

1 ROBERT S. BREWER, JR.  
 United States Attorney  
 2 BRETT NORRIS, Calif. Bar No. 224875  
 Deputy Chief, Civil Division  
 3 DOUGLAS KEEHN, Calif. Bar No. 233686  
 Assistant U.S. Attorney  
 4 PAUL STARITA, Calif. Bar No. 219573  
 Assistant U.S. Attorney  
 5 Office of the U.S. Attorney  
 6 880 Front Street, Room 6293  
 7 San Diego, CA 92101-8893  
 619-546-7620 / 619-546-7751 (fax)  
 8 brett.norris@usdoj.gov  
 douglas.keehn@usdoj.gov, paul.starita@usdoj.gov

9  
10 ATTORNEYS FOR RESPONDENTS

11 **UNITED STATES DISTRICT COURT**  
 12 **SOUTHERN DISTRICT OF CALIFORNIA**

13 JACINTO VICTOR ALVAREZ,  
 14 JOSEPH BRODERICK, MARLENE  
 CANO, JOSE CRESPO-VENEGAS,  
 15 NOE GONZALEZ-SOTO, VICTOR  
 LARA-SOTO, RACQUEL  
 16 RAMCHARAN, GEORGE RIDLEY,  
 MICHAEL JAMIL SMITH,  
 17 LEOPOLDO SZURGOT, JANE DOE  
 on behalf of themselves and those  
 18 similarly situated,

19 Petitioners,

20 v.

21 CHRISTOPHER J. LAROSE, Senior  
 Warden, Otay Mesa Detention Center,

22 STEVEN C. STAFFORD, United  
 States Marshal for the Southern District  
 23 of California,

24 DONALD W. WASHINGTON,  
 Director of the United States Marshals  
 25 Service,

26 Respondents.  
27  
28

Case No. 20-CV-00782-DMS-AHG

**RESPONDENTS' RESPONSE IN  
 OPPOSITION TO MOTION FOR  
 EMERGENCY TEMPORARY  
 RESTRAINING ORDER, AND FOR  
 CLASS-WIDE PRELIMINARY  
 INJUNCTION**

**(PROPOSED CLASS ACTION)**

Date: May 5, 2020  
 Time: 1:30 p.m.  
 Hon. Dana M. Sabraw

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1 Respondents, Donald T. Washington, Director, United States Marshals Service  
2 (“USMS”), and Steven C. Stafford, United States Marshal for the Southern District of  
3 California, raise the following issues in opposition to Petitioners’ motion for a temporary  
4 restraining order and class-wide preliminary injunction:

5 1. The Prison Litigation Reform Act (“PLRA”) places strict limitations on a  
6 district court’s ability to order the release of inmates. In fact, the PLRA expressly precludes  
7 a single district judge from ordering such a release. But that is exactly what Petitioners –  
8 eleven inmates currently detained at the Otay Mesa Detention Center (“OMDC”) for  
9 violations of federal criminal law – ask this Court to do. Can this Court grant the Petitioners’  
10 motion for release when the PLRA prohibits it from doing so?

11 2. The PLRA also prohibits inmates from filing any action challenging the  
12 conditions of their confinement without first exhausting their available administrative  
13 remedies. Here, OMDC has an administrative grievance process, but none of the Petitioners  
14 exhausted it before filing this action. Does the PLRA prohibit this action from proceeding?

15 3. The Bail Reform Act (“BRA”) allows inmates to seek modification of their  
16 conditions of release or detention in their criminal cases. For example, at least four of the  
17 Petitioners have already sought bond modifications in their criminal cases. By filing this  
18 action, however, the Petitioners seek to circumvent not only the BRA, but also the  
19 conditions of release set, and the detention orders issued, by the Magistrate Judge in each  
20 Petitioner’s criminal case. Is Petitioners’ motion for release to this Court appropriate?  
21 Would an order granting Petitioners’ motion conflict with the existing orders in each  
22 Petitioner’s criminal case? And how would Respondents comply with such conflicting  
23 orders?

24 4. Petitioners seek injunctive relief on behalf of an undefined number of inmates,  
25 broadly claiming that the risk to all will be reduced if they are released from OMDC. But  
26 Petitioners fail to mention many inmates will have little or no access to housing or medical  
27 care if released. Is the determination of who will benefit from release, and who will not,  
28



1 better made on an individual basis by the appropriate Magistrate Judge and, if need be,  
2 reviewed by the District Court Judge assigned to each criminal case?

3 **I.**

4 **FACTUAL BACKGROUND**

5 **A. Petitioners’ Pending Criminal Cases**

6 Petitioners are not immigration detainees. They are “Pretrial and Post-Conviction”  
7 federal criminal detainees at OMDC. (ECF No. 2 at p. 3:7-19.) The following is a summary  
8 of each Petitioner’s criminal case:<sup>1</sup>

- 9 • **Jacinto Victor Alvarez**, Case No. 19-cr-05093-LAB (related case 19-cr-4869).  
10 Mr. Alvarez is represented by Federal Defenders of San Diego, Inc. He is charged  
11 in a two-count Indictment with attempted unlawful entry by an alien, in violation  
12 of 8 U.S.C. § 1325 and attempted reentry of removed alien, in violation of 8 U.S.C.  
13 § 1326(a) and (b). At his bond hearing, the court ordered Mr. Alvarez detained as  
14 a flight risk. More recently, the court vacated the motion *in limine* hearing and  
15 trial dates and set a status hearing for May 18, 2020. Further, the court excluded  
16 time under the Speedy Trial Act, 18 U.S.C. §§ 3161(h)(7)(A) and 3174.
- 17 • **Joseph Broderick**, Case No. 19-cr-04780-GPC. Mr. Broderick is represented by  
18 Federal Defenders of San Diego, Inc. He is charged as a co-defendant in a 6-count  
19 Indictment with conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1349,  
20 five counts of wire fraud, in violation of 18 U.S.C. § 1343, and criminal forfeiture.  
21 Mr. Broderick and his co-conspirator submitted fraudulent loan applications for  
22 real estate loans and received loan proceeds based on these fraudulent applications.  
23 At his bond hearing, the court ordered Mr. Broderick detained as a flight risk.  
24 Pursuant to a joint motion, the Court ordered the Motion Hearing/Trial Setting  
25 continued to May 22, 2020 and excluded time under the Speedy Trial Act, 18  
26

27  
28 <sup>1</sup> Pursuant to Fed. R. Evid. 201, Respondents respectfully ask the Court to take judicial  
notice of the factual and procedural posture of each Petitioner’s criminal case.

1 U.S.C. §§ 3161(h)(7)(A) and 3174. A motion for reconsideration of the detention  
2 order is pending.

3 • **Victor Lara-Soto**, Case No. 19-cr-04949-BAS. Mr. Lara-Soto is represented by  
4 Federal Defenders of San Diego, Inc. He is charged in a single count Information  
5 with importation of 48 kilograms of methamphetamine, in violation of 21 U.S.C.  
6 § 952 and 960. At his bond hearing, the court ordered Mr. Lara-Soto detained as  
7 a flight risk. The Court ordered the Motion Hearing/Trial Setting continued to May  
8 18, 2020 and excluded time under the Speedy Trial Act, 18 U.S.C. §§  
9 3161(h)(7)(A), (h)(7)(B)(i), (h)(B)(iv) and 3174. Further, a Change of Plea  
10 Hearing is set for May 21, 2020.

11 • **George Martinez-Ridley**, Case No. 19-cr-04905-DMS. Mr. Martinez-Ridley is  
12 represented by Federal Defenders of San Diego, Inc. He is charged in a three-  
13 count Information with attempted sex trafficking of children, in violation of 18  
14 U.S.C., §§ 1591 and 1594, attempted enticement of a minor, in violation of 18  
15 U.S.C. § 2422(b), and conspiracy to engage in sex trafficking of children, in  
16 violation of 18 U.S.C. § 1594 (c). The court ordered Mr. Martinez-Ridley detained  
17 as a danger to the community and as a flight risk. It later denied his motion to  
18 reconsider the detention order. At the request of counsel, the Motion Hearing set  
19 for April 10, 2020 to address the pending Motion to Compel Discovery, to Preserve  
20 Evidence, and for Leave to File Other Motions was continued to June 5, 2020.  
21 Mr. Martinez-Ridley's second motion to reconsider the Court's order of detention  
22 is pending.

23 • **Leopaldo Szurgot**, Case No. 19-cr-4867-DMS. Mr. Szurgot is represented by  
24 Federal Defenders of San Diego, Inc. He entered a guilty plea to Count One of a  
25 two count Information alleging conspiracy to import 31 kilograms of  
26 methamphetamine, in violation of 21 U.S.C. § 952, 960 and 963. The court set a  
27 \$30,000 appearance bond for Mr. Szurgot, to be secured by the signature of two  
28

1 financially responsible adults. A Pre-Sentence Report is on file and the Court reset  
2 Mr. Szurgot's Sentencing Hearing from May 8, 2020 to August 14, 2020.

3 • **Jane Doe**, Case No. 19-cr-05184-MMA. Jane Doe is represented by Federal  
4 Defenders of San Diego, Inc. She is charged in a single count Information alleging  
5 attempted reentry of removed alien, in violation of 8 U.S.C. § 1326(a) and (b).  
6 Initially, the court ordered Jane Doe detained pending trial, but it later set a \$40,000  
7 appearance bond to be secured by two financially responsible adults with a \$4,000  
8 cash deposit to be paid by a family member or surety. Jane Doe is also pending a  
9 revocation of supervised release in case number 18-cr-01417-MMA. The court,  
10 *sua sponte*, vacated the Motion Hearing/Trial Setting set for April 20, 2020 and  
11 reset it for May 18, 2020.

12 • **Marlene Cano**, Case No. 20-cr-00036-BTM. Ms. Cano is represented by Federal  
13 Defenders of San Diego, Inc. She entered a plea of guilty to a single count  
14 Superseding Indictment alleging importation of 0.45 kilograms of  
15 methamphetamine, in violation of 21 U.S.C. § 952 and 960. The court initially set  
16 at a \$15,000 appearance bond for Ms. Cano, to be secured by the signature of one  
17 financially responsible adult and 10 percent cash deposit. In a minute order, the  
18 court denied Ms. Cano's request for a bond modification stating, "[w]hile the Court  
19 is mindful of the serious risks any person faces due to the COVID-19 pandemic,  
20 said reason alone is insufficient to modify the balance of factors prescribed by  
21 Congress in determining appropriate bond in this case." At the request of the  
22 assigned Probation Officer and with the concurrence of Ms. Cano's defense  
23 counsel, the Court continued her Sentencing Hearing from April 28, 2020 to  
24 August 4, 2020.

25 • **Jose Crespo-Venegas**, Case No. 19-CR-5169-JLS. Mr. Crespo-Venegas is  
26 represented by Federal Defenders of San Diego, Inc. He entered a plea of guilty  
27 to a single count Information alleging attempted reentry of removed alien, in  
28 violation of 8 U.S.C. § 1326(a) and (b). At his bond hearing, the court ordered

1 Mr. Crespo-Venegas detained as a flight risk. A Pre-Sentence Report is on file but  
2 a date for the Sentencing Hearing has not been set. A motion to reconsider the  
3 Court's order of detention is pending.

- 4 • **Noe Gonzalez-Soto** 19-cr-03858-BTM. Mr. Gonzalez-Soto is represented by  
5 Federal Defenders of San Diego, Inc. He entered pleas of guilty to a two-count  
6 Information alleging importation of 28 kilograms of methamphetamine, in  
7 violation of 21 U.S.C. §§ 952 and 960, and importation of 26 kilograms of cocaine,  
8 in violation of 21 U.S.C. §§ 952 and 960. At his bond hearing, the court ordered  
9 Mr. Gonzalez-Soto detained as a flight risk. Pursuant to a joint motion, the Court  
10 continued the Sentencing Hearing from March 10, 2020 to May 5, 2020.
- 11 • **Racquel Ramcharan**, Case No. 19-cr-00869-GPC. Ms. Ramcharan is represented  
12 by Federal Defenders of San Diego, Inc. She entered a plea of guilty to a single  
13 count superseding indictment alleging possession with the intent to distribute  
14 fentanyl, in violation of 21 U.S.C. § 841(a)(1). Ms. Ramcharan was previously  
15 released on bond but the court remanded her to custody after a failed drug  
16 screening. A Pre-Sentence Report is on file and at the request of the parties, the  
17 court advanced the Sentencing Hearing from June 19, 2020 to May 6, 2020.
- 18 • **Michael Jamil Smith**, Case No. 19-cr-01270-W. Mr. Smith is represented by  
19 Federal Defenders of San Diego, Inc. He entered a plea of guilty to Count One of  
20 a five-count Indictment alleging felon in possession of a firearm, a double-barrel  
21 break-action shotgun, in violation of 18 U.S.C. § 922(g)(1). The court initially  
22 ordered Mr. Smith detained as a flight risk, but it later set a \$20,000 appearance  
23 bond secured by cash or a corporate surety. Mr. Smith's Sentencing Hearing with  
24 Pre-Sentence Report is set for July 20, 2020.

25 **B. Southern District of California Interagency COVID-19 Committee**

26 In March of 2020, the Chief Judge and the United States Attorney's Office  
27 established a federal interagency COVID-19 Committee. *See* Declaration of Keith Johnson,  
28 filed concurrently herewith, at ¶ 9. The Committee's purpose is to ensure the orderly

1 operation of the criminal justice process during the pandemic. *Id.* The Committee members  
 2 include: the Chief Judge, the Presiding Magistrate Judge, the U.S. Attorney, the Executive  
 3 Director of Federal Defenders of San Diego, Inc., the coordinator for the Criminal Justice  
 4 Act Panel Attorneys, the Clerk of Court, the Chief of U.S. Probation, the Chief of U.S.  
 5 Pretrial Services, the Warden of the Metropolitan Correctional Center, and the U.S.  
 6 Marshal. *Id.* The Committee meets by telephone up to 3 times per week and their discussions  
 7 include the impact of the pandemic on inmate housing. *Id.* As a result of the Committee’s  
 8 efforts, the overall inmate population in USMS custody decreased by thirty-three percent  
 9 between February 25 and April 30, 2020, from 3,454 to 2,297. And at OMDC, it decreased  
 10 by forty-two percent, from 537 to 310, during this same timeframe.<sup>2</sup> *Id.* at ¶ 13.

### 11 **C. The Petition in this Case**

12 Petitioners have initiated this action on behalf of themselves and a putative class of  
 13 unstated size, encompassing (1) a “Pretrial Class” of all current and future persons in  
 14 pretrial detention at OMDC; (2) a “Pretrial Medically Vulnerable Subclass” of all current  
 15 and future people detained pretrial at OMDC who are aged 45 years or older or who, by  
 16 undefined standards, have “medical conditions that place them at heightened risk of severe  
 17 illness or death from COVID-19”; (3) a “Post-Conviction Class” of all current and future  
 18 persons in post-conviction detention at OMDC; (4) a “Post-Conviction Medically  
 19 Vulnerable Subclass” of all current and future people detained post-conviction at OMDC  
 20 who are aged 45 years or older or who again, by undefined standards, have medical  
 21 conditions that place them at heightened risk of severe illness or death from COVID-19.  
 22 ECF No. 1 at 39, “Prayer for Relief”; *see* “[Proposed] Order Granting Class Certification[,]”  
 23 submitted by Petitioner ex parte via Chambers email, April 27, 2020.

24 On behalf of these potentially universal “classes and subclasses” of OMDC inmates,  
 25 Petitioners allege conditions posing a risk of COVID-19 infection such that violate the Fifth  
 26 and Eighth Amendments to the United States Constitution (ECF 1, at ¶ 15), and demand a

27 <sup>2</sup> While USMS determines where inmates are housed, neither USMS nor OMDC controls  
 28 which of those inmates are ordered detained or released from detention. Johnson Dec. at ¶  
 3.

1 menu of actions by the Court, including: (1) certification of a class action on behalf of the  
2 undefined class; (2) issuance of a writ of habeas corpus requiring the immediate release of  
3 members of undefined “medical subclasses” and an unstated number of additional inmates;  
4 (3) injunctive relief or a temporary restraining order requiring Defendants to immediately  
5 release members of the undefined subclasses and an unstated number of additional inmates;  
6 (4) an order requiring Defendants to provide information regarding “the ongoing COVID-  
7 19 outbreak at OMDC;” (4) order that a plan be immediately submitted to the Court and a  
8 public health expert that outlines specific mitigation efforts to prevent COVID-19 spread  
9 among inmates, and a housing and/or public support plan for released inmates exposed  
10 COVID-19, apparently, at any time or through any means; (5) expedited review of the  
11 Petition; (6) declaratory judgment that OMDC detention violates the Fifth and Eighth  
12 Amendment of the United States Constitution; (7) attorneys’ fees and expenses; and (8) any  
13 further relief “deemed just and proper.” ECF No. 1 at 39-41.

14 Respondents now oppose.

## 15 II.

### 16 ARGUMENT

#### 17 **A. The Existing Statutory Framework Bars the Relief Petitioners Seek**

18 The government has both a significant interest in “safeguard[ing] the health and  
19 safety of those remanded [into] custody,” and an “obligation to maintain public safety and  
20 to protect victims and witnesses from threats and retaliation[.]” *See* Attorney General Barr  
21 Mem., dated Apr. 6, 2020, attached hereto as Exhibit “A.” In determining whether to seek  
22 detention in the first instance, or to oppose a motion for release, the government employs  
23 an individual, case-by-base assessment that takes into account both the defendant’s risk  
24 from COVID-19 and the risk that the defendant’s release would pose to the public. These  
25 individualized, case-specific determinations are the only appropriate legal avenue through  
26 which Petitioners may seek release due to the threat to health and safety posed by  
27 COVID-19. Injunctive relief is inappropriate here.

28



1           **1.     The Bail Reform Act and the Attorney General’s April 6 Memorandum**

2           The BRA expressly allows district courts to consider an individual defendant’s health  
3 when deciding whether to detain him or her pending trial. A person charged with an offense  
4 may be released, released on conditions, or detained pending trial. 18 U.S.C. § 3142(a). In  
5 determining “whether there are conditions of release that will reasonably assure the  
6 appearance of the person as required and the safety of any other person and the community,”  
7 the court “shall . . . take into account the available information concerning,” inter alia, “the  
8 history and characteristics of the person, including . . . the person’s . . . physical and mental  
9 condition[.]” 18 U.S.C. § 3142(g)(3). District courts have statutory authority to review,  
10 revoke or amend a magistrate judge’s detention order. 18 U.S.C. § 3145(b); *United States*  
11 *v. Gebro*, 948 F.2d 1118, 1120 (9th Cir. 1991) (ruling that “the district court had the  
12 jurisdiction to reopen the bail issue on its own motion”).

13           The Attorney General recently issued guidance to federal prosecutors concerning  
14 “Litigating Pre-Trial Detention Issues During the COVID-19 Pandemic.” Ex. “A.” The  
15 Attorney General’s April 6 Memorandum makes clear that “the current COVID-19  
16 pandemic requires that [prosecutors] ensure [they] are giving appropriate weight to the  
17 potential risks facing certain individual from being remanded to . . . custody.” *Id.* Thus,  
18 although prosecutors’ “paramount obligation” is to “[p]rotect[ ] the public,” they must also  
19 “consider the medical risks associated with individuals being remanded into . . . custody  
20 during the COVID-19 pandemic.” *Id.* Prosecutors “should consider not seeking detention  
21 to the same degree [they] would under normal circumstances,” and must weigh “the risk of  
22 flight and seriousness of the offense . . . against the defendant’s vulnerability to COVID-  
23 19.” *Id.* Likewise, “these same considerations should govern [prosecutors’] litigation of  
24 motions filed by detained defendants seeking release in light of the pandemic.” *Id.* Such a  
25 defendant’s “risk from COVID-19 should be a significant factor in [each prosecutor’s]  
26 analysis[.]” *Id.*

## 2. The Prison Litigation Reform Act and Prisoner Release Orders Generally

The PLRA places strict limits on a district court's ability to order the release of inmates "in any civil action with respect to prison conditions," and expressly precludes a single district judge from doing so. 18 U.S.C. § 3626(a)(3)(B). That prohibition applies to "any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison[.]" 18 U.S.C. § 3626(g)(2). In non-prohibited suits, the court "may enter a temporary restraining order or an order for preliminary injunctive relief," but such injunctive relief "must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm." 18 U.S.C. § 3626(a)(2). Under the PLRA, a "prisoner release order" – which "includes any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison," § 3626(g)(4) – may "be entered only by a three-judge court," § 3626(a)(3)(B), and then only if certain conditions have been met. Among other requirements, "no court shall enter a prisoner release order unless – (i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order; and (ii) the defendant has had a reasonable amount of time to comply with the previous court orders." 18 U.S.C. § 3626(a)(3)(A).

Congress enacted the PLRA to "revive the hands-off doctrine," which was "a rule of judicial quiescence derived from federalism and separation of powers concerns[.]" in order to remove the federal judiciary from day-to-day prison management. *Gilmore v. California*, 220 F.3d 987, 991, 996-97 (9th Cir. 2000) (*ref.* 141 Cong. Rec. S14418, at S14418-19 (1995); H.R. Rep. No. 104-378, at 166 (1995); *and* H.R. Rep. No. 104-21, at 24 n.2 (1995)). Section 3626 thus "restrict[s] the equity jurisdiction of federal courts," *Gilmore*, 220 F.3d at 999, and, "[b]y its terms . . . restricts the circumstances in which a court may enter an



1 order ‘that has the purpose or effect of reducing or limiting the prison population,’” *Brown*  
 2 *v. Plata*, 563 U.S. 493, 511 (2011). The PLRA’s “requirements ensure that the ‘last remedy’  
 3 of a population limit is not imposed ‘as a first step.’” *Id.* at 514 (quoting *Inmates of*  
 4 *Occoquan v. Barry*, 844 F.2d 828, 843 (D.C. Cir. 1988)). “The release of prisoners in large  
 5 numbers . . . is a matter of undoubted, grave concern.” *Plata*, 563 U.S. at 501.

6 **3. Petitioners Must Seek Relief Under the Bail Reform Act in Their**  
 7 **Respective Criminal Cases Because the Prison Litigation Reform Act**  
 8 **Precludes This Court from Reducing or Limiting the Prison Population**  
 9 **In This Case**

10 The PLRA precludes this Court from ordering the primary relief Petitioners seek  
 11 here. “The authority to release prisoners as a remedy to cure a systemic violation of the  
 12 Eighth Amendment is a power reserved to a three-judge district court, not a single-judge  
 13 district court.” *Plata*, 563 U.S. at 500 (*citing* 18 U.S.C. § 3626(a)); *see* 18 U.S.C. §  
 14 3626(a)(3)(B) (“In any civil action in Federal court with respect to prison conditions, a  
 15 prisoner release order shall be entered only by a three-judge court[.]”). Moreover, such an  
 16 order may not be entered unless “(i) a court has previously entered an order for less intrusive  
 17 relief that has failed to remedy the deprivation of the Federal right sought to be remedied  
 18 through the prisoner release order; and (ii) the defendant has had a reasonable amount of  
 19 time to comply with the previous court orders.” 18 U.S.C. § 3626(a)(3)(A). And, even a  
 20 three-judge court may order prisoners released to remedy unconstitutional prison conditions  
 21 “only if the court finds by clear and convincing evidence” that “crowding in the primary  
 22 cause of the violation” and “no other relief will remedy [it.]” 18 U.S.C. § 3626(a)(3)(E)(i)-  
 23 (ii).

24 Here, there can be no legitimate dispute that Petitioners’ lawsuit is a “civil action  
 25 with respect to prison conditions” governed by the PLRA. The PLRA defines “civil action  
 26 with respect to prison conditions” broadly to mean “any civil proceeding arising under  
 27 Federal law with respect to the conditions of confinement or the effects of actions by  
 28 government officials on the lives of persons confined in prison, but [that term] does not

1 include habeas corpus proceedings challenging the fact or duration of confinement in  
2 prison[.]” 18 U.S.C. § 3626(g)(2). This case neatly falls within that definition. *Id.*  
3 Although Petitioners invoke habeas corpus and 28 U.S.C. § 2241, Doc. # 1 ¶¶ 17-18, this is  
4 not a “habeas corpus proceeding[] challenging the fact or duration of confinement in  
5 prison.” 18 U.S.C. § 3626(g)(2). Petitioners make no claims regarding the fact or duration  
6 of their detention. Rather, Petitioners challenge the conditions of their confinement at  
7 OMDC as inadequate to address the threat to health and safety posed by COVID-19. ECF  
8 No. 1 ¶ 13. This case is thus a “civil proceeding arising under Federal law with respect to  
9 the conditions of confinement or the effects of actions by government officials on the lives  
10 of persons confined in prison” governed by the PLRA. 18 U.S.C. § 3626(g)(2).

11 The PLRA strictly limits the relief this Court may grant. Under the PLRA, a single  
12 district court judge may not enter “a prisoner release order,” § 3626(a)(3)(B), which is  
13 broadly defined to “include[ ] any order, including a temporary restraining order or  
14 preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison  
15 population, or that directs the release from or nonadmission of prisoners to a prison[.]” 18  
16 U.S.C. § 3626(g)(4). Therefore, to the extent Petitioners seek an order or injunction that  
17 would require Respondents “to immediately release both Medically Vulnerable Subclasses”  
18 and an unstated “number of class members to reduce the overall population of USMS  
19 detainees at OMDC[.]” ECF No. 1 at 39-40, the PLRA precludes that relief. Moreover,  
20 courts have held that habeas is an inappropriate collateral attack when pretrial detainees can  
21 seek release in their pending criminal cases, as they can here. *Reese v. Warden Philadelphia*  
22 *FDC*, 904 F.3d 244, 246–48 (3d Cir. 2018); *Medina v. Choate*, 875 F.3d 1025, 1029 (10th  
23 Cir. 2017); *Falcon v. U.S. Bureau of Prisons*, 52 F.3d 137, 139 (7th Cir. 1995); and *Fassler*  
24 *v. United States*, 858 F.2d 1016, 1017–19 (5th Cir. 1988).

25 As another district court recently recognized, although “the issue of inmate health  
26 and safety is deserving of the highest degree of attention,” an “order imposing a court-  
27 ordered and court-managed ‘process’ for determining who should be released” from a state  
28 prison in response to the COVID-19 pandemic falls “squarely within

1 Section 3626(a)(3) – which forbids this Court from granting it.” *Money v. Pritzker*,  
2 20CV2093, 2020 U.S. Dist. Lexis 63599, at 5, 45-6 (N.D. Ill. April 10, 2020). “[T]he  
3 release of inmates requires a process that gives close attention to detail, for the safety of  
4 each inmate, his or her family, and the community at large demands a sensible and  
5 individualized release plan – especially during a pandemic.” *Id.* at 5. Individual motions  
6 for release under the BRA allows judges to undertake that “inherently inmate-specific  
7 inquiry,” *id.* at 6, and are the proper legal vehicle for Petitioners to attempt to obtain release  
8 due to health risks posed by the COVID-19 pandemic. *See also Plata v. Newsom*,  
9 01CV1351, 2020 U.S. Dist. Lexis 70271 (N.D. Cal. Apr. 17, 2020) (same). Moreover,  
10 most, if not all, of the members of Petitioners’ proposed classes have made appearances in  
11 BRA hearings, already heard by other courts in this district.

#### 12 **4. Petitioners Did Not Exhaust Their Administrative Remedies**

13 The PLRA mandates that “[n]o action shall be brought with respect to prison  
14 conditions under . . . any . . . Federal law, by a prisoner confined in any jail, prison, or other  
15 correctional facility until such administrative remedies as are available are exhausted.”  
16 42 U.S.C. § 1997e(a); *Johnson v. California*, 543 U.S. 499, at 528, n.1 (2005) (PLRA  
17 exhaustion “statutorily mandated”); *Maronyan v. Toyota Motor Sales, USA, Inc.*, 658 F3d  
18 1038, 1041-42 (9th Cir. 2011) (PLRA exhaustion “requirement”). The PLRA’s mandatory  
19 exhaustion requirement applies equally to pretrial criminal detainees, 42 U.S.C. § 1997e(h),  
20 and, indeed, “all inmate suits about prison life[.]” *Porter v. Nussle*, 534 U.S. 516, 532  
21 (2002); *see also Cutter v. Wilkinson*, 544 U.S. 709, n. 12 (2005) (similar).

22 Here, OMDC has a specific grievance process. *See* Declaration of L. Mileto, filed  
23 concurrently herewith, at ¶¶ 9-36. None of the Petitioners, however, have exhausted that  
24 process. *Id.* at ¶¶ 10-45. And because of their failure to exhaust, the Petition should be  
25 denied.

#### 26 **5. The Narrow Exceptions for Failure to Exhaust Do Not Apply Here**

27 Failure to exhaust may be excused only (1) where the remedy “operates as a simple  
28 dead end – with officers unable or consistently unwilling to provide any relief to aggrieved

1 inmates”; (2) where the administrative scheme is “so opaque that it becomes, practically  
2 speaking, incapable of use;” or (3) where “prison administrators thwart inmates from taking  
3 advantage of a grievance process through machination, misrepresentation, or intimidation.”  
4 *Ross v. Blake*, 136 S. Ct. 1850, 1853-54, 1859-60 (2016). None of those three narrow  
5 exceptions applies here. Nothing in the Petition suggests that Petitioners’ pursuit of  
6 administrative remedies was hindered “through machination, misrepresentation, or  
7 intimidation.” *Ross*, 136 S. Ct. at 1859-60.

8 To be sure, COVID-19 presents unusual circumstances, in which decisions regarding  
9 prisoner grievances should be made expeditiously (as provided in OMDC’s grievance  
10 procedures). But permitting prisoners to ignore the PLRA’s mandatory exhaustion  
11 requirement, even in these unusual circumstances, would frustrate Congress’s objective in  
12 the PLRA to “eliminate unwarranted federal-court interference with the administration of  
13 prisons,” and “reduce the quantity and improve the quality of prisoner suits.” *Woodford v.*  
14 *Ngo*, 548 U.S. 81, 93 (2006) (quoting *Porter*, 534 U.S. at 524). More problematically,  
15 permitting prisoners to ignore the PLRA’s mandatory exhaustion requirement would  
16 deprive prisons of “a fair opportunity to correct their own errors,” *id.* at 93, as Petitioners  
17 have done here by filing this lawsuit. Because Petitioners failed to exhaust their  
18 administrative remedies as required by the PRLA, and because none of the exceptions to  
19 the exhaustion requirement applies in this case, the Petition should be denied. *See Johnson*,  
20 543 U.S. at 528 n.1.

#### 21 **B. Petitioners Have an Adequate Remedy At Law, Foreclosing Injunctive Relief**

22 As discussed in the foregoing, the Petitioners’ motion must also be denied because  
23 they have an adequate remedy at law. *See Matthews v. Rodgers*, 284 U.S. 521, 525 (1932)  
24 (equitable injunctive relief is not available in federal court “in any case where plain,  
25 adequate and complete remedy may be had at law”); *Dillon v. Montana*, 634 F.2d 463, 466  
26 (9th Cir. 1980); *Times Newspapers, Ltd. (of Great Britain) v. McDonnell Douglas Corp.*,  
27 387 F. Supp. 189, 205, Appx. A (C.D. Cal 1974) (recognizing persuasive authority that  
28 “[i]njunction won’t lie where there is adequate remedy at law”).

1 The Bail Reform Act (“BRA”) expressly authorizes the district court handling a  
2 criminal matter to consider an individual defendant’s health when deciding whether to  
3 detain him or her pending trial. 18 U.S.C. § 3142(i). In addition to the standard motions  
4 for release by pretrial defendants, 18 U.S.C. § 3142(b), or for post-conviction release, 18  
5 U.S.C. § 3143, or bail pending appeal, 18 U.S.C. § 3143(b)(1), a defendant may seek release  
6 under 18 U.S.C. § 3142(i), which provides that a “judicial officer may, by subsequent order,  
7 permit the temporary release of [a] person, in the custody of a United States marshal or  
8 another appropriate person, to the extent that the judicial officer determines such release to  
9 be necessary for preparation of the person’s defense or for another compelling reason.” 18  
10 U.S.C. § 3142(i).

11 Here, Petitioners are free to seek release due to the threat to health and safety posed  
12 by COVID-19 at any time by moving before the judge who is assigned to the inmate’s  
13 criminal case. Indeed, various applications of this type have already been made in this  
14 district. For example, Petitioners Cano and Martinez-Ridley both sought bond  
15 modifications, but were denied; while Petitioners Jane Doe and Smith both received bond  
16 modifications. Thus, because Petitioners have multiple opportunities to seek release based  
17 on the BRA’s robust statutory scheme, the highly extraordinary injunctive relief they seek  
18 here is foreclosed.

### 19 **C. The Relief Petitioners Demand Interferes With Existing Court Orders**

20 Similarly, the Court must decline Petitioners’ highly extraordinary equitable demand  
21 based on principles of inter-court comity, between this Court and sibling courts managing  
22 the myriad criminal matters implicated by such a demand. *See Applied Medical Corp. v.*  
23 *Surgical Co. BV*, 587 F.3d 909, 913 (9th Cir. 2009) (before issuing injunctive relief  
24 potentially contradicting other courts, a district court must consider whether the parties and  
25 issues are the same, whether the judicial operations will frustrate one another, and the  
26 overall impact on comity between those courts). The Ninth Circuit has held that, when an  
27 injunction sought in one federal proceeding would interfere with another federal  
28 proceeding, considerations of comity require that injunctions should be granted only in the

1 most unusual cases. *Bergh v. State of Wash.*, 535 F.2d 505, 507 (9th Cir. 1976).  
2 Furthermore, the Ninth Circuit has stated that where, as here, a federal court is of coordinate  
3 jurisdiction to one or more others, all of whose decisions are reviewed by the same Court  
4 of Appeals, the issuance of such an injunction is perhaps never justified. *Bergh*, 535 F.2d  
5 at 507 (*ref. United States v. American Radiator & Standard Sanitary Corp.*, 388 F.2d 201,  
6 203-04 (3rd Cir. 1967), *cert. denied*, 390 U.S. 922 (1968)). Rather, declining injunctive  
7 relief minimizes conflicts between courts administering the same law, conserves judicial  
8 time and expense, and “has a salutary effect upon the prompt and efficient administration  
9 of justice.” *Bergh*, at 507 (*ref. Brittingham v. Commissioner*, 451 F.2d 315, 318 (5th Cir.  
10 1971)).

11 At core, Petitioners’ rigid and effectively singular insistence on the release of  
12 criminal inmates requires this Court to interfere with other judicial orders in this district  
13 where Petitioners’ criminal matters are already pending, wherein all of the concerns  
14 presented in the Motion may be readily addressed. Respecting Congress’s statutory  
15 procedure in the BRA will avoid the inevitable reverberation of inter-court conflicts. The  
16 Court can, and should, deny Petitioners’ Motion for these reasons alone. *Bergh v. State of*  
17 *Wash.*, at 507.

18 **D. Respondents Lack Authority to Release Pretrial Detainees or Post Conviction**  
19 **Detainees Who Are Already Subject to Orders in Their Criminal Cases**

20 In addition, Petitioners cite no authority whatsoever for the hand-wave notion that  
21 Respondent may simply “reduce the detained population” while those detainees are subject  
22 to valid, case-specific orders of detention from federal judges in this district. *See* ECF No  
23 1 at ¶¶ 52, 112, pp. 38-40. Respondent is not, as Petitioners wish the Court to presume,  
24 empowered to provide Petitioners immediate release from lawful criminal detention.  
25 *See* ECF No. 2-1 at 3-4. Although Respondent is the immediate custodian for Petitioners,  
26 Petitioners are not subject to detention by any authority of Respondent.

27 Indeed, as they must fully understand in order to have initiated representation in this  
28 matter, Petitioners are subject to detention by order of the federal judges already handling



1 each of their criminal matters. *See* 18 U.S.C. § 3142. As discussed above, the bail process  
2 is the only appropriate legal avenue through which Petitioners may seek release due to a  
3 perceived threat to health and safety posed by COVID-19 illness. Because Petitioners may  
4 present these arguments for release in their criminal cases, and because Respondent is  
5 unable to release them on its own authority, the Court should deny Petitioners' motion.

6 **E. Petitioners Have Not Shown That They Are Likely to Suffer Irreparable Harm**  
7 **in the Absence of Injunctive Relief**

8 Independently, Petitioners have not shown that they are likely to suffer immediate  
9 and irreparable harm in the absence of injunctive relief. To the contrary, Petitioners' alleged  
10 harm – that their detention increases the risk of harm from COVID-19 – is speculative based  
11 on the site-specific circumstances at OMDC. And, again, are more appropriately addressed  
12 in their individual criminal cases. Further, Petitioners have not shown that their alleged  
13 injury – that they are all subject to a heightened risk of death from COVID-19 illness – will  
14 be redressed by ordering their release. To the contrary, release from detention will not  
15 ameliorate their claimed heightened risk of injury or death resulting from COVID-19, nor  
16 can release prevent them from contracting COVID-19. Petitioners offer no proof, nor is  
17 Respondent aware of any, that their release from OMDC into a population under state of  
18 emergency based on the COVID-19 crisis will reduce their risk of injury or death. *See*  
19 *generally* ECF No. 1.

20 Moreover, it cannot be overlooked that OMDC provides medical care at no cost to  
21 inmates, including Petitioners. By reason of their detention, Petitioners have greater access  
22 to robust medical care than many in the general public. Ordering their release from OMDC  
23 would leave Petitioners without their present access to health care and could put them at  
24 greater risk of serious complications in the event that they contracts COVID-19. Because  
25 Petitioners have not shown that they are likely to suffer immediate and irreparable harm,  
26 the Court should deny their motion.

**F. Petitioners Have Not Shown That The Balance Of Equities Tips In Their Favor Or That An Injunction is in The Public Interest**

The final two factors, which “merge when the Government is the opposing party,” *Nken v. Holder*, 556 U.S. 418, 435 (2009), also tilt squarely against injunctive relief. Petitioners ask this Court to order Respondent to release a substantial and indefinite number of inmates, ostensibly until remaining inmates face no risk of COVID-19 illness. ECF No. 2 at 3-4; ECF No. 2-1 at 3-4; see “[Proposed] Order Granting Class Certification[,]” submitted by Petitioner ex parte via Chambers email, April 27, 2020.

But Petitioners do not provide any information regarding viable housing options outside of OMDC, either for themselves or members of the putative class and subclasses, or whether they or members of any such class would be deprived of access to food, means of personal hygiene, and medical care if released from OMDC. ECF No. 1. Not only would that put Respondents at risk of becoming infected with COVID-19, but it would also put others in the community at risk, undermining the substantial public efforts to suppress the spread of the COVID-19. Because Petitioners have not shown that these remaining factors support the extraordinary injunction they seek, the Court should deny Petitioner’s Motion.

**III.**

**CONCLUSION**

Petitioners ask this Court to brush aside the PLRA, the BRA, jurisdictional limitations, the orders of numerous other courts, and the limitations on habeas relief, and to issue an order releasing them – and an undefined number of other inmates – from OMDC. For all of the foregoing reasons, Petitioners’ motion should be denied.

DATED: May 1, 2020

Respectfully submitted,

ROBERT S. BREWER JR.  
United States Attorney

s/ Brett Norris  
BRETT NORRIS  
Deputy Chief, Civil Division



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*s/ Douglas Keehn*  
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DOUGLAS KEEHN  
Assistant U.S. Attorney

*s/ Paul Starita*  
\_\_\_\_\_  
PAUL STARITA  
Assistant U.S. Attorney

Attorneys for Respondents

# EXHIBIT “A”



Office of the Attorney General  
Washington, D. C. 20530

April 6, 2020

MEMORANDUM FOR ALL HEADS OF DEPARTMENT COMPONENTS AND  
ALL UNITED STATES ATTORNEYS

FROM:

THE ATTORNEY GENERAL

Handwritten signature of W.P. Barr in black ink.

SUBJECT:

Litigating Pre-Trial Detention Issues During the COVID-19  
Pandemic

The mission of the Department of Justice is to enforce our nation's laws and to ensure the safe and fair administration of justice. We have an obligation to maintain public safety and to protect victims and witnesses from threats and retaliation, and we must also safeguard the health and safety of those remanded to our custody. As always, controlling weight should be given to public safety, and under no circumstance should those who present a risk to any person or the community be released. But the current COVID-19 pandemic requires that we also ensure we are giving appropriate weight to the potential risks facing certain individuals from being remanded to federal custody. Each case must be evaluated on its own and, where appropriate, the risks the pandemic presents should be part of your analysis, as elaborated further below.

First, the Bail Reform Act ("BRA") remains the governing statute for pretrial detention issues and you are to continue enforcing that provision according to its terms. As you know, the BRA provides that a defendant must be detained pending trial where "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. § 3142(e)(1).

For certain crimes, it is presumed that "no condition or combination of conditions of release will reasonably assure the appearance of the person as required and the safety of the community." 18 U.S.C. § 3142(e)(3). We should continue applying the BRA's factors and that presumption according to their terms. We simply cannot agree to anything that will put the public at risk. COVID-19 presents real risks, but so does allowing violent gang members and child predators to roam free. When you believe a defendant poses a risk to the safety of any person or the community at large, you should continue to seek remand as zealously today as you would have before the pandemic began, in accordance with the BRA's plain terms. Protecting the public from criminals is our paramount obligation.

Memorandum from the Attorney General

Page 2

Subject: Litigating Pre-Trial Detention Issues During the COVID-19 Pandemic

Second, in applying the familiar BRA analysis, which already includes some consideration of the defendant's "physical and mental condition," *id.*, you should now consider the medical risks associated with individuals being remanded into federal custody during the COVID-19 pandemic. Even with the extensive precautions we are currently taking, each time a new person is added to a jail, it presents at least some risk to the personnel who operate that facility and to the people incarcerated therein. It also presents risk to the individual being remanded into custody—risk that is particularly acute for individuals who are vulnerable to a serious infection under the Centers for Disease Control and Prevention ("CDC") Guidelines.

We have an obligation to minimize these risks to the extent possible while remaining faithful to the BRA's text and discharging our overriding obligation to protect the public. That means you should consider not seeking detention to the same degree we would under normal circumstances—specifically, for those defendants who have not committed serious crimes and who present little risk of flight (but no threat to the public) and who are clearly vulnerable to COVID-19 under CDC Guidelines. In this analysis, the risk of flight and seriousness of the offense must be weighed against the defendant's vulnerability to COVID-19. Accordingly, we should continue to seek detention for defendants who are charged with serious crimes and who pose a substantial risk of flight, or for defendants who would normally warrant detention under the BRA and who are not vulnerable to COVID-19 under CDC Guidelines.

Third, these same considerations should govern your litigation of motions filed by detained defendants seeking release in light of the pandemic. In these cases, the Court has already made a finding based on the evidence presented that a defendant posed a risk of flight or a danger to the community and should therefore be remanded pending trial. In assessing whether it is appropriate to revisit that determination, you should also consider the potential risk that the defendant will spread COVID-19 in his or her community upon release. At the same time that the defendant's risk from COVID-19 should be a significant factor in your analysis, you should also consider any risk that releasing the defendant would pose to the public. This consideration will depend on the facts and circumstances of each defendant and the facility where he or she is being held, and you should factor this consideration into your analysis as appropriate. Our duty to protect the public extends to protecting it from contagion spread by someone released from our custody.

\* \* \*

The factors and considerations discussed herein should guide your analysis of pretrial detention issues while the pandemic is ongoing, but what position to take in each particular case is ultimately your decision. We must adapt to the current difficult circumstances, while also ensuring that we never deviate from our duty to keep the public safe from dangerous criminals. Please exercise your discretion appropriately.

DECLARATION OF CHIEF DEPUTY UNITED STATES MARSHAL  
KEITH JOHNSON

I, Keith Johnson, Chief Deputy United States Marshal (CDUSM) for the Southern District of California, make the following statements under oath and subject to the penalty of perjury:

1. I am employed by the U.S. Department of Justice, United States Marshals Service (USMS), and currently serve as the CDUSM for the USMS Southern District of California. I have held this position since 2016. I have been employed by the USMS since 1993.
2. I provide this declaration based on my personal knowledge, belief, reasonable inquiry, and information obtained from various records, systems, databases, other USMS employees, and information portals maintained and relied upon by USMS in the regular course of business.
3. The USMS houses prisoners that have been remanded to its custody by a federal judicial officer pursuant to 18 U.S.C. §3142. All named petitioners in case number 20-cv-00782-AJB-BGS are either currently in a pre-trial status or a post-conviction/pre-sentence status. Decisions regarding the appropriateness of releasing prisoners in these statuses from USMS custody remain with the U.S. District Court responsible for issuing the remand order. The USMS has no authority to grant release in these situations.
4. As the USMS does not own or maintain detention facilities, the USMS must house federal prisoners in Federal Bureau of Prisons (BOP) Pretrial facilities, in state and local detention facilities pursuant to Intergovernmental Agreements (IGA), or private jails pursuant to a contract.
5. Otay Mesa Detention Center (OMDC) is a private jail operated by CoreCivic in San Diego, California.
6. The Immigration & Customs Enforcement Agency (ICE) has a contract with OMDC to house ICE detainees. The contract was originally signed and administered by the former Office of the Federal Detention Trustee (OFDT), the federal agency that was previously responsible for administration of the federal prisoner detention fund. OFDT, however, was subsumed by the USMS pursuant to a Congressional mandate. Thereafter, the USMS assumed administration of the contract with OMDC on behalf of ICE. In 2019, the USMS returned administration of the contract to ICE. However, to assist the USMS in fulfilling prisoner housing needs in the Southern District of California, the USMS “rides” the contract, by housing USMS prisoners in the facility. The OMDC provides the USMS bedspace for 350 prisoners at a fixed monthly rate. The USMS may also utilize an additional 262 beds at the contract per diem rate for a total of 612 beds.
7. Under the contract, OMDC is required to provide secure custody, safekeeping, housing, subsistence, and care of USMS prisoners in accordance with all state and local laws,

standards, regulations, policies, and court orders applicable to the operation of the facility. OMDC is required to house USMS prisoners pursuant to the Federal Performance Based Detention Standards (FPBDS), and/or any other standards delineated in the agreement. To ensure compliance with the contract terms, the USMS conducts yearly on-site Quality Assurance Reviews (QARs). Additionally, there is an on-site administrative Detention Contract Monitor to monitor daily contract compliance.

8. Medical care at OMDC is provided by the Immigration Health Services Corps (IHSC). Through an intergovernmental agreement, the USMS pays a per diem/per capita rate to ICE to provide these services to USMS prisoners.
9. In March of this year, I was invited to participate on the Interagency COVID-19 Committee. This committee, set up by the Chief Judge in conjunction with the U.S. Attorney's Office, is comprised of representatives from each of the agencies that have a part in ensuring the smooth operation of the court process during the pandemic. In addition to me, the committee members are the Chief Judge of the District Court, the Presiding Magistrate Judge, the U.S. Attorney and several Assistant U.S. Attorneys, the Executive Director of Federal Defenders of San Diego and several of her attorney staff, the coordinator for the Panel of Defense Attorneys, the Clerk of the U.S. District Court, the Chief of U.S. Probation, the Chief of U.S. Pretrial, the Warden of the Metropolitan Correctional Center, and the U.S. Marshal. The committee meets telephonically as often as three times a week to discuss all aspects of the Covid-19 crisis' effect on the court, the staff of the represented offices, and the prisoner housing facilities.
10. In addition to the telephonic meetings of the Interagency Committee, I have almost daily contact with the Executive Director of Federal Defenders of San Diego. I am also in frequent contact with other members of her office, sometimes on a daily basis. These conversations include general discussion of the changes to processes caused by COVID-19 as well as specific discussions about the status of particular defendants.
11. I have multiple staff members within my office who are assigned to liaison with defense attorneys and jail facilities. These staff members are in almost daily or daily contact with attorneys from Federal Defenders of San Diego to coordinate meetings, provide updates on facility statuses, and ensure concerns the attorneys have are addressed.
12. Each of the named petitioners in case number 20-cv-00782-AJB-BGS is represented in his/her respective criminal case by Federal Defenders of San Diego.
13. Due to the work of the Interagency Committee, between February 25<sup>th</sup> and April 30<sup>th</sup> of this year, the overall number of prisoners in the custody of the USMS Southern District of California has fallen 33%, from 3,454 down to 2,297. During the same period the population at OMDC has fallen by 42%, from 537 to 310.
14. As of this date, nearly half of the USMS prisoners housed at OMDC do not share a cell. In its current configuration, the average population level of each housing unit at OMDC with USMS prisoners is approximately 31% of its capacity, with 6 of the 9 housing

units at or below 33% of capacity. The housing unit closest to its designed capacity is approximately two-thirds full.

I declare, under penalty of perjury under 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my knowledge.

Dated: April 30, 2020



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Keith Johnson  
Chief Deputy U.S. Marshal  
Southern District of California  
United States Marshals Service



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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

Jacinto Victor ALVAREZ, Joseph  
BRODERICK, Marlene CANO, Jose  
CRESPO-VENEGAS, Noe  
GONZALEZ-SOTO,  
Victor LARA-SOTO, Racquel  
RAMCHARAN, George RIDLEY,  
Michael Jamil SMITH, Leopoldo  
SZURGOT, Jane DOE, on behalf of  
themselves and those similarly situated.

Plaintiffs-Petitioners,

v.

Christopher J. LAROSE, Senior  
Warden,  
Otay Mesa Detention Center,  
  
Steven C. STAFFORD, United States  
Marshal for the Southern District of  
California,  
  
Donald W. WASHINGTON, Director  
of  
the United States Marshal Service.

Defendants-  
Respondents.

NO. 20-cv-782-AJB-BGS

**DECLARATION OF L. MILETO**

I, L. MILETO, make the following Declaration:

1. I am over the age of 18 years and competent to testify to the matters set forth in this Declaration. I make this Declaration in support of Respondents' Response to Motion for Temporary Restraining Order.



1           2.     I am currently employed by CoreCivic as the Grievance Coordinator at  
2 CoreCivic’s Otay Mesa Detention Center (“OMDC”), located in San Diego,  
3 California. I have held this position since April 1, 2018, and have been employed  
4 with CoreCivic since August 2004.

5           3.     OMDC is owned and operated by CoreCivic, Inc. CoreCivic is the  
6 service provider under a detention service contract with U.S. Immigration and  
7 Customs Enforcement (“ICE”), with the United States Marshals Service (“USMS”)  
8 as an authorized user. OMDC houses both ICE immigration detainees and USMS  
9 criminal detainees.

10          4.     As the OMDC Grievance Coordinator, I am familiar with CoreCivic’s  
11 policies and relating to the preparation and retention of facility records including, but  
12 not limited to, the OMDC Detainee Admission and Orientation Handbook  
13 (“Handbook”), Acknowledgment of Inmate/Detainee Orientation Form  
14 (“Acknowledgment”), and the Inmate/Resident Grievance Form (“Grievance”), and  
15 review of detainee grievances.

16          5.     My duties and responsibilities as the Grievance Coordinator include  
17 coordinating the detainee grievance process and insuring that both the informal and  
18 formal grievance processes are administered in compliance with CoreCivic and  
19 government partner requirements. I coordinate the investigation of grievances to  
20 determine the facts and reach a reasonable and effective resolution. I also track  
21 inmate/detainee grievances to ensure timely responses and maintain accurate records  
22 and logs in accordance with company policy, procedure, and contract requirements.

23          6.     I make the statements in this Declaration based upon my personal  
24 knowledge and my review of the grievance records for United States Marshals  
25 Service (“USMS”) detainees George Ridley, Leopoldo Szurgot, Jacinto Victor  
26 Alvarez, Joseph Broderick, Victor Lara-Soto, Michael Jamil Smith, Jose Crespo-  
27 Venegas, Noe Gonzalez-Soto, Marlene Cano, and Raquel Ramcharan, which are  
28 generated and maintained in the normal course of CoreCivic/OMDC operations.



1           14. Detainees are also provided education and instruction on the grievance  
2 process by OMDC detention staff during orientation and ongoing, as requested  
3 and/or needed.

4           15. As the Detainee Handbook instructs, prior to submitting a grievance,  
5 detainees are encouraged to attempt to mutually resolve most complaints and  
6 grievances orally and informally during daily interaction. (Handbook at 35, at  
7 Attachment 1.)

8           16. If the complaint/grievance cannot be resolved informally, detainees  
9 have the right to file a formal grievance utilizing the forms available in all the housing  
10 pods. A detainee may file a formal grievance at any time during, after, or in lieu of  
11 lodging an informal complaint. (*Id.*)

12           17. Grievances must be filed within a reasonable amount of time of the  
13 alleged incident. (*Id.*)

14           18. Detainees may not submit a grievance on the behalf of another detainee  
15 or grieve for another detainee. However, detainees may obtain assistance from  
16 another detainee in the same housing pod, the housing officer, or other facility staff,  
17 family members, legal representatives and non-governmental organizations in  
18 preparing a grievance. Assistance for detainees with impairments or disabilities is  
19 available through interpretation/translation services for detainees with limited  
20 English proficiency (LEP) and assistance for detainees with limited literacy. (*Id.*)

21           19. Completed grievance forms are to be to be placed in the correspondence  
22 boxes located in dining halls for general population detainees, or in  
23 medical/segregation for those not living in general population. Detainees are  
24 encouraged to keep the pink copy for reference. (*Id.*)

25           20. All grievances must have a requested action, and be signed and dated by  
26 the detainee filing the grievance. (*Id.*)

27           21. An emergency grievance is one which the potential for personal injury  
28 or irreparable harm exists are given directly to a supervisor. (*Id.*)

1           22.    OMDC’s grievance process for USMS detainees provides three steps:  
2 (1) informal resolution (optional); (2) formal grievance; and (3) appeal.

3           **Step One: Informal Resolution**

4           23.    Detainees may utilize the informal resolution process concerning  
5 questions, disputes, or complaints prior to the submission of a formal grievance. (*Id.*  
6 at 36.)

7           24.    If a detainee is not satisfied with the results of the informal resolution  
8 process, the detainee may file a formal grievance. Detainees may bypass or terminate  
9 the informal resolution process at any point and proceed directly to the formal  
10 grievance process. (*Id.*)

11           25.    If the detainee chooses to use the Informal Resolution process, the  
12 Informal Resolution Form must submit be submitted within seven (7) calendar days  
13 of the incident resulting in the grievance. (*Id.*)

14           26.    Unless unusual circumstances are present, the detainee will receive a  
15 response to an informal grievance within ten (10) calendar days of submission. In the  
16 event of unusual circumstances, the assigned staff member will provide the detainee  
17 with written documentation extending the response deadline. (*Id.*)

18           **Step Two: Formal Grievance**

19           27.    The detainee must file a grievance within five (5) calendar days of the  
20 response date listed on the Informal Resolution Form. If the detainee bypassed the  
21 informal grievance process, the detainee must file a grievance within seven (7)  
22 calendar days from the date of the alleged incident. In the event the detainee pursues  
23 a formal grievance, the detainee must attach a copy of the Informal Resolution to the  
24 formal grievance form. The time for filing begins from the date the problem or  
25 incident became known to the detainee. (*Id.*)

26           28.    In the event a detainee terminates the informal resolution process, he/she  
27 will have seven (7) calendar days from terminating the informal grievance to file a  
28 formal grievance. The total time for the formal grievance process will be no more

1 than twenty-seven (27) days from filing to a final appeal decision, unless unusual  
2 circumstances are present. (*Id.*)

3 **Step Three: Appeal**

4 29. If a detainee is not satisfied with the decision of a formal or emergency  
5 grievance, the detainee may complete the appeal section of the page 2 of the  
6 grievance and resubmit the grievance. The detainee must file the appeal within five  
7 (5) calendar days of the response date listed on the grievance form. (*Id.*)

8 30. The Grievance Officer will forward all grievance appeals to the Warden  
9 for review and a final response. (*Id.*)

10 31. Upon receipt of the Warden's response, the attempt to administratively  
11 resolve the issue will be considered exhausted. (*Id.*)

12 **Emergency Grievances**

13 32. If the subject matter of a grievance is such that compliance with the  
14 regular time requirements would subject the detainee to risk of personal injury, the  
15 detainee may request that the grievance be considered an emergency grievance. (*Id.*)

16 33. The emergency grievance must detail the basis for requiring an  
17 immediate response. When the grievance is of an emergency nature, utilization of the  
18 informal resolution process is not required. (*Id.*)

19 34. Emergency Grievances are to be submitted to the designated grievance  
20 mail box, or is to be given directly to the Grievance Coordinator. (*Id.*)

21 35. Emergency grievances are immediately forwarded to a designated  
22 Administrative Duty Officer below the rank of Warden for a response. Emergency  
23 grievances will be resolved within one (1) calendar day of receipt of the grievance  
24 and a written response provided to the detainee. (*Id.*)

25 36. If it is determined that the grievance is not of an emergency nature, the  
26 standard procedures for a formal grievance will be followed. (*Id.*)

27 ///

**PETITIONERS' GRIEVANCE HISTORY**

1  
2 37. I have reviewed Petitioners' grievance histories. With the exception of  
3 detainee Joseph Broderick, none of the Petitioners filed Informal Resolutions and/or  
4 Grievances with respect to allegations related to OMDC's COVID-19 response  
5 protocols to include complaints regarding sanitation, social distancing, meal service,  
6 access to cleaning supplies, access to facial masks or gloves, access to facial masks,  
7 access to medical care, COVID-19 testing, or COVID-19 exposure/infection risk.

8 38. On April 13, 2020, two Grievances were received from Detainee  
9 Broderick and assigned Grievance No. 2020-2610-00282-G. The first Grievance was  
10 undated. He alleged that the detainees had not been given supplies needed to protect  
11 themselves from COVID-19 and requested PPE, cleaning supplies, soap, Styrofoam  
12 trays and alternatively, release. (Grievance No. 2020-2610-00282-G at 1,  
13 Attachment 3.)

14 39. The second Grievance received from Detainee Broderick on April 13,  
15 2020 was dated April 7 and complained of COVID-19 outbreak as well as alleged  
16 denial of Styrofoam trays, masks, gloves, and soap. He requested masks, test, PPE  
17 and food service. (*Id.* at 2.)

18 40. On April 22, 2020, Detention Contract Monitor D. Crutchfield  
19 responded to both of Detainee Broderick's grievances reporting that staff from both  
20 the day and night shifts and the safety manager verified that disinfectant spray bottles  
21 were being refilled with the proper mixtures, cleaning supplies were available in all  
22 USMS pods, masks had been issued and replacements were available upon request,  
23 clean clothes were being restocked as needed, and medical personnel had begun  
24 testing detainees with COVID-19 symptoms. (*Id.* at 3.) Contract Monitor Crutchfield  
25 encouraged Detainee Broderick to sign up for Sick Call if he was experiencing  
26 symptoms or felt ill, noting that in the case of a medical emergency, medical  
27 personnel would be called immediately. (*Id.* at 3)

1           41. To date, Detainee Broderick has not appealed this grievance response.  
2 Accordingly, he has not exhausted available administrative remedies on these  
3 grievances.

4           42. On April 21, 2020, Detainee Broderick submitted another Grievance  
5 form assigned Grievance No. 2020-2610-00312-G alleging he was scared for his life  
6 because he does not have PPE and his pod was quarantined. (Grievance No. 2020-  
7 2610-00312-G at Attachment 4.) He requested PPE, testing for all, or alternatively,  
8 release. This grievance was not submitted as an emergency grievance. (*Id.* at 1.)

9           43. Acting Unit Manager K. Hawkins responded to this grievance on April  
10 27, 2020, reporting that masks had been distributed to all detainees on April 24, 2020,  
11 that OMDC is following CDC guidelines for PPD, any detainee testing positive for  
12 COVID-19 is being moved to a quarantine pod, and testing is being performed. (*Id.*  
13 at 2.)

14           44. To date, Detainee Broderick has not appealed this grievance response  
15 and thus to date, has not exhausted available administrative remedies on these  
16 grievances.

17           45. Detainees G. Ridley, L. Szurgot, J. Victor Alvarez, V. Lara-Soto, M.  
18 Jamil Smith, J. Crespo-Venegas, N. Gonzalez-Soto, M. Cano, and R. Ramcharan  
19 have not submitted any grievances related to OMDC's COVID-19 response  
20 protocols. As such, they have not exhausted available administrative remedies  
21 regarding any complaints pertaining to the same.

22           I declare under penalty of perjury under the laws of the United States and the  
23 State of California that the foregoing is true and correct to the best of my  
24 knowledge.

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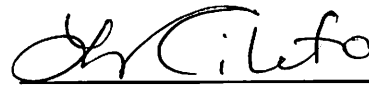
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EXECUTED this 30th day of April, 2020 at San Diego, California.



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L. MILETO

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