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25 those similarly situated.

26 Plaintiff-Petitioners,

27 v.

28 Christopher J. LAROSE, Senior
Warden, Otay Mesa Detention Center,

Steven C. STAFFORD, United States
Marshal for the Southern District of
California,

CASE NO.

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF-PETITIONERS' EX
PARTE APPLICATION FOR
TEMPORARY RESTRAINING
ORDER AND ORDER TO SHOW
CAUSE FOR PRELIMINARY
INJUNCTION**

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1 **I. INTRODUCTION**

2 This emergency action seeks urgent court intervention to prevent a public
3 health disaster at the Otay Mesa Detention Center (“Otay Mesa” or “OMDC”).
4 To reduce the grave harm now threatening the approximately 340 people detained
5 at OMDC by the U.S. Marshals Service (“USMS”), Plaintiffs seek immediate
6 relief to secure reasonable mitigation efforts, namely, the prompt release of the
7 most medically vulnerable people in USMS custody.

8 Plaintiffs filed a class complaint and petition for writ of habeas corpus on
9 behalf of themselves and similarly situated detained individuals currently held in
10 USMS custody at Otay Mesa, seeking, among other things, a court-supervised,
11 orderly reduction in the population of detained persons at OMDC to allow for the
12 social distancing necessary to prevent the further spread of COVID-19. Otay
13 Mesa is among the detention facilities in the United States with the highest rates
14 of COVID-19 infections. Due to the unfolding crisis at OMDC, Plaintiffs now
15 bring this emergency request for a temporary restraining order, preliminary
16 injunction,¹ and/or writ of habeas corpus, seeking the immediate release of all
17 current people detained by USMS pretrial or post-conviction at OMDC who are
18 aged 45 years or older or who have medical conditions that place them at
19 heightened risk of severe illness or death from COVID-19.²

20 As of April 21, 2020, nearly 2.4 million individuals around the globe have
21 been diagnosed with the highly contagious new coronavirus, COVID-19.³ The
22

23 ¹For ease of reference and because the standards for granting the two forms of
24 relief are the same, Plaintiffs intend the phrase “temporary restraining order”
hereinafter to refer to both temporary restraining order and preliminary injunction.

25 ²The individuals covered by the relief requested herein comprise Plaintiffs’
26 proposed subclasses: (1) medically vulnerable pretrial detained persons and
27 (2) medically vulnerable post-conviction detained persons in USMS custody at
OMDC. Plaintiffs respectfully request that this immediate release of the medically
vulnerable pretrial and post-conviction subclasses be effectuated pursuant to the
Proposed Order.

28 ³*Coronavirus disease 2019 (COVID-19) Situation Report – 92*, WHO, Apr. 21,
2020, available at <https://www.who.int/docs/default->

1 United States leads the world in diagnosed cases, with almost 750,000 individuals
2 who have tested positive.⁴ Testing for the disease has been extremely limited, so
3 it is likely that many more infections have gone undiagnosed. Nationally, Centers
4 for Disease Control and Prevention (“CDC”) projections indicate that, in the
5 worst case scenario, over 200 million individuals in the United States could
6 ultimately be infected with COVID-19 without effective public health
7 intervention.⁵

8 There is no known treatment for or vaccine against COVID-19, and there is
9 no known cure. As of April 21, 2020, COVID-19 had killed over 43,000
10 individuals in the United States. Amon Decl. ¶ 5. According to CDC models,
11 there could be as many as 1.7 million deaths in the United States over the course
12 of the pandemic.⁶ The risk is heightened for individuals in vulnerable
13 populations, such as those over the age of 45 or suffering from certain underlying
14 conditions. These groups face an acute risk of serious illness or death if they
15 contract the virus.

16 In light of this threat, the COVID-19 outbreak has halted all but the most
17 essential activities and has transformed the daily lives of many Americans. The
18 CDC has advised that the only effective way to mitigate the risk of serious illness
19 or death from COVID-19, especially for people whose age or underlying medical
20 conditions place them at heightened risk of harm due to the virus, is to practice
21 social distancing and vigilant hygiene. Institutions—including schools, places of
22

23 [source/coronaviruse/situation-reports/20200421-sitrep-92-covid-19.pdf?sfvrsn=38e6b06d_6](https://www.cdc.gov/coronavirus/2019-ncov/situation-reports/20200421-sitrep-92-covid-19.pdf?sfvrsn=38e6b06d_6).

24 ⁴*Id.*

25 ⁵James Glanz, et al., *Coronavirus Could Overwhelm U.S. without Urgent Action, Estimates Say*, N.Y. Times, Mar. 20, 2020, available at
26 <https://www.nytimes.com/2020/03/13/us/coronavirus-deaths-estimate.html>; Sheri Fink, *Worst-Case Estimates for U.S. Coronavirus Deaths*, N.Y. Times, Mar. 13, 2020, available at <https://www.nytimes.com/2020/03/13/us/coronavirus-deaths-estimate.html>.

28 ⁶*Id.*

1 worship, businesses, and governments—have taken steps to reduce or eliminate
2 the number of people in close quarters. The CDC has published step-by-step
3 guidance regarding aggressive sanitation measures, such as cleaning and
4 disinfecting all surfaces for exacting periods of time with products with particular
5 alcohol contents, as well as closing off any areas used by a sick person for
6 community facilities, schools, and workplaces.⁷ The CDC has also published
7 detailed guidance on the management of COVID-19 in correctional and detention
8 facilities.⁸

9 At Otay Mesa, however, the USMS is not following the CDC’s guidance.
10 Amon Decl. ¶ 25. Moreover, as Plaintiffs’ declarations make evident, it is
11 structurally impossible for detained people in OMDC to practice the requisite
12 social distancing or personal hygiene necessary to keep themselves safe from the
13 threat of this virus. Detained persons at OMDC cannot maintain a six foot
14 distance from other individuals: they sleep, eat, bathe, and engage in other
15 activities in close proximity with each other. Cleaning standards are inadequate,
16 and cleaning supplies are not always available.

17 As of April 23, 2020, OMDC had 97 confirmed COVID-positive cases
18 among detained persons (38 persons detained by USMS and 59 persons detained
19 by ICE), 18 CoreCivic employee cases, and 8 ICE employee cases. In light of
20 this unfolding crisis, the immediate release of all current people detained by
21 USMS pretrial or post-conviction at OMDC who are aged 45 years or older or
22 who have medical conditions that place them at heightened risk of severe illness
23 or death from COVID-19 is essential and is the only meaningful way to prevent
24

25 ⁷*Cleaning and Disinfecting Your Facility*, CDC, Apr. 14, 2020, available at
26 <https://www.cdc.gov/coronavirus/2019-ncov/community/disinfecting-building-facility.html>

27 ⁸*Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in*
28 *Correctional and Detention Facilities*, CDC, Mar. 23, 2020,
<https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf>.

1 death and mitigate the proliferation of the virus among those in OMDC detention.
2 Goldenson Decl. ¶ 23. As set forth below, the danger posed by Plaintiffs’
3 detention during the COVID-19 pandemic is “so grave that it violates
4 contemporary standards of decency to expose anyone unwillingly to such a risk”
5 and violates their constitutional rights. *Helling v. McKinney*, 509 U.S. 25, 36
6 (1993).

7 Plaintiffs ask this Court to take action to protect persons detained at OMDC
8 and the public from this grave public health crisis by provisionally certifying the
9 Pretrial Class, the Pretrial Medically Vulnerable Subclass, the Post-Conviction
10 Class, and Post-Conviction Medically Vulnerable Subclass of people detained in
11 USMS custody at OMDC, and by granting this emergency request ordering the
12 immediate identification and release of the Pretrial and Post-Conviction Medically
13 Vulnerable Subclass members.⁹

14 **II. STATEMENT OF FACTS**

15 **A. COVID-19 Poses a Significant Risk of Serious Illness, Injury, 16 and Death.**

17 COVID-19 is a deadly and rapidly spreading global pandemic. As of April
18 21, 2020, the outbreak has resulted in more than 2.3 million confirmed cases
19 worldwide, with more than 160,000 deaths.¹⁰ These numbers are growing
20 exponentially; on April 21, 2020, the World Health Organization reported more
21 than 80,000 new infections worldwide in the preceding 24 hours.¹¹ The United
22 States has seen more than 750,000 cases to date and more than 35,000 deaths.¹²

23
24 ⁹*See supra* note 2.

25 ¹⁰*Coronavirus disease 2019 (COVID-19) Situation Report – 92*, WHO, Apr. 21,
26 2020, available at https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200421-sitrep-92-covid-19.pdf?sfvrsn=38e6b06d_6.

27 ¹¹*Id.*

28 ¹²*Id.*

1 The consequences of contracting COVID-19 can be severe. COVID-19 can
2 result in respiratory failure, kidney failure, and death. As of April 21, 2020, 5.4%
3 of people in the United States with a confirmed COVID-19 diagnosis died from
4 the virus.¹³ According to estimates, the fatality rate of people infected with
5 COVID-19 is about ten times higher than a severe seasonal influenza, even in
6 advanced countries with highly effective health care systems.¹⁴

7 Infected individuals who do not die from the disease can face serious
8 damage to the lungs, heart, liver, or other organs, resulting in prolonged recovery
9 periods, including extensive rehabilitation from neurological damage and loss of
10 respiratory capacity. In serious cases, COVID-19 causes acute respiratory disease
11 syndrome (“ARDS”), which is life-threatening; even those who receive ideal
12 medical care with ARDS have a 30% mortality rate.¹⁵

13 These complications can manifest at an alarming pace. Patients can show
14 the first symptoms of infection in as little as two days after exposure, and their
15 condition can seriously deteriorate in as little as five days or sooner.¹⁶ Even some
16 younger and healthier people who contract COVID-19 may require supportive
17 care, which includes supplemental oxygen, positive pressure ventilation, and in
18 extreme cases, extracorporeal mechanical oxygenation.¹⁷ The World Health
19

20 ¹³*Coronavirus Resource Center, Mortality Analysis*, Johns Hopkins Univ. (Apr.
21 21, 2020), available at <https://coronavirus.jhu.edu/data/mortality>.

22 ¹⁴Betsy McKay, *Coronavirus vs. Flu Which Virus is Deadlier*, Wall St. J., Mar.
23 10, 2020, available at <https://cutt.ly/itEmi8j>.

24 ¹⁵Letter from Faculty at Johns Hopkins School of Medicine, School of Nursing,
25 and Bloomberg School of Public Health to Hon. Larry Hogan, Gov. of Maryland,
26 Mar. 25, 2020, available at [https://bioethics.jhu.edu/wp-](https://bioethics.jhu.edu/wp-content/uploads/2019/10/Johns-Hopkins-faculty-letter-on-COVID-19-jails-and-prisons.pdf)
27 [content/uploads/2019/10/Johns-Hopkins-faculty-letter-on-COVID-19-jails-and-](https://bioethics.jhu.edu/wp-content/uploads/2019/10/Johns-Hopkins-faculty-letter-on-COVID-19-jails-and-prisons.pdf)
28 [prisons.pdf](https://bioethics.jhu.edu/wp-content/uploads/2019/10/Johns-Hopkins-faculty-letter-on-COVID-19-jails-and-prisons.pdf).

29 ¹⁶*Interim Clinical Guidance for Management of Patients with Confirmed*
30 *Coronavirus Disease (COVID-19)*, CDC, Apr. 6, 2020, available at
31 [https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-](https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html)
32 [patients.html](https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html).

33 ¹⁷Robin McKie, *Why do some young people die of coronavirus?*, The Guardian,
34 April 5, 2020, available at [https://www.theguardian.com/world/2020/apr/09/why-](https://www.theguardian.com/world/2020/apr/09/why-do-some-young-people-die-of-coronavirus-covid-19-genes-viral-load)
35 [do-some-young-people-die-of-coronavirus-covid-19-genes-viral-load](https://www.theguardian.com/world/2020/apr/09/why-do-some-young-people-die-of-coronavirus-covid-19-genes-viral-load).

1 Organization estimates that one in five people who contract COVID-19 require
2 hospitalization.¹⁸

3 Risk of serious illness or death from COVID-19 is even greater in older
4 individuals or individuals of any age who suffer from certain underlying
5 conditions.¹⁹ In a February 29, 2020 preliminary report, individuals age 50-59 had
6 an overall mortality rate of 1.3%, 60-69-year-olds had an overall 3.6% mortality
7 rate, and those 70-79 years old had an 8% mortality rate.²⁰ Early reports estimate
8 that the mortality rate for those with cardiovascular disease was 13.2%, 9.2% for
9 diabetes, 8.4% for hypertension, 8.0% for chronic respiratory disease, and 7.6%
10 for cancer.²¹ Individuals with moderate to severe asthma, severe obesity, chronic
11 kidney disease, liver disease, or who are immunocompromised also face an
12 elevated risk due to COVID-19.²² Most people in higher-risk categories who
13 develop serious illness will need advanced support. This requires highly
14 specialized equipment like ventilators that are in limited supply, and an entire
15 team of care providers, including 1:1 or 1:2 nurse-to-patient ratios, respiratory
16 therapists, and intensive care physicians.²³

17
18 ¹⁸Q&A on Coronaviruses (COVID-19), WHO, Apr. 8, 2020, *available at*
19 <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses>.

20 ¹⁹Xianxian Zhao, et al., *Incidence, clinical characteristics and prognostic factor*
21 *of patients with COVID- 19: a systematic review and meta-analysis*, Mar. 20,
2020, *available at*
22 <https://www.medrxiv.org/content/10.1101/2020.03.17.20037572v1.article-info>.

23 ²⁰*Age, Sex, Existing Conditions of COVID-19 Cases and Deaths Chart*,
24 worldometer, Apr. 16, 2020, *available at* <https://cutt.ly/ytEimUQ> (analysis
25 based on WHO China Joint Mission Report and Chinese CCDC report
26 published in the Chinese Journal of Epidemiology).

27 ²¹*Report of the WHO-China Joint Mission on Coronavirus Disease 2019*
28 *(COVID-19)*, WHO, at 12, Feb. 28, 2020, *available at*
[https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-](https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf)
[on-covid-19-final-report.pdf](https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf).

²²*Groups at Higher Risk for Severe Illness*, CDC, Apr. 17, 2020, *available at*
<https://bit.ly/3dYDrqI>.

²³Kevin McCoy and Katie Wedell, *'On-the-job emergency training': Hospitals may run low on staff to run ventilators for coronavirus patients*, USA Today, Mar. 27, 2020, *available at*

1 COVID-19 is highly contagious. It is known to spread from person to
2 person through respiratory droplets, close personal contact, and from contact with
3 contaminated surfaces and objects.²⁴ People can also spread COVID-19 while
4 asymptomatic, making testing or seclusion of only those who are exhibiting
5 symptoms an ineffective solution. Amon Decl. ¶ 12.

6 There is no vaccine against COVID-19, nor is there any known medication
7 to prevent or cure infection from the virus. Goldenson Decl. ¶ 15. The only
8 known effective measures to reduce the risk of COVID-19 are to prevent infection
9 through social distancing and vigilant hygiene, including hand washing and
10 disinfecting surfaces.²⁵

11 **B. People in Congregate Environments Such as Prisons, Jails, and**
12 **Detention Centers are Particularly Vulnerable to COVID-19.**

13 People in prisons, jails, and detention centers face a heightened risk of
14 infection, serious illness and death due to the coronavirus. Amon Decl. ¶ 17. In
15 these facilities, the high concentration of people housed in close quarters makes
16 social distancing impossible. Features like shared bathrooms, eating spaces, and
17 common areas; high rates of turnover and mixing between detained persons and
18 staff; poor ventilation; and substandard medical services create inherent risks in
19 the context of a virus that is transmitted through respiratory droplets, close
20 personal contact, and from contact with contaminated surfaces and objects.
21 Goldenson Decl. ¶ 19. Limited access to sinks, showers, toilets, water, personal
22

23
24 <https://www.usatoday.com/story/news/nation/2020/03/27/coronavirus-hospitals-face-shortages-respiratory-therapists-run-ventilators/2914635001/>.

25 ²⁴*Interim Infection Prevention and Control Recommendations for Patience with*
26 *Suspected or Confirmed Coronavirus Disease 2019 (COVID-19) in Healthcare*
Settings, CDC, Apr. 13, 2020, available at <https://cutt.ly/ztRAo0X>.

27 ²⁵*Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in*
28 *Correctional and Detention Facilities*, CDC, at 8, Mar. 23, 2020,
<https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf>.

1 hygiene supplies, and facility cleaning equipment further prevents detained
2 persons from practicing the vigilant hygiene necessary to protect themselves. *Id.*

3
4 When COVID-19 has entered detention facilities, it has spread at an
5 alarming rate, illustrating the heightened danger posed in custodial settings. Amon
6 Decl. ¶ 39. For example, at Rikers Island in New York, infection rates have grown
7 exponentially since the virus was introduced. Over a four-day period in late
8 March, the number of infected inmates rose from 21 to 75 and the number of
9 employees who tested positive jumped from 17 to 37.²⁶ As of April 21, 2020,
10 there were 367 total positive test cases at Rikers Island.²⁷ The Legal Aid Society
11 in New York has reported that the infection rate for COVID-19 at local jails is
12 more than seven times higher than the rate citywide and 87 times higher than the
13 country at large.²⁸ The Cook County Jail in Chicago has likewise seen an
14 alarming rise in cases, with over 500 confirmed cases among the detained
15 population as of April 13, 2020 and three detained persons deaths.²⁹ Similarly, in
16 late February, at the peak of the outbreak in Wuhan, China—the city where
17 COVID-19 originated—over half of all new infection cases were incarcerated
18 people.³⁰

19
20 ²⁶21 Inmates, 17 Employees Test Positive for Covid-19 on Rikers Island: Officials, NBC New York, Mar. 22, 2020, available at
21 <https://www.nbcnewyork.com/news/coronavirus/21-inmates-17-employees-test-positive-for-covid-19-on-rikers-island-officials/2338242/>, accessed Apr. 19, 2020.

22 ²⁷COVID-19 Infection Tracking in NYC Jails, The Legal Aid Soc’y, Apr. 21,
23 2020, available at <https://legalaidnyc.org/covid-19-infection-tracking-in-nyc-jails/>, accessed Apr. 19, 2020.

24 ²⁸Coronavirus Update: Rikers Island Rate of Infection 7 Times Higher than
25 Citywide, Legal Aid Says, CBS New York, Mar. 26, 2020, available at
<https://newyork.cbslocal.com/2020/03/26/coronavirus-rikers-island/>.

26 ²⁹Cheryl Corley, *The COVID-19 Struggle in Chicago’s Cook County Jail*, NPR,
27 Apr. 13, 2020, available at <https://www.npr.org/2020/04/13/833440047/the-covid-19-struggle-in-chicagos-cook-county-jail>.

28 ³⁰Zi Yang, *Cracks in the System: COVID-19 in Chinese Prisons*, The Diplomat,
Mar. 9, 2020, available at <https://thediplomat.com/2020/03/cracks-in-the-system-covid-19-in-chinese-prisons/>.

1 As of April 23, the BOP reported 620 incarcerated persons and 357 staff
2 had tested positive for COVID-19—more than fifteen times the number of cases
3 reported on April 1, 2020,³¹ and still almost certainly an undercount as BOP is
4 only testing very sick incarcerated persons—and at least 24 had died of COVID-
5 19 in federal custody.³² These deaths, hospitalizations, and infections will keep
6 exponentially rising because social distancing is virtually impossible in detention,
7 absent the relief sought through the Petition. Goldenson Decl. ¶ 27. In the
8 community, scientists estimate that one person with COVID-19 will infect
9 between two and three people without social distancing, and about one person
10 with strong social distancing and quarantining.³³ By contrast, scientists estimate
11 that, in confined settings like prisons and cruise ships, one person with COVID-19
12 will infect about 11 people, each of whom will in turn infect up to 11 other
13 people.³⁴

14
15 **C. Otay Mesa Has Failed to Implement Adequate Measures to**
16 **Protect Detained Persons from the Heightened Risk of Infection**
17 **at the Facility.**

18 Individuals detained at OMDC face an acute threat due to COVID-19.
19 Amon Decl. ¶ 39. San Diego County, where OMDC is located, has reported

20
21 ³¹*Open COVID-19 Tested Positive Cases*, Bureau of Prisons, Apr. 21, 2020,
22 <https://www.bop.gov/coronavirus/>; *Open COVID-19 Tested Positive Cases*,
23 Bureau of Prisons, Apr. 1, 2020,
24 <https://web.archive.org/web/20200401000146/https://www.bop.gov/coronavirus/>.

25 ³²*Open COVID-19 Tested Positive Cases*, Bureau of Prisons, Apr. 23, 2020,
26 <https://www.bop.gov/coronavirus/>.

27 ³³Adam J. Kucharski et al., *Early dynamics of transmission and control of*
28 *COVID-19: a mathematical modelling study*, *The Lancet*, Mar. 11, 2020,
available at [https://doi.org/10.1016/S1473-3099\(20\)30144-4](https://doi.org/10.1016/S1473-3099(20)30144-4).

³⁴Kenji Mizumoto & Gerardo Chowell, *Transmission potential of the novel*
coronavirus (COVID-19) onboard the diamond Princess Cruises Ship, 2020, 5
Infectious Disease Modelling 264, Feb. 2, 2020 (evaluating the transmission rate
on a cruise ship, and comparing that infection rate to similarly confined spaces
like hospitals, prisons, and churches), available at
<https://www.sciencedirect.com/science/article/pii/S2468042720300063>.

1 almost 2,500 confirmed COVID-19 cases as of April 21, 2020.³⁵ 87 San Diego
2 County residents have died from COVID-19.³⁶ Given the rapid spread of COVID-
3 19 through incarcerated populations in the U.S., the fact that the facility has
4 already been exposed to COVID-19, and the particular conditions at OMDC, it is
5 only a matter of time before the disease becomes widespread among the detained
6 population. Amon Decl. ¶ 22. Defendants have failed to take the necessary
7 measures to mitigate that risk. *Id.* ¶ 48-50.

8
9 1. *Persons Detained At Otay Mesa Are Unable to Engage in
Social Distancing.*

10 It is currently impossible for individuals at OMDC to comply with the
11 CDC's recommendation to remain six feet apart at all times. Goldenson Decl. ¶
12 27. Persons detained at OMDC are housed together in pods, which consist of
13 roughly 60 to 120 persons each. *Id.* ¶ 24. The pods house individuals in close
14 quarters, well under the distance of six feet apart that the CDC recommends.
15 Amon Decl. ¶ 24. Within each pod, most individuals share small cells with two or
16 three persons per cell. *Id.* For example, Plaintiff Lara-Soto shares a three-by-five
17 meter (approximately 9-by-16 foot) cell with three other people and, like
18 everyone at the facility, is locked in the cell every evening with his cellmates for
19 at least seven hours a day. Lara-Soto Decl. ¶¶ 3, 4, 6.

20 When not in their cells, detained persons share common spaces and cannot
21 consistently maintain a six-foot distance from others. Szurgot Decl. ¶ 11; Lara-
22 Soto Decl. ¶ 42. Ridley Decl. ¶ 8; Doe Decl. ¶ 5. Chairs and tables in communal
23 areas are bolted to the ground and chairs are less than three feet apart. Ridley
24 Decl. ¶ 7; Doe Decl. ¶ 4; Smith Decl. ¶ 6. To watch television, individuals have to
25

26 ³⁵Christina Byvik et al., *San Diego County confirms 2,434 cases of COVID-19,*
27 *deaths increase by 15 to reach 87*, San Diego Union-Tribune, Apr. 21, 2020,
28 *available at* <https://www.sandiegouniontribune.com/news/health/story/2020-03-16/tracking-coronavirus-cases-san-diego-countys-case-count-reaches-55>.

³⁶*Id.*

1 sit in close proximity to each other. Crespo-Venegas Decl. ¶ 6; Gonzalez-Soto
2 Decl. ¶ 9; Lara-Soto Decl. ¶ 26.

3 The preparation and distribution of food at the facility is particularly
4 problematic. As of April 20, 2020, detained persons who work in the kitchens
5 were still standing shoulder to shoulder while preparing food. Broderick Decl. ¶
6 14; Ridley Decl. ¶ 23; Cano Decl. ¶ 7. Before approximately April 3, 2020, in
7 order to get to the cafeteria, individuals were crowded in a locked sallyport with
8 15-25 other detained individuals. Ridley Decl. ¶ 22; Doe Decl. ¶ 10; Smith Decl.
9 ¶ 19. At the cafeteria they had to stand in line to retrieve their food, which was
10 delivered in a work-line with individuals standing shoulder to shoulder. Ridley
11 Decl. ¶ 23; Amon Decl. ¶ 24. The dining area was often crowded. Doe Decl. ¶ 10.
12 As of approximately April 6, 2020, detained persons are no longer eating in the
13 cafeteria, but eat within their pod. Ridley Decl. ¶ 22; Doe Decl. ¶ 10. As of April
14 20, 2020, individuals still had to wait in line—with less than a six-foot distance
15 between each other—to get food within their pod. Doe Decl. ¶ 11.

16 In short, the communal conditions at the facility force people to live in
17 close quarters. Amon Decl. ¶ 24. Food preparation is communal. *Id.* Detained
18 persons share toilets, sinks, and showers. *Id.* These conditions make adequate
19 social distancing impossible. *Id.* ¶¶ 27–29.

20
21 2. *Otay Mesa Has Failed to Enable Detained Persons To*
22 *Practice Adequate Hygiene or to Provide Sufficient Personal*
Protective Equipment.

23 Not only is social distancing impossible in current conditions, the hygienic
24 situation in the facility is inadequate to abate the spread of COVID-19. Goldenson
25 Decl. ¶ 30. Individuals incarcerated at OMDC do not get adequate products to
26 maintain proper hygiene. Amon Decl. ¶ 53. Detained persons report being
27 provided with only one small bar of soap once a week or sometimes once a day—
28 an insufficient amount given the rigorous handwashing required to avoid

1 contracting COVID-19. Alvarez Decl. ¶¶ 6–7; Gonzalez-Soto ¶ 15. Recently,
2 some detained persons indicate that they sometimes receive more bar soap if they
3 ask, however they have difficulty getting liquid soap. Cano Decl. ¶ 10. Several
4 detained persons report that they cannot get hand sanitizer. Ramcharan Decl. ¶ 6;
5 Victor Alvarez Decl. ¶ 6; Szurgot Decl. ¶ 5.

6 The facility further offers little opportunity for surface disinfection. Cano
7 Decl. ¶ 8; Smith Decl. ¶ 21; Szurgot Decl. ¶ 4; Amon Decl. ¶ 24. OMDC relies on
8 volunteer-based cleaning. Doe Decl. ¶ 8; Smith Decl. ¶ 21. Showers, which are
9 shared by all individuals within each pod, are only cleaned once or twice a day
10 rather than after every use. Cano Decl. ¶ 9; Doe Decl. ¶ 6; Ramcharan Decl. ¶ 5.
11 Telephones—which are generally not six feet apart—are not wiped after each use.
12 Gonzalez-Soto Decl. ¶ 4.

13 OMDC has not been providing detained persons adequate protective
14 equipment such as masks and gloves, and detention center staff are themselves
15 not consistently wearing masks or gloves. Amon Decl. ¶ 34. In the last week,
16 facility staff began offering masks to detained individuals under certain
17 conditions; however, detained persons were provided with only one disposable
18 mask each and were told they had to use it for a period of two weeks. *Id.*

19
20 3. *Otay Mesa is Not Performing Adequate Testing or Following*
21 *Sufficient Quarantine Procedures, Particularly Given its*
Transitory Detained Population.

22 Despite these inadequate conditions and the existing positive COVID-19
23 cases, OMDC is not conducting widespread testing. Amon Decl. ¶ 24; Szurgot
24 Decl. ¶ 10. Detained people who report flu-like symptoms consistent with
25 COVID-19 are not being tested. *Id.* Sick detained persons are given pills or told to
26 drink water with salt. Lara-Soto Decl. ¶ 46; Doe Decl. ¶ 14; Broderick Decl. ¶ 24.
27 Even in pods where individuals have tested positive for the virus, OMDC staff
28 have informed detained persons that they would only test those with severe

1 symptoms or that testing everyone would be too expensive. Lara-Soto Decl. ¶ 46.
2 Plaintiff Gonzalez-Soto, for example, recently had a high fever and was vomiting
3 for two days. Gonzalez-Soto Decl. ¶ 6. Once he was able to see a doctor, he was
4 given a physical and some ibuprofen. *Id.* The doctor informed him that he would
5 only be tested for COVID-19 if he displayed symptoms for five days. *Id.* ¶ 7.
6 Gonzalez-Soto was not isolated from his cellmate and continued his laundry
7 duties while sick, delivering laundry to every person in his pod daily. *Id.* ¶ 8.
8 Numerous detained persons report remaining in a pod with dozens of
9 asymptomatic individuals after reporting their symptoms. Amon Decl. ¶ 34.

10 A high rate of turnover and population mixing of staff and detained persons
11 at a detention facility can increase the likelihood of exposure to COVID-19.
12 Goldenson Decl. ¶ 20. Because OMDC detains individuals under the custody of
13 the USMS, they are generally awaiting trial or sentencing. As a result, the
14 detained population is transitory with intake and release being far more common
15 than at a long-term detention facility, thus increasing the risk of exposure to
16 COVID-19. Additionally, because the facility is intended for relatively short-term
17 stays, OMDC does not provide the same level of medical care as long-term
18 detention facilities. There have been reports of significant delays in access to
19 medical treatment and OMDC has refused to take individuals to medical unless
20 they have a fever. Amon Decl. ¶ 24.

21
22 4. *Releasing Detained Persons Is the Only Effective Mitigation*
23 *Strategy and This Court Has the Authority to Order Their*
Release.

24 Because of the severity of the threat posed by COVID-19, and its potential
25 to rapidly spread throughout a correctional setting, public health experts
26 recommend, first and foremost, the rapid release from custody of people with
27
28

1 heightened vulnerability to COVID-19.³⁷ It is extremely difficult to adopt policies
2 that can protect detained persons in facilities like OMDC. Amon Dec. ¶ 53;
3 Goldenson Dec. ¶ 29. Release of medically vulnerable people from detention is
4 especially important given the heightened risks to their health and safety and
5 given the lack of a viable vaccine for prevention or effective treatment at this
6 stage. Amon Decl. ¶ 50. Release protects medically vulnerable people from
7 transmission of the virus, and also allows for greater risk mitigation for people
8 held or working in a prison and the broader community. Amon Decl. ¶ 52.
9 Release of medically vulnerable people from custody also reduces the burden on
10 the region’s health care infrastructure by reducing the likelihood that an
11 overwhelming number of people will become seriously ill from COVID-19 at the
12 same time. *Id.*

13 In light of the severe threats posed by COVID-19, a growing number of
14 courts have ordered release from confinement and modifications of supervised
15 release for individuals in the federal criminal system. For example,

- 16 • *United States v. Meekins*, Case No. 1:18-cr- 222-APM, Dkt. No. 75 (D.D.C.
17 Mar. 31, 2020) (post-plea, pre-sentence release order releasing defendant
18 with three pending assault charges due to extraordinary danger COVID-19
19 poses to people in detention);
- 20 • *United States v. Davis*, No. 1:20-cr-9-ELH, Dkt. No. 21 (D. Md. Mar. 30,
21 2020) (releasing defendant due to the “urgent priority” of decarcerating, to
22 protect both the defendant and the community, and to preserve Sixth
23 Amendment rights in this perilous time);
- 24 • *United States v. Muniz*, Case No. 4:09-cr-199, Dkt. No. 578 (S.D. Tex.
25 Mar. 30, 2020) (releasing defendant serving 188-month sentence for drug
26 conspiracy in light of vulnerability to COVID-19: “[W]hile the Court is
27 aware of the measures taken by the Federal Bureau of Prisons, news reports
28 of the virus’s spread in detention centers within the United States and
beyond our borders in China and Iran demonstrate that individuals housed

³⁷See, e.g., Josiah Rich, Scott Allen, and Mavis Nimoh, *We must release prisoners to lessen the spread of coronavirus*, Washington Post, Mar. 17, 2020, available at <https://wapo.st/2JDVq7Y>.

1 within our prison systems nonetheless remain particularly vulnerable to
2 infection.”);

- 3 • *United States v. Hector*, Case No. 2:18-cr-3-002, Dkt. No. 748 (W.D. Va.
4 Mar. 27, 2020) (granting release pending sentencing after Fourth Circuit
5 remanded detention decision requiring court to specifically consider
6 extraordinary danger posed by COVID-19 to folks in prison);
- 7 • *United States v. Grobman*, No. 18-cr- 20989, Dkt. No. 397 (S.D. Fla. Mar.
8 29, 2020) (releasing defendant convicted after trial of fraud scheme in light
9 of “extraordinary situation of a medically-compromised detained person
10 being housed at a detention center where it is difficult, if not impossible, for
11 [the defendant] and others to practice the social distancing measures which
12 government, public health and medical officials all advocate”);
- 13 • *United States v. Mclean*, No. 19-cr-380, Dkt. No. (D.D.C. Mar. 28, 2020)
14 (“As counsel for the Defendant candidly concedes, the facts and evidence
15 that the Court previously weighed in concluding that Defendant posed a
16 danger to the community have not changed - with one exception. That one
17 exception - COVID-19 - however, not only rebuts the statutory
18 presumption of dangerousness, see 18 U.S.C. § 3142(e), but tilts the
19 balance in favor of release.”);
- 20 • *United States v. Harris*, No. 19-cr-356 (D.D.C. Mar. 26, 2020) (“The Court
21 is convinced that incarcerating Defendant while the current COVID-19
22 crisis continues to expand poses a far greater risk to community safety than
23 the risk posed by Defendant's release to home confinement on . . . strict
24 conditions.”); and
- 25 • *In re Request to Commute or Suspend County Jail Sentences*, Docket No.
26 084230 (N.J. Mar. 22, 2020) (releasing large class of defendants serving
27 time in county jail “in light of the Public Health Emergency” caused by
28 COVID-19).

29 Courts have also ordered the immediate release of persons in immigration
30 detention because of COVID-19 risks and public health considerations.³⁸

31 ³⁸*See, e.g., Xochihua-Jaimes v. Barr*, No. 18-71460, 2020 WL 1429877 (9th Cir.
32 Mar. 24, 2020) (ordering release “[i]n light of the rapidly escalating public health
33 crisis, which public health authorities predict will especially impact immigration
34 detention centers[.]”); *Castillo v. Barr*, No. CV2000605TJHAFMX, 2020 WL
35 1502864 (C.D. Cal. Mar. 27, 2020) (granting temporary restraining order and
36 ordering the government to “forthwith and without delay, release Petitioners”);
37 *Coronel v. Decker*, No. 20-cv-2472, 2020 WL 1487274 (S.D.N.Y. Mar. 27, 2020)
38 (ordering release of four medically vulnerable immigration detained persons due
39 to threat of COVID-19); *Thakker v. Doll*, No. 20-cv-00480 (M.D. Pa. Mar. 31,
40 2020) (same for 13 medically vulnerable petitioners); *Basank v. Decker*, No. 20-

1 Moreover, across the country, state officials and jail staff have recognized the
2 threat posed by COVID-19 and released high numbers of detained persons. Jail
3 administrators in San Diego County;³⁹ Cuyahoga County, Ohio;⁴⁰ Los Angeles,
4 California;⁴¹ San Francisco, California;⁴² Jefferson County, Colorado;⁴³ and the
5 State of New Jersey,⁴⁴ among others, have concluded that widespread jail release
6 is a necessary and appropriate public health intervention.
7

8 **III. ARGUMENT**

9 To obtain a temporary restraining order or preliminary injunction the
10 movant must establish (1) that they are likely to succeed on the merits; (2) they
11 are likely to suffer irreparable harm; (3) the balance of equities favors them; and
12 (4) an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*,
13 555 U.S. 7, 20 (2008); *George v. United States*, No. 3:19-cv-01557-BAS-BLM,
14 2019 WL 4962979, at *4 (S.D. Cal. Oct. 7, 2019). The Ninth Circuit applies a
15 sliding scale approach, under which a stronger showing of one element may offset
16

17 cv-2518, 2020 WL 1481503 (S.D.N.Y. Mar. 26, 2020) (same for 10 medically
18 vulnerable petitioners); *Calderon Jimenez v. Wolf*, No. 18-10225-MLW (D.
19 Mass. Mar. 26, 2020) (ordering grant of bail for an immigrant detained person
held in Plymouth County, Massachusetts because “being in jail enhances risk”).

20 ³⁹Greg Moran, *Hundreds Released from Jail Under New Bail Rules, but*
21 *Prosecutors Object to Release of Nearly 200 More*, San Diego Union Tribune,
Apr. 15, 2020, <https://www.sandiegouniontribune.com/news/courts/story/2020-04-15/court-and-jail-releases-draft>.

22 ⁴⁰Scott Noll, *Cuyahoga County Jail Releases Hundreds of Low-Level Offenders to*
23 *Prepare for Coronavirus Pandemic*, Mar. 20, 2020, <https://cutt.ly/CtRSHkZ>.

24 ⁴¹Alene Tchekmedyan, *More L.A. County Jail Inmates Released Over Fears of*
25 *Coronavirus Outbreak*, L.A. Times, (Mar. 19, 2020), <https://cutt.ly/lRSCs6>.

26 ⁴²Megan Cassidy, *Alameda County Releases 250 Jail Inmates Amid Coronavirus*
27 *Concerns, SF to Release 26*, San Francisco Chronicle, Mar. 20, 2020,
<https://cutt.ly/0tRSVmG>.

28 ⁴³Jenna Carroll, *Inmates Being Released Early from JeffCo Detention Facility*
Amid Coronavirus Concerns, KDVR Colorado, Mar. 19, 2020,
<https://cutt.ly/UtRS8LE>.

⁴⁴Erin Vogt, *Here's NJ's Plan for Releasing Up to 1,000 Inmates as COVID-19*
Spreads, New Jersey, 101.5, Mar. 23, 2020, <https://cutt.ly/QtRS53w>.

1 a weaker showing of another. *See Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th
2 Cir. 2012). Because the legal standard for issuing a temporary restraining order
3 and a preliminary injunction are the same, the two remedies are analyzed together.
4 *Doe v. McAleenan*, 415 F. Supp. 3d 971, 976 (S.D. Cal. 2019) (“The standard for
5 issuing a temporary restraining order is identical to the standard for issuing a
6 preliminary injunction.”); *see, e.g., Stuhlberg Int’l Sales Co. v. John D. Brush &*
7 *Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001) (“Because our analysis is substantially
8 identical for the injunction and the TRO, we do not address the TRO
9 separately.”).

10 Here, the Plaintiffs are likely to prevail on the merits and they will suffer
11 irreparable harm—serious illness or death—in the absence of relief. The balance
12 of hardships is clearly in their favor, and the public interest also favors relief.

13
14 **A. Plaintiffs Have a Substantial Likelihood of Success on the Merits.**

15 Plaintiffs will likely prevail on their claims because Defendants are not
16 adequately protecting their health and safety during the current COVID-19
17 pandemic as required by the Fifth and Eighth Amendments. To succeed on this
18 element, “at ‘an irreducible minimum, the moving party must demonstrate a fair
19 chance of success on the merits, or questions serious enough to require
20 litigation.’” *Guzman v. Shewry*, 552 F.3d 941, 948 (9th Cir. 2009) (quoting *Dep’t*
21 *of Parks & Recreation v. Bazaar Del Mundo, Inc.*, 448 F. 3d 1118, 1124 (9th Cir.
22 2006)).

23
24 1. *Defendants Are Subjecting Detained Persons to*
25 *Unconstitutional Punishment Under the Fifth Amendment.*

26 The Fifth Amendment Due Process Clause prohibits punishment of
27 detained persons prior to “a formal adjudication of guilt in accordance with due
28 process of law.” *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979) (quoting

1 *Ingraham v. Wright*, 430 U.S. 651, 671-72 (1946)). Thus, the government violates
2 a detained person’s rights if the conditions of confinement amount to punishment.
3 *See Doe v. Kelly*, 878 F.3d 710, 720 (9th Cir. 2017) (quoting *Bell*, 441 U.S. at
4 539).

5 A punitive condition can be established “(1) where the challenged
6 restrictions are expressly intended to punish, or (2) where the challenged
7 restrictions serve an alternative, non-punitive purpose but are nonetheless
8 excessive in relation to the alternative purpose, or are employed to achieve
9 objectives that could be accomplished in so many alternative and less harsh
10 methods.” *Jones v. Blanas*, 393 F.3d 918, 932 (9th Cir. 2004) (citations and
11 quotation marks omitted); *Doe v. Kelly*, 878 F.3d 710, 720 (9th Cir. 2017) quoting
12 *Bell*, 441 U.S. at 539).

13 Given the existing outbreak of COVID-19 at Otay Mesa, further
14 transmission of the virus is inevitable. This poses an imminent threat to Medically
15 Vulnerable Subclass Members, as well as to all detained persons at OMDC,
16 facility employees, and members of the surrounding community. The
17 consequences of further spread of COVID-19 are dire; once contracted, there is no
18 known treatment or cure and the risks of serious illness or injury are substantial.
19 The relief requested herein lays out an available alternative to confinement that
20 offers a meaningful way to prevent death and mitigate the proliferation of the
21 virus among those in USMS custody at OMDC. Given these facts, continued
22 detention is excessive.

23 The imminent danger posed by COVID-19 vastly outweighs any
24 government interest in confinement because the government’s objectives can
25 easily be accomplished through alternatives to detention. Detained persons have
26 homes or other locations available to them upon release where they can remain
27 and adhere to guidelines for self-quarantine, further undercutting any interest in
28

1 confinement. These harsh conditions and viable alternatives establish that Otay
2 Mesa is punishing individuals prior to a formal adjudication of guilt in violation
3 of the Eighth Amendment.

4
5 2. *Defendants’ Deliberate Indifference to the Risks of COVID-19*
6 *Violate Detained Persons’ Rights to Constitutional Conditions*
7 *of Confinement.*

8 The Constitution imposes an affirmative duty on the government to
9 “provide humane conditions of confinement,” including by providing for
10 incarcerated persons’ reasonable safety and by addressing their serious medical
11 needs. *Farmer v. Brennan*, 511 U.S. 825, 828, 832-33 (1994); *Estelle v. Gamble*,
12 429 U.S. 97, 104 (1976) (requiring corrections officials to address prisoners’
13 serious medical needs). The government violates this obligation when it takes a
14 person into its custody but “fails to provide for [their] basic human needs—e.g.,
15 food, clothing, shelter, medical care, and reasonable safety.” *DeShaney v.*
16 *Winnebago Cty. Dep’t. of Soc. Servs.*, 489 U.S. 189, 199–200 (1989). To establish
17 a violation of this duty, Plaintiffs must establish that the government acted with
18 “deliberate indifference” to a substantial risk of serious harm. *Farmer*, 511 U.S. at
19 828.

20 A “deliberate indifference” claim can arise under either the Fifth
21 Amendment or the Eighth. Here, Defendants are violating the Pretrial and Post-
22 Conviction Class Members’ Fifth Amendment rights.⁴⁵ Alternately, in the event

23
24 ⁴⁵A number of circuits have held that that the Fifth Amendment Due Process
25 Clause applies to individuals who have been convicted and not yet sentenced in
26 addition to pretrial detained persons. *See, e.g., Lewis v. Downey*, 581 F.3d 467,
27 474 (7th Cir. 2009). The Supreme Court has further suggested that a “formal
28 adjudication” includes both conviction and sentence. *Graham v. Connor*, 490 U.S.
386, 392 n.6 (1986) (observing that *Ingraham* signifies that “Eighth Amendment[]
protections d[o] not attach until after conviction and sentence.”). The Ninth
Circuit has addressed this issue only in the context of the standard for determining
a due process liberty interest in being free from segregated housing, *see Resnick v.*
Hayes, 213 F.3d 443, 448 (9th Cir. 2000). It is thus an open question whether the
Fifth Amendment’s prohibition against punishment, and the objective deliberate

1 the Court concludes the Post-Conviction Class Members’ rights are governed by
2 the Eighth Amendment, the conditions at Otay Mesa nevertheless amount to
3 “deliberate indifference” under the Eighth Amendment standard and, thus, a
4 constitutional violation.

5 To succeed on a Fifth Amendment claim regarding inadequate medical
6 care, a petitioner must demonstrate “an intentional decision” regarding conditions
7 that puts detained persons at “substantial risk of suffering serious harm” and a
8 failure to “take reasonable available measures to abate that risk.” *See Gordon v.*
9 *Cty. of Orange*, 888 F.3d 1118, 1125 (9th Cir. 2018). This is “something akin to
10 reckless disregard” as the standard is “more than negligence but less than
11 subjective intent.” *Id.* at 1125 (quoting *Castro v. Cty. Of Los Angeles*, 833 F.3d
12 1060, 1071 (9th Cir. 2016)).

13 To establish “deliberate indifference” under the Eighth Amendment, “it is
14 enough that the official acted or failed to act despite his knowledge of a
15 substantial risk of serious harm.” *Farmer*, 511 U.S. at 842. While this is a
16 subjective standard, a fact-finder may infer that a prison official had knowledge of
17 a substantial risk by looking to “circumstantial evidence” or “the very fact that the
18 risk was obvious.” *Id.* at 841-42. For example, that a risk to inmates is “pervasive,
19 well-documented, or expressly noted by prison officials in the past” is enough for
20 a fact-finder to determine actual knowledge on the part of prison officials. *Id.* at
21 842-43.

22 With respect to an impending infectious disease like COVID-19, deliberate
23 indifference is satisfied under the Eighth Amendment when corrections officials
24 “ignore a condition of confinement that is sure or very likely to cause serious
25 illness and needless suffering the next week or month or year,” even when “the
26 complaining inmate shows no serious current symptoms.” *Helling*, 509 U.S. 25,
27 _____
28 indifference standard described in *Gordon*, 888 F.3d at 1125, also protects those
convicted but not yet sentenced to incarceration.

1 33, 36 (1993) (holding that a prisoner “states a cause of *action* . . . by alleging that
2 [corrections officials] have, with deliberate indifference, exposed him to
3 conditions that pose an unreasonable risk of serious damage to future health”). In
4 other words, officials may not constitutionally wait until it is too late act. *Helling*,
5 509 U.S. at 33-34 (“It would be odd to deny an injunction to inmates who plainly
6 proved an unsafe, life-threatening condition in their prison on the ground that
7 nothing yet had happened to them”).

8 The Supreme Court has held that “due process rights . . . are at least as
9 great as the Eighth Amendment protections available to a convicted prisoner.”
10 *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983). Consequently, the
11 Ninth Circuit recognizes that, where an individual’s rights arise under the Due
12 Process Clause, “the guarantees of the Eighth Amendment provide a *minimum*
13 standard of care for determining their rights, including the rights to medical and
14 psychiatric care.” *Or. Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1120 (9th Cir. 2003)
15 (quoting *Revere*, 463 U.S. at 244).

16 Otay Mesa’s conduct constitutes a plain violation of Petitioners’ Fifth *or*
17 Eighth Amendment rights. The world community recognizes the grave threat
18 posed by the COVID-19 pandemic. That threat is heightened in detention
19 facilities, such as Otay Mesa, where the disease is already spreading among
20 detained persons and staff. The dangers of transmission of the novel coronavirus
21 and the resulting risk of serious illness and death are self-evident; indeed, efforts
22 to mitigate these risks have transformed the daily lives of individuals around the
23 globe. Despite these inescapable facts, Defendants have failed to take the steps
24 necessary to protect persons detained at Otay Mesa from conditions that present
25 an unreasonable risk of serious damage to their future health, and to the health of
26 the surrounding community. This is unconstitutional.

1 Even in the event the Court concludes that the Post-Conviction Class is not
2 entitled to Fifth Amendment protections, the conduct here nevertheless violates
3 their rights under the subjective Eighth Amendment standard. The threat of
4 COVID-19 is “obvious pervasive, [and] well-documented.” *Farmer*, 511
5 U.S. at 842-43. This is more than sufficient to show actual knowledge on the part
6 of prison officials and establish “deliberate indifference” under the Eighth
7 Amendment.
8

9 **B. Absent Relief, Plaintiffs are Likely to Suffer Irreparable Harm.**

10 It is well established that the deprivation of constitutional rights constitutes
11 irreparable injury. *Hernandez v. Sessions*, 872 F.3d 976, 994 (9th Cir. 2017);
12 *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012); *Warsoldier v.*
13 *Woodford*, 418 F.3d 989, 1001–02 (9th Cir. 2005). The Ninth Circuit recently
14 recognized that dangerous conditions of detention also constitute irreparable harm
15 supporting injunctive relief. *Padilla v. U.S. Immigration & Customs Enforcement*,
16 953 F.3d 1134, 1147 (9th Cir. 2020). The Ninth Circuit also has recognized that
17 irreparable harm exists where the government’s actions threaten an individual’s
18 health. *M.R. v. Dreyfus*, 663 F.3d 1100, 1111 (9th Cir. 2011), *as amended by* 697
19 F.3d 706 (9th Cir 2012); *Indep. Living Ctr. of S. Cal., Inc. v. Shewry*, 543 F.3d
20 1047, 1049–50 (9th Cir. 2008) (recognizing that Medi-Cal beneficiaries would
21 suffer irreparable harm where new policy would limit access to pharmaceuticals).

22 Medically Vulnerable Subclass Members face a heightened risk of serious
23 injury or death due to COVID-19, as do all detained persons at Otay Mesa and in
24 the broader community, absent the relief sought herein. The irreparable harm as a
25 result of death or serious illness by contracting COVID-19 cannot be overstated.
26 Absent immediate steps, the spread of COVID-19 throughout the facility is
27 virtually inevitable and subclass members are likely to experience serious injury
28

1 or death due to the virus. Given these grave risks, this factor weighs heavily in
2 favor of injunctive relief.

3
4 **C. The Balance of Equities and Public Interest Weigh Heavily in**
5 **Plaintiffs' Favor.**

6 Given the “preventable human suffering” at issue, the “balance of hardships
7 tips decidedly in plaintiffs’ favor.” *Hernandez*, 872 F.3d at 996 (quotation
8 omitted). The government “cannot reasonably assert that it is harmed in any
9 legally cognizable sense” by being compelled to follow the law. *Zepeda v. I.N.S.*,
10 753 F.2d 719, 727 (9th Cir. 1983). The balance of equities thus favors preventing
11 the violation of “requirements of federal law.” *Arizona Dream Act Coal. v.*
12 *Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014). Finally, “it is *always* in the public
13 interest to prevent the violation of a party’s constitutional rights.” *Melendres*, 695
14 F.3d at 1002 (emphasis added).

15 It is in not only the Plaintiffs’, but the Defendants’ and the broader public’s
16 interest to release the Medically Vulnerable Subclass Members. Release will
17 reduce the risk of serious illness and death for the Subclass members themselves.
18 And it will also reduce the overall health risk for remaining detained persons and
19 facility staff at Otay Mesa. Finally, reducing the number of people detained,
20 starting with those who are most vulnerable, serves the public interest by reducing
21 the risk of widespread community infection that will overwhelm demands on
22 local health care infrastructures, especially considering the inevitable transmission
23 of the virus between the detention center and the community resulting from the
24 daily circulation of staff in and out of OMDC. Goldson Decl. ¶ 27; Amon Decl.
25 ¶¶ 45, 42. In short, here, “the impact of [a temporary restraining order] reaches
26 beyond the parties, carrying with it a potential for public consequences.”
27 *Hernandez*, 872 F.3d at 996 (quotation omitted).

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IV. CONCLUSION

For the foregoing reasons, the Court should provisionally certify the Pretrial Class, the Pretrial Medically Vulnerable Subclass, the Post-Conviction Class, and Post-Conviction Medically Vulnerable Subclass and issue a Subclass-wide temporary restraining order, preliminary injunction, and/or writ of habeas corpus directing Defendants to immediately identify and release all members of the Medically Vulnerable Subclasses from OMDC, pursuant to the procedures recommended in the Proposed Order.

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Respectfully submitted,

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*Application for *pro hac vice*
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