulnerable Subclass on non-monetary bond pending the outcome of their habeas petition. *See infra* at 33–35.

[53] *See* Ex. 36, CDC at 23 (stating that facilities should "ensure that incarcerated/detained individuals receive medical evaluation and treatment at the first signs of COVID-19 symptoms," and [i]f the facility is not able to provide such evaluation and treatment, a plan should be in place to safely transfer the individual to another facility or local hospital"); *id.* at 16 (noting that if its medical isolation recommendations are infeasible, a prison should "[s]afety transfer individual[s] to another facility with [the recommended] medical isolation capacity"); *see also* Amend at 3

remedy the substantial risk of serious harm to certain prisoners, it transfer them to home detention or another appropriate facility.[54] Another federal court recently recognized this solution for protecting prisoners in a jail that cannot adequately address the risk of COVID-19. *See* Ex. G, *Gray v. Cty. of Riverside* (Doc. 191), 5:13-cv-0444-VAP-OPx, at 4 (C.D. Cal., Apr. 14, 2020) (stating that if the jail "is unable to implement adequate social distancing within its existing jail facilities and take other necessary steps to decrease the risk of infection, this Court has the authority to order the transfer of prisoners to different facilities.").

Indeed, courts have previously transferred prisoners where necessary to protect their Eighth Amendment rights. For example, in *Plata v. Brown*, No. C01-1351 TEH, 2013 WL 3200587 (E.D. Cal. June 24, 2013), the court addressed the presence of "cocci" infections at two California prisons. Cocci infections are asymptomatic for 60 percent of people, but it "can also result in serious illness and, in the most extreme cases, death." *Id.* at *2. The court found that the prisons' measures to abate the threat of cocci were inadequate to avoid a substantial risk of serious harm to certain high-risk inmates, and, accordingly, failure to transfer these groups of prisoners would "result in deliberate indifference under the Eighth Amendment." *Id.* at 10. Other courts have also

("Prisons, jails, and other places of detention that are not able to comply with ethical standards of quarantine and medical isolation in the COVID-19 pandemic should urgently implement strategies to release or transfer people to locations that have the capacity to meet community standards of medical care"); *see also* ABA Standards for Criminal Justice, 23-6.2(c) (3d ed. 2011) ("A prisoner who requires care not available in the correctional facility should be transferred to a hospital or other appropriate place for care."); Ex. 30, Meyer Decl. ¶ 39–40 (recommending, among other things, that "the jail should evaluate individuals for release in order to reduce the population of the jail" particularly "individuals with preexisting conditions").

[54] Depending on its current capacity, Defendants may be able to transfer some prisoners to the Prince George's County Community Release Center.

ordered transfers to remedy or avoid Eighth Amendment violations.[55] If necessary to avoid a substantial risk of serious harm to some or all prisoners, this court should do the same.[56]

B. This Court Has and Should Exercise the Authority to Release Medically Vulnerable Subclass Members on Non-Monetary Bond Conditions Pending Review of Their Request for Habeas Relief Under § 2241.

A federal court has the authority to grant bail to habeas petitioners who are properly before it. *See United States v. Perkins*, 53 F. App'x 667, 669 (4th Cir. 2002) (explaining the standard "[t]o prevail on a motion for release on bail in a habeas case"); *Mapp v. Reno*, 241 F.3d 221, 226 (2d Cir. 2001) (describing "the authority of the federal courts to grant bail to habeas petitioners"); *Bolante v. Keisler*, 506 F.3d 618, 620 (7th Cir. 2007) ("Inherent judicial authority to grant bail to persons who have asked for relief in an application for habeas corpus is a natural incident of habeas corpus, the vehicle by which a person questions the government's right to detain him."). Pursuant

[55] *See, e.g.*, *Reaves v. Dep't of Corr.*, 392 F. Supp. 3d 195, 200, 210 (D. Mass. 2019) (concluding that transfer a quadriplegic state prisoner convicted of first degree murder to a non-Department of Corrections facility where he could receive adequate care was the appropriate remedy for his Eighth Amendment claims challenging his inadequate medical care); *United States v. Wallen*, 177 F. Supp. 2d 455, 458, 459 (D. Md. 2001) (ordering transfer of a pretrial detainee because of the Court's "grave[] concern[s] that [his] Fifth Amendment rights [against deliberate indifference to his serious medical needs] may have been violated and, more importantly, that those rights may be at continued risk if he [were] returned to [the jail]"); *Johnson v. Harris*, 479 F. Supp. 333, 338 (S.D.N.Y. 1979) (ordering the transfer of a severely diabetic prison to a facility that could meet his medical needs as a remedy for Eighth Amendment violations).

[56] Transfers to restrictive home detention do not constitute "prisoner release order[s]," which are prohibited under the Prison Litigation Reform Act (PLRA) absent certain conditions. *See* 18 U.S.C. § 3626(a)(3); *see Gray* (Doc. 191), 5:13-cv-0444-VAP-OPx, at 4-5 ("[N]othing in the PLRA prohibits a district judge from ordering the transfer of prisoners in response to violations of their constitutional rights . . . nor would it prohibit the Court from ordering the Sheriff to use his authority . . . to transfer prisoners"); *Reaves*, 404 F. Supp. 3d at 522–23 (finding that transfer of a prisoner to a facility outside of the Department of Corrections where his medical needs could be met did not constitute a "prisoner release order" under the PLRA); *Plata*, 2013 WL 3200587, at *8 (N.D. Cal. 2013) (noting Defendants' concession that a transfer out of a prison to correct a constitutional violation was not a "prisoner release order").

to this authority, if this Court does not immediately release members of the Medically Vulnerable Subclass under § 2241, it should release some or all of them on non-monetary bond.

Release on bond pending habeas is appropriate where the petitioner can "show that his petition presents a substantial constitutional claim upon which he has a high probability of success, and that extraordinary circumstances warrant his release." *Perkins*, 53 F. App'x at 669. Circuit courts have defined "extraordinary circumstances" to mean that "the grant of bail [is] necessary to make the habeas remedy effective." *Mapp*, 241 F.3d at 226 (quotations omitted). *See Abdullah v. Bush*, 945 F. Supp. 64, 67 (D.D.C. 2013), *aff'd sub nom. Abdullah v. Obama*, 753 F.3d 193 (D.C. Cir. 2014) (same); *Landano v. Rafferty*, 970 F.2d 1230, 1239 (3d Cir. 1992) (same).

Extraordinary circumstances exist here.[57] The Medically Vulnerable Subclass seeks habeas relief because if they do not receive it, there is an unacceptable risk that they will become seriously ill and die. Rapid removal from the jail is necessary "to make the habeas remedy effective" because, with further delay, medically vulnerable prisoners may suffer the severe illness, physical damage, and death they seek habeas to avoid. *Mapp*, 241 F.3d at 226.[58]

Based on these considerations, a federal court for the District of Massachusetts has released (and continues to release) numerous civil immigration detainees on non-monetary bond conditions while their class action habeas petition based on a detention center's failure to protect them from the spread of COVID-19 is pending. *See* Ex. H, Order (Doc. 64), *Savino v. Souza*, No. 20-10617-

[57] Plaintiffs have already described above, why they are likely to succeed on the merits. *See supra* at 17–25. And a constitutional challenge to jail conditions that imperil prisoners' health and safety is surely "substantial." *Perkins*, 53 F. App'x at 669.

[58] *Cf. Johnson v. Marsh*, 227 F.2d 528, 529-32 (3d Cir. 1955) (finding that a district court had the power to grant of bail pending habeas where the petitioner, "an advanced diabetic, was, under conditions of confinement, rapidly progressing toward total blindness," comparing this authority to a judge's power to issue a "stay of execution" while a petition is pending).

WGY, 2020 WL 1703844, at *8–9 (Apr. 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. On April 15, 2020, the Court denied the government's request to stay the releases. In its Order, the Court explained: "We are in the midst of a pandemic unprecedented in our lifetime. . . . [T]he Court will continue, on an individual basis, to work through the difficult issues of bail in the present crisis. . . . Moreover, compelling issues of individual, institutional, and community health preclude the luxury of a stay." Doc. No. 86 at 1-3 (Apr. 15, 2020) (docket text).

Other courts have also found that the risks imposed by COVID-19 warranted release on bond while a habeas action was pending.[59] Given the severe and unavoidable risks to the Medically Vulnerable Class, this Court can and should act quickly to do the same.

[59] *See Avendano Hernandez v. Decker*, No. 20-CV-1589 (JPO), 2020 WL 1547459, at *3 (S.D.N.Y. Mar. 31, 2020) (releasing § 2241 habeas petitioner challenging unconstitutional conditions of confinement—"specifically, continued risk of exposure to COVID-19"—because his continued detention would expose him to the infection he seeks habeas relief to avoid and, thus, "immediate[] release [wa]s necessary to 'make the habeas remedy effective'") (quoting *Mapp*, 241 F.3d at 230); Ex. I, Order (Doc. 507-1), *Jimenez v. Wolf*, No. 18-10225-MLW, at 3-4 (D. Mass. Mar. 26, 2020) (concluding that release of habeas petitioner on bail was "necessary to … make the habeas remedy effective" because "we're living in the midst of a coronavirus pandemic," "being in a jail enhances risk," and "[i]f the petitioner is infected and dies …. [t]he habeas remedy will be ineffective").

Respectfully submitted on April 21, 2020,

By s/Elizabeth Rossi
Elizabeth Rossi
Bar No. 19616
Katherine Chamblee-Ryan
application to the Bar of this Court pending
Olevia Boykin
application forthcoming
Ryan Downer
application pending
CIVIL RIGHTS CORPS
1601 Connecticut Ave. NW, Suite 800
Washington, D.C. 20009
katie@civilrightscorps.org
610-931-7715

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
GREENBELT DIVISION

KEITH SETH, *et al.*, Individually and on behalf of a class of similarly situated persons,	)	
Plaintiffs-Petitioners,	)	Case No.
v.	)	
MARY LOU MCDONOUGH, In her official capacity as Director of the Prince George's County Department of Corrections, *et al.*	)	
Defendants-Respondents.	)	

APPENDIX OF EXHIBITS FOR EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Index of Exhibits

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EDWARD BANKS, et al.,
Plaintiffs

v.

QUINCY L. BOOTH, *et al*.,
Defendants

Civil Action No. 20-849(CKK)

ORDER
(April 19, 2020)

For the reasons set forth in the accompanying Memorandum Opinion, it is, this 19th day of April, 2020, hereby

ORDERED that Plaintiffs' [5] Motion for a Temporary Restraining Order is GRANTED IN PART AND DENIED IN PART. Specifically, the Court ORDERS the following relief:

In light of the medical surveillance and monitoring that is occurring currently in the quarantine units, Defendants shall ensure that the triage process associated with sick call requests on the non-quarantine units is expedited and reflects appropriate sensitivity to the wide variety of symptoms associated with COVID-19 disease. Correctional officers and other staff who are in contact with inmates should ensure that the medical staff are promptly informed about inmates who present with symptoms of COVID-19 and medical staff should respond to the housing unit on an expedited basis. Any inmate grievances that include allegations of delay in medical assessment should be prioritized and submitted to the DOC medical director immediately. Additionally, in light of the fact that the DOC is relying on inmates to self-report symptoms of COVID-19, Defendants shall provide better documentation as to the dates and times of sick calls and urgent care calls, the inmates' reported symptoms, the dates and times the inmates are seen by medical professionals, and the outcomes to allow for better tracking of the response to inmates' complaints of COVID-19 symptoms.

If the Defendants are not already doing so, they shall that ensure that cell restrictions are appropriately monitored, tracked, and corrective action is undertaken on an expedited basis if warranted.

In instances in which inmates are transferred from the intake unit to a different unit before the 14-day quarantine period expires, Defendants shall ensure that appropriate housing, surveillance and monitoring is afforded to the inmate in the receiving unit.

Defendants shall consult with public health professionals regarding strategies that can be implemented to strengthen the COVID-19-related education program for both staff and inmates. Moreover, Defendants shall explore appropriate supports that can be provided on an expedited basis to both staff and inmates who are living and working in an extremely stressful and high-risk environment and are at substantial risk of exposure.

Defendants shall conduct additional staff training on the use of the non-touch, infrared thermometers consistent with manufacturer guidelines and provide guidance to staff regarding what to do when thermometers produce results that appear on their face to be inaccurate.

Defendants shall take immediate steps to 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.

Defendants shall ensure appropriate and consistent implementation of social distancing policies by addressing limitations in current staffing levels, supervisory oversight of line staff, and provide enhanced education related to the importance of social distancing.

Defendants shall communicate clear expectations, in writing, to correctional staff about the types of PPE required to perform the various supervision and operational functions that are conducted throughout the facility, including the PPE they should expect to be given on each shift for each specific category of post assignment; the proper donning, doffing and disposal of the PPE; and an explanation of the related rationale. Clear communication to staff regarding differences in risk exposures and providing consistent PPE over time could help lower anxiety levels among staff.

In addition, Defendants shall also ensure that all PPE issued is properly fitted. For example, N95 respirators must be properly fitted to ensure that they provide the intended protection. During the site visits that amici conducted, none of the correctional staff who were wearing N95 respirators in isolation units reported that they had been fitted for the respirators.

Defendants shall ensure that all DOC staff receive instruction on the proper disposal of PPE, and appropriate and accessible receptables for immediate disposal must be readily available. During the site visits, amici observed that receptables for disposal of PPE were not accessible on a consistent basis, including to staff assigned to isolation units at the CTF.

There is a critical need for the defendants to strengthen the environmental health and safety program at both the CDF and the CTF. It is recommended that the DOC immediately retain a registered sanitarian to oversee the environmental health and safety programs at both facilities and provide training so that cleaning tools and products are used properly. A registered sanitarian should bring the appropriate knowledge, oversight, and quality control necessary to mitigate at least some of the critical public health concerns that are evident in both facilities.

In addition to engaging a sanitarian, supervisory correctional staff must ensure that housing unit staff properly manage the work performed by the inmate detail workers. In order to accomplish that goal, correctional staff and detail workers require guidance from a sanitarian trained to oversee the facility's environmental health program.

In addition to engaging a sanitarian, the defendants shall consider contracting for professional cleaning services on the non-secure side of the facility at least until a sanitarian is hired to bolster the existing environmental health and safety program at both facilities. Additionally, proper cleaning supplies that have been sanitized regularly shall be immediately provided to each unit, and a schedule for cleaning common areas and cells shall be established and enforced.

Defendants shall reduce the extent to which common spaces encourage inmates to congregate in close quarters (e.g., around a single television in a small enclosed area, or next to one another in order to use telephones that are mounted closer than six feet apart). The

effectiveness of this strategy would increase if Defendants were to consistently apply their stated policy of allowing no more than small groups of inmates out of their cells at any given time. Whatever strategies Defendants adopt, increased active and direct supervision will be required by both housing unit correctional officers and the midlevel managers responsible for overseeing and supporting the correctional officers assigned to housing units. Enforcing social distancing standards as a public health measure is a new responsibility for correctional staff and they must be supported as they adjust to this new role. Moreover, Defendants shall assess whether any additional security staff are needed to provide appropriate supervision, on a unit-by-unit basis, taking into consideration the layout of the housing units, the number of inmates housed on the units, and the security designation of the unit, in order to enforce social distancing policies.

Finally, Defendants shall ensure that all inmates, including those on isolation, have access to confidential, unmonitored legal calls of a duration sufficient to discuss legal matters.

As relief, the Court has adopted in general the recommendations set out by the amici in their final report. The Court has not set out each detail in the report which supports these recommendations. However, the Court expects Defendants to address those specific deficiencies set out in the final report, which support the recommendations, and to rectify those deficiencies.

SO ORDERED.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAMAAL CAMERON, RICHARD BRIGGS, RAJ LEE, MICHAEL CAMERON, and MATTHEW SAUNDERS, individually and on behalf of all others similarly situated,

Plaintiffs,

Civil Case No. 20-10949
Honorable Linda V. Parker

v.

MICHAEL BOUCHARD, CURTIS D. CHILDS, and OAKLAND COUNTY,

Defendants.
_____/

OPINION AND ORDER

On this date, Plaintiffs filed a putative class action complaint, raising grave concerns about the conditions in the Oakland County Jail in the face of the novel coronavirus (COVID-19) pandemic. Plaintiffs are Oakland County Jail pretrial or convicted detainees. Plaintiffs seek to represent a class of all current and future Oakland County Jail (hereafter also "Jail") detainees, as well as the following sub-classes:

- The First Subclass ("Pre-trial Subclass") is defined as "All current and future persons detained at the Oakland County Jail during the course of the COVID-19 pandemic who have not yet been convicted of the offense for which they are currently held in the Jail."

- The Second Subclass ("Post-conviction Subclass") is defined as "All current and future persons detained at the Oakland County Jail during the course of the COVID-19 pandemic who have been sentenced to serve time in the Jail or who are otherwise in the Jail as the result of an offense for which they have already been convicted."

- The Third Subclass ("Medically-Vulnerable Subclass") is defined as: "All members of the Jail class who are also over the age of fifty or who, regardless of age, experience an underlying medical condition that places them at particular risk of serious illness or death from COVID-19 …."

Plaintiffs also filed an emergency motion for temporary restraining order ("TRO") in which they ask the Court to order (a) the release of members of the Medically-Vulnerable Subclass pending briefing and argument and (b) the undertaking of certain measures to improve hygiene and safety at the Jail.

Having reviewed Plaintiffs' Complaint and pending motion, the Court is granting at this time Plaintiffs' request for a TRO requiring Defendants to utilize the measures set forth below to improve hygiene and safety at the Jail.[1] The Court is without sufficient information to rule on Plaintiffs' request to release all members of the Medically-Vulnerable Subclass and is scheduling a hearing to

[1] The Court is not imposing all of the measures requested by Plaintiffs and will discuss those measures that are omitted with the parties during the hearing scheduled *infra*.

address that request. The Court has considered the following factors in deciding whether to issue the TRO:

> (1) whether the movant has a strong likelihood of success on the merits, (2) whether the movant would suffer irreparable injury absent a stay, (3) whether granting the stay would cause substantial harm to others, and (4) whether the public interest would be served by granting the stay.

Ohio Republic Party v. Brunner, 543 F.3d 357, 361 (6th Cir. 2008).

The Court finds that Plaintiffs are likely to succeed on the merits of their claim alleging that jail conditions violate their Eighth and Fourteenth Amendment rights. Plaintiffs' allegations reflect that Oakland County has not imposed even the most basic safety measures recommended by health experts, the Centers for Disease Control and Prevention, and Michigan's Governor to reduce the spread of COVID-19 in detention facilities. It cannot be disputed that COVID-19 poses a serious health risk to Plaintiffs and the putative class.[2]

Plaintiffs also are likely to suffer irreparable harm absent an injunction, as they face a heightened risk of contracting this life-threatening virus simply as incarcerated individuals and even more so without the imposition of these cautionary measures. Entering an injunction requiring Defendants to adopt the safety precautions set forth below poses no harm to them other than potentially

[2] A spread of the virus among incarcerated persons also poses a grave risk of harm to the jail employees with whom they interact.

increased costs and energy, which are insufficient to justify a denial of Plaintiffs' motion. *See Mich. Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991). "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994).

Accordingly,

IT IS ORDERED that Defendants shall as soon as practicable, or at least within ten (10) days of this Opinion and Order, undertake the following minimum measures:

> (1) Ensure that each incarcerated person receives, free of charge: (a) an individual supply of liquid hand soap and paper towels sufficient to allow regular hand washing and drying each day, and (b) an adequate supply of disinfectant hand wipes or disinfectant products effective against the COVID-19 virus for daily cleanings;
>
> (2) Ensure that all incarcerated people have no-cost access to hand sanitizer containing at least 60% alcohol where permissible based on security restrictions;
>
> (3) Provide access to showers and clean laundry, including clean personal towels on a regular basis, but at a minimum on a weekly basis;[3]
>
> (4) Ensure that, to the fullest extent possible, all Jail staff wear personal protective equipment, including masks,

[3] At the hearing, the Court will address whether it should set forth a specific frequency for these items after weighing regular Jail practices and any information reflecting the need for more frequency during the COVID-19 pandemic.

when interacting with any person or when touching surfaces in cells or common areas;

(5) Ensure, to the fullest extent possible, that all Jail staff wash their hands with soap and water or use hand sanitizer containing at least 60% alcohol both before and after touching any person or any surface in cells or common areas. Consider allowing staff to carry individual sized bottles while on duty;

(6) Establish protocol through which an incarcerated person may self-report symptoms of COVID-19 infection and to evaluate those symptoms, including temperature monitoring;

(7) Conduct immediate testing for anyone displaying known symptoms of COVID-19;

(8) Provide adequate spacing of six feet or more between people incarcerated, to the maximum extent possible, so that social distancing can be accomplished;

(9) Ensure that individuals identified as having COVID-19, with symptoms of COVID-19, or having been exposed to COVID-19 receive adequate medical care and are properly quarantined in a non-punitive setting, with continued access to showers, mental health services, reading materials, phone and video calling with loved ones, communications with counsel, and personal property (to the extent reasonable and necessary to the inmate's physical and mental well-being). Such individuals shall remain in quarantine and wear face masks when interacting with other individuals until they are no longer at risk of infecting other people;

(10) Respond to all COVID-19 related emergencies (as defined by the medical community) within an hour;

(11) Provide sufficient disinfecting supplies, without cost, so incarcerated people can clean high-touch areas or

items (including, but not limited to, phones and headphones) between each use;

(12) Effectively communicate to all people incarcerated, including low-literacy and non-English-speaking people, sufficient information about COVID-19, measures taken to reduce the risk of transmission, and any changes in policies or practices to reasonably ensure that individuals are able to take precautions to prevent infection;

(13) Train all staff regarding measures to identify inmates with COVID-19, measures to reduce transmission, and the Jail's policies and procedures during this crisis (including those measures contained in this Order);

(14) Refrain from charging medical co-pays before treatment is provided to those experiencing COVID-19-related symptoms, including testing;[4]

(15) Waive all charges for medical grievances during this pandemic until further order of the Court[5];

(16) Cease and desist (a) all use of punitive transfers or threats of transfers to areas of the jail that have higher infection rates (or any other form of threat involving increased exposure to infection) for any infraction whatsoever; and (b) all retaliation in any form, against class members who raise concerns either formally or informally about the health and safety conditions in the Jail.[6]

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[4] The Court will consider at the hearing whether co-pays may be charged if payment is not required before treatment or testing.

[5] The Court will address at the hearing whether charges for medical grievances should be allowed if payment is not required before a grievance is accepted and addressed.

[6] At the hearing, the Court will address Plaintiffs' request for an injunction restraining Defendants from taking "all punitive measures … against class

IT IS FURTHER ORDERED, that Defendants shall take the following measures in preparation for the TRO hearing:

> (1) Promptly provide Plaintiffs and the Court with a list of all individuals who are members of the Medically-Vulnerable Subclass as defined in paragraph 94 of Plaintiffs' Complaint, which includes their location, charge and bond status; and,
>
> (2) Promptly thereafter provide Plaintiffs and the Court with a list of any individuals in the Medically-Vulnerable Subclass who Defendants object to releasing and the basis for that objection.

IT IS FURTHER ORDERED that the parties shall appear before the undersigned for a telephonic conference call **on Monday, April 20, 2020 at 11:00 a.m.**, and for a telephonic hearing **on Friday, April 24, 2020 at 11:00 a.m.** For both the conference and hearing, Counsel shall call the Court's toll-free conference line at 1-888-808-6929 and use Access Code 8141695.

IT IS SO ORDERED.

s/ Linda V. Parker
LINDA V. PARKER
U.S. DISTRICT JUDGE

Dated: April 17, 2020

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members who decline to engage in labor on the grounds that such labor represents a threat to their health and safety or the health and safety of other class members."

EXHIBIT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LADDY CURTIS VALENTINE, *et al*,	§	
	§	
Plaintiffs,	§	
VS.	§	CIVIL ACTION NO. 4:20-CV-1115
	§	
BRYAN COLLIER, *et al*,	§	
	§	
Defendants.	§	

PRELIMINARY INJUNCTION ORDER

This matter came for hearing before the Court on April 16, 2020, upon the Application of Plaintiffs Laddy Curtis Valentine and Richard Elvin King, individually and on behalf of those similarly situated, for injunctive relief. At the hearing, the Court heard testimony from Plaintiffs' witnesses and argument from counsel for both parties. The Court notes that the Defendants chose to present no live testimony to controvert Plaintiffs' evidence. After consideration of the Class Action Complaint, the attached evidence, the testimony and evidence at the April 16, 2020 hearing, and any arguments of counsel, the Court finds that Plaintiffs are substantially likely to succeed on the merits of the underlying litigation; that, in the absence of a preliminary injunction, Plaintiffs will suffer immediate irreparable injury for which there is no adequate remedy at law, in that they will face a high risk of serious illness or death from exposure to COVID-19; that the issuance of a preliminary injunction will not inflict greater or undue injury upon those restrained or third parties; and the issuance of a preliminary injunction order will serve the public interest and maintain the status quo. The Court further finds the relief below is narrowly drawn, is consistent with Center for Disease Control (CDC) guidelines, extends no further than necessary to correct the harm the Court finds requires preliminary relief, and is the least intrusive means necessary to correct the

harm the Court finds requires preliminary relief. The Court has given substantial weight to any adverse impact on public safety and the operation of the criminal justice system caused by the preliminary relief and shall respect the principles of comity in tailoring this preliminary relief. *See* 18 U.S.C. § 3626(a)(2).

Plaintiffs' Application for a Temporary Restraining Order is therefore **GRANTED** as a preliminary injunction, and it is **ORDERED**, pursuant to Federal Rule of Civil Procedure 65, that all Defendants, their agents, representatives, and all persons or entities acting in concert with them are enjoined as follows:

- Provide Plaintiffs and the class members with unrestricted access to hand soap and disposable hand towels to facilitate handwashing.
- Provide Plaintiffs and the class members with access to hand sanitizer that contains at least 60% alcohol in the housing areas, cafeteria, clinic, commissary line, pill line, and laundry exchange.
- Provide Plaintiffs and the class members with access to tissues, or if tissues are not available, additional toilet paper above their normal allotment.
- Provide 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, and provide new gloves and masks for each inmate during each time they are cleaning or performing janitorial services.
- Provide all inmates and staff members with masks. If TDCJ chooses to provide inmates with cotton masks, such masks must be laundered regularly.

- Require common surfaces in housing areas, bathrooms, and the dining hall to be cleaned every thirty minutes from 7 a.m. to 10 p.m. with bleach-based cleaning agents, including table tops, telephones, door handles, and restroom fixtures.
- Increase regular cleaning and disinfecting of all common areas and surfaces, including common-use items such as television controls, books, and gym and sports equipment.
- Institute a prohibition on new prisoners entering the Pack Unit for the duration of the pandemic. In the alternative, test all new prisoners entering the Pack Unit for COVID-19 or place all new prisoners in quarantine for 14 days if no COVID-19 tests are available.
- Limit transportation of Pack Unit inmates out of the prison to transportation involving immediately necessary medical appointments and release from custody.
- For transportation necessary for prisoners to receive medical treatment or be released, CDC-recommended social distancing requirements should be strictly enforced in TDCJ buses and vans.
- Post signage and information in common areas that provides: (i) general updates and information about the COVID-19 pandemic; (ii) information on how inmates can protect themselves from contracting COVID-19; and (iii) instructions on how to properly wash hands. Among other locations, all signage must be posted in every housing area and above every sink.
- Educate inmates on the COVID-19 pandemic by providing information about the COVID-19 pandemic, COVID-19 symptoms, COVID-19 transmission, and how to protect oneself from COVID-19. A TDCJ staff person must give an oral presentation or show an educational video with the above-listed information to all inmates, and give all inmates an opportunity to ask questions. Inmates should be provided physical handouts containing

COVID-19 educational information, such as the CDC's "Share Facts About COVID-19" fact sheet already in TDCJ's possession.

- TDCJ must also orally inform all inmates that co-pays for medical treatment are suspended for the duration of the pandemic, and encourage all inmates to seek treatment if they are feeling ill.
- TDCJ must, within three (3) days, provide the Plaintiffs and the Court with a detailed plan to test all Pack Unit inmates for COVID-19, prioritizing those who are members of Dorm A and of vulnerable populations that are the most at-risk for serious illness or death from exposure to COVID-19. For any inmates who test positive, TDCJ shall provide a plan to quarantine them while minimizing their exposure to inmates who test negative. TDCJ must also provide a plan for testing all staff who will continue to enter the Pack Unit, and for any staff that test positive, provide a plan for minimizing inmates' exposure to staff who have tested positive.

The Defendants have not sought a bond and the Court finds and holds that no security need be posted. *See* Fed. R. Civ. P. 65(c); *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 628 (5th Cir. 1996) ("In holding that the amount of security required pursuant to Rule 65(c) is a matter for the discretion of the trial court, we have ruled that the court may elect to require no security at all." (internal quotation marks omitted)); *see also A.T.N. Indus., Inc. v. Gross*, 632 F. App'x 185, 192 (5th Cir. 2015) (holding that, under Rule 65(c), a court may elect to require no security at all as the amount it considers to be proper).

The Court will issue a memorandum and order setting forth the grounds for this preliminary injunction.

IT IS SO ORDERED.

SIGNED at Houston, Texas on this the 16th day of April, 2020.

KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

EXHIBIT D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No.: 1:20-cv-21457-KMW

ANTHONY SWAIN, et al.,

Plaintiffs,

v.

DANIEL JUNIOR, et al.,

Defendants.

_____/

ORDER GRANTING IN PART PLAINTIFFS' EMERGENCY MOTION FOR A TEMPORARY RESTRAINING ORDER

THIS MATTER is before the Court on Plaintiffs' Motion for Temporary Restraining Order (DE 3). Defendants oppose the motion. To obtain either a temporary injunction or a preliminary injunction, a party must demonstrate that: "(1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest." *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1247 (11th Cir. 2016). Based on the Court's review of the record, relevant case law, and the Parties' representations during the telephonic status conferences held April 6, 2020 and April 7, 2020, Plaintiffs have met that standard.

Accordingly, after consultation with the Parties, and for the reasons cited at the telephonic status conferences held April 6, 2020 and April 7, 2020 with all Parties present, it is **ORDERED and ADJUDGED** that Plaintiffs' Motion for Temporary Restraining Order (DE 3) is **GRANTED IN PART** as follows:

1. It is **ORDERED** that by **April 9, 2020**, Defendants shall file under seal a list of all individuals who are currently detained at Metro West Detention Facility and who meet any of the criteria in paragraph three. This list shall be filed under seal to protect the confidential health information of those individuals and shall remain under seal pending further order by this Court.

2. It is further **ORDERED** that by **April 9, 2020**, Defendants shall file a notice describing the particular measures being employed to protect these individuals from the risk of COVID-19.1

3. The list of individuals shall include all of those currently detained at Metro West Detention Facility who meet any of the following criteria:

- Are 60 years of age or older;
- Have chronic respiratory disease, including lung disease, moderate to severe asthma, or chronic obstructive pulmonary disease (e.g. bronchitis or emphysema);
- Have heart disease, such as congenital heart disease, congestive heart failure, or coronary artery disease;
- Have chronic liver or kidney disease (including hepatitis and conditions requiring dialysis);
- Have diabetes;
- Have epilepsy;
- Have diagnosed hypertension;

1 One of the lists required under Paragraph 1 or 2 shall be filed with the Court by **6:00 PM on April 9, 2020** and the other shall be filed by **midnight on April 9, 2020**.

- 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 sickle cell disease; and/or
- Are or have been pregnant within the last two weeks.

4. It is further **ORDERED** that Defendants shall take the following actions at the Metro West Detention Center:

- Effectively communicate to all people incarcerated at Metro West Detention Center, including low-literacy and non-English-speaking people, sufficient information about COVID-19, measures taken to reduce the risk of transmission, and any changes in policies or practices to reasonably ensure that individuals are able to take precautions to prevent infection;
- To the maximum extent possible considering Metro West Detention Center's current population level, provide adequate spacing of six feet or more between people incarcerated at Metro West so that social distancing can be accomplished;
- Ensure that each incarcerated person receives, free of charge: (1) an individual supply of soap, preferably liquid as recommended by the CDC, sufficient to allow frequent hand washing each day, (2) hand drying machines, or disposable paper towels as recommended by the CDC, and individual towels, sufficient for daily use (3) an adequate supply of disinfectant products effective against the virus that causes COVID-19 for daily cleanings; and (4) an adequate supply of toilet paper sufficient for daily

use;

- Provide reasonable access to showers and to clean laundry;
- Require that all MDCR staff wear personal protective equipment, including masks, and gloves when physically interacting with any person and require that, absent extraordinary or unusual circumstances, a new pair of gloves is worn each time MDCR staff touch a different person; and require all inmate workers who are cleaning facilities or preparing food to follow this same protocol;
- Require that all MDCR staff regularly wash their hands with soap and water or use hand sanitizer containing at least 60% alcohol;
- Ensure access to proper testing for anyone displaying known symptoms of COVID-19 in accordance with CDC guidelines;
- Ensure that individuals identified as having COVID-19 or having been exposed to COVID-19 receive adequate medical care and are properly quarantined, with continued access to showers, mental health services, phone calling with family, and communications with counsel; individuals identified as having COVID-19 or having been exposed to COVID-19 shall not be placed in cells normally used for disciplinary confinement absent emergency circumstances;
- Respond to all emergency (as defined by the medical community) requests for medical attention as soon as possible;
- Provide sufficient disinfecting supplies consistent with CDC recommendations in each housing unit, free of charge, so incarcerated

people can clean high-touch areas or any other items in the unit between each use;

- Waive all medical co-pays for those experiencing COVID-19-related symptoms; and
- Waive all charges for medical grievances during this health crisis.

5. This Temporary Order is valid for a limited period of 14 days or until further order of this Court, or until Defendants demonstrate that they have substantially complied with this Order. The Court's ruling is subject to change based on a more fully developed record at preliminary injunction proceedings.

6. For purposes of this Order, the Court accepted the allegations in the Complaint and its attachments as true without briefing or evidentiary submissions by Defendants; this Order does not make a finding of wrongdoing on the part of any defendant and no defendant has waived any defenses to this action.

7. If Defendants have not yet been served in accordance with Federal Rule of Civil Procedure 4, Plaintiffs shall immediately provide a copy of this Order to Defendants.

8. A telephonic hearing on Plaintiff's Emergency Motion (DE 3) for Preliminary Injunction is **SET** for **April 21, 2020 at 1:00 PM**.

9. Defendants shall file a response (not exceeding 35 pages) to Plaintiff's Emergency Motion (DE 3) by **April 16, 2020 at 5:00 p.m.** Defendants need not file responses to any other pleading or motions until further order of the Court. Plaintiffs may file a reply by **April 20, 2020 at 12:00 p.m.**

DONE AND ORDERED in chambers in Miami, Florida, this 7th day of April, 2020.

KATHLEEN M. WILLIAMS
UNITED STATES DISTRICT JUDGE

EXHIBIT E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Janet Malam,

Petitioner,

v.

Rebecca Adducci, *et al.*,

Respondents.

_____/

Case No. 20-10829

Judith E. Levy
United States District Judge

Mag. Judge Anthony P. Patti

AMENDED OPINION AND ORDER GRANTING IN PART PETITIONER'S EMERGENCY APPLICATION FOR A TEMPORARY RESTRAINING ORDER [2][1]

This is an emergency petition challenging Janet Malam's mandatory detention pursuant to 8 U.S.C. § 1226(c) because of danger posed to her by the COVID-19 pandemic. Petitioner claims that her continued detention violates her Fifth Amendment rights by exposing her to substantial risk of illness and death. She requests a temporary restraining order (TRO) requiring that Respondents release her on her

[1] On April 6, 2020 the Court amended its April 5, 2020 Order to include additional terms of supervision.

own recognizance and refrain from re-detaining her for the pendency of her immigration proceedings.

For the foregoing reasons, the Court GRANTS IN PART this emergency application for relief.

BACKGROUND

Petitioner Janet Malam, born in the United Kingdom, is a lawful permanent resident. (ECF No. 1, PageID.3.) She was legally admitted to the United States in 1967 at the age of four and is now fifty-six years old. (*Id.*) Petitioner has been detained since March 4, 2020, in the Calhoun County Correctional Facility[2] in conjunction with removal proceedings at the Detroit Immigration Court. (*Id.*) She brings suit against the following Respondents: Rebecca Adducci, the Detroit District Director of United

[2] The parties each refer to the Calhoun County Correctional Facility with different terminology. *See Jail/Corrections Division*, Calhoun County, https://www.calhouncountymi.gov/departments/sheriffs_office/jail.php (last visited Apr. 5, 2020) ("Calhoun County Correctional Facility"); *Detention Facilities*, U.S. Immigrations and Customs Enforcement, https://www.ice.gov/detention-facility/calhoun-county-correctional-center (last visited Apr. 5, 2020) ("Calhoun County Correctional Center"); *Calhoun County Jail*, Google Maps, at https://www.google.com/maps/place/Calhoun+County+Jail/@42.3166565,-85.1757947,15z/data=!4m2!3m1!1s0x0:0x4f8faa7bcca370c4?sa=X&ved=2ahUKEwiRwvHM3NHoAhUQmHIEHWeUCl4Q_BIwCnoECA4QCA (last visited Apr. 5, 2020) ("Calhoun County Jail"). The Court will refer to Petitioner's current place of detention as the Calhoun County Correctional Facility or CCCF.

States Immigration and Customs Enforcement (ICE); Matthew Albence, Deputy Director of ICE; Chad Wolf, Acting Secretary of the U.S. Department of Homeland Security; William Barr, Attorney General of the United States; ICE; and Heidi Washington, Director of the Michigan Department of Corrections (MDOC). (*Id.*)

Petitioner alleges that she suffers from a number of health conditions, including: multiple sclerosis; bipolar disorder; pain; anemia; essential primary hypertension; hypothyroidism; chronic obstructive pulmonary disease; fibromyalgia; mild cognitive impairment; carpal tunnel syndrome; severe major depressive disorder; opioid addiction; nicotine dependence; and polyneuropathy. (ECF No. 1, PageID.7.) According to Petitioner's extensive medical records, these diagnoses are current and accurate as of March 3, 2020. (ECF No. 1-4, PageID.31.)

Because Petitioner has committed two or more crimes involving moral turpitude, her detention is mandatory pursuant to 28 U.S.C. § 1226(c).[3] On March 30, 2020, Petitioner filed a petition requesting

[3] Petitioner does not specify the nature of these crimes in either her petition or this application. In their response to Petitioner's application for a temporary restraining order, Respondents note that Petitioner's charge of removal is based on a 2003 Michigan state conviction of Larceny from the Person, Mich. Comp. Laws § 750.737, a 2008 conviction of Larceny $100 or Less in violation of a Taylor City,

emergency relief in either one of two forms: a writ of habeas corpus or an injunction "ordering Defendants to immediately release [Petitioner], with appropriate precautionary public health measures, on the grounds that her continued detention violates the Due Process Clause [of the Fifth and Fourteenth Amendments]." (*Id.* at PageID.17.) Petitioner simultaneously filed an Application for Temporary Restraining Order requesting that the Court order Petitioner's release during the pendency of her immigration proceedings due to the substantial risk to her health posed by COVID-19 as a result of Petitioner's continued detention in the enclosed group environment endemic to the Calhoun County Correctional Facility. (ECF No. 2.)

For the reasons stated below, the Court GRANTS Petitioner's application for a temporary restraining order requiring her immediate release from detention for the duration of the COVID-19 State of Emergency in Michigan or until further Court order.

LAW AND ANALYSIS

Michigan ordinance, a 2009 conviction of Retail Fraud in violation of a City of Flat Rock, Michigan ordinance, a 2011 conviction of Attempted Simple Larceny in violation of a City of Tyler, Michigan ordinance, and a 2012 conviction of Retail Fraud 3rd Degree $200 or less in violation of a City of Southgate, Michigan ordinance. (ECF No. 11-1, PageID.192.)

I. Jurisdiction

"Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress." *Hamama v. Adducci,* 912 F.3d 869, 874 (6th Cir. 2018) (citing *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986)). All courts have an "independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) (citing *Ruhgras AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999)). A court must determine whether it has jurisdiction before deciding a cause of action. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998).

Petitioner pleads that "[t]he Court has subject matter jurisdiction over this case pursuant to Article I, § 9, cl. 2 of the U.S. Constitution (Suspension Clause); the Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution; 28 U.S.C. § 1331 (federal question); 28 U.S.C. §1651 (All Writs Act); and 28 U.S.C. § 2241 (habeas corpus)." (ECF No. 1, PageID.5.) The Court has jurisdiction to adjudicate Petitioner's claims under 28 U.S.C. § 2241. Moreover, even if

Petitioner's claims could not be heard under 28 U.S.C. § 2241, 28 U.S.C. § 1331 provides an independent source of jurisdiction.

A. 28 U.S.C. § 2241 Jurisdiction

28 U.S.C. § 2241 provides a district court with jurisdiction over petitions for habeas corpus where a petitioner is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). *See INS v. St. Cyr*, 533 U.S. 289, 298 (2001) (recognizing 28 U.S.C. § 2241 as a jurisdictional statute). For over 100 years, habeas corpus has been recognized as the vehicle through which noncitizens may challenge the fact of their detention. *See Chin Yow v. U.S.*¸ 208 U.S. 8, 13 (1908) ("Habeas corpus is the usual remedy for unlawful imprisonment.") In 2001, the Supreme Court recognized the continued viability of the writ in cases involving the detention of noncitizens: "§ 2241 habeas corpus proceedings remain available as a forum for statutory and constitutional challenges to post-removal-period detention." *Zadvydas v. Davis*, 533 U.S. 678, 688 (2001). In 2018, the Court ruled on the merits of a habeas petition challenging the validity of pre-removal detention. *Jennings v. Rodriguez,* 138 S. Ct. 830 (2018).

Respondents claim, citing *Luedtke v. Berkebile*, that the Court lacks jurisdiction to grant habeas relief because 28 U.S.C. § 2241 "is not the proper vehicle for a prisoner to challenge conditions of confinement." *Luedtke v. Berkebile*, 704 F.3d 465, 466 (6th Cir. 2013). Though the Supreme Court has left as an open question "the reach of the writ with respect to claims of unlawful conditions of treatment or confinement," *Boumedienne v. Bush*, 553 U.S. 732, 792 (2006), the Sixth Circuit, conversely, has held that "a § 2241 habeas petition is not the appropriate vehicle for challenging the conditions of . . . confinement." *Velasco v. Lamanna*, 16 F. App'x 311, 314 (6th Cir. 2001). In 2018, the Sixth Circuit reiterated this holding, affirming a district court that dismissed a § 2241 petition raising an Eighth Amendment challenge to subpar prison conditions because such a claim must be brought in a civil-rights action such as one under *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). *Solano-Moreta v. Fed. Bureau of Prisons*, No. 17-1019, 2018 WL 6982510 (6th Cir. Sep. 24, 2018); *but see Aamer v. Obama*, 742 F.3d 1023 (D.C. Cir. 2014) ("Habeas corpus tests not only the fact but also the form of detention.") (internal citation

omitted); *Roba v. U.S.*, 604 F.2d 215 (2d Cir. 1979) (holding that § 2241 petition may be used to challenge conditions of confinement).

The Respondents argue that "there is no dispute that Petitioner brings a challenge to the conditions of her confinement." (ECF No. 11, PageID.175.) On its face, the application appears to concern Petitioner's conditions of confinement. Petitioner titles her claim for relief: "Freedom from Cruel Treatment and Conditions of Confinement." (ECF No. 1, PageID.16.) But Petitioner may nonetheless bring her claim under 28 U.S.C. § 2241 because she seeks immediate release from confinement as a result of there being no conditions of confinement sufficient to prevent irreparable constitutional injury under the facts of her case.

Supreme Court and Sixth Circuit precedent support the conclusion that where a petitioner claims no set of conditions would be sufficient to protect her constitutional rights, her claim should be construed as challenging the fact, not conditions, of her confinement and is therefore cognizable in habeas. In *Nelson v. Campbell*, the Supreme Court held that a death-row inmate's challenge to the method of his upcoming execution constituted a challenge to the conditions—not the fact or duration—of his execution, and therefore his claim fell outside the "core"

of habeas corpus. 541 U.S. 637, 644-45 (2004). However, the Court speculated that if the challenged method "were a statutorily mandated part of the lethal injection protocol, or if as a factual matter petitioner were unable or unwilling to concede acceptable alternatives," there would be a "stronger argument that success on the merits, coupled with injunctive relief, would call into question the death sentence itself," bringing the claim into the core of habeas corpus. *Id.* at 645. In *Adams v. Bradshaw*, the Sixth Circuit relied on *Nelson* to uphold habeas jurisdiction over a claim where a petitioner challenged the method of his execution but did not concede that any acceptable alternative existed. 644 F.3d 481, 483 (6th Cir. 2011) ("Adams has not conceded the existence of an acceptable alternative procedure. . . . Thus, Adams's lethal-injection claim, if successful, could render his death sentence effectively invalid.") Here, Petitioner has not conceded the existence of acceptable alternative conditions of her confinement; her Fifth Amendment claim, if successful, would render her continued detention invalid.

In contrast to this case, claims which the Sixth Circuit has held noncognizable in habeas are those in which the petitioner seeks relief other than release from custody: *See Solano-Moreta*, 2018 WL 6982510,

at *1 (seeking transfer); *Luedtke v. Berkebile*, 704 F.3d 465, 465–66 (6th Cir. 2013) (challenge to lack of compensation and conditions of work performed in prison); *Hodges v. Bell*, 170 F. App'x 389, 390 (6th Cir. 2006) (seeking amelioration of conditions or transfer to mental health facility); *Sullivan v. United States*, 90 Fed. App'x 862, 862 (6th Cir. 2004) (seeking medical treatment in prison); *Lutz v. Hemingway*, 476 F.Supp. 2d 715, 718 (E.D. Mich. 2007) (seeking restoration of mail privileges in prison); *see also Martin v. Overton*, 391 F.3d 710, 712 (6th Cir. 2004) (seeking transfer). Indeed, in *Preiser v. Rodriguez*, the Supreme Court distinguished conditions of confinement claims from claims seeking immediate or speedier release. 411 U.S. 475, 500 (1973) (distinguishing habeas case seeking good-time credits from § 1983 conditions of confinement cases on the grounds that "none of the state prisoners in those cases was challenging the fact or duration of his physical confinement itself, and none was seeking immediate release or a speedier release from that confinement—the heart of habeas corpus.")

Although Petitioner here titles her claim for relief "Freedom from Cruel Treatment and Conditions of Confinement," her Petition is a challenge to the continued validity of her confinement, regardless of its

conditions. Petitioner argues that the only adequate relief is her release from confinement. As Petitioner explains,

> [S]ocial distancing and hygiene measures [are] Janet's only defense against COVID-19. Those protective measures are exceedingly difficult, if not impossible, in the environment of an immigration detention center, where Janet shares toilets, sinks, phones, and showers, eats in communal spaces, and is in close contact with the many other detainees and officers.

(ECF No. 1, PageID.16.) At the Court's March 31, 2020 status conference for this case, counsel for Respondents conceded that social distancing between prisoners of at least six feet would be impossible at the Calhoun County Correctional Facility. This concession supports the conclusion of multiple doctors and public health experts: that "[t]he only viable public health strategy available is risk mitigation. . . . [T]he public health recommendation is to release high-risk people from detention, given the heightened risks to their health and safety" (ECF No. 6-1, PageID.87 (Declaration of Infectious Disease Epidemiologist Joseph Amon)); the only way to "prevent serious illness including death" in ICE facilities is to "release all people with risk factors." (ECF No. 20-3, PageID.374 (Declaration of Dr. Robert B. Greifingert).)

In this case, Petitioner does not take issue with the steps taken at the Calhoun County Correctional Facility to mitigate the risk of detainees contracting COVID-19. Rather, she says that no matter what steps are taken, due to her underlying serious health conditions, there is no communal holding facility where she could be incarcerated during the Covid-19 pandemic that would be constitutional. Petitioner's claim must therefore be considered as a challenge to the continued validity of confinement itself. Accordingly, Petitioner's claim is properly brought under 28 U.S.C. § 2241, and the Court has jurisdiction.

B. 28 U.S.C. § 1331 Jurisdiction

Even if the Court were to lack jurisdiction under 28 U.S.C. § 2241, the Fifth Amendment provides Petitioner with an implied cause of action, and thus 28 U.S.C. § 1331 would offer an independent source of jurisdiction.

28 U.S.C. § 1331 provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Petitioner properly framed her pleading as a civil rights action "[i]n the alternative." In addition to her request for a writ of habeas corpus, Petitioner requests "injunctive relief

ordering Defendants to immediately release Janet, with appropriate precautionary public health measures, on the grounds that her continued detention violates the Due Process Clause." (ECF No. 1, PageID.17.) She titles her single claim for relief "Violation of Fifth Amendment Right to Substantive and Procedural Due Process (Unlawful Punishment; Freedom from Cruel Treatment and Conditions of Confinement." (*Id.* at PageID.16.)

Should Petitioner's habeas petition fail on jurisdictional grounds, the Fifth Amendment provides Petitioner with an implied cause of action, and accordingly 28 U.S.C. 1331 would vest the Court with jurisdiction. In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, the Supreme Court first upheld the proposition that the Constitution itself provided an implied cause of action for claims against federal officials. 403 U.S. at 388. In 2017, the Supreme Court held that federal courts should not extend a *Bivens* remedy into new contexts if there exist any "special factors counseling hesitation." *Ziglar v. Abassi*, 137 S.Ct. 1843, 1857 (2017). However, there is no corresponding limitation on the Constitution as a cause of action to seek injunctive or other equitable relief. *See Ziglar*, 137 S. Ct. at 1862 (declining to extend

Bivens to conditions of confinement claim, but noting that "Respondents . . . challenge large-scale policy decisions concerning the conditions of confinement imposed on hundreds of prisoners. To address those kinds of decisions, detainees may seek injunctive relief."). Instead, there is a "presumed availability of federal equitable relief against threatened invasions of constitutional interests." *Hubbard v. E.P.A.*, 809 F.2d 1, 11 (D.C. Cir. 1986) (citing *Bivens*, 403 U.S. at 404 (Harlan, J., concurring)). Indeed, "the power of the federal courts to grant equitable relief for constitutional violations has long been established." *Mitchum v. Hurt*, 73 F.3d 30, 35 (3d Cir. 1995). Here, Petitioner seeks only injunctive and declaratory relief. Accordingly, she may bring her claim directly under the Fifth Amendment, and the Court has jurisdiction to hear the claim under 28 U.S.C. § 1331.

At oral argument, counsel for Respondent raised the question of whether the United States may be entitled to sovereign immunity if Petitioner brought this case under the Fifth Amendment. Sovereign immunity does not apply in this instance, and even if it did, it has been statutorily waived. Federal courts may exercise the traditional powers of equity in cases within their jurisdiction to enjoin violations of

constitutional rights by government officials. In *Ex Parte Young*, the Supreme Court first articulated the principle that state government officials may be sued for acting unconstitutionally, even if an ensuing injunction would bind the state. 209 U.S. at 123. In *Philadelphia Co. v. Stimson*, the Supreme Court recognized the applicability of that principle to suits against federal officials. 223 U.S. 605, 620 (1912) ("in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process"). More recently, the Supreme Court affirmed this principle in *Dalton v. Specter*: "sovereign immunity would not shield an executive officer from suit if the officer acted either 'unconstitutionally or beyond his statutory powers.'" 511 U.S. 462, 472 (1994) (citing *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 n.11 (1949)). In *Malone v. Bowdoin*, the Court called this principle the "constitutional exception to the doctrine of sovereign immunity." 369 U.S. 643, 647 (1962). Petitioner here raises a constitutional challenge to her detention as the result of actions taken by Respondent Adducci, a federal officer. Sovereign immunity does not apply.

Even absent this constitutional exception, the Administrative Procedure Act (APA) provides a statutory waiver to any defense of sovereign immunity. 5 U.S.C. § 702 provides that:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

In 2013, the Sixth Circuit recognized that this waiver extends beyond suits brought under the APA:

> [W]e now join all of our sister circuits who have done so in holding that § 702's waiver of sovereign immunity extends to all non-monetary claims against federal agencies and their officers sued in their official capacity, regardless of whether plaintiff seeks review of "agency action" or "final agency action" as set forth in § 704.

Muniz-Muniz v. U.S. Border Patrol, 741 F.3d 668, 673 (6th Cir. 2013); *see also Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) ("The APA's waiver of sovereign immunity applies to any suit whether under the APA or not."). ICE is a federal agency, of which Respondent Adducci is an officer or employee thereof. Petitioner challenges

Respondent's actions made in her official capacity. Accordingly, the APA provides a statutory waiver of sovereign immunity.

C. Petitioner's Status as a Noncitizen

Petitioner's status as a noncitizen who is undergoing removal proceedings does not affect the Court's jurisdiction to hear this case. Although several statutes limit a district court's authority to hear cases in the immigration context, none apply here, as set forth below.

28 U.S.C. § 1252(b)(9) provides that judicial review of:

> all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter [including §§ 1225 and 1226] shall be available only in judicial review of a final order under this section.

28 U.S.C. § 1252(b)(9). Petitioner does not have a final order of removal. In *Jennings v. Rodriguez*, the Supreme Court held that 1252(b)(9) did not strip jurisdiction from courts to hear challenges to detention pending removal because detention was not an action taken to remove a noncitizen from the United States. 138 S. Ct. 830, 841 (2018). Petitioner challenges her continued detention; accordingly, 28 U.S.C. § 1252(b)(9) does not strip this Court of jurisdiction.

8 U.S.C. § 1226(e) bars federal court review of any discretionary decision made by the Attorney General regarding detention, release, bond, or parole in an immigration case. However, in *Demore v. Kim*, 123 S. Ct. 1708, 1713–14 (2003), the Supreme Court held that § 1226(e) did not prevent noncitizens from raising constitutional challenges to mandatory detention under § 1226(c). Petitioner here raises a Fifth Amendment challenge to her continued mandatory detention under § 1226(c); thus, § 1226(e) does not prevent this Court from exercising jurisdiction.

Finally, 8 U.S.C. § 1252(f), titled "Limit on Injunctive Relief," provides that:

> [N]o court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

8 U.S.C. § 1252(f)(1). But as the Supreme Court recognized in *Reno v. Amer.-Arab Anti-Discrim. Comm.*, "this ban does not extend to individual cases." 525 U.S. 471, 481–82 (1999). Petitioner seeks individual relief.

Therefore, 8 U.S.C. § 1252(f) does not affect this Court's jurisdiction to enter injunctive or declaratory relief.

II. Proper Habeas Respondent

Petitioner names as Respondents: Rebecca Adducci, the Detroit District Director of ICE; Matthew Albence, Deputy Director; Chad Wolf, Acting Secretary of the U.S. Department of Homeland Security; William Parr, Attorney General of the United States; U.S. Immigration and Customs Enforcement; and Heidi Washington, Director of the Michigan Department of Corrections. Only Respondent Rebecca Adducci is properly named with respect to the petition for a writ of habeas corpus.

"Historically, the question of who is 'the custodian,' and therefore the appropriate respondent in a habeas suit, depends primarily on who has power over the petitioner and . . . on the convenience of the parties and the court." *Roman v. Ashcroft*, 340 F.3d 314, 319 (6th Cir. 2003) (citing *Henderson v. INS*, 157 F.3d 106, 122 (2d Cir. 1998)). In *Roman*, the Sixth Circuit held that for habeas petitions in immigration contexts, "the INS District Director for the district where a detention facility is located 'has power over' alien habeas corpus petitioners." *Id.* at 320. The court, in finding that the Attorney General was not a proper respondent

for a noncitizen's habeas claim and that a habeas claim could properly have only one respondent, reiterated 28 U.S.C. § 2243's requirement that a writ of habeas corpus "shall be directed to *the* person having custody of the person detained." *Id.* at 321. Michigan only has one ICE District, located in Detroit. *See Enforcement and Removal Operations Field Offices*, https://www.ice.gov/contact/ero. Accordingly, Rebecca Adducci, the Detroit District Director, is the proper Respondent for Petitioner's request for a writ of habeas corpus.

III. Petitioner's Application for a Temporary Restraining Order

Petitioner, along with her complaint, filed an emergency application for a temporary restraining order. (ECF No. 3.) In determining whether to grant such an order, courts evaluate four factors: 1) whether the movant has a strong likelihood of success on the merits; 2) whether the movant would suffer irreparable injury absent an injunction; 3) whether granting the injunction would cause substantial harm to others; and 4) whether the public interest would be served by granting the injunction. *Northeast Ohio Coal. for Homeless and Serv. Emps. Intern. Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006). These four factors "are not prerequisites that must be met,

but are interrelated considerations that must be balanced together. For example, the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the movants will suffer absent the stay." *Id.* (internal quotations omitted). "[P]reliminary injunctions are extraordinary and drastic remedies [] never awarded as of right." *Am. Civil Liberties Union Fund of Michigan v. Livingston Cty.*, 796 F.3d 636, 642 (6th Cir. 2015). Nonetheless, each of the four factors weighs in Petitioner's favor, and the Court grants Petitioner's motion for a temporary restraining order.

A. Irreparable Harm

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

1. Loss of Health or Life from COVID-19

The ongoing 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 22, 2020, the Governor of Michigan issued the following statement: "The novel coronavirus (COVID-19) is a respiratory disease

that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine or antiviral treatment for this disease." Executive Order, No. 2020-20 (Mar. 22, 2020).

Since March 4, 2020, the date of Petitioner's detention at the Calhoun County Correctional Facility, the exceptionally dangerous nature of the COVID-19 pandemic has become apparent. On March 10, 2020, the Governor of Michigan announced the state's first two cases of COVID-19 and simultaneously declared a State of Emergency. Executive Order, No. 2020-4 (Mar. 10, 2020). The number of new cases then began to grow exponentially. As of April 5, 2020, there are now 15,718 confirmed cases of COVID-19 and 617 known related deaths, with 238 confirmed cases within the Michigan Department of Corrections system specifically. *See* *Coronavirus*, Michigan.gov, https://www.michigan.gov/coronavirus/0,9753,7-406-98163-520743--,00.html. COVID-19 has a high risk of transmission, and the number and

rate of confirmed cases indicate broad community spread.[4] Executive Order, No. 2020-20 (Mar. 22, 2020). Nationally, ICE detention facilities across our country are experiencing the same thing. As of April 4, 2020, ICE has confirmed at least 13 cases of COVID-19 among immigration detainees and 7 cases among detention facility employees and personnel. *ICE Guidance on COVID-19*, U.S. Immigration and Customs Enforcement, https://www.ice.gov/coronavirus (updated Apr. 4, 2020 at 8:00pm).

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),

[4] Indeed, since the time of Respondent's brief, the numbers have continued to grow. Respondent reported that, as of April 3, 2020, Calhoun County alone had 25 cases. (ECF No. 11, PageID.169) By the time the Court held oral argument later that day, that number had grown to 31, with 1 reported death. On April 5, the date of this Order, the number of confirmed cases is now 42, with 1 reported death. *Coronavirus*, https://www.michigan.gov/coronavirus/0,9753,7-406-98163_98173---,00.html.

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 a 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 handwashing). *Id.*

Though the CDC has recommended public health guidance for detention facilities, and though the Calhoun County Correctional Facility has 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 the 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 (Apr. 1, 2020), https://www.theguardian.com/us-news/2020/apr/01/rikers-island-jail-coronavirus-public-health-disaster. In the immigration context specifically, despite Respondents' argument that the federal government has effectively incorporated appropriate and effective precautions, medical experts at the Department of Homeland Security have warned that detention confinement creates a "tinderbox scenario" where rapid outbreak is extremely likely, and extremely likely to lead to deadly results as resources dwindle on an exponential level. Catherine E. Shoichet, *Doctors Warn of 'Tinderbox Scenario' if Coronavirus Spreads in ICE Detention*, CNN (Mar. 20, 2020), https://www.cnn.com/2020/03/20/health/doctors-ice-detention-coronavirus/index.html.

Petitioner is 56 years old and suffers from the following conditions, almost all of which place her at an increased risk of a dire outcome from

contracting the COVID-19 virus: multiple sclerosis, bipolar disorder, anemia, essential primary hypertension, hypothyroidism, chronic obstructive pulmonary disease, fibromyalgia, severe major depressive disorder, opioid addition, and polyneuropathy. (ECF No. 1-4, PageID.31.) *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 she "shares toilets, sinks, phones, and showers, eats in communal spaces, and is in close contact with the many other detainees and officers." (ECF No. 1, PageID.16.) Petitioner's involuntary interaction with purportedly asymptomatic guards who rotate shifts is also a significant exposure factor. *How COVID-19 Spreads*, CDC (April 3, 2020), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-

covidspreads.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fprepare%2Ftransmission.html.[5]

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 3/23/2020. For these reasons, Petitioner's confinement at the Calhoun County Correctional Facility renders her substantially likely to contract COVID-19, and Petitioner's severe health conditions render her substantially likely to suffer irreparable harm or death as a result.

Respondents focus on one particular issue: whether Petitioner is more likely to contract COVID-19 if released than if she remains confined in their jail. Respondents acknowledge that "there is a health risk posed by COVID-19 and that Petitioner is in the category of people identified to be at higher risk for serious health consequences if she contracts COVID-

[5] On April 3, 2020, after Petitioner filed her emergency application for a temporary restraining order, the CDC updated its guidance in light of new evidence of asymptomatic transmission of COVID-19 to recommend that all individuals wear cloth face coverings "in public settings where other social distancing measures are difficult to maintain." *Recommendation Regarding the Use of Cloth Face Coverings, Especially in Areas of Significant Community-Based Transmission*, CDC (Apr. 3, 2020), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html.

19." (ECF No. 11, PageID.178.) Respondents also acknowledge that Petitioner "does not have to wait until she has COVID-19 to claim that the precautions taken to reduce exposure were insufficient." (*Id.* at PageID.179.) Indeed, the crux of Respondents' argument is not that COVID-19 does not pose a deadly threat to Petitioner if contracted. Rather, Respondents' argument relies on the proposition that Petitioner does not have a substantial risk for *exposure* at the Calhoun County Correctional Facility, and her risk of exposure in the community may be greater. (*Id.* at PageID.178.)

To this end, Respondents posit the following: Petitioner has not established that she has either been exposed to COVID-19, or that her exposure is "imminent," because there are currently no cases in the facility in which she is detained "and only 25 cases in the surrounding county."[6] (ECF No. 11, PageID.179.) Additionally, Respondents argue that their facility has implemented "numerous precautions to reduce the risk of exposure and spread of COVID-19,"[7] and that even if Petitioner is

[6] Hours later, due to the exponential nature of COVID-19's spread, this statistic was already out of date. *See supra* fn.2.

[7] Specifically, Respondents note that the ICE and CCCF precautions are as follows: tracking the disease, screening incoming detainees, isolating and testing

at a "generalized risk" of contracting COVID-19, that does not mean that she is at a "substantial risk" for purposes of her constitutional claim. (*Id.* at PageID.179-180, citing *Wooler v. Hickman Cty.*, 377 Fed. Appx. 502, 505 (6th Cir. 2010)).

Respondents' arguments fail to address the stark reality of this particular global public health crisis. In the face of a deadly pandemic with no vaccine, no cure, limited testing capacity, and the ability to spread quickly through asymptomatic human vectors, a "generalized risk" *is* a "substantial risk" of catching the COVID-19 virus for any group of human beings in highly confined conditions, such as Petitioner within the CCCF facility. In acknowledgment of this simple truth, both the United States Attorney General and the Governor of Michigan have issued independent directives to consider early release for detainees who do not pose a public safety risk, as minimizing crowded populations is the only known way to mitigate spread of this pandemic. *Prioritization of*

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symptomatic detainees, quarantining detainees who test positive, screening incoming staff, suspending in-person social visitation and limiting professional visitation to non-contact, increasing sanitation, educating all staff and detainees, providing detainees with toilet paper, personal soap, and disinfectants, and increasing hand-washing stations. (ECF No. 11, PageID.172.)

Home Confinement as Appropriate in Response to COVID-19 Pandemic, Att'y Gen. (Mar. 26, 2020); Executive Order, No. 2020-29 (COVID-19) (Mar. 26, 2020). Moreover, Petitioner's risk of contracting COVID-19 outside of Respondents' custody has no bearing on whether they have exposed her to the likelihood of irreparable harm. Though the Court commends Respondents for the steps they have taken to prevent spread of the disease, as prisons and courts around the country are beginning to recognize, such measures are insufficient to stem deadly prison outbreaks. *See, e.g.*, *New York City Board of Correction Calls for City to Begin Releasing People From Jail as Part of Public Health Response to COVID-19*, N.Y.C. Bd. of Corr. (Mar. 17, 2020), https://www1.nyc.gov/assets/boc/downloads/pdf/News/2020.03.17%20-%20Board%20of%20Correction%20Statement%20re%20Release.pdf (arguing that, despite the "heroic work" of Department of Correction and Correctional Health Services staff "to prevent the transmission of COVID-19 in the jails and maintain safe and humane operations, the City must drastically reduce the number of people in jail right now and limit new admissions to exceptional circumstances."). Even the Calhoun County Correctional Facility's additional measure of screening incoming

shift workers for high temperatures is insufficient to stem the spread of disease, as COVID-19 spreads asymptomatically. *How COVID-19 Spreads*, CDC (Apr. 3, 2020), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covidspreads.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fprepare%2Ftransmission.html.

Accordingly, the Court concludes that Petitioner's continued confinement at the Calhoun County Correctional Facility exposes her to a substantial risk of contracting COVID-19, which due to her specific underlying health conditions exposes her to a substantial risk of irreparable harm to her health or life.

2. Violation of Constitutional Rights

Petitioner's Fifth Amendment claim triggers a finding that Petitioner will suffer irreparable harm absent an injunction. Petitioner alleges that in "subjecting Janet to detention conditions that amount to punishment and that fail to ensure her safety and health," Respondent is "subjecting [her] to a substantial risk of serious harm, in violation of [her] rights under the Due Process Clause." (ECF No. 1, PageID.17.) 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 (6th Cir. 2002) (citing *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998); *Covino v. Patrissi*, 967 F.2d 73, 77; *McDonell v. Hunter*, 746 F.2d 785, 787 (8th Cir. 1984) ; *see also Rhinehart v. Scutt*, 408 F. App'x 510, 514 (6th Cir. 2018) (suggesting that allegation of "continuing violation of . . . Eighth Amendment rights" would trigger a finding of irreparable harm). Below, the Court finds Petitioner is likely to succeed on the merits of this Fifth Amendment claim. Accordingly, "no further showing of irreparable injury is necessary." *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d 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 her claim that her continued confinement during the COVID-19 pandemic violates her 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. U.S. Const. amend.

V. The protection applies to "all 'persons' within the United States, including [noncitizens], whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). As it pertains to Petitioner, the Due Process Clause prohibits the government from imposing torture or cruel and unusual confinement conditions on non-convicted detainees. *See Bell v. Wolfish*, 441 U.S. 520, 535 (1979) ("[U]nder 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, 568 (6th Cir. 2013).

Eighth Amendment claims require a showing of deliberate indifference, *see Farmer v. Brennan*, 511 U.S. 825, 835 (1994), which has both an objective and a subjective component. *Villegas v. Metro. Gov't of Nashville*, 709 F.3d 563, 568 (6th Cir. 2013) (citing *Harrison v. Ash*, 539 F.3d 510, 518 (6th 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 (6th Cir. 2016) (citing *Amick v. Ohio Dep't of Rehab. & Corr.*, 521 Fed.Appx. 354, 361 (6th Cir.2013)). Respondents argue that the precautions they have taken at the Calhoun County Correctional Facility combined with the lack of a confirmed outbreak of COVID-19 at the facility show that Petitioner is unable to demonstrate she is at substantial risk of serious harm. (ECF No. 11, PageID.180.) Instead, Respondents argue that Petitioner merely has a "generalized risk" of contracting COVID-19, which is insufficient to prevail on a Fifth Amendment constitutional claim. (*Id.*) But as noted above, in Petitioner's case, a generalized risk is a substantial risk.

As the Supreme Court explained in *Helling v. McKinney*, "[w]e have 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 U.S. 25, 33 (1993). "That 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.*

Respondents attempt to distinguish this case from *Helling* on the grounds that the Petitioner in *Helling* alleged a sufficiently imminent danger from "actual exposure to high levels of cigarette smoke because his former cellmate was a five-pack a day smoker." (ECF No. 11, PageID.179 (citing *Helling*, 509 U.S. at 29).) Respondents argue that "Petitioner has not established that she either has been exposed to COVID-19, or that her exposure is "imminent."" (*Id.*) But as the above analysis regarding the risk of irreparable injury to Petitioner demonstrates, the Respondents grievously underestimate the seriousness of the risk to Petitioner, in spite of precautionary measures and despite the lack of confirmed CCCF outbreak to date. The ever-growing number of COVID-19 outbreaks in prisons and detention facilities,[8] despite a range of precautionary measures, demonstrates that

[8] *See, e.g.*, Ted Rod Roelofs, *Coronavirus Cases Surge in Michigan's Crowded Prisons*, Bridge (Mar. 27, 2020), https://www.bridgemi.com/michigan-government/coronavirus-cases-surge-michigans-crowded-prisons; *Oregon Inmate in Salem Tests Positive for COVID-19, the First in the State Prison System*, SalemReporter (Apr. 3, 2020), https://www.salemreporter.com/posts/2168/oregon-inmate-in-salem-tests-positive-for-covid-19-the-first-in-the-state-prison-system (noting outbreak despite precautionary measures); Ames Alexander and Jessica

the risk of a COVID-19 outbreak in Respondent's facility is significant. Nor, given the percentage of asymptomatic COVID-19 cases and the virus' incubation period of up to fourteen days, can Respondents reasonably assert, as they do, that there are no COVID-19 cases in CCCF; they can only allege that there are no confirmed cases. By the time a case is confirmed, it will almost certainly be too late to protect Petitioner's constitutional rights. Petitioner, so long as she 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 the 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 (6th Cir. 2014)). "Because government officials do not readily admit the subjective

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Banov, *In NC Prisons, Five Employees and Four Inmates Have Now Tested Positive for COVID-19*, Charlotte Observer (Apr. 1, 2020), https://www.charlotteobserver.com/news/coronavirus/article241675886.html; Alexandra Kelley, *Louisiana Prison Records Third Inmate Death as a Result of the Coronavirus*, The Hill (Apr. 1, 2020), https://thehill.com/changing-america/well-being/prevention-cures/490839-louisiana-prison-records-third-inmate-death-as-a.

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 (6th Cir. 2009)). Additionally, "a factfinder 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.

Respondents concede the COVID-19 risk to Petitioner: "The government does not dispute that there is a health risk posed by COVID-19 and that Petitioner is in the category of people identified to be at higher risk for serious health consequences if she contracts COVID-19." (ECF No. 11, PageID.178.) Rightfully so: the above analysis pertaining to the risk of irreparable harm reveals that the substantial risk to Petitioner is obvious. *Farmer*, 511 U.S. at 842.

Respondents instead argue that Calhoun County Correctional Facility's precautionary measures preclude a finding of deliberate indifference because government officials cannot be said to have disregarded the risk to Petitioner. As noted above, officials at the Calhoun County Correctional Facility have taken a range of precautionary measures to protect against a potential outbreak. (*See*

ECF No. 11-3.) But as Plaintiff's pleadings and the above analysis regarding irreparable injury demonstrate, even with these precautionary measures, in light of Petitioner's underlying health conditions, she is not ensured anything close to "reasonable safety." *Farmer*, 511 U.S. at 844. (*See* ECF No. 6-3, PageID.112 (Declaration of Doctor Golob stating, "[V]ulnerable people, people over the age of 50 and people of any age with lung disease . . . living in an institutional setting . . . are at grave risk of severe illness and death from COVID-19."); ECF No. 6-1, PageID.87 (Declaration of Infectious Disease Epidemiologist Joseph Amon, stating "The only viable public health strategy available is risk mitigation. . . . [T]he public health recommendation is to release high-risk people from detention, given the heightened risks to their health and safety.").) Based on the record before the Court, the only reasonable response by Respondents 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 (1979) (holding that pretrial detention not

reasonably related to a legitimate government purpose must be considered punishment and therefore contrary to the Fifth Amendment). In their response, Respondents do not directly address the justification for Petitioner's continued detention. The Court notes that Petitioner is in civil detention pending removal proceedings pursuant to 28 U.S.C. § 1226(c). Petitioner faces significant risk of death due to COVID-19; accordingly, her continued confinement at the Calhoun County Correctional Facility is both unrelated and contrary to the government purpose of carrying out her removal proceedings.

Both the objective and subjective components are met; Petitioner has shown a likelihood of success on the merits. The Court reiterates that at this early stage in the litigation, Petitioner need not show a certainty of success on the merits. Indeed, "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 (6th 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 these facts, Petitioner has met her current burden with respect to the merits of her claim.

Respondents nonetheless cite to some authority that release is an inappropriate remedy for Petitioner's claim. *See Glaus v. Anderson,* 408 F.3d 382, 387 (7th Cir. 2005) (noting release is not among the proper remedies for Eighth Amendment deliberate indifference claims, which are limited to injunctive relief for proper treatment and damages); *Heximer v. Woods*, No. 08-14170, 2018 WL 1193368, at *2 (E.D. Mich. Mar. 8, 2018) (noting that "release from custody is not an available remedy for a deliberate indifference claim."). As explained above, Petitioner has shown a likelihood of success on the merits of her claim that given the extraordinary nature of the COVID-19 pandemic, no set of possible confinement conditions would be sufficient to protect her 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 (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

In its supplemental brief, Respondents note that to the extent Petitioner brings a civil rights case, Respondents are entitled to assert a defense of qualified immunity. (ECF No. 19, PageID.317.) Qualified immunity is unavailable as a defense in cases seeking injunctive relief. *See Pearson v. Callahan*, 555 U.S. 223, 242 (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 (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, as Respondents do here, 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 (D.C. Cir. 2016) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)).

The public interest favors Petitioner's release because of the risk that Petitioner's constitutional rights will be deprived absent an injunction. "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge Inc. v. Mich. Liquor Control Comm.*, 23 F.3d 1071, 1079 (6th Cir.1994).

Additionally, Petitioner's release will protect public health. Given the highly unusual and unique circumstances posed by the COVID-19 pandemic and ensuing crisis, "the continued detention of aging or ill civil detainees does not serve the public's interest." *Basank,* 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 (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 (6th Cir. 2003) (recognizing public health and safety as legitimate government interests).

Respondents argue that public interest favors Petitioner's continued detention because "the public interest in enforcement of the

United States' immigration laws is significant." (ECF No. 11, PageID.187 (citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 556–58 (1976); *Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d 1211, 1221 (D.C. Cir. 1981) ("The Supreme Court has recognized that the public interest in enforcement of the immigration laws is significant.")).

Respondents point to only one immigration law that will see continued enforcement by denying relief to Petitioner. That law is 8 U.S.C. § 1226(c), and it authorizes Petitioner's continued detention. But as set forth above, Petitioner's continued detention is in violation of the United States Constitution, to which 8 U.S.C. § 1226(c) must give way.

The enforcement of the remainder of U.S. immigration laws against Petitioner will continue unabated should the Court grant Petitioner relief. A hearing on Petitioner's request for cancellation of removal is scheduled for April 14, 2020. (ECF No. 11, PageID.170). Respondents do not argue that Petitioner's release will jeopardize her appearance at that hearing, nor do they argue that Petitioner's release will undermine her removal from this country, should Petitioner's defense fail and should conditions allow such removal.

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.

Because all four factors weigh in favor of issuing emergency injunctive relief, Petitioners motion for a temporary restraining order is granted.

IV. Conclusion

For the reasons stated above, Petitioner's Application for a Temporary Restraining Order is GRANTED IN PART. Respondent Adducci is ORDERED to release Petitioner on April 6, 2020 on her own recognizance. Petitioner will be subject to the following restrictions: Petitioner is subject to fourteen days of home quarantine; Petitioner must comply with all Michigan Executive Orders; and Petitioner must appear at all hearings pertaining to her removal proceedings. Respondents may impose other reasonable nonconfinement terms of supervision.

Respondents are further RESTRAINED from arresting Petitioner for civil immigration detention purposes until the State of Emergency in

Michigan (related to COVID-19) is lifted or until further Court Order stating otherwise.

The Temporary Restraining Order will expire on April 17, 2020, at 6:30 p.m. No later than April 10, 2020, at 12:00 p.m., Respondents must show cause why this Order should not be converted to a preliminary injunction. Petitioner may file a response no later than April 16, 2020, at 12:00 p.m.

IT IS SO ORDERED.

Dated: April 6, 2020
Ann Arbor, Michigan

s/Judith E. Levy
JUDITH E. LEVY
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on April 6, 2020.

s/William Barkholz
WILLIAM BARKHOLZ
Case Manager

EXHIBIT F

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

San Francisco Division

JOHN DOE,

Plaintiff,

v.

WILLIAM P. BARR, et al.,

Defendants.

Case No. 20-cv-02141-LB

ORDER GRANTING PETITIONER'S MOTION FOR TEMPORARY RESTRAINING ORDER

Re: ECF No. 6

INTRODUCTION

The petitioner, a citizen of Haiti and a lawful permanent resident of the United States, is in removal proceedings based on his conviction for second-degree robbery.[1] He finished his state sentence and has been in the custody of the U.S. Immigration and Customs Enforcement ("ICE") at Yuba County Jail since April 15, 2019.[2] He has not had a bond hearing. He has medical issues — chronic post-traumatic stress disorder ("PTSD"), depression, and latent tuberculosis — and given the COVID-19 pandemic and his conditions of confinement at Yuba County Jail, he petitions under 28 U.S.C. § 2241 for his release or, alternatively, a bond hearing within seven days

[1] Pet. – ECF No. 1. Citations refer to material in the Electronic Case File ("ECF"); pinpoint citations are to the ECF-generated page numbers at the top of documents.

[2] Notice of Custody Determination, Ex. C to Pet. – ECF No. 1-2 at 13.

before an Immigration Judge ("IJ"). He also moved for a temporary restraining order ("TRO") to obtain the same relief.[3] After full briefing and a hearing on April 9, 2020, the court grants the petitioner's motion for a TRO and orders his release.

STATEMENT[4]

1. COVID-19

The World Health Organization has designated COVID-19 a global pandemic.[5] The state of California has declared a state of emergency, and the President has declared a national emergency.[6] Our courthouses are mostly closed to in-person business, and counties have implemented shelter-in-place orders that require social distancing and the closing of schools and businesses.[7] These are extraordinary times.[8]

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[3] Pet. – ECF No. 1; Mot. – ECF No. 6.

[4] In part because this is a TRO, the court overrules the government's objections to the evidence submitted with the petitioner's reply brief. Opp'n – ECF No. 16 at 11 n. 5; Objs. – ECF No. 22; *see Flynt Distrib. Co. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984) ("The trial court may give even inadmissible evidence some weight, when to do so serves the purpose of preventing irreparable harm"). The severity of COVID-19 is undisputed. The information about the petitioner's community support is helpful and cannot be reasonably disputed.

[5] World Health Organization, *WHO Director-General's opening remarks at media briefing* (Mar. 11, 2020), https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020 (last visited April 10, 2020).

[6] Proclamation of State Emergency (Mar. 4, 2020), https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf (last visited Apr. 10, 2020); Proclamation No. 994, 85 F3d. Reg. 15,337), https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/ (last visited Apr. 10, 2020).

[7] *See United States v. Daniels*, No. 19-cr-00709-LHK (NC), Order – ECF No. 24 at 3–4 (N.D. Cal. Apr. 9, 2020); *see* Statewide "Shelter in Place" Order Replaces Yuba-Sutter directive, https://yubanet.com/regional/statewide-shelter-in-place-order-replaces-yuba-sutter-directive/ (last visited Apr. 10, 2020); Mervosh, Lu, & Swales, *See Which States and Cities Have Told Residents to Stay at Home* (Apr. 7, 2020), https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html (last visited Apr. 10, 2020).

[8] *In the Matter of the Extradition of Alejandro Toledo Manrique*, No. 19-mc-71055-TSH, 2020 WL 1307109, at *1(N.D. Cal. Mar. 19, 2020).

COVID-19 spreads "easily and sustainably" from person to person, infected people can spread it (even if they are asymptomatic), and COVID-19 can survive on surfaces for days.[9] It spreads even faster when it is in confined spaces, such as cruise ships, aircraft carriers, and prisons.[10]

There is no approved vaccine to prevent infection.[11] Instead, to control the virus, the CDC (the Centers for Disease Control and Prevention) recommends that people stay at least six feet away from each other (a practice called "social distancing"), stay at home, wash their hands often, disinfect surfaces, and cover their mouths and nose with a cloth face cover when around others.[12]

"[J]ails and prisons present extraordinarily dangerous conditions for the spread of the virus." *United States v. Daniels*, No. 5:19-cr-00709-LHK (NC), Order – ECF No. 24 at 5–7 (N.D. Cal. Apr. 9, 2020) (citing articles and cases and taking judicial notice of information on the U.S. Bureau of Prisons' website).[13]

The CDC has determined that certain persons are more susceptible to being infected with COVID-19.[14] These include people who are 65 and older, people who live in a nursing home or other long-term care facility, people who are homeless, and people of all ages with underlying

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[9] Ctrs. For Disease Control & Prevention, *How COVID-19 Spreads* (Apr. 2, 2020), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fabout%2Findex.html (last visited Apr. 10, 2020).

[10] *Ortuño v. Jennings*, No. 3:20-cv-02064-MMC, Order – ECF No. 28 at 3–4 (N.D. Cal. Apr. 8, 2020); *Daniels*, No. 5:19-cr-00709-LHK (NC) – ECF No. 24 at 4–5.

[11] Ctrs. For Disease Control & Prevention, *How to Protect Yourself & Others,* https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html (last visited Apr. 10. 2020).

[12] Ctrs. For Disease Control & Prevention, *Social Distancing, Quarantine, and Isolation* (April 4, 2020), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html (last visited Apr. 10, 2020); Ctrs. For Disease Control & Prevention, *How to Protect Yourself & Others* (April 8, 2020), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html (last visited Apr. 10, 2020).

[13] *See also* Mot. – ECF No. 6-1 at 12–15 (describing the risks and collecting authorities on the point). This factual issue matters because the government argues that the risk is speculative (and that it is safer to be incarcerated), in support of an argument that the petitioner lacks standing. *See* Opp'n – ECF No. 16 at 18. The government's fact assertions are unsubstantiated, and the evidence is to the contrary.

[14] Ctrs. For Disease Control and Prevention, *Groups At Risk For Severe Illness* (April 2, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html (last visited Apr. 10, 2020).

medical conditions, particularly if not well controlled, including the following: people with chronic lung disease or moderate to severe asthma, people who have hypertension or serious heart conditions, people with severe obesity (with a body-mass index of 40 or higher), people with diabetes, people with chronic kidney disease undergoing dialysis, people with liver disease, and people who are immunocompromised (including from cancer treatment, smoking, bone marrow or organ transplantation, immune deficiencies, poorly controlled HIV or AIDS, and prolonged use of corticosteroids and other immune-weakening medications).[15]

2. The Petitioner

The petitioner is a citizen of Haiti who came to the United States in July 2005, when he was 16, after he witnessed Haitian police officers' beheading his parents.[16] In 2007, he became a lawful permanent resident based on an approved Special Immigrant Juvenile Status petition.[17] He initially lived in a foster home but ultimately moved to California, went to school, connected with many family members who live in the U.S. (including his cousins in East Oakland), and met (in 2009) and married (in 2012) his wife, a U.S. citizen.[18] They have lived together since 2010.[19]

The petitioner pleaded no contest in December 2011 to second-degree robbery, in violation of Cal. Penal Code § 211, with enhancements for bodily injury and use of a weapon, and was sentenced to three years for the robbery with a consecutive seven years for the enhancements.[20] (The weapon was a BB gun that the petitioner used to hit the person he robbed.[21]) He has no other

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[15] *Id.*

[16] Pet. – ECF No. 1 at 6 (¶ 22); Petitioner's Decl., Ex. F. to Morales Decl. – ECF No. 1-2 at 23–24 (¶¶ 11–18); Lovedel Decl. – ECF No. 16-1 at 5 (¶ 12).

[17] Pet. – ECF No. 1 at 6 (¶ 22); Rabinovich Decl. – ECF No. 1-4 at 2 (¶ 3); Lovedel Decl. – ECF No. 16-1 at 5 (¶ 12).

[18] Pet. –ECF No. 1 at 6–7 (¶¶ 24–25); Petitioner's Decl., Ex. F. to Morales Decl. – ECF No. 1-2 at 24–26 (¶¶19–31); Wife's Decl., Ex. H to Morales Decl. – ECF No. 1-2 at 67 (¶ 2).

[19] Wife's Decl., Ex. H to Morales Decl. – ECF No. 1-2 at 67 (¶ 2).

[20] Pet. – ECF No. 1 at 7 (¶ 26); DHS Record, Ex. D to Morales Decl. – ECF No. 1-2 at 17–18.

[21] Petitioner's Decl., Ex. F. to Morales Decl. – ECF No. 1-2 at 27 (¶ 35).

criminal history.[22] He served eight years of his ten-year sentence (slightly less than the ordinary 85% because of good-time and educational-merit credits) and was released from Folsom State Prison on April 15, 2019.[23] His declaration in support of his application for adjustment of status describes his activities at Folsom, including obtaining his high-school diploma, vocational training in electronics, mental-health treatment, reconnecting to the spiritual practice (called Ifa) of his father, learning and then teaching guitar, performing with a band, and charitable work.[24] He apparently had no disciplinary violations at Folsom.[25] A psychological assessment of him includes a review of his prison records, confirms his mental-health diagnosis and his extensive (and successful) educational, therapeutic, and charitable activities.[26]

The petitioner has been in ICE custody since April 15, 2019 and has not had a bond hearing.[27]

A G4S security officer — a company that contracts with ICE — groped the petitioner on at least two separate legal visits in San Francisco between September and December 2019.[28] The petitioner and several other victims reported the assault to the San Francisco Police Department

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[22] *See* Pet. – ECF No. 1 at 7 (¶¶ 26, 28); Rabinovich Decl. – ECF No. 1-4 at 2 (¶ 3); DHS Record, Ex. D to Morales Decl. – ECF No. 1-2 at 17–18.

[23] Rabinovich Decl. – ECF No. 1-4 at 2 (¶ 3).

[24] Petitioner's Decl., Ex. F to Morales Decl. – ECF No. 1-2 at 28–32 (¶¶ 40–71). Ifa is a practice focused on building a "character of humility and compassion." *Id*. at 30 (¶ 56).

[25] *See id.* at 31 (¶ 69).

[26] In the psychological evaluation (credited by the IJ), the psychologist reviewed prison records reflecting the diagnosis of chronic PTSD, depression, anxiety, and symptoms that included sleeplessness and nightmares. Shidlo Decl., Ex. G to Morales Decl. – ECF No. 1-2 at 39 (¶¶ 14–22). The records show the petitioner's participation in therapy, religious programs, a band, and college and electronics courses. *Id.* (¶ 15). An annual review at Folsom notes that the petitioner did not engage in any cell violence or predatory behavior toward inmates or staff. *Id.* (¶ 16). The records reflect all of the petitioner's programming and describe him as a role model, a motivated student, disciplined, reliable, and hardworking, with the "right attitude for employment." *Id.* at 40–41 (¶¶ 17–22). The assessment synopsizes the petitioner's background and experiences (including the crime), describes the tests that the psychologist administered, confirms the diagnosis of PTSD and Depressive Disorder NOS, finds him credible, finds that he presented a low risk of violence, and opines that with good mental-health treatment, the petitioner is likely to function successfully, both socially and vocationally. *Id.* at 41–53 (¶¶ 23–63).

[27] Pet. – ECF No. 1 at 6 (¶ 21); Rabinovich Decl. – ECF No. 1-4 at 4 (¶ 8).

[28] Rabinovich Decl. – ECF No. 1-4 at 3 (¶ 7).

("SFPD"), which investigated the assault.[29] SFPD Sergeant-Inspector Antonio Flores signed a Form I-918 Supplement, U Nonimmigration Status Certification, certifying him as a victim of the qualifying crimes of Abusive Sexual Contact and Sexual Assault, and reflecting the petitioner's cooperation and truthful information.[30] This allows the petitioner to file for a U visa.[31]

The petitioner has been diagnosed with chronic PTSD, depression, and latent tuberculosis.[32] He has nightmares, usually about his parents' death, and experiences fear, anxiety, tightness in his chest, and trouble sleeping.[33]

One article describes PTSD as — in addition to a chronic psychiatric illness — a "somatic condition, such that patients with PTSD have been found to have a biological alterations in several primary pathways involving the neuroendocrine and immune systems."[34] Mira Zein, M.D., M.P.H., who is a Clinical Assistant Professor at Stanford University School of Medicine, Department of Psychiatry and Behavioral Sciences, describes how depression, stress, and PTSD affect the immune system.[35] "Growing evidence demonstrates that PTSD, anxiety/stress, and depression can lead to decreased immune response and increased risk of infections."[36] These illnesses are "linked with elevated stress levels," which can impact immune responses.[37] "Depression, anxiety, and PTSD have all been found to directly stimulate production of pro-inflammatory cytokines, as well as downregulate cellular immunity leading to increased risk of

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[29] *Id.*

[30] *Id.*; Supp. B, U Nonimmigrant Status Certification, Ex. C to Morales Decl. – ECF No. 1-3 at 50–53.

[31] Rabinovich Decl. – ECF No. 1-4 at 3 (¶ 7).

[32] Pet. – ECF No. 1 at 2 (¶ 1), 9 (¶ 33), 26 (¶ 75); Shidlo Decl., Ex. G to Morales Dec. – ECF No. 1-2 at 36 (¶ 2); *see also* Zein Decl., Ex. AA to Morales Supp. Decl. – ECF No. 19-1 at 7–9.

[33] Petitioner's Decl., Ex. F to Morales Decl. – ECF No. 1-2 at 28–29 (¶¶ 40–54).

[34] Neigh & Ali, *Co-Morbidity of PTSD and Immune System Dysfunction: Opportunities for Treatment*, Curr. Opin. Pharmacol. (Author Manuscript) (Aug. 1, 2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4992603/pdf/nihms805030.pdf

[35] Zein Decl., Ex. AA to Morales Third Decl. – ECF No. 19-1. M.P.H. is a Master's Degree in Public Health.

[36] *Id.* at 5.

[37] *Id*. at 7.

acute and prolonged infection, and delayed wound healing."[38] She concludes that weakened immunity due to mental-health disorders can put detainees "at increased risk of contracting and suffering from more severe forms of COVID-19."[39]

Carlos Franco-Paredes, M.D., M.P.H., D.T.M.H., who is an Associate Professor of Medicine at the University of Colorado Department of Medicine, Division of Infectious Diseases, describes COVID-19 risks at immigration detention centers.[40] "The physical and emotional trauma that detainees and asylum seekers experience can weaken their immune systems, resulting in increased risk of severe manifestations of infections."[41] Other countries have identified people with "severe psychiatric illness" as a group at "high risk of dying [from COVID-19] regardless of their age."[42]

The petitioner also suffers from latent tuberculosis.[43] Initially, he described his medical condition thusly: "it is unclear how the novel coronavirus will interact with" the petitioner's latent tuberculosis.[44] Subsequently, he submitted additional information.[45] Tuberculosis, like COVID-19, is a respiratory disease.[46] George Martinez, M.D., who conducted the petitioner's medical examination for his immigration proceedings, did not specify a definite relationship between latent tuberculosis and COVID-19, given that the virus is still new to healthcare professionals.[47] One observational study studied the relationship of tuberculosis and COVID-19 in 36 confirmed COVID-19 patients.[48] It found that "individuals with latent or active TB [Tuberculosis] may be

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[38] *Id*.

[39] *Id*. at 9.

[40] Franco-Paredes Decl., Ex. S to Morales Decl. – ECF No. 1-3 at 78–90. D.T.M.H. is a diploma in tropical medicine and hygiene.

[41] *Id.* at 81.

[42] *Id*. at 82.

[43] Pet. – ECF No. 1 at 26 (¶ 75); Rabinovich Decl. – ECF No. 1-4 at 7 (¶ 24).

[44] Pet.– ECF No. 1 at 26 (¶ 75) (citing Rabinovitch Decl. – ECF No. 1-4 at 7 (¶ 24)).

[45] Mot. – ECF No. 26. Given the nature of the proceedings, and for the reasons described above, the court considers the additional submission.

[46] Chen Study, Ex. A to Rabinovich Decl. – ECF No. 26-1 at 12.

[47] Rabinovich Decl. – ECF No. 1-4 at 7 (¶ 24).

[48] Chen Study, Ex. A to Rabinovich Decl. – ECF No. 26-1 at 6, 9–10.

more susceptible to SARS-CoV-2[49] infection."[50] It also found that "COVID-19 disease progression may be more rapid and severe" in those with latent or active tuberculosis.[51] It identified "tuberculosis history (both of active TB and latent TB) [as] an important risk factor for SARS-CoV-2 infection."[52] The study noted that its findings are limited because it is based on a low number of cases.[53]

If he is released, the petitioner has said that he will live with his wife in Oakland, California.[54] In her declarations, the petitioner's wife describes their close relationship, his relationship with her son and other children in the family, his creativity and support, his rehabilitation, and her need for his support given her health issues.[55] She identifies her two-bedroom apartment in Oakland as their residence, describes how they will be able to practice social distancing, and describes the substantial precautions she follows to ensure her health, such as washing her hands, wearing a mask and gloves outside, immediately washing her clothes when she returns to her home, cleaning frequently, and washing her hands frequently.[56]

Because the petitioner is on County parole, he will have access to robust mental-health, educational, job-training, and job-placement services.[57]

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[49] SARS-COV-2 is the virus for COVID-19. World Health Org., *Naming the coronavirus (COVID-19) and the virus that causes it,* https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it (last visited Apr. 11, 2020).

[50] Chen Study, Ex. A to Rabinovich Decl. – ECF No. 26-1 at 11.

[51] *Id.*

[52] *Id*. at 5–6.

[53] *Id*. at 12. The study has not been peer-reviewed, given that it was posted on March 16, 2020.

[54] Rabinovich Decl. – ECF No. 1-4 at 8 (¶ 30).

[55] *See* Wife's Decl., Ex. H to Morales Decl. – ECF No. 1-2 at 67–71 (¶¶ 2–29); Wife's Decl., Ex. BB to Morales Third Decl. – ECF No. 19-1 at 19 (¶¶ 3–4).

[56] *See* Wife's Decl., Ex. BB to Morales Third Decl. – ECF No. 19-1 at 19 (¶¶ 2–5).

[57] Letter, Ex. CC to Morales Third Decl. – ECF No. 19-1 at 22–31. Alameda County is resource-rich for those on County supervision.

3. Immigration Proceedings

The petitioner's conviction is an aggravated felony, which means that he is removable under § 273(a)(2)(A)(iii) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1227(a)(2)(A)(iii).[58] The petitioner advanced two claims for relief from removal: an adjustment of status (based on an approved spousal visa) and protection under the Convention Against Torture.[59] On February 13, 2020, the Immigration Judge ("IJ") denied the application for relief and ordered the petitioner removed to Haiti.[60] The IJ "observed the [petitioner's] demeanor and analyzed his testimony for consistency, specificity, and persuasiveness" and found his testimony "plausible, believable, candid, and generally consistent."[61] "After considering the totality of the evidence and weighing all the relevant factors," the IJ found the petitioner "credible and accord[ed] his testimony full evidentiary weight," and also found credible the testimony of the petitioner's wife and the examining psychologist (summarized above).[62]

On March 2, 2020, the petitioner timely appealed to the Board of Immigration Appeals.[63] There is no briefing schedule, and the timeline for a decision is anywhere from six months to over a year.[64]

As mentioned above, the petitioner has said that he will apply for a U visa.[65]

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[58] Pet. – ECF No. 1 at 7 (¶ 28); Notice to Appear, Ex. A to Morales Decl. – ECF No. 1-2 at 6.

[59] Pet. – ECF No. 1 at 7–8 (¶ 29); *see also* IJ Order, Ex. L to Morales Decl. – ECF No. 1-3 at 32–42.

[60] IJ Order, Ex. M to Morales Decl. – ECF No 1-3 at 42.

[61] *Id.* at 34.

[62] *Id.* at 36 (summarizing the psychologist's diagnoses, the strong family relationships, and the petitioner's wife's need for support from her husband, given her own ailments, and also finding other witnesses credible).

[63] Pet. – ECF No. 1 at 8 (¶ 32); Notice of Appeal, Ex. M to Morales Decl. – ECF No 1-3 at 44.

[64] Rabinovich Decl. – ECF No. 1-4 at 3 (¶¶ 5–6).

[65] *Id.* (¶ 7).

4. The Conditions of Confinement at Yuba County Jail

The petitioner's housing unit is detained in "Pod C," a large open space in the basement, housing 50 people, and divided into an upstairs and a downstairs.[66] The detainees sleep downstairs, in an open room with beds about three to four feet apart.[67] The upstairs has a communal dining area, the commissary, and an exercise space. [68] There are phones and bathrooms upstairs and downstairs.[69] There are six sinks in the pod, and one has hot water for food preparation.[70] The sinks have push-button faucets that stay on for only a short time and require repeated pressing to complete a handwashing.[71] The detainees have three meals a day, served communally, at tables that seat six people, and some eat on their cots because there are not enough spaces in the dining room.[72]

Until March 19, 2020, according to the petitioner, no jail employee cleaned inside the pod, though detainees cleaned occasionally (possibly weekly) and had to ask a guard for cleaning supplies (kept in a locked closet).[73] Before March 19, 2020, detainees could obtain soap only by buying it at the commissary, and they could not buy hand sanitizer.[74] Starting on March 20, 2020, jail officials began distributing small bars of soap that disintegrate quickly, allow only a couple of hand washes, and did not always allow distribution to all detainees.[75] There are no masks for detainees, but some (not all) staff members have masks now.[76]

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[66] *Id*. at 4 (¶¶ 10–12).
[67] *Id.* (¶ 12).
[68] *Id*.
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.* at 5 (¶ 13).
[73] *Id.* (¶ 14)).
[74] *Id*. (¶ 15).
[75] Rabinovich Decl. – ECF No. 19-2 at 2 (¶ 4).
[76] *Id.* at 2–3 (¶ 6).

According to the government, the jail can house 210 detainees.[77] Since March 11, 2020 (the date that the World Health Organization declared COVID-19 a global pandemic), ICE's Enforcement and Removal Operations is "taking affirmative steps to reduce the number of detainees" at Yuba County Jail and has reduced the population (from 168 to 150) by 10 percent.[78] As of April 2, 2020, there are 150 detainees at Yuba, 140 male and 10 female.[79] The number of detainees can fluctuate based on book-ins and releases.[80] ICE is assessing detainees at intake, placing any detainees with COVID-19 symptoms in quarantine (and testing them), and thereafter providing appropriate treatment.[81]As of April 9, 2020, there are no suspected or confirmed cases of COVID-19 at Yuba.[82] The jail has "increased sanitation frequency and provides sanitation supplies including disinfectants, sanitizer, and soap in every housing unit," and the "administration is encouraging both staff and the general staff population to use these [hygiene] tools often and liberally."[83] It has suspended in-person visits and limited professional visits to noncontact visits.[84] It screens all staff and vendors for body temperature when they enter the facilities.[85] It provides education to staff and detainees on the importance of hand-washing and other hygiene measures.[86] It has "identified housing units for the quarantine of patients who are suspected of or test positive for COVID-19" (after the assessment and monitoring protocols that apply during intake).[87]

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[77] Lovedel Decl. – ECF No. 16-1 at 4 (¶ 7).

[78] *Id*.

[79] *Id*.

[80] *Id*. The petitioner replies to this point by pointing to increased book-ins and a resulting increased population of detainees. Reply – ECF No. 19 at 6–7; Zukin Decl., Ex. H to Morales Decl. – ECF No. 19-1 at 118–120 (¶¶ 4–8).

[81] Moon Decl. – ECF No. 16-2 at 5–6 (¶¶ 8–10).

[82] *See* Moon Decl. – ECF No. 16-2 at 6 (¶ 12) ("As of March 26, 2020 there are zero suspected cases of COVID-19 in the Yuba County Jail and zero confirmed cases"); Lovedel Decl. – ECF No. 16-1 at 5 (¶ 11). The respondent said at the April 9, 2020 hearing that this remains the case.

[83] Moon Decl. – ECF No. 16-2 at 6 (¶ 14).

[84] *Id*. (¶ 15).

[85] *Id*. (¶ 16).

[86] *Id*. at 7 (¶ 18).

[87] *Id*. (¶ 19).

5. Procedural Background

In his § 2241 petition, the petitioner challenges the conditions of his confinement (based on his inability to address his medical vulnerabilities through CDC-recommended measures such as social distancing and using cleaning products) and claims that his continued detention violates (1) his substantive due-process right under the Fifth Amendment to the U.S. Constitution to be detained in a safe situation, free from punitive conditions of confinement, and (2) his procedural due-process right to a bond hearing under the Fifth Amendment.[88]

The court granted the petitioner's unopposed motion to proceed pseudonymously.[89] The court held a hearing on the TRO on April 9, 2020.[90]

STANDARD OF REVIEW

A TRO preserves the status quo and prevents irreparable harm until a hearing can be held on a preliminary-injunction application. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 439 (1974). A TRO is an "extraordinary remedy" that the court should award only when a plaintiff makes a clear showing that it is entitled to such relief. *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7, 22 (2008).

The standards for a TRO and a preliminary injunction are the same. *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co., Inc.,* 240 F.3d 832, 839 n.7 (9th Cir. 2001). A movant must demonstrate (1) a likelihood of success on the merits, (2) a likelihood of irreparable harm that would result if an injunction were not issued, (3) the balance of equities tips in favor of the plaintiff, and (4) an injunction is in the public interest. *Winter*, 555 U.S. at 20. The irreparable injury must be both likely and immediate. *Id*. at 20–21. "[A] plaintiff must demonstrate immediate threatened injury as a prerequisite to preliminary injunctive relief." *Caribbean Marine Serv. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988).

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[88] *Id*. at 29–30 (¶¶ 83–90).

[89] Order – ECF No. 10; Statement of Non-Opposition – ECF No. 9.

[90] Mot. – ECF No. 6; Opp'n – ECF Nos. 16, 17; Reply – ECF No. 19; Minute Entry – ECF No. 23.

Before *Winter*, the Ninth Circuit employed a "sliding scale" test that allowed a plaintiff to prove either "(1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) [ ] serious questions going to the merits were raised and the balance of hardships tips sharply in its favor." *Walczak v. EPL Prolong, Inc*., 198 F.3d 725, 731 (9th Cir. 1999) (citation omitted). In this continuum, "the greater the relative hardship to [a movant], the less probability of success must be shown." *Id*. After *Winter*, the Ninth Circuit held that although the Supreme Court invalidated one aspect of the sliding scale approach,[91] the "serious questions" prong of the sliding scale survived if the plaintiff satisfied the other elements for preliminary relief. *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131–32 (9th Cir. 2011). Thus, a preliminary injunction may be appropriate when a movant raises "serious questions going to the merits" of the case and the "balance of hardships tips sharply in the plaintiff's favor," provided that the other elements for relief also are satisfied. *Id*. at 1134–35.

ANALYSIS

The government argues that (1) the petitioner cannot challenge the conditions of his confinement in a § 2241 petition seeking immediate release, (2) the petitioner did not exhaust his administrative remedies, (3) the petitioner lacks standing because any injury is speculative, and (4) the petitioner does not establish his entitlement to a TRO.[92] These arguments are not persuasive.

First, the court can address the petitioner's challenges to the conditions of confinement in a § 2241 petition. *See, e.g.*, *Ortuño*, No. 3:20-cv-02064-MMC, Order – ECF No. 38 at 4 (N.D. Cal. Apr. 8, 2020); *Bent v. Barr*, No. 4:19-cv-06123-DMR, 2020 WL 1812850, at *2–3 (N.D. Cal. Apr. 9, 2020) (collecting cases); *see Lopez-Marroquin v. Barr*, No. 18-72922, Order (9th Cir. Apr. 9, 2020) (construing immigration detainee's COVID-19-related request for release under the All Writs Act as a 28 U.S.C. § 2241 petition and remanding to district court for consideration).

[91] The Supreme Court in *Winter* rejected the Ninth Circuit's holding that "the 'possibility' of irreparable harm was sufficient, in some circumstances to justify a preliminary injunction." *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). Instead, the *Winter* Court held that "plaintiffs must establish that irreparable harm is *likely*, not just possible, in order to obtain a preliminary injunction." *Id*. (emphasis in original).

[92] Opp'n – ECF No. 16 at 15–24.

Second, for habeas claims, exhaustion of administrative remedies is prudential, not jurisdictional. *Hernandez v. Sessions*, 872 F.3d 976, 988 (9th Cir. 2017). A court "may require prudential exhaustion when: (1) agency expertise makes agency considerations necessary to generate a proper record and reach a proper decision; (2) relaxation of the requirement would encourage the deliberate bypass of the administrative scheme; and (3) administrative review is likely to allow the agency to correct its own mistakes and to preclude the need for judicial review." *Id*. (*citing Puga v. Chertoff*, 488 F.3d 812, 815 (9th Cir. 2007)). "Nonetheless, a court may waive the prudential exhaustion requirement if administrative remedies are inadequate or not efficacious, pursuant of administrative remedies would be a futile gesture, irreparable injury will result, or the administrative proceedings would be void." *Id*. (citation and quotation omitted).

Waiver of the prudential exhaustion requirement is appropriate here. Courts have entertained similar COVID-19 claims under habeas jurisdiction without mentioning prudential exhaustion. *See Bent*, 2020 WL 1812850 at *5–6 (collecting cases addressing habeas challenges). Also, the petitioner's claim of entitlement to a bond hearing is based on the Fifth Amendment (as opposed to being grounded in a statutory entitlement), and thus exceeds the jurisdiction of the immigration courts and the BIA. *See Hernandez v. Wolf*, No. 5:20-cv-00617-TJH (KSx), Order – ECF No. 17 at 10 (C.D. Cal. April 1, 2020) (waiving prudential exhaustion in a case with similar facts about the conditions of confinement). In addition, the petitioner suffers continued harm from the lack of a bond hearing, and given his health issues, irreparable injury results from his continued detention. *See Jimenez v. Wolf*, No. 5:19-cv-07996-NC, Order – ECF No. 25 at 3–4 (N.D. Cal. Mar. 6, 2020) (waiving the prudential-exhaustion requirement for similar reasons).

Third, the petitioner has standing. The risk of injury is not speculative. The petitioner submitted uncontested statements from public-health experts about the risks in jails, prisons, and detention centers. The risks are serious, even without a confirmed case of the virus in this detention center. *See Bent*, 2020 WL 1812850 at *3–4. The weight of authority supports the conclusion that detainees have standing. *See, e.g.*, *id.* at *3 ("[g]iven the exponential spread of the virus, the ability of COVID-19 to spread through asymptomatic individuals[,] . . . effective relief for [petitioner] and other detainees may not be possible if they are forced to wait until their

particular facility records a confirmed case") (collecting cases); *Ortuño*, No. 3:20-cv-02064-MMC, ECF No. 38 at 3 (where petitioners have not contracted COVID-19, standing is still met because of how rapidly the disease can spread in a confined space); *see also Castillo v. Barr*, No. 5:20-cv-00605-TJH (AFMx), 2020 WL 1502864, at *4–5 (C.D. Cal. Mar. 27, 2020) (standing based on similar facts); *see also Xochihua-Jaimes v. Barr*, No. 18-71460, 2020 WL 1429877 (9th Cir. Mar. 24, 2020) (sua sponte ordering the petitioner released (and his removal stayed) pending final disposition by the court "[i]n light of the rapidly escalating public health crisis, which public health authorities predict will especially impact immigration detention centers."

* * *

Fourth, as discussed in the next sections, the petitioner has satisfied the four TRO factors: (1) a likelihood of success on the merits, (2) a likelihood of irreparable harm, (3) the balance of equities tips in favor of the petitioner, and (4) an injunction is in the public interest.

1. Likelihood of Success on the Merits

The petitioner has two claims: (1) a substantive due-process claim under the Fifth Amendment that his conditions of confinement — in light of his heightened risk to COVID-19 — amount to punishment, and (2) a procedural due-process claim under the Fifth Amendment because he has been in ICE custody for a year and has not had a bond hearing.[93]

1.1 Substantive Due-Process Claim

The petitioner has at least raised a serious question that his continued detention poses risks that exceed the government's needs to ensure his presence at immigration proceedings, in violation of his substantive due-process rights under the Fifth Amendment.

Because the petitioner is a civil detainee, his confinement is unconstitutional under the Fifth Amendment if his conditions of confinement "amount to punishment." *Bell v. Wolfish*, 441 U.S. 520, 535 (1979); *Jonas v. Blanas*, 393 F.3d 918, 932 (9th Cir. 2004) (quoting *Bell*, 441 U.S. at 535); *accord Bent*, 2020 WL 1812850 at *4; *Ortuño*, No. 3:20-cv-02064-MMC, Order – ECF No.

[93] Pet. – ECF No. 1 at 29–30 (¶¶ 83–90).

38 at 4; *Castillo*, 2020 WL 1502864 at *3. "[P]unitive conditions may be shown (1) where the challenged restrictions are expressly intended to punish, or (2) where the challenged restrictions serve an alternative, non-punitive purpose but are nonetheless excessive in relation to the alternative purpose, . . . or are employed to achieve objectives that could be accomplished in so many alternative and less harsh methods." *Jonas*, 393 F.3d at 932 (citations and quotation marks omitted). The government's legitimate, non-punitive interests include ensuring a detainee's presence at immigration proceedings. *See id.* (ensuring a detainee's presence at trial); *Ortuño*, No. 3:20-cv-02064-MMC, Order – ECF No. 38 at 4 (immigration proceedings).

The issue here is whether, in light of the petitioner's health, his detention is excessive in relation to the government's interest in securing his presence at immigration proceedings. The evidence is undisputed that those with respiratory ailments are more susceptible to being infected by COVID-19, and the petitioner's other diagnoses of chronic PTSD and depression compound his susceptibility. His risk is heightened because detainees at Yuba County jail live in close quarters, cannot practice social distancing, do not have masks, and do not have access to adequate disinfecting and cleaning supplies.

Courts have found that similar conditions of confinement do not meet the constitutional standard for at-risk civil detainees. *See, e.g.*, *Ortuño*, No. 3:20-cv-02064-MMC, Order – ECF No. 38 at 6–7 (petitioners with diabetes and asthma; detainees are in close quarters, do not have masks, and cannot meaningfully practice social distancing); *Bent*, 2020 WL 1812850 at *2, 5–6 (petitioner with asthma, hypertension, and pre-diabetes; inadequate soap, sanitizer, and cleaning supplies; resulting inability — despite efforts to encourage social distancing — to implement the CDC's social-distancing guidelines; "public health experts make clear that an outbreak in confined spaces is potentially devastating") (collecting cases); *Castillo*, 2020 WL 1502864, at *5 (detainees cannot maintain a six-foot distance and were "put into a situation where they are forced to touch surfaces touched by other detainees, such as with common sinks, toilets, and showers;" noted the risks of infection in immigration facilities, given the rotation of facility guards and staff); *Hernandez*, No. 5:20-cv-00617-TJH (KSx), Order – ECF No. 17 at 1, 5–6, 13 (petitioner with hypertension and multiple medical ailments; similar conditions of confinement); *Basank v.*

Decker, 20-cv-2518 (AT), 2020 WL 1481503, at *5 (S.D.N.Y. Mar. 26 2020) (inability to maintain social distancing to protect high-risk detainees shows a likelihood of success on the merits).

In sum, the petitioner has at least shown a serious question that his continued detention exceeds the government's legitimate interest in assuring his appearance in immigration proceedings. (The court addresses flight risk and danger to the community in section 2, below.)

1.2 Procedural Due-Process Claim

Because he has not had a bond hearing (despite a year in ICE custody), the petitioner has shown that he is likely to succeed on the merits of his procedural due-process claim.

A person who (like the petitioner) commits an aggravated felony may be detained in immigration proceedings, and the statutory scheme does not provide for a bond hearing or limit the length of detention. *See* 8 U.S.C. §§ 1226(a), (c); *Jennings v. Rodriguez*, 138 S. Ct. 830, 844, 846 (2018) ("§ 1226(c) does not on its face limit the length of the detention it authorizes."); *Jimenez v. Wolf*, No. 5:19-cv-7996-NC, 2020 WL 510347, at *2 (N.D. Cal. Jan. 30, 2020). Still, the Fifth Amendment "entitles aliens to the due process of law in deportation proceedings." *Demore v. Kim*, 538 U.S. 510, 523 (2003). When confinement continues past a year, courts are wary of continued custody absent a bond hearing. *Gonzalez v. Bonnar*, No. 3:18-cv-05321-JSC, 2019 WL 330906, at *3 (N.D. Cal. Jan. 26, 2019) (collecting cases). Courts apply the three-factor balancing test in *Mathews v. Eldridge*, 424 U.S. 319 (1976), to evaluate the constitutionality of the detention. *See, e.g.*, *Jimenez*, 2020 WL 510347 at *3 The three factors are (1) the private interest affected by the official action, (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value of any additional procedural safeguards, and (3) the government's interest, "including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." *Mathews*, 424 U.S. at 334–35.

First, there is no briefing schedule for the BIA appeal, and the uncontested timeline is anywhere from another six months to over a year. Given the petitioner's detention for almost a year to date, and the likelihood of six months to a year in the future, the length of detention

supports the conclusion that the petitioner's private interest militates in favor of his claim that the denial of a bond hearing violates his procedural due-process rights under the Fifth Amendment. *Gonzalez*, 2019 WL 330906, at *5; *Jimenez*, 2020 WL 510347 at *3.

Second, the other factors weigh in the petitioner's favor. The probable value of a hearing (given the lack of any bond hearing) is high. And while there is an important government interest in securing the petitioner's presence at any removal, the procedural due-process inquiry is about holding a bond hearing to assess whether the alien represents a flight risk or a danger to the community. *Jimenez*, 2020 WL 510347 at *3.

2. Remaining TRO Elements

The first element is irreparable harm. Continued detention and exposure to health-threatening conditions establish this element. *Sessions*, 872 F.3d at 994 (unconstitutional detention is irreparable harm); *Bent*, 2020 WL 1812850 at *6 (health issues establish irreparable harm to the petitioner's health and safety); *Ortuño*, No. 3:20-02064-MMC, Order – ECF No. 38 at 8 (same).

The second and third elements — the balance of equities and whether an injunction is in the public interest — merge. *Bent*, 2020 WL 1812850 at *7. The public's interests are containing COVID-19, securing the petitioner's appearance in his immigration proceedings, and preventing any danger to the community. *Id.*; *Ortuño*, No. 3:20-cv-02064-MMC, ECF No. 38 at 8. Under the circumstances here, the balance of equities and the public interest weigh in favor of release.

The petitioner cannot meaningfully protect himself at Yuba County jail from the risks of his custody. *Ortuño*, No. 3:20-cv-02064-MMC, ECF No. 38 at 8; *Bent*, 2020 WL 1812850 at *7. Injunctive relief that prevents the further spreading of the virus and allows social distancing is in the public's interest. *Ortuño*, No. 3:20-cv-02064-MMC, ECF No. 38 at 8 ("the public interest in promoting public health is served by efforts to contain the further spread of COVID-19, particularly in detention centers"); *Bent*, 2020 WL 1812850 at *7 (collecting cases); *Castillo*, 2020 WL 1502864 at *6 ("[t]he public has a critical interest in preventing the further spread of the

coronavirus").[94] By living with his wife, the petitioner will be able to protect himself and others through social distancing and the other hygienic measures that the CDC recommends.

As to the risk of flight and danger to the community, the global pandemic is changing behavior and the way courts assess risk of flight and community safety. *See Bent*, 2020 WL 1812850 at *7 (collecting cases). The petitioner has substantial ties to the community and every incentive to comply with the conditions of his supervision, given the alternative of custody and the attendant dangers to his health there. He has a parole officer and considerable community resources, as discussed above, which means he has the supervision necessary to secure his appearance at immigration proceedings and ensure the safety of the community. His underlying crime is serious. But the record of his confinement shows his substantial rehabilitation. The IJ also found the petitioner to be plausible, believable, candid, and consistent, and the psychological evaluation of the petitioner confirmed his good behavior, his low risk of violence, and the likelihood that he will function successfully, both socially and vocationally.[95] Also, the court's conditions of release address any concern about flight risk and safety of the community.

In sum, given the petitioner's combination of medical issues (chronic PTSD, depression, and latent tuberculosis), the COVID-19 pandemic, the conditions of confinement at Yuba County jail, the irreparable harm to the petitioner, the balance of equities, and the public interest, the court grants the TRO and, as relief, orders the petitioner's release.

CONCLUSION

The court grants the petitioner's motion for a TRO and orders his immediate release from custody.

The petitioner must reside with his wife in Oakland (at the address that she provided in her declaration), and he must shelter in place unless otherwise directed by his parole officer. What that

[94] Social distancing and sheltering in pace are the means to prevent the spread of the virus and not overwhelm the health-care system. Siobhan Roberts, *Flattening the Coronavirus Curve* (Mar. 27, 2020), https://www.nytimes.com/article/flatten-curve-coronavirus.html.

[95] IJ Order, Ex. M to Morales Decl. – ECF No. 1-3 at 34; Shidlo Decl., Ex. G to Morales Decl. – ECF No. 102 at 39–53 (¶¶ 14–63).

means is that pending further order of the court or the permission of his parole officer, the petitioner may leave home only to obtain medical care, meet with his parole officer (as directed), meet with his attorneys, appear at any immigration proceedings, or to obey any order issued by the immigration authorities. While on release, he must not violate any federal, state, or local law. The petitioner's parole officer may impose additional conditions or modify these conditions — when it is appropriate to do so — to allow the petitioner to engage in gainful activity. His attorneys must file any modified conditions on the docket.

Within two business days, the parties must confer about and submit a proposed schedule for the court's issuing a preliminary injunction. Ordinarily, that would require the government to show cause why the court should not issue a preliminary injunction, and the petitioner to thereafter file a response, and the government to file a reply.

IT IS SO ORDERED.

Dated: April 12, 2020

LAUREL BEELER
United States Magistrate Judge

EXHIBIT G

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES – GENERAL

Case No.	5:13-cv-0444-VAP-OPx	Date	April 14, 2020
Title	*Quinton Gray v. County of Riverside*		

Present: The Honorable	VIRGINIA A. PHILLIPS, CHIEF UNITED STATES DISTRICT JUDGE

CHRISTINE CHUNG	Not Reported
Deputy Clerk	Court Reporter

Attorney(s) Present for Plaintiff(s):	Attorney(s) Present for Defendant(s):
None Present	None Present

Proceedings: **(IN CHAMBERS) MINUTE ORDER GRANTING "EMERGENCY MOTION TO ENFORCE CONSENT DECREE" [DKT. 177]**

On April 6, 2020, Plaintiff Quinton Gray ("Plaintiff") filed a document captioned "Emergency Motion[1] to Enforce Consent Decree." ("Motion," Dkt. 177). Pursuant to this Court's April 8, 2020 Minute Order, (Dkt. 182), Defendant County of Riverside ("Defendant") opposed the Motion on April 10, 2020 ("Opp.," Dkt. 183). After considering all papers submitted in support of, and in opposition to, the Motion, as well as the arguments advanced during the telephonic hearing on April 13, 2020, the Court GRANTS the Motion.

In 2016, the Parties entered into a Consent Decree "to ensure the provision of constitutional health care and to ensure non-discrimination for inmates with disabilities in the Riverside County Jails." (Dkt. 173 ¶ 1). The plaintiff class includes three distinct subclasses: the medical subclass, which comprises "[a]ll prisoners who are now, or will in the future be, subjected to the medical care policies and practices of the Riverside

[1] The Court notes that an "Emergency Motion" is procedurally improper. Plaintiff should have filed an ex parte application to shorten time for hearing on a motion, in conformance with Local Rule 7-19. In the interests of justice, the Court will treat Plaintiff's Motion as though it had been filed properly.

Jails"; the mental health subclass, which comprises "[a]ll prisoners who are now, or will in the future be, subjected to the mental health care policies and practices of the Riverside Jails"; and the disability subclass, which comprises "all prisoners who are now, or will be in the future, subjected to policies and practices of the Riverside jails regarding specialized or sheltered housing for prisoners due to their mobility impairments and need for assistive devices, and the provision and confiscation of accommodations for prisoners with mobility impairments[.]" (Dkt. 173 ¶ 3).

The Parties to the Consent Decree negotiated a Remedial Plan, which "is designed to meet the minimum level of health care necessary to fulfill Defendant's obligations under the Eighth and Fourteenth Amendments, as well as to ensure non-discrimination against inmates with disabilities in the areas addressed by the Plan, as required by the ADA and Section 504 of the Rehabilitation Act." (Dkt. 173 ¶ 9). In light of the coronavirus ("COVID-19") pandemic[2], "Plaintiffs seek to enforce the Consent Decree by requiring the County to submit a plan to the Court to implement the Governor's order for physical distancing for all Californians housed in the jails and to provide sanitation and other essential services generally accepted as necessary in correctional facilities to provide for the basic health needs of incarcerated people." (Motion at 3-4).

As Defendant argues, the Consent Decree specifies a dispute resolution process which provides that the Parties first conduct negotiations to resolve informally matters in dispute, then, if they are unable to resolve the dispute, to request that the Relevant Court experts evaluate the issue and prepare a report. Following preparation of this report, if the parties still are unable to resolve the issue, they may request mediation with Judge Raul Ramirez. Only after having mediated are the parties to file a motion for relief with this Court. (Dkt. 173 ¶¶ 26–29). Here, the parties have conducted the first two steps, but have not yet mediated. Nevertheless, "[g]iven the urgent nature of the proceedings, Plaintiffs request the Court modify the Consent Decree to allow for urgent appeal for enforcement directly to the Court." (Motion at 17 n.2).

[2] The pandemic has caused unprecedented disruption to daily life. On March 13, 2020, the President of the United States declared a National Emergency in response to the Coronavirus Disease- 2019 ("COVID-19") pandemic pursuant to the National Emergencies Act (50 U.S.C. § 1601, et seq.). California Governor Gavin Newson has declared a state of emergency in response to the COVID-19 outbreak and, in his March 19, 2020 Executive Order N-33-20, "require[d] physical distancing to keep Californians at least six feet apart at all times and to prepare hospitals and health care workers for the coming surge in cases." (Motion at 2).

The Court finds good cause to modify the Consent Decree to permit appeal to this Court. "[A] party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree. . . . A party seeking modification of a consent decree may meet its initial burden by showing either a significant change either in factual conditions or in law."" *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 383–84 (1992). The party seeking modification need not prove the change in circumstance was "unforeseen and unforeseeable" at the time of entering into the consent decree, but "[o]rdinarily, . . . modification should not be granted where a party relies upon events that *actually were anticipated* at the time it entered into a decree." *Id*. at 385 (emphasis added). Here, clearly, the emergency resulting from the pandemic constitutes a "significant change in circumstances" that was not actually foreseen at the time the parties entered into the Consent Decree. *Id*. at 383.

The parties therefore meet the standard to modify the Consent Decree to permit appeal to this Court. In light of the urgency of the matter, the Court orders a two-track dispute resolution mechanism. The Parties are to proceed with mediation before Judge Ramirez on April 17, 2020, or an earlier date, if possible. (*See* Opp. at 10). The Court simultaneously assumes jurisdiction to enforce the Consent Decree to the extent specified in this Order.

The Court next turns to Defendant's obligations under the Consent Decree. Plaintiff seeks to enforce the Consent Decree's mandate to "meet the minimum level of health care necessary to fulfill Defendant's obligations under the Eighth and Fourteenth Amendments," (Dkt. 173 ¶ 9), by ensuring that Defendants implement the physical distancing recommendations made by the Court's experts, (*see* Dkt. 178, Ex. J, Allen Expert Report, ¶¶ 9-10, 14-16; Dkt. 178, Ex. K, Gage Expert Report, ¶¶ 5-10.). Plaintiff argues that the County has several options available to limit the spread of the disease within the jails, including transferring prisoners to new, currently empty, John J. Benoit Detention Center ("JJBDC") in Indio, California; relocating particularly vulnerable prisoners; and even release people to allow for physical distancing. (Motion at 4). At the hearing, Defendant did not have information regarding conditions in the existing county jail facilities, insisted that moving prisoners to a newly completed, empty jail in Indio was not feasible, and admitted that it had not researched alternative housing options such as recreation centers, halfway houses, and hotels. Rather than having created a plan to safeguard those most vulnerable to the COVID-19 virus, Defendant conceded that it has not conducted an analysis of its own records to identify particularly vulnerable prisoners. It also has not conducted an analysis of its jail population to determine whether there are any low-level offenders who might be eligible for early release.

Despite Defendant's insistence that conditions in the Riverside County jails are compliant with public health recommendations regarding social distancing, its counsel lacked information to respond to the Court's questions regarding the ability to maintain 6 feet distance between all prisoners in the jail, at all times, its plan for doing so, the size of cells and dormitories, and the number of prisoners per room.

Defendant failed to provide satisfactory information about the feasibility of transfer of prisoners to other jail or non-jail facilities, including transfers of prisoners currently confined in crowded jails to the new, empty, John J. Benoit Detention Center ("JJBDC") in Indio, California. The County states that it is "not-yet-ready to be populated" but provides no details as to why. (Opp. at 13). The County stated at the hearing that the facility was completed in February 2020, but maintained that it is not yet ready for prisoners. In their papers and at the hearing, Defendant argued that "[t]he Sheriff's Department is currently in the midst of a ninety day 'transition period' of the facility to determine whether any issues arise that will need to be resolved before JJBDC can be populated with inmates." (Dkt. 183-4, "Graves Decl." ¶ 4). The County states that the technology used in the JJBDC facility differs from that of other County facilities, but did not explain, in its papers or at the hearing, why this would prevent the transfer of inmates in an emergency situation. (Graves Decl. ¶ 5).

Should the County be unable to implement adequate social distancing within its existing jail facilities and take other necessary steps to decrease risk of infection, this Court has the authority to order the transfer of prisoners to different facilities. Under California law, the Sheriff has the authority to relocate prisoners to respond to emergency situations:

> In any case in which an emergency endangering the lives of inmates of a state, county, or city penal or correctional institution has occurred or is imminent, the person in charge of the institution may remove the inmates from the institution. He shall, if possible, remove them to a safe and convenient place and there confine them as long as may be necessary to avoid the danger, or, if that is not possible, may release them.

Other courts, including the Superior Court for the County of Sacramento County, already have ordered the Sheriff to use its authority under Cal. Gov't Code § 8658 to respond to the coronavirus emergency. *See* Order Authorizing Sacramento County Sheriff's Department to Grant Release (Cal. Super. Ct., Sac. Cty., Mar. 25, 2020).

Defendant argues that the Prison Litigation Reform Act ("PLRA") precludes this Court from ordering the release of prisoners. Even assuming this is true, nothing in the

PLRA prohibits a district judge from ordering the transfer of prisoners in response to violations of their constitutional rights, as the district court did in *Brown v. Plata*, 2013 WL 3200587, No. C01-1351 TEH (N.D. Cal. June 24, 2013), nor would it prohibit the Court from ordering the Sheriff to use his authority under § 8658 to transfer prisoners.

"[A]n order to transfer any single inmate out of a prison to correct the violation of a constitutional right" where a "transfer was necessary for the inmate to obtain appropriate medical care" is not a "prisoner release order," but rather a transfer. *Plata v. Brown*, 2013 WL 3200587 at *8. The same is true of "a policy that would result in transfer of a large group of inmates." *Id*. Indeed, several potential courses of action qualify as "transfer" for the purposes of the PLRA. Relocation to halfway houses, for example, is a "transfer" rather than "release." The PLRA defines a "residential reentry center" as a form of "prerelease custody." See 18 U.S.C. § 3624(g)(2)(B) ("A prisoner placed in prerelease custody pursuant to this subsection who is placed at a residential reentry center shall be subject to such conditions as the Director of the Bureau of Prisons [(BOP)] determines appropriate."). Ninth Circuit case law assumes that a person in a "residential reentry center" is a "prisoner" and subject to BOP control. *See, e.g.*, *Bottinelli v. Salazar*, 929 F.3d 1196, 1200 (9th Cir. 2019) (citing 18 U.S.C. § 3624(c)(1) as "requiring that the BOP, 'to the extent practicable, ensure that a prisoner serving a term of imprisonment spends a portion of the final months of that term' in prerelease custody").

In *Plata v. Brown*, the court declined to decide which standard governs the court's review of such requests for transfer, finding that the *Plata* plaintiffs could satisfy the most burdensome standard. That standard "would require [them] to demonstrate that the [transfer] policy must be enforced because failure to do so would result in deliberate indifference under the Eighth Amendment." *Id*. at *10. The Court makes no determination here as to whether Plaintiff has met this standard, but notes that the County's recitation of "aggressive and swift" measures it has taken in response to COVID-19, *none* of which concern jails, suggests that the County's failure to act to protect inmates does indeed constitute deliberate indifference. (Opp. at 16). The County's assurances that it has provided unlimited free soap to prisoners and advised prisoners to remain physically distant—without establishing that it is physically possible to do so—is unlikely to be sufficient to defeat a claim of deliberate indifference (or sufficient to defeat the request to transfer prisoners for health reasons).

In sum, Defendant has failed to demonstrate that it is currently taking adequate precautions to protect the health of the prisoners in the county jails. Plaintiff's request that Defendant be required "to submit a plan to the Court to implement the Governor's order for physical distancing for all Californians housed in the jails" (Motion at 3-4), is therefore GRANTED.

Plaintiffs are instructed to submit a proposed order detailing the findings and outstanding questions from the April 13, 2020 hearing no later than 4:00 p.m. on April 15, 2020. Prior to submission to the Court, Plaintiff shall share the proposed order with Defendant, who may approve the it as to form and content or submit objections to Court thereafter.

IT IS SO ORDERED.

EXHIBIT H

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MARIA ALEJANDRA CELIMEN SAVINO, JULIO CESAR MEDEIROS NEVES, and all those similarly situated, Petitioners,	)	CIVIL ACTION NO. 20-10617-WGY
v.	)	
STEVEN J. SOUZA, Superintendent of Bristol County House of Corrections in his official capacity, Respondent.	)	

YOUNG, D.J. April 8, 2020

MEMORANDUM & ORDER

I. INTRODUCTION

This habeas petition reflects the petitioners' dire personal circumstances and legal grievances. Yet it also speaks to the shared anxieties of a world brought to its knees by the pandemic of the novel coronavirus, dubbed COVID-19. It reaches the Court at an especially grim moment.[1] The petitioners are civil immigration detainees who say they are held in tight quarters and unable to keep safe distance from others who may --

[1] See Sarah Westwood, Surgeon General: This Week Will Be Like a 'Pearl Harbor' and '9/11' Moment, CNN (Apr. 5, 2020 1:25 pm), https://www.cnn.com/2020/04/05/politics/jerome-adams-coronavirus/index.html.

and with time, inevitably will -- carry the highly contagious virus. They demand release or implementation of social distancing and other hygienic practices recommended by infectious disease experts.

Pending before this Court are their petition for a writ of habeas corpus, their motion for class certification, and their motion for a preliminary injunction. The Court is not yet ready to rule on the underlying habeas petition or the motion for a preliminary injunction. Rather, the Court ALLOWS the motion for class certification, with slight modification, and takes this opportunity to explain its reasoning with respect to bail. For the health and safety of the petitioners -- as well as the other inmates, staff, and the public -- the Court will expeditiously consider bail for appropriate detainees.

A. Factual Background

The named petitioners are two of approximately 148 individuals (the "Detainees") detained by Immigration and Customs Enforcement ("ICE") on civil immigration charges and held at the Bristol County House of Corrections ("BCHOC") in North Dartmouth, Massachusetts. Pet. Writ Habeas Corpus ("Pet.") ¶ 1, ECF No. 1; Opp'n Mot. TRO ("Opp'n"), Ex. A, Aff. Sheriff Thomas H. Hodgson ("Hodgson Aff.") ¶ 6(o), ECF No. 26-1.[2]

[2] Though Sheriff Hodgson's affidavit, dated March 29, 2020, states that there are 148 ICE detainees in the BCHOC, the

The Detainees are held in two on-site facilities: ninety-two are in a separate ICE facility called the C. Carlos Carreiro Immigration Detention Center ("Carreiro"), and the rest are housed in a portion of the BHCOC called "Unit B" together with non-immigration pre-trial detainees. Id.; Pet. ¶ 1; Opp'n 2.[3]

Since February, the respondent ("the government") asserts, the medical team and administration of BCHOC "have instituted strict protocols to keep inmates, detainees and staff safe and take all prudent measures to prevent exposure to the COVID- 19 infection." Hogdson Aff. ¶ 5. Entrance into the facilities by outsiders is now generally prohibited; attorneys, clergy, and staff are "medically screened prior to entrance by questions relating to COVID-19 symptoms and by body temperature assessment." Id. ¶ 6(a)-(d). Inmates and detainees who are over 60-years-old or are immuno-compromised "are being specially monitored." Id. ¶ 6(k). In addition:

> All housing units are sanitized no less than three times per day. Fresh air is constantly circulated by opening windows and utilizing handler/vents throughout the day. All feeding is done inside the housing or

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government provided the Court (in a submission dated April 1, 2020) with a list of 147 names received from ICE that it represented as a complete roster of ICE detainees at BCHOC. The Court expects that this discrepancy be cleared up quickly.

[3] The government explains that "[o]nly detainees who have been classified by ICE as high risk, typically based upon violent behavior (and not in any way related to COVID-19), are housed with non-immigration pre-trial inmates, but this is not in the general population." Opp'n 2.

> cells and inmates do not congregate for meals in the main dining hall. Outside recreation is done as usual daily except that it is now done on split schedule to prevent close inmate-to-inmate contact.

Id. ¶ 6(f). According to BCHOC's medical director, Dr. Nicholas J. Rencricca, "we are doing all that we can to reduce the risk of a COVID-19 outbreak within BCHOC." Aff. Nicholas J. Rencricca, MD, PhD ¶ 24. As of April 8, 2020, "there have been no inmates or immigration detainees who have presented with, or have tested positive for, COVID-19" at BCHOC, though one "unit intake nurse tested positive for COVID-19" and she last showed up to work on March 24. Decl. Debra Jezard ¶ 8; Def.'s Input Apr. 8 List 1, ECF No. 58.

The Detainees dispute much of this. They allege, for instance, that "BCHOC facilities lack adequate soap, toilet paper, and medical resources and infrastructure to address the spread of infectious disease or to treat people most vulnerable to illness." Pet. ¶ 70. They also state that "[h]ygiene is . . . unavailable and unavailing under the[ir] conditions," id. ¶ 6, and that they "are unaware of any meaningful safety measures enacted by Defendants since the inception of this crisis," id. ¶ 28. Their "confinement conditions are a tinderbox," the Detainees warn, "that once sparked will engulf the facility." Id. ¶ 29. Yet there are important aspects of the Detainees'

allegations that are substantially undisputed. Chief among these is the challenge of social distancing in BCHOC.

The Centers for Disease Control and Prevention ("CDC") states that "COVID-19 spreads mainly among people who are in close contact (within about 6 feet) for a prolonged period," and therefore recommends that everyone practice "social distancing" -- even among those with no symptoms, since the virus can be spread by asymptomatic people. CDC, Social Distancing, Quarantine, and Isolation (reviewed Apr. 4, 2020), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html (last accessed Apr. 6, 2020). The CDC thus advises that everyone "[s]tay at least 6 feet (2 meters) from other people." Id. The CDC has issued guidance specifically for prisons and detention centers that beat the same drum. CDC, Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities, at 4 (Mar. 23, 2020), https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf ("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."); id. ("Social distancing is the practice of increasing the space between individuals and decreasing the frequency of contact to reduce

the risk of spreading a disease (ideally to maintain at least 6 feet between all individuals, even those who are asymptomatic).").

The Detainees assert that they "find it impossible to maintain the recommended distance of 6 feet from others" and they "must also share or touch objects used by others." Pet. ¶ 67. They specifically allege that their beds "are situated only 3 feet apart" and that "[m]eals are inadequate and eaten in close quarters." Pet. ¶ 68. Indeed, the government has provided the Court with photos of the sleeping quarters in the facility and this appears to be an accurate description.[4] In one unit the "cell size" is listed as 30 feet by 10 feet (300 square feet), and the photo shows three bunk beds (sleeping six people) lining the wall. Other images supplied include a photo labeled "Bunk Area" that shows a large room packed with rows of bunk beds. None appears to enjoy anything close to six feet of isolation. One of the named petitioners, Mr. Neves, avers that he "is being held in the same room as 49 other people," that his "bed is too close to other people," and that he is "not able to

[4] The government protests that "not every bed is filled and the minimal distance is believed to be between ends, not the long sides of beds." Def.'s Suppl. Br. 9 n.6, ECF No. 41. The CDC's guidelines are concerned with people, not furniture, so the Court does not see what bearing the government's distinction (whether the beds are measured from their length or width) has upon the safety of the Detainees.

engage in 'social distancing.'" TRO Mem., Ex. 8, Decl. Julio Cesar Medeiros Neves ¶¶ 4-6, ECF No. 12-8.

The COVID-19 global pandemic threatens all of us. Yet "[t]he combination of a dense and highly transient detained population presents unique challenges for ICE efforts to mitigate the risk of infection and transmission." Opp'n, Ex. 2, Memorandum from Enrique M. Lucero, ICE, to Detention Wardens & Superintendents 1 (Mar. 27, 2020), ECF No. 26-2. As the Supreme Judicial Court of Massachusetts recently explained in reference to statewide correctional facilities, including BCHOC, "correctional institutions face unique difficulties in keeping their populations safe during this pandemic." Committee for Pub. Counsel Servs. v. Chief Justice of the Trial Court, No. SJC-12926, 2020 WL 1659939, at *3 (Mass. Apr. 3, 2020). Indeed, BCHOC's medical director acknowledged the obvious fact "that a prison setting poses particular challenges from an infectious disease standpoint," while asserting that "the risk of infection is tempered by the degree of control we have over access to the facility." Renricca Aff. ¶ 21.

The Detainees have provided affidavits from two physicians who have recently visited Detainees on site. Dr. Nathan Praschan of Massachusetts General Hospital states that "[t]he best-known methods of preventing infectious spread," such as "social distancing, frequent hand washing, and sanitation of

surfaces . . . are unavailable to . . . [these] detainees, who sleep, eat, and recreate in extremely close quarters and do not have access to basic hygienic supplies." Decl. Dr. Nathan Praschan ¶ 9. Dr. Matthew Gartland of Brigham and Women's Hospital avers that "based on my own experience visiting Bristol County House of Corrections, I do not believe that . . . [these] detainees, can be adequately protected from the virus that causes COVID-19. This is based on a lack of private sinks or showers and inadequate hand soap supplies, and hand sanitizers, as well as inadequate allowance for social distancing, screening for symptoms and exposure to the virus, testing of individuals with symptoms, and appropriate quarantine and isolation facilities." Decl. Dr. Matthew Gartland ¶ 16.

B. Procedural History

The Detainees filed a habeas petition as a putative class action in this Court on March 27, 2020. Pet. The petition asserts two claims: (1) violation of due process as a result of confinement in conditions "that include the imminent risk of contracting COVID-19," id. ¶¶ 98-105; and (2) violation of section 504 of the Rehabilitation Act for failure to provide reasonable accommodations, in the form of protection against COVID-19, to Detainees with medical conditions, id. ¶¶ 105-116.

On the same day, the Detainees filed a motion for a temporary restraining order ("TRO"), ECF No. 11, and a motion

for class certification, ECF No. 13. As these motions refer only to the due process claim, the Detainees do not seek a TRO or class certification for their claim under the Rehabilitation Act. See Mem. Supp. Mot. Temporary Restraining Order ("TRO Mem."), ECF No. 12; Mem. Supp. Pls.' Mot. Class Cert. ("Class Cert. Mem."), ECF No. 14; Reply Resp.-Def.'s Opp'n Mot. TRO ("Pet'rs' Reply") 16 n.6. The Government has opposed both motions. See Opp'n; Def.'s Suppl. Br., ECF No. 41.

The Court held an initial hearing on March 30, 2020, converting the motion for a TRO into a motion for a preliminary injunction.[5] ECF No. 27. At the next hearing, on April 2, 2020, the Court provisionally certified five subclasses and took the other matters under advisement. Electronic Clerk's Notes, ECF No. 36; see Order, ECF No. 38 (listing twelve members of first subclass). The following day, the Court held another hearing at which it was informed that the Government voluntarily agreed to release six members of the first subclass. The Court deemed the case moot as to those individuals, ordered release on bail under certain conditions for three other members of the subclass,[6] and

[5] All hearings in this matter have been held remotely by video conference in light of the danger posed by COVID-19.

[6] The bail order was as follows:

> The Court grants bail to Henry Urbina Rivas, Robson Maria-De Oliveira, and Jervis Vernon pending resolution of the habeas corpus petition, upon all

either denied bail without prejudice or continued the matter for the rest of the subclass. Order, ECF No. 44. The Court notified the parties that it would consider bail for fifty additional detainees, id. ¶ 6, and later set a schedule for considering those fifty individual bail applications at a rate of ten per day beginning on April 7, 2020. Order, ECF No. 46. It has since ordered bail for several more Detainees. See ECF Nos. 54-55.

> bail conditions deemed appropriate and imposed by ICE, and the following additional terms and conditions as to each of them: (a) release only to an acceptable custodian; (b) such custodian will pick the releasee up outside the facility by car; (c) releasee will be taken from the facility to the place of residence previously identified to ICE (ICE shall notify the state and local law enforcement authorities about their presence and the[] details of their bail status); (d) releasees are to be fully quarantined for 14 days from date leaving facility to the residence; (e) during and after the 14-day quarantine, releasees will remain under house arrest, without electronic monitoring, and shall not . . . leave the residence for any reason save to attend immigration proceedings or attend to their own medical needs should those needs be so severe that they have to go to a doctor's office or hospital (in which case they shall notify ICE as soon as practicable of their medical necessity); (f) releasees are not to be arrested by ICE officers unless: (i) upon probable cause a warrant is issued by a United States Magistrate Judge or United States District Judge that they have violated any terms of their bail, or (ii) there is a final order of removal making them presently removable from the United States within two weeks. The Court may, sua sponte or on motion of the parties, modify or revoke the bail provided herein.

Order ¶ 2, ECF No. 44.

II. ANALYSIS

This opinion tackles three issues. First, the Court rejects the government's argument that the Detainees lack Article III standing because their risk of injury is too speculative. Next, the Court certifies a general class of Detainees for their due process claim of deliberate indifference to a substantial risk of serious harm. Though there are indeed pertinent and meaningful distinctions among the various Detainees, there is a common question of unconstitutional overcrowding that binds the class together. Nor, contrary to the government's assertion, is there a statutory bar to class certification in this case. Finally, the Court explains its rulings and authority in ordering bail for certain Detainees.

A. Article III Standing

To satisfy constitutional standing in federal court, a habeas petitioner (like other litigants) "must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." Spencer v. Kemna, 523 U.S. 1, 7 (1998) (quoting Lewis v. Continental Bank Corp., 494 U.S. 472, 477 (1990)). The government argues the Detainees' "claims of future injury are hypothetical" and "conjectural" because "crowding in and of itself does not cause COVID-19 infection if none in the group has contracted COVID-19." Opp'n 15.

The Court disagrees. The Supreme Court has held that "future injuries" may support standing "if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur." Department of Commerce v. New York, 139 S. Ct. 2551, 2565 (2019) (quoting Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2341 (2014)). In this moment of worldwide peril from a highly contagious pathogen, the government cannot credibly argue that the Detainees face no "substantial risk" of harm (if not "certainly impending") from being confined in close quarters in defiance of the sound medical advice that all other segments of society now scrupulously observe.[7] See TRO Mem., Ex. 1, Decl. Alan S. Keller, M.D. ¶ 10, ECF No. 12-1 ("[T]he risk of COVID-19 infection and spread in immigration detention facilities,

[7] Amazingly, the government appears to make this argument. At the April 2 hearing, the government emphasized that no Detainee or inmate in BCHOC has yet tested positive for COVID-19 and argued that "if the Court starts from the position that the Court's goal here is to reduce the concentration of inmates it has jumped past the presence, or non-presence, of the virus to an assumption that the virus is present and therefore we're going to do everything we can to increase social distancing." In a later filing the government reiterated the point: "It is ICE's position, for the record, that release of none of the listed individuals is required for either their safety or the safety of the remaining civil detainee population at BCHOC." Defs.' Input Regarding Apr. 7 List 1, ECF No. 50. Yet the government's quarrel is not with the Court but with the vigorous recommendations of infectious disease experts worldwide, including in the federal government, to maximize social distancing.

including Bristol County, is extremely high."). This risk of injury is traceable to the government's act of confining the Detainees in close quarters and would of course be redressable by a judicial order of release or other ameliorative relief.

Accordingly, the Court rules that the Detainees easily meet Article III's standing requirements.

B. Class Certification

The Detainees moved to certify the following proposed class: "All civil immigration detainees who are now or will be held by Respondents-Defendants at the Bristol County House of Corrections (BCHOC) and the C. Carlos Carreiro Immigration Detention Center ("Carreiro") in North Dartmouth, Massachusetts." Class Cert. Mem. 9. At the hearing on April 2, 2020, the Court declined to certify the class as proposed but provisionally certified five subclasses. Electronic Clerk's Notes, ECF No. 36.[8] The Court does not now revisit that

[8] The Court described the five provisionally certified subclasses as follows:

Group 1: Detainees with no criminal record and no pending criminal charges.

Group 2: Detainees with medical conditions recognized under the CDC guidelines as heightening their risk of harm from COVID-19 and who have minor, non-violent criminal records or minor, non-violent criminal charges pending.

Group 3: Detainees without the medical conditions of Group 2 but who likewise have minor criminal records or minor, primarily non-violent criminal charges pending.

Group 4: Detainees with pending criminal charges against them for violent crimes, either in the United States or abroad.

provisional ruling.[9] Yet it does, for the reasons given below, now certify the general class as proposed by the Detainees, albeit excluding those not yet in custody.

1. Bar on Classwide Injunction in Immigration Matters

The government first argues that the proposed class cannot be certified because 8 U.S.C. § 1252(f)(1) bars courts (other than the Supreme Court) from enjoining or restraining the "operation" of immigration enforcements actions except in their application to "an individual alien against whom proceedings under such chapter have been initiated." Opp'n 9. The government cites dicta from Reno v. American Arab Anti-Discrimination Comm. indicating that classwide injunctive relief

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Group 5: Detainees with criminal convictions for violent crimes, either in the United States or abroad.

[9] The government argues, without citation to authority, that "Rule 23(c)(5) requires that there be a class first before subclasses are created." Def.'s Suppl. Br. 8. The Court has found only one judicial opinion seemingly endorsing that view, Sprague v. General Motors Corp., 133 F.3d 388, 399 n.9 (6th Cir. 1998) (en banc), while the Eleventh Circuit disagrees, Klay v. Humana, Inc., 382 F.3d 1241, 1261–62 (11th Cir. 2004). See 3 William B. Rubenstein, Newberg on Class Actions § 7:29 n.1 (5th ed. 2019) (citing circuit split); Scott Dodson, Subclassing, 27 Cardozo L. Rev. 2351, 2389 (2006) (concluding that "the best interpretation" of Fed. R. Civ. P. 23 allows subclasses to be certified in the absence of a valid general class). The First Circuit recently suggested that "[t]he commonality standard might also be satisfied in some cases by certifying subclasses." Parent/Professional Advocacy League v. City of Springfield, 934 F.3d 13, 29 n.15 (1st Cir. 2019) (citing Mark C. Weber, IDEA Class Actions After Wal-Mart v. Dukes, 45 U. Tol. L. Rev. 471, 498–500 (2014)). In any case, because the Court now certifies the general class, the question is academic.

is simply not available in immigration cases. 525 U.S. 471, 481-82 (1999) (describing § 1252(f) as "prohibit[ing] federal courts from granting classwide injunctive relief against the operation of [8 U.S.C.] §§ 1221–1231"). Thus, the government appears to argue, the Court cannot certify this class now because it will not later be able to provide classwide relief.

Yet section 1252(f) says nothing about declaratory relief, which the Detainees expressly request here in addition to injunctive relief. Pet. 24. Accordingly, this provision does not bar declaratory relief and therefore poses no obstacle to class certification. See Reid v. Donelan, 390 F. Supp. 3d 201, 226 (D. Mass. 2019) (Saris, C.J.); Rodriguez v. Marin, 909 F.3d 252, 256 (9th Cir. 2018); Alli v. Decker, 650 F.3d 1007, 1014 (3d Cir. 2011). Seeking to avoid this conclusion, the government cites a Sixth Circuit decision for the proposition that declaratory relief may be the "functional equivalent" of a prohibited classwide injunction. Opp'n 11 (quoting Hamama v. Adducci, 912 F.3d 869, 880 n.8 (6th Cir. 2018)). The Sixth Circuit opinion was issued after three Justices argued to the contrary in Jennings v. Rodriguez, 138 S. Ct. 830, 876 (2018) (Breyer, J., dissenting), but before three other Justices agreed, see Nielsen v. Preap, 139 S. Ct. 954, 962 (2019) (plurality opinion). With six Justices of the current Supreme Court now on record stating that section 1252(f) does not bar

declaratory relief, and because that is the better reading of the statute, the Court adheres to that view. See Reid, 390 F. Supp. 3d at 226; Reid v. Donelan, No. 13-30125-PBS, 2018 WL 5269992, at *7-8 (D. Mass. Oct. 23, 2018) (Saris, C.J.).

This is not to suggest that injunctive relief will be categorically unavailable in this case. See Marin, 909 F.3d at 256 (allowing a classwide injunction when all members of the class were individuals against whom detention proceedings had been initiated, in accordance with the exception contained in section 1252(f)(1)). Nor does the Court intimate that it will eventually provide any relief at all, since it has not yet reached the merits. At this class certification stage, it is enough to establish that the Court could provide a classwide remedy in the form of a declaratory judgment or injunctive relief. Having established that, the Court rejects the government's argument that section 1252(f) precludes class certification.

2. The Requirements of Rule 23

"To obtain class certification, the plaintiff must establish the four elements of [Fed. R. Civ. P.] 23(a) and one of several elements of Rule 23(b)." Smilow v. Southwestern Bell Mobile Sys., Inc., 323 F.3d 32, 38 (1st Cir. 2003) (citing Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997)). Rule 23(a) permits class certification only if:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

In addition to establishing these four elements, the Detainees must satisfy one of Rule 23(b)'s categories. The Detainees rely on Rule 23(b)(2), Class Cert. Mem. 16-17, which permits class certification when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

Since numerosity and adequacy appear well-founded, the government challenges only the commonality and typicality of the proposed class. Opp'n 13 ("The proposed class lacks uniformity and the Plaintiffs are not representative of the proposed class members."). Though commonality and typicality are distinct elements under Rule 23(a), the Supreme Court has repeatedly recognized that they "tend to merge." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349 n.5 (2011) (quoting General Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157 n.13 (1982)). Indeed, the government attacks both commonality and typicality with the same set of arguments. The gist of the government's contention on

this score is that the various detainees are not "similarly situated" because they "are of different ages and all present different levels of health at this time." Opp'n 12. Furthermore, the government points out that some detainees are subject to statutorily mandated detention while others are not, and that "each detainee presents a different risk of flight and/or public safety threat if released." Id. Accordingly, the Court treats commonality and typicality together.

To establish commonality under Rule 23(a)(2), one common question is enough. Wal-Mart, 564 U.S. at 359. "A question is common if it is 'capable of classwide resolution -- which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.'" Parent/Professional Advocacy League v. City of Springfield, 934 F.3d 13, 28 (1st Cir. 2019) (quoting Wal-Mart, 564 U.S. at 350). It is not critical whether common "questions" are raised; the decisive factor is "the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." Id. (quoting Wal-Mart, 564 U.S. at 350).

The Detainees frame the common question as follows: "Whether the conditions of confinement at Bristol County Immigration Detention Facilities, under the current conditions and in light of the COVID-19 pandemic, render class members'

confinement a punishment that violates constitutional standards." Class Cert. Mem. 18-19. Here, as is typical in the Rule 23 commonality inquiry, "proof of commonality necessarily overlaps with [the Detainees'] merits contention." Wal-Mart, 564 U.S. at 352. Accordingly, the Court now discusses the merits of the Detainees' constitutional claim, but only to the extent necessary to decide the class certification question. See Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds, 568 U.S. 455, 466 (2013) ("Merits questions may be considered to the extent -- but only to the extent -- that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.").

When the government "so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs -- e.g., food, clothing, shelter, medical care, and reasonable safety -- it transgresses . . . the Due Process Clause." DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 197 (1989). The due process guarantee of the Constitution obliges the government "to refrain at least from treating a pretrial detainee with deliberate indifference to a substantial risk of serious harm to health." Coscia v. Town of Pembroke, 659 F.3d 37, 39 (1st Cir. 2011) (citing City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 244 (1983) & Farmer v. Brennan, 511

U.S. 825, 835 (1994)). "Proof of deliberate indifference requires a showing of greater culpability than negligence but less than a purpose to do harm," id. (citing Farmer, 511 U.S. at 835), "and it may consist of showing a conscious failure to provide medical services where they would be reasonably appropriate," id. (citing Estelle v. Gamble, 429 U.S. 97, 104 (1976)). "To show such a state of mind, the plaintiff must provide evidence that the defendant had actual knowledge of impending harm, easily preventable, and yet failed to take the steps that would have easily prevented that harm." Leite v. Bergeron, 911 F.3d 47, 52-53 (1st Cir. 2018) (quoting Zingg v. Groblewski, 907 F.3d 630, 635 (1st Cir. 2018) (further citation and internal quotation marks omitted). "This standard, requiring an actual, subjective appreciation of risk, has been likened to the standard for determining criminal recklessness." Id. at 53 (quoting Giroux v. Somerset Cty., 178 F.3d 28, 32 (1st Cir. 1999)). Courts generally apply the same standard for civil immigration detainees as for pre-trial detainees. See E. D. v. Sharkey, 928 F.3d 299, 306-07 (3d Cir. 2019) (stating that "the legal rights of an immigration detainee [are] analogous to those of a pretrial detainee" and collecting cases of other circuits).

With this legal background in mind, it is understandable why the government highlights the differences among the Detainees. For example, it may be easier for Detainees who are

at heightened risk of harm from COVID-19 to prove the "substantial risk of serious harm" prong of the inquiry than it will be for healthier Detainees who lack special risk factors. Detainees with a serious criminal background might have a tougher time demonstrating that the government could "have easily prevented that harm" by releasing them on bond, for instance. Indeed, these very considerations guided the Court in provisionally certifying five separate subclasses.

Upon reflection, however, the Court determines that the admittedly significant variation among the Detainees does not defeat commonality or typicality. At bottom, a common question of law and fact in this case is whether the government must modify the conditions of confinement -- or, failing that, release a critical mass of Detainees -- such that social distancing will be possible and all those held in the facility will not face a constitutionally violative "substantial risk of serious harm." Farmer, 511 U.S. at 847. Crucial to the Court's determination is the troubling fact that even perfectly healthy detainees are seriously threatened by COVID-19. To be sure, the harm of a COVID-19 infection will generally be more serious for some petitioners than for others. Yet it cannot be denied that the virus is gravely dangerous to all of us.

Consider recent data from the CDC. In a sample of COVID-19 patients aged 19 and older with no underlying health conditions

or risk factors, approximately 7.2-7.8% were hospitalized without requiring admission to the Intensive Care Unit ("ICU"), and an additional 2.2-2.4% were hospitalized in the ICU, totaling 9.6-10.4%. If the pool is restricted to patients between the ages of 19 and 64, all with no underlying health conditions reported, approximately 6.2-6.7% were hospitalized without admission to the ICU, and an additional 1.8-2.0% required the ICU, for a total hospitalization rate of 8-8.7%. The rates of hospitalization and ICU admittance are significantly higher for those with underlying health conditions.[10] Since COVID-19 is highly contagious and the quarters are close, the Detainees' chances of infection are great. Once infected, taking hospitalization as a marker of "serious harm," it is apparent that even the young and otherwise healthy detainees face a "substantial risk" (between five and ten percent) of such harm.

Likewise, the "deliberate indifference" part of the inquiry, which asks whether the government "disregards th[e]

[10] See Nancy Chow et al., CDC COVID-19 Response Team, Preliminary Estimates of the Prevalence of Selected Underlying Health Conditions Among Patients with Coronavirus Disease 2019 — United States, February 12–March 28, 2020, 69 Morbidity & Mortality Weekly Report 382, 382-84 (Apr. 3, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6913e2-H.pdf. It must be emphasized that this data is partial and preliminary. See id. at 384-85 (listing six limitations on the report's findings).

risk by failing to take reasonable measures to abate it," Farmer, 511 U.S. at 847, is apt to generate a common answer for the entire class of Detainees. The question is not so much whether any particular Detainee should be released -- a matter as to which the various individuals are surely differently situated. Rather, the question is whether the government is taking reasonable steps to identify those Detainees who may be released in order to protect everyone from the impending threat of mass contagion. Nor does it matter how the density of Detainees is reduced. Transfer to less crowded facility, deportation, release on bond, or simply declining to contest lawful residence -- any of these methods would effectively minimize the concentration of people in the facility. This affords the government greater flexibility and minimizes the differences among the various Detainees.

The case law supports a finding of commonality for class claims against dangerous detention conditions, even when some detainees are more at risk than others. For example, the Ninth Circuit affirmed class certification for an Eighth Amendment challenge to inmate medical care policies, explaining that "although a presently existing risk may ultimately result in different future harm for different inmates -- ranging from no harm at all to death -- every inmate suffers exactly the same constitutional injury when he is exposed to a single statewide

[department of corrections] policy or practice that creates a substantial risk of serious harm." Parsons v. Ryan, 754 F.3d 657, 678 (9th Cir. 2014). Similarly, the Fifth Circuit affirmed class certification of all prisoners in an overheated prison, despite the variations in health and risk among prisoners, because the prison authority's "heat-mitigation measures . . . were ineffective to reduce the risk of serious harm to a constitutionally permissible level for any inmate, including the healthy inmates." Yates v. Collier, 868 F.3d 354, 363 (5th Cir. 2017). Here, too, even the otherwise healthy Detainees face a substantial risk of serious harm from COVID-19. The commonality analysis of Parsons and Yates is persuasive and has been approvingly cited by the First Circuit. See Parent/Professional, 934 F.3d at 28 n.14. Accordingly, the Court rules that the commonality and typicality prongs of the Rule 23(a) analysis are satisfied.

Before certifying the class, the Court pauses to consider the uniformity of remedy required by Rule 23(b)(2). See Wal-Mart, 564 U.S. at 360 (holding that "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant."). Thus, the Court may certify the class

only if it would be entitled to an "indivisible" remedy. Id. The Court concludes that a uniform remedy would be possible in this case, whether in the form of declaratory relief or (depending on the proper reading of 8 U.S.C. § 1252(f), as alluded to above) an injunction ordering the government to reduce crowding of Detainees. Cf. Brown v. Plata, 563 U.S. 493, 502 (2011) (affirming classwide injunction of "court-mandated population limit" in state prisons to remedy Eighth Amendment violations due to "severe and pervasive overcrowding").

Thus, the requirements of Rule 23 are met and the Court certifies the general class as proposed by the Detainees, with one caveat: The Court declines to include those who "will be held," Class Cert. Mem. 9, but are not yet in custody. Although the government has not declared that it will not admit more detainees to BCHOC during this health crisis, it has agreed to notify the Court before doing so. Tr. Hr'g 25, ECF No. 48. The Court sees no need to include possible future detainees in this class. Moreover, since the situation is rapidly evolving and future detainees may well be subject to different confinement conditions than those now obtaining, it may be that the named representative cannot "fairly and adequately protect the interests" of those future detainees. Fed. R. Civ. P. 23(a)(4); cf. Amchem, 521 U.S. at 625-26 (holding that differences between

currently injured and not-yet-injured members of proposed class defeated adequacy requirement).

C. The Court's Inherent Authority to Order Bail

The Court now turns to explain its decision to order bail for several Detainees and to consider bail applications for others. The First Circuit has explained "that a district court entertaining a petition for habeas corpus has inherent power to release the petitioner pending determination of the merits." Woodcock v. Donnelly, 470 F.2d 93, 94 (1st Cir. 1972) (per curiam). Such authority may be exercised in the case of "a health emergency," where the petitioner has also demonstrated a likelihood of success on the merits. Id. For example, Woodcock approvingly cited Johnston v. Marsh, in which the Third Circuit affirmed the decision of the district court granting bail to a habeas petitioner who, "as an advanced diabetic, was, under conditions of confinement, rapidly progressing toward total blindness." 227 F.2d 528, 529-32 (3d Cir. 1955). In Mapp v. Reno, the Second Circuit held that "the federal courts have the same inherent authority to admit habeas petitioners to bail in the immigration context as they do in criminal habeas case." 241 F.3d 221, 223 (2d Cir. 2001). A court considering bail for a habeas petitioner "must inquire into whether 'the habeas petition raise[s] substantial claims and [whether] extraordinary circumstances exist[] that make the grant of bail necessary to

make the habeas remedy effective.'" Id. at 230 (alterations in original) (quoting Iuteri v. Nardoza, 662 F.2d 159, 161 (2d Cir. 1981)).

Other courts, including another session of this Court, have recently relied on Mapp to order bail for habeas petitioners who were civil immigration detainees at risk due to the COVID-19 pandemic. See Avendaño Hernandez v. Decker, No. 20-CV-1589 (JPO), 2020 WL 1547459, at *2-4 (S.D.N.Y. Apr. 1, 2020); Jimenez v. Wolf, Civ. A. No. 18-10225-MLW, Memorandum & Order ("Jimenez Order"), ECF No. 507 (D. Mass. Mar. 26, 2020) (Wolf, J.). As expressed during the hearing on April 3, the Court follows these precedents in construing its authority to order bail for habeas petitioners under the reigning "exceptional circumstances," Glynn v. Donnelly, 470 F.2d 95, 98 (1972), of this nightmarish pandemic. Like Judge Wolf in Jiminez and Judge Oetken in Hernandez, this Court ruled that bail was appropriate for some Detainees on the basis of Mapp and its First Circuit analogues.[11]

[11] The First Circuit in Glynn stated that bail should not be ordered without "a clear case" on both the law and the facts, and that "Merely to find that there is a substantial question is far from enough," 470 F.2d at 98, and Woodcock indicated that a finding of likelihood of success on the merits may be needed, 470 F.2d at 94. This contrasts with Mapp, which required only (apart from the presence of extraordinary circumstances) that the petitioner raise "substantial claims." 241 F.3d at 230. Yet, as Judge Wolf observed, the First Circuit cases were dealing with a state prisoner convicted of a crime and for that reason insisted upon a higher standard, see Glynn, 470 F.2d at 98, whereas here "the Mapp test or something similar or perhaps

Additionally, the Court follows the light of reason and the expert advice of the CDC in aiming to reduce the population in the detention facilities so that all those who remain (including staff) may be better protected. In this respect, the Supreme Judicial Court of Massachusetts has articulated sound principles: "[T]he situation is urgent and unprecedented, and . . . a reduction in the number of people who are held in custody is necessary," but "the process of reduction requires individualized determinations, on an expedited basis, and, in order to achieve the fastest possible reduction, should focus first on those who are detained pretrial who have not been charged with committing violent crimes." Committee for Pub. Counsel Servs., 2020 WL 1659939, at *9.[12] The Court will proceed in a similar fashion in diligently entertaining bail applications while the petitions for habeas corpus are pending.

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less is appropriate." Jimenez Order, Ex. 1, at 1-2, ECF No. 507-1. This Court agrees, though it makes little difference because the Detainees released on bail would also satisfy a more exacting standard.

[12] With respect to federal prisons, Congress responded to the pandemic by expressly authorizing the Bureau of Prisons to exceed the statutory maximum period of home confinement if the Attorney General makes a finding of "emergency conditions," CARES Act, Pub. L. No. 116-136, § 12003(b)(2) (2020), and the Attorney General has now found such an emergency. See Memorandum of Attorney General William Barr to Director of Bureau of Prisons (Apr. 3, 2020), https://www.politico.com/f/?id=00000171-4255-d6b1-a3f1-c6d51b810000.

III. CONCLUSION

The motion for class certification is ALLOWED. The Court now certifies the following class: "All civil immigration detainees who are now held by Respondents-Defendants at the Bristol County House of Corrections and the C. Carlos Carreiro Immigration Detention Center in North Dartmouth, Massachusetts." The named petitioners in this action, Maria Alejandra Celimen Savino and Julio Cesar Medeiros Neves, are appointed class representatives.

SO ORDERED.

/s/ William G. Young
WILLIAM G. YOUNG
DISTRICT JUDGE

EXHIBIT I

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

LILIAN PAHOLA CALDERON JIMENEZ AND LUIS GORDILLO, ET AL., individually and on behalf of all others similarly situated,	)	
Petitioners-Plaintiffs,	)	
v.	)	C.A. No. 18-10225-MLW
CHAD WOLF, ET AL.,	)	
Respondents-Defendants.	)	

MEMORANDUM AND ORDER

WOLF, D.J. March 26, 2020

Attached is a transcript of the decision, issued orally on March 25, 2020, granting the Motion for Immediate Interim Release of Class Member Salvador Rodriguez-Aguasviva (Docket No. 500).

UNITED STATES DISTRICT JUDGE

* * * * *

THE COURT: I'm going to decide this matter, and I will explain my decision. The transcript will be a record of the decision and you must order it. It's possible I'll write this up, but I do think this is an urgent matter and I should tell you my decision, so I will.

First, I've concluded for the reasons described by the Second Circuit in Mapp v. Reno, 241 F. 3d 221 at 230, a 2001 Second Circuit case, that District Courts do have the power to order the release of immigration detainees on bail. I don't think that the REAL ID Act alters that fundamental authority.

As I said earlier, I believe that the Glynn v. Donnelly case, the First Circuit case, 470 F.2d 95, 98 is distinguishable in a material respect. In Glynn, the First Circuit did hold that in certain extraordinary circumstances a District Court could release a detained petitioner before the petition was decided on the merits. It created a higher standard or stated a higher standard than the Second Circuit in Mapp. In Glynn, the petitioner was somebody who had been convicted of a crime. I believe his appeal had been denied, and then he was petitioning for habeas corpus, but he had no presumption of innocence.

In this case, it's important to remember we're talking about a civil detainee, somebody who has never been charged, let alone convicted of any crime. And I think that the Mapp

test or something similar or perhaps less is appropriate. As I said, the Mapp test where the court in Mapp said -- I don't know -- somebody perhaps didn't mute their phone because, unless I'm hearing the court reporter, there's something clicking, banging.

But the court in Mapp said the court considering a habeas petitioner's fitness for bail must inquire into whether the habeas petitioner raises substantial claims and whether extraordinary circumstances exist to make the grant of bail necessary to make the habeas remedy effective. And I would add to that that, even if those requirements are met, the court would have to be satisfied that the petitioner would not be a danger to the community, reasonably assured that the petitioner would not be a danger to the community or not would flee if released on reasonable feasible conditions.

I do find, without expressing any prediction of how the merits will be resolved, that a substantial claim or question is raised by the petitioner's habeas petition. The initial description by ICE of the reason for his detention -- well, the reason for his detention sent to petitioner's counsel in an email was that in effect -- well, that he was likely to be unable -- the petitioner was likely to be unable to receive an approved I-601A because he did not appear at his removal hearing. He was ordered removed in absentia. The essence of this, the way it was stated initially indicated that ICE was

under the impression or misimpression that the petitioner is ineligible for an I-601A.

While I've commended Mr. Lyons and Mr. Charles on many things they've done, since June 2018, I have found ICE has repeatedly failed to understand its own regulations as I held in 2018. And I learned, to my dismay, in the fall of 2019, when the witness responsible for much of the national program for many years testified that he didn't understand -- he didn't realize there was a regulation that required that everybody detained more than six months had to be interviewed. It would be sadly consistent with the pattern in this case if ICE misunderstood whether somebody who failed to appear for a removal hearing was ineligible for an I-601A.

And indeed it appears that ICE's position has evolved and they don't take that position anymore. Mr. Lyons has articulated in his declaration other reasons for the detention, but there is the question of whether those reasons were in his mind when he decided to detain the petitioner or whether the affidavit that appears to have been drafted by a lawyer has rationalizations that weren't part of the decisionmaking process at issue. That's an issue that I may need to hear testimony on. I also -- but I do think that there's a substantial question, a substantial claim.

In addition, I find that extraordinary circumstances exist that make the grant of bail necessary to make the habeas

effective, to make the habeas remedy effective. To be blunt, we're living in the midst of a coronavirus pandemic. Some infected people die; not all, but some infected people die. If the petitioner is infected and dies, the case will be moot. The habeas remedy will be ineffective.

And being in a jail enhances risk. Social distancing is difficult or impossible. Washing hands repeatedly may be difficult. There is, it appears not to be disputed, one court -- one Plymouth County jail employee who has been
03:31 infected, and there's a genuine risk that this will spread throughout the jail. Again, the petitioner is in custody with people charged with or convicted of crimes. He's not been charged or convicted of anything.

I've also considered what I ordinarily consider in making or reviewing bail decisions in criminal cases. There's no contention that the petitioner will be dangerous to any individual or the community if he's released on reasonable conditions.

ICE does contend that he would be a risk of flight. That
03:32 is based on the fact that he missed one immigration hearing at which his removal was ordered and apparently did not tell ICE of his change of address. And he is facing a serious risk of being removed. He may not prevail on the habeas petition. And if he does, he may not get a provisional waiver.

However, there's no indication that the petitioner has

anyplace to go. Being among other people, say, in a homeless shelter is very dangerous, like being in a jail. There's no indication that he has any relatives or others who might take him in other than his wife. And I am ordering that he live with his wife in Lawrence, Massachusetts; that he stay in their residence, except if there is a medical need for him to leave; and, unless it's a genuine emergency, he would need the permission of ICE to leave. And he is to be on electronic monitoring, so if he leaves the residence when he hasn't been 03:33 authorized to leave, ICE would know that and, if appropriate, could come back to me to revoke his release.

In addition, there are certain equities that favor the release of the petitioner. He's now been detained since September 4, 2019. On January 27, the motion was filed to enjoin his removal. As I indicated in the course of the argument, with the assent of petitioner's counsel, class counsel, ICE has repeatedly been given extensions of time to respond to the motion.

On January 31, 2020, the parties filed a joint motion to 03:35 give ICE until February 14 to confer, and then on February 13, the respondents filed an unopposed motion for an extension of time to file their opposition until February 20, which I allowed. Then I was asked not to schedule a hearing in this case until after March 25 because Mr. Lyons would not be available from March 10 to 24. I accommodated that. And I was

told that local counsel, Ms. Piemonte, would be on trial until April 6. On March 19 I allowed the respondent's motion for respondents to file a sur-reply. And though it's possible, except for ICE asking for and receiving extensions of time to respond or file a sur-reply, that there would have been a hearing and a decision on this case earlier.

So essentially we're in a circumstance where an individual who has not been accused of any crime has been detained for -- I think it comes to about six and a half months. Part of that is because I've stayed his removal pending the decision on his motion to enjoin removal, but because of accommodations to ICE, that wasn't fully briefed until less than a week ago, and I had been asked to defer to Mr. Lyons' availability, which I did.

So for all of those reasons, I'm ordering that the petitioner be released no later than tomorrow, March 26, 2020, on the conditions I articulated and will memorialize in a brief order.

I'm ordering counsel for ICE to inform me when he has been released, and if there's some problem with implementing this order by tomorrow, you'll have to let me know promptly. Petitioners' counsel I'm directing, ordering, to inform the petitioner and his wife of my decision, including the requirements that he live with his wife and that he be on electronic monitoring. And he'll have to confirm for ICE, he'll have to provide ICE her address if they don't have it and

confirm her willingness to have her husband with her for the duration of this case.

* * * * *