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9 ATTORNEYS FOR RESPONDENTS

10
 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' MOTION TO DENY
 PETITION FOR WRIT OF HABEAS
 CORPUS AND INJUNCTIVE AND
 DECLARATORY RELIEF**

(PROPOSED CLASS ACTION)

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

TABLE OF CONTENTS

PAGE

I. INTRODUCTION1

II. FACTUAL BACKGROUND.....2

 A. Petitioners’ Pending Criminal Cases2

 B. Southern District of California Interagency COVID-19 Committee6

 C. The Petition In This Case6

III. LEGAL STANDARDS7

 A. Rule 12(b)(1): Subject Matter Jurisdiction.....7

 B. Rule 12(b)(6): Requirements to State a Claim and Plead with
 Specificity8

IV. ARGUMENT9

 A. The Existing Statutory Framework Bars the Relief Petitioners Seek9

 1. The Bail Reform Act and the Attorney General’s
 April 6 Memorandum9

 2. The Prisoner Litigation Reform Act And Prisoner Release
 Orders Generally10

 3. Petitioners Must Seek Relief Under the Bail Reform Act
 In Their Respective Criminal Cases Because the Prisoner
 Litigation Reform Act Precludes This Court From
 Reducing Or Limiting the Prison Population
 In This Case12

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

B. The Petition Fails Because Petitioners Have Not Exhausted
 Their Administrative Remedies.....14

 1. Petitioners Did Not Exhaust Their Administrative
 Remedies14

 2. The Narrow Exceptions for Failure to Exhaust Do Not
 Apply Here14

C. The Peition Does Not Provide a Valid Jurisdictional Basis for
 Conditions-Of-Confinement Relief.....15

D. The Petition Must Be Denied to the Extent It Seeks an Injunction
 Requiring Respondents to Release Detainees Subject to Conditions of
 Release or Order of Detention From a Federal Court.....16

V. CONCLUSION.....18

TABLE OF AUTHORITIES

CASES

PAGES

1
2
3
4
5
6 *Allen v. McCurry*,
7 449 U.S. 90 (1980)16
8 *Ashcroft v. Iqbal*,
9 556 U.S. 662 (2009)8
10 *Bell Atl. Corp v. Twombly*,
11 550 U.S. 544 (2007),8
12 *Brown v. Plata*,
13 563 U.S. 493 (2011)11, 12
14 *Cutter v. Wilkinson*,
15 544 U.S. 709 (2005)14
16 *Daimler Chrysler Corp. v. Cuno*,
17 547 U.S. 332 (2006)7, 8, 16
18 *Falcon v. U.S. Bureau of Prisons*,
19 52 F.3d 137, 139 (7th Cir. 1995).....16
20 *Fassler v. United States*,
21 858 F.2d 1016, 1017-19 (5th Cir. 1988)16
22 *Gilmore v. California*,
23 220 F.3d 987 (9th Cir. 2000)11
24 *Gon v. Gonzalez*,
25 534 F. Supp. 2d 118 (D.D.C. 2008).....17
26 *Inmates of Occoquan v. Barry*,
27 844 F.2d 828 (D.C. Cir. 1988).....11
28 *INS v. St. Cyr*,
533 U.S. 289 (2001)15

1 *Johnson v. California*,
 2 543 U.S. 499 (2005)14
 3 *Kokkonen v. Guardian Life Ins. Co. of Am*,
 4 511 U.S. 375 (1994)8
 5 *Lehigh Mining & Mfg. Co. v. Kelly*,
 6 160 U.S. 327 (1895)8
 7 *Maronyan v. Toyota Motor Sales, USA, Inc.*,
 8 658 F.3d 1038 (9th Cir. 2011)14
 9 *Medina v. Choate*,
 10 875 F.3d 1025, 1029 (10th Cir. 2017).....16
 11 *Munaf v. Geren*,
 12 553 U.S. 674 (2008)15
 13 *Navarro v. Block*,
 14 250 F.3d 729 (9th Cir. 2001) 8
 15 *Porter v. Nussle*,
 16 534 U.S. 516 (2002)14, 15
 17 *Preiser v. Rodriguez*,
 18 411 U.S. 475 (1973)16
 19 *Reese v. Warden Philadelphia*
 20 *FDC*, 904 F.3d 244, 246-48 (3d Cir. 2018)16
 21 *Renne v. Geary*,
 22 501 U.S. 312 (1981)7
 23 *Ross v. Blake*,
 24 136 S. Ct. 1850 (2016).....15
 25 *Safe Air For Everyone v. Meyer*,
 26 373 F.3d 1035 (9th Cir. (2004).....8
 27 *Starr v. Baca*,
 28 652 F.3d 1202 (9th Cir. 2011)9

1 *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*,
 2 551 U.S. 308 (2007)9
 3 *United States v. Gebro*,
 4 948 F.2d 1118 (9th Cir. 1991),10
 5 *United States v. Green*,
 6 107 F.2d 19 (9th Cir. 1939)8
 7 *Woodford v. Ngo*,
 8 548 U.S. 81 (2006)15
 9 *Zixiang Li v. Kerry*,
 10 710 F.3d 995 (9th Cir. 2013)9
 11 Statutes
 12 5 U.S.C. § 702 1
 13 8 U.S.C. § 13252
 14 8 U.S.C. § 1326(a).....2, 4, 5
 15 18 U.S.C. § 922(g)(1).....5
 16 18 U.S.C. § 13433
 17 18 U.S.C. § 13493
 18 18 U.S.C. § 15943
 19 18 U.S.C. § 2422(b)3
 20 18 U.S.C. § 31422, 16
 21 18 U.S.C. § 3142(a).....9
 22 18 U.S.C. § 3142(b)17
 23 18 U.S.C. § 3142(g)(3).....10
 24 18 U.S.C. § 3142(i)17
 25 18 U.S.C. § 314317
 26 18 U.S.C. § 3143(b)(1).....17
 27 18 U.S.C. § 3145(b)10
 28 18 U.S.C. § 3626(a)(2).....11

1 18 U.S.C. § 3626(a)(3) 1

2 18 U.S.C. § 3626(a)(3)(A) 11, 12

3 18 U.S.C. § 3626(a)(3)(B)..... 10, 12

4 18 U.S.C. § 3626(g)(2)..... 11, 12, 13

5 18 U.S.C. § 3626(g)(4)..... 13

6 18 U.S.C. § 3161(h)(7)(A) 3

7 21 U.S.C. § 841(a)(1)..... 5

8 21 U.S.C. § 952 3, 4, 5

9 28 U.S.C. § 2241 1, 12

10 42 U.S.C. § 1997e(a)..... 2

11 42 U.S.C. § 1997e(h)..... 14

12 Rules

13 Fed. R. Civ. P. 8(a)(2) 8

14 Fed. R. Civ. P. 12(b)(1)..... 1, 7

15 Fed. R. Civ. P. 12(h)(3)..... 8

16 Fed. R. Civ. P. 12(b)(6)..... 8, 9

17 Fed. R. Civ. P. 23 1

18 Fed. R. Civ. P. 65 1

19 Fed. R. Evid. 201..... 2

20 Other Authorities

21

22 H.R. Rep No. 104 -378 166..... 11

23 H.R. Rep. No. 104-21 n.2..... 11

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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 (collectively “Respondents”), respectfully move pursuant to Fed. R. Civ. P.
4 12(b)(1) and 12(b)(6) to deny the Class Action Petition by Petitioners Jacinto Victor
5 Alvarez, et al. (collectively, “Petitioners”) seeking writ of habeas corpus and injunctive and
6 declaratory relief filed under 28 U.S.C. §§ 2241, 2243 (habeas corpus), 2201-02
7 (declaratory relief), 1651 (All Writs Act), 5 U.S.C. § 702 (judgment against federal
8 officers), Federal Rule of Civil Procedure 65 (injunctive relief), Federal Rule of Civil
9 Procedure 23 (class action), as well as the Fifth and Eighth Amendments to the United States
10 Constitution. ECF Doc. 1, at ¶ 15.

11 **I.**

12 **INTRODUCTION**

13 Petitioners are federal criminal detainees charged with, or convicted of, serious
14 crimes. They challenge the conditions of their confinement at the Otay Mesa Detention
15 Center (“OMDC”) as inadequate to address the threat to health and safety posed by COVID-
16 19. Rather than availing themselves of (or exhausting) the opportunities for seeking release
17 in their respective criminal cases set forth under the Bail Reform Act, Petitioners filed this
18 civil action on behalf of themselves and a putative class seeking a highly extraordinary
19 injunction that would require Respondents to immediately to release some number of
20 detainees from OMDC, and that would require this Court to function as a judicial monitor
21 regarding the conditions at OMDC.

22 The Petition and its highly extraordinary relief must be denied for the following
23 independent reasons:

- 24 1. This Court lacks subject matter jurisdiction under the Prison Litigation
25 Reform Act, which places strict limits on a district court’s ability to order
26 the release of inmates and expressly precludes a single district judge from
27 doing so. 18 U.S.C. § 3626(a)(3);
28

1 § 1326(a) and (b). At his bond hearing, the court ordered Mr. Alvarez detained as
2 a flight risk. More recently, the court vacated the motion *in limine* hearing and
3 trial dates and set a status hearing for May 18, 2020. Further, the court excluded
4 time under the Speedy Trial Act, 18 U.S.C. §§ 3161(h)(7)(A) and 3174.

- 5 • **Joseph Broderick**, Case No. 19-cr-04780-GPC. Mr. Broderick is represented by
6 Federal Defenders of San Diego, Inc. He is charged as a co-defendant in a 6-count
7 Indictment with conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1349,
8 five counts of wire fraud, in violation of 18 U.S.C. § 1343, and criminal forfeiture.
9 Mr. Broderick and his co-conspirator submitted fraudulent loan applications for
10 real estate loans and received loan proceeds based on these fraudulent applications.
11 At his bond hearing, the court ordered Mr. Broderick detained as a flight risk.
12 Pursuant to a joint motion, the Court ordered the Motion Hearing/Trial Setting
13 continued to May 22, 2020 and excluded time under the Speedy Trial Act, 18
14 U.S.C. §§ 3161(h)(7)(A) and 3174. A motion for reconsideration of the detention
15 order is pending.
- 16 • **Victor Lara-Soto**, Case No. 19-cr-04949-BAS. Mr. Lara-Soto is represented by
17 Federal Defenders of San Diego, Inc. He is charged in a single count Information
18 with importation of 48 kilograms of methamphetamine, in violation of 21 U.S.C.
19 § 952 and 960. At his bond hearing, the court ordered Mr. Lara-Soto detained as
20 a flight risk. The Court ordered the Motion Hearing/Trial Setting continued to May
21 18, 2020 and excluded time under the Speedy Trial Act, 18 U.S.C. §§
22 3161(h)(7)(A), (h)(7)(B)(i), (h)(B)(iv) and 3174. Further, a Change of Plea
23 Hearing is set for May 21, 2020.
- 24 • **George Martinez-Ridley**, Case No. 19-cr-04905-DMS. Mr. Martinez-Ridley is
25 represented by Federal Defenders of San Diego, Inc. He is charged in a three count
26 Information with attempted sex trafficking of children, in violation of 18 U.S.C.,
27 §§ 1591 and 1594, attempted enticement of a minor, in violation of 18 U.S.C. §
28 2422(b), and conspiracy to engage in sex trafficking of children, in violation of 18
U.S.C. § 1594 (c). The court ordered Mr. Martinez-Ridley detained as a danger to
the community and as a flight risk. It later denied his motion to reconsider the

1 detention order. At the request of counsel, the Motion Hearing set for April 10,
2 2020 to address the pending Motion to Compel Discovery, to Preserve Evidence,
3 and for Leave to File Other Motions was continued to June 5, 2020. Mr. Martinez-
4 Ridley's second motion to reconsider the Court's order of detention is pending.

- 5 • **Leopaldo Szurgot**, Case No. 19-cr-4867-DMS. Mr. Szurgot is represented by
6 Federal Defenders of San Diego, Inc. He entered a guilty plea to Count One of a
7 two count Information alleging conspiracy to import 31 kilograms of
8 methamphetamine, in violation of 21 U.S.C. § 952, 960 and 963. The court set a
9 \$30,000 appearance bond for Mr. Szurgot, to be secured by the signature of two
10 financially responsible adults. A Pre-Sentence Report is on file and the Court reset
11 Mr. Szurgot's Sentencing Hearing from May 8, 2020 to August 14, 2020.
- 12 • **Jane Doe**, Case No. 19-cr-05184-MMA. Jane Doe is represented by Federal
13 Defenders of San Diego, Inc. She is charged in a single count Information alleging
14 attempted reentry of removed alien, in violation of 8 U.S.C. § 1326(a) and (b).
15 Initially, the court ordered Jane Doe detained pending trial, but it later set at a
16 \$40,000 appearance bond to be secured by two financially responsible adults with
17 a \$4,000 cash deposit to be paid by a family member or surety. Jane Doe is also
18 pending a revocation of supervised release in case number 18-cr-01417-MMA.
19 The court, *sua sponte*, vacated the Motion Hearing/Trial Setting set for April 20,
20 2020 and reset it for May 18, 2020.
- 21 • **Marlene Cano**, Case No. 20-cr-00036-BTM. Ms. Cano is represented by Federal
22 Defenders of San Diego, Inc. She entered a plea of guilty to a single count
23 Superseding Indictment alleging importation of 0.45 kilograms of
24 methamphetamine, in violation of 21 U.S.C. § 952 and 960. The court initially set
25 at a \$15,000 appearance bond for Ms. Cano, to be secured by the signature of one
26 financially responsible adult and 10 percent cash deposit. In a minute order, the
27 court denied Ms. Cano's request for a bond modification stating, "[w]hile the Court
28 is mindful of the serious risks any person faces due to the COVID-19 pandemic,
said reason alone is insufficient to modify the balance of factors prescribed by
Congress in determining appropriate bond in this case." At the request of the

1 assigned Probation Officer and with the concurrence of Ms. Cano's defense
2 counsel, the Court continued her Sentencing Hearing from April 28, 2020 to
3 August 4, 2020.

- 4 • **Jose Crespo-Venegas**, Case No. 19-CR-5169-JLS. Mr. Crespo-Venegas is
5 represented by Federal Defenders of San Diego, Inc. He entered a plea of guilty
6 to a single count Information alleging attempted reentry of removed alien, in
7 violation of 8 U.S.C. § 1326(a) and (b). At his bond hearing, the court ordered
8 Mr. Crespo-Venegas detained as a flight risk. A Pre-Sentence Report is on file but
9 a date for the Sentencing Hearing has not been set. A motion to reconsider the
10 Court's order of detention is pending.
- 11 • **Noe Gonzalez-Soto** 19-cr-03858-BTM. Mr. Gonzalez-Soto is represented by
12 Federal Defenders of San Diego, Inc. He entered pleas of guilty to a two-count
13 Information alleging importation of 28 kilograms of methamphetamine, in
14 violation of 21 U.S.C. §§ 952 and 960, and importation of 26 kilograms of cocaine,
15 in violation of 21 U.S.C. §§ 952 and 960. At his bond hearing, the court ordered
16 Mr. Gonzalez-Soto detained as a flight risk. Pursuant to a joint motion, the Court
17 continued the Sentencing Hearing from March 10, 2020 to May 5, 2020.
- 18 • **Racquel Ramcharan**, Case No. 19-cr-00869-GPC. Ms. Ramcharan is represented
19 by Federal Defenders of San Diego, Inc. She entered a plea of guilty to a single
20 count superseding indictment alleging possession with the intent to distribute
21 fentanyl, in violation of 21 U.S.C. § 841(a)(1). Ms. Ramcharan was previously
22 released on bond but the court remanded her to custody after a failed drug
23 screening. A Pre-Sentence Report is on file and at the request of the parties, the
24 court advanced the Sentencing Hearing from June 19, 2020 to May 6, 2020.
- 25 • **Michael Jamil Smith**, Case No. 19-cr-01270-W. Mr. Smith is represented by
26 Federal Defenders of San Diego, Inc. He entered a plea of guilty to Count One of
27 a five-count Indictment alleging felon in possession of a firearm, a double-barrel
28 break-action shotgun, in violation of 18 U.S.C. § 922(g)(1). The court initially
ordered Mr. Smith detained as a flight risk, but it later set a \$20,000 appearance

1 bond secured by cash or a corporate surety. Mr. Smith's Sentencing Hearing with
2 Pre-Sentence Report is set for July 20, 2020.

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

4 In March of 2020, the Chief Judge and the United States Attorney's Office
5 established a federal interagency COVID-19 Committee. *See* Declaration of Keith Johnson,
6 filed concurrently herewith, at ¶ 9. The Committee's purpose is to ensure the orderly
7 operation of the criminal justice process during the pandemic. *Id.* The Committee members
8 include: the Chief Judge, the Presiding Magistrate Judge, the U.S. Attorney, the Executive
9 Director of Federal Defenders of San Diego, Inc., the coordinator for the Criminal Justice
10 Act Panel Attorneys, the Clerk of Court, the Chief of U.S. Probation, the Chief of U.S.
11 Pretrial Services, the Warden of the Metropolitan Correctional Center, and the U.S.
12 Marshal. *Id.* The Committee meets by telephone up to 3 times per week and their discussions
13 include the impact of the pandemic on inmate housing. *Id.* As a result of the Committee's
14 efforts, the overall inmate population in USMS custody decreased by thirty-three percent
15 between February 25 and April 30, 2020, from 3,454 to 2,297. And at OMDC, it decreased
16 by forty-two percent, from 537 to 310, during this same timeframe.² *Id.* at ¶ 13.

17 **C. The Petition In This Case**

18 Petitioners have initiated this action on behalf of themselves and a putative class of
19 unstated size, encompassing (1) a "Pretrial Class" of all current and future persons in
20 pretrial detention at OMDC; (2) a "Pretrial Medically Vulnerable Subclass" of all current
21 and future people detained pretrial at OMDC who are aged 45 years or older or who, by
22 undefined standards, have "medical conditions that place them at heightened risk of severe
23 illness or death from COVID-19"; (3) a "Post-Conviction Class" of all current and future
24 persons in post-conviction detention at OMDC; (4) a "Post-Conviction Medically
25 Vulnerable Subclass" of all current and future people detained post-conviction at OMDC

26
27 ² USMS determines which of its inmates are housed at OMDC. Johnson Dec. at ¶ 3.
28 While USMS determines where inmates are housed, neither USMS nor OMDC controls
which of those inmates are ordered detained or released from detention. Johnson Dec. at ¶
3.

1 who are aged 45 years or older or who again, by undefined standards, have medical
2 conditions that place them at heightened risk of severe illness or death from COVID-19.
3 ECF Doc. No. 1 at 39, “Prayer for Relief”; *see* “[Proposed] Order Granting Class
4 Certification[,]” submitted by Petitioner ex parte via Chambers email, April 27, 2020.

5 On behalf of these potentially universal “classes and subclasses” of OMDC detainees,
6 Petitioners allege conditions posing a risk of COVID-19 infection such that violate the Fifth
7 and Eighth Amendments to the United States Constitution (ECF Doc. 1, at ¶ 15), and
8 demand a menu of actions by the Court, including: (1) certification of a class action on
9 behalf of the undefined class; (2) issuance of a writ of habeas corpus requiring the
10 immediate release of members of undefined “medical subclasses” and an unstated number
11 of additional detainees; (3) injunctive relief or a temporary restraining order requiring
12 Defendants to immediately release members of the undefined subclasses and an unstated
13 number of additional detainees; (4) an order requiring Defendants to provide information
14 regarding “the ongoing COVID-19 outbreak at OMDC”; (4) order that a plan be
15 immediately submitted to the Court and a public health expert that outlines specific
16 mitigation efforts to prevent COVID-19 spread among detainees, and a housing and/or
17 public support plan for released detainees exposed COVID-19, apparently, at any time or
18 through any means; (5) expedited review of the Petition; (6) declaratory judgement that
19 OMDC detention violates the Fifth and Eighth Amendment of the United States
20 Constitution; (7) attorneys’ fees and expenses; and (8) any further relief “deemed just and
21 proper.” ECF Doc. No. 1 at 39-41.

22 Respondents now oppose.

23 **III.**

24 **LEGAL STANDARDS**

25 **A. Rule 12(b)(1): Subject Matter Jurisdiction**

26 Because federal courts are considered courts of limited jurisdiction, jurisdiction is
27 never presumed – in fact, the presumption operates to the contrary. Fed. R. Civ. P. 12(b)(1);
28 *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006) (*citing Renne v. Geary*, 501

1 U.S. 312, 316 (1991)); *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377
2 (1994); *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U.S. 327, 336-337 (1895); *United States v.*
3 *Green*, 107 F.2d 19, 21 (9th Cir. 1939). Rather, “the party asserting federal jurisdiction
4 when it is challenged has the burden of establishing it.” *DaimlerChrysler*, 547 U.S. at 342,
5 n.3. For these purposes the Court “need not presume the truthfulness of the plaintiff’s
6 allegations[,]” and in evaluating such factual allegations the Court “may review evidence
7 beyond the complaint without converting the motion to dismiss into a motion for summary
8 judgment.” *Safe Air For Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). If the
9 Court does not have subject matter jurisdiction, it must dismiss the claim. Fed. R. Civ. P.
10 12(h)(3).

11 **B. Rule 12(b)(6): Requirement to State a Claim and Plead with Specificity**

12 A Federal Rule of Civil Procedure 12(b)(6) motion “tests the legal sufficiency of a
13 claim.” *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). To survive a 12(b)(6) motion
14 a complaint must contain sufficient factual matter to “state a claim to relief that is plausible
15 on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The plausibility standard asks for
16 more than mere possibility that a defendant has acted unlawfully. *Id.* at 679. “Where a
17 complaint pleads facts that are merely consistent with a defendant’s liability, it stops short
18 of the line between possibility and plausibility of entitlement to relief.” *Id.* at 678 (internal
19 quotations omitted).

20 Therefore, while allegations of material fact are taken as true and construed in the
21 light most favorable to the non-moving party, this principle does not presume that every
22 grievance gives rise to the relief demanded. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544
23 (2007). Factual allegations must show a legal entitlement sufficient to compel the expense
24 of discovery and continued litigation, and a court need not accept as true allegations that are
25 conclusory, boilerplate, unwarranted deductions of fact, legal conclusions or unreasonable
26 inferences. *Twombly*, at 555 (“a plaintiff’s obligation to provide the ‘grounds’ of his
27 ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation
28 of the elements of a cause of action will not do”); *Iqbal*, 556 U.S. at 678-79 (quoting Fed.

1 R. Civ. P. 8(a)(2), “[W]here the well-pleaded facts do not permit the court to infer more
2 than the mere possibility of misconduct, the complaint has alleged—but it has not
3 ‘show[n]’—‘that the pleader is entitled to relief.’”).

4 Rule 12(b)(6) is read in conjunction with Rule 8 so as to require “fair notice of the
5 nature of the claim[and] grounds on which the claim rests.” *Zixiang Li v. Kerry*, 710 F.3d
6 995, 998-99 (9th Cir. 2013). A plaintiff must articulate necessary facts clearly and
7 specifically, to enable the opposing party to defend itself. *Starr v. Baca*, 652 F.3d 1202,
8 1216 (9th Cir. 2011). Here, too, courts will consider materials “incorporated into the
9 complaint by reference” for the purpose of a Fed. R. Civ. P. 12(b)(6) motion. *Tellabs, Inc.*
10 *v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

11 IV.

12 ARGUMENT

13 A. The Existing Statutory Framework Bars the Relief Petitioners Seek

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

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

25 The Bail Reform Act (“BRA”) expressly allows district courts to consider an
26 individual defendant’s health when deciding whether to detain him or her pending trial.
27 A person charged with an offense may be released, released on conditions, or detained
28 pending trial. 18 U.S.C. § 3142(a). In determining “whether there are conditions of release

1 that will reasonably assure the appearance of the person as required and the safety of any
 2 other person and the community,” the court “shall . . . take into account the available
 3 information concerning,” inter alia, “the history and characteristics of the person, including
 4 . . . the person’s . . . physical and mental condition[.]” 18 U.S.C. § 3142(g)(3). District
 5 courts have statutory authority to review, revoke or amend a magistrate judge’s detention
 6 order. 18 U.S.C. § 3145(b); *United States v. Gebro*, 948 F.2d 1118, 1120 (9th Cir. 1991)
 7 (ruling that “the district court had the jurisdiction to reopen the bail issue on its own
 8 motion”).

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

23 **2. The Prisoner Litigation Reform Act And Prisoner Release Orders** 24 **Generally**

25 The Prison Litigation Reform Act (“PLRA”) places strict limits on a district court’s
 26 ability to order the release of inmates “in any civil action with respect to prison conditions,”
 27 and expressly precludes a single district judge from doing so. 18 U.S.C. § 3626(a)(3)(B).
 28 That prohibition applies to “any civil proceeding arising under Federal law with respect to

1 the conditions of confinement or the effects of actions by government officials on the lives
2 of persons confined in prison, but does not include habeas corpus proceedings challenging
3 the fact or duration of confinement in prison[.]” 18 U.S.C. § 3626(g)(2). In non-prohibited
4 suits, the court “may enter a temporary restraining order or an order for preliminary
5 injunctive relief,” but such injunctive relief “must be narrowly drawn, extend no further
6 than necessary to correct the harm the court finds requires preliminary relief, and be the
7 least intrusive means necessary to correct that harm.” 18 U.S.C. § 3626(a)(2). Under the
8 PLRA, a “prisoner release order” – which “includes any order, including a temporary
9 restraining order or preliminary injunctive relief, that has the purpose or effect of reducing
10 or limiting the prison population, or that directs the release from or nonadmission of
11 prisoners to a prison,” § 3626(g)(4) – may “be entered only by a three-judge court,”
12 § 3626(a)(3)(B), and then only if certain conditions have been met. Among other
13 requirements, “no court shall enter a prisoner release order unless – (i) a court has previously
14 entered an order for less intrusive relief that has failed to remedy the deprivation of the
15 Federal right sought to be remedied through the prisoner release order; and (ii) the defendant
16 has had a reasonable amount of time to comply with the previous court orders.” 18 U.S.C.
17 § 3626(a)(3)(A).

18 Congress enacted the PLRA to “revive the hands-off doctrine,” which was “a rule of
19 judicial quiescence derived from federalism and separation of powers concerns[.]” in order
20 to remove the federal judiciary from day-to-day prison management. *Gilmore v. California*,
21 220 F.3d 987, 991, 996-97 (9th Cir. 2000) (*ref.* 141 Cong. Rec. S14418, at S14418-19
22 (1995); H.R. Rep. No. 104-378, at 166 (1995); *and* H.R. Rep. No. 104-21, at 24 n.2 (1995)).
23 Section 3626 thus “restrict[s] the equity jurisdiction of federal courts,” *Gilmore*, 220 F.3d
24 at 999, and, “[b]y its terms . . . restricts the circumstances in which a court may enter an
25 order ‘that has the purpose or effect of reducing or limiting the prison population,’” *Brown*
26 *v. Plata*, 563 U.S. 493, 511 (2011). The PLRA’s “requirements ensure that the ‘last remedy’
27 of a population limit is not imposed ‘as a first step.’” *Id.* at 514 (quoting *Inmates of*
28

1 *Occoquan v. Barry*, 844 F.2d 828, 843 (D.C. Cir. 1988)). “The release of prisoners in large
2 numbers . . . is a matter of undoubted, grave concern.” *Plata*, 563 U.S. at 501.

3 **3. Petitioners Must Seek Relief Under the Bail Reform Act In Their**
4 **Respective Criminal Cases Because the Prisoner Litigation Reform Act**
5 **Precludes This Court From Reducing Or Limiting the Prison Population**
6 **In This Case**

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

20 Here, there can be no legitimate dispute that Petitioners’ lawsuit is a “civil action
21 with respect to prison conditions” governed by the PLRA. The PLRA defines “civil action
22 with respect to prison conditions” broadly to mean “any civil proceeding arising under
23 Federal law with respect to the conditions of confinement or the effects of actions by
24 government officials on the lives of persons confined in prison, but [that term] does not
25 include habeas corpus proceedings challenging the fact or duration of confinement in
26 prison[.]” 18 U.S.C. § 3626(g)(2). This case neatly falls within that definition. *Id.*
27 Although Petitioners invoke habeas corpus and 28 U.S.C. § 2241, Doc. # 1 ¶¶ 17-18, this is
28 not a “habeas corpus proceeding[] challenging the fact or duration of confinement in

1 prison.” 18 U.S.C. § 3626(g)(2). Petitioners make no claims regarding the fact or duration
2 of their detention. Rather, Petitioners challenge the conditions of their confinement at
3 OMDC as inadequate to address the threat to health and safety posed by COVID-19. ECF
4 Doc. No. 1 ¶ 13. This case is thus a “civil proceeding arising under Federal law with respect
5 to the conditions of confinement or the effects of actions by government officials on the
6 lives of persons confined in prison” governed by the PLRA. 18 U.S.C. § 3626(g)(2).

7 The PLRA strictly limits the relief this Court may grant. Under the PLRA, a single
8 district court judge may not enter “a prisoner release order,” § 3626(a)(3)(B), which is
9 broadly defined to “include[] any order, including a temporary restraining order or
10 preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison
11 population, or that directs the release from or nonadmission of prisoners to a prison[.]” 18
12 U.S.C. § 3626(g)(4). Therefore, to the extent Petitioners seek an order or injunction that
13 would require Respondents “to immediately release both Medically Vulnerable Subclasses”
14 and an unstated “number of class members to reduce the overall population of USMS
15 detainees at OMDC[,]” ECF Doc. No. 1 at 39-40, the PLRA precludes that relief.

16 As another district court recently recognized, although “the issue of inmate health
17 and safety is deserving of the highest degree of attention,” an “order imposing a court-
18 ordered and court-managed ‘process’ for determining who should be released” from a state
19 prison in response to the COVID-19 pandemic falls “squarely within
20 Section 3626(a)(3) – which forbids this Court from granting it.” *Money v. Pritzker*,
21 20CV2093, 2020 U.S. Dist. Lexis 63599, at 5, 45-6 (N.D. Ill. April 10, 2020). “[T]he
22 release of inmates requires a process that gives close attention to detail, for the safety of
23 each inmate, his or her family, and the community at large demands a sensible and
24 individualized release plan – especially during a pandemic.” *Id.* at 5. Individual motions
25 for release under the BRA allows judges to undertake that “inherently inmate-specific
26 inquiry,” *id.* at 6, and are the proper legal vehicle for Petitioners to attempt to obtain release
27 due to health risks posed by the COVID-19 pandemic. *See also Plata v. Newsom*,
28 01CV1351, 2020 U.S. Dist. Lexis 70271 (N.D. Cal. Apr. 17, 2020) (same). Moreover,

1 most, if not all, of the members of Petitioners’ proposed classes have made appearances in
2 BRA hearings, already heard by other courts in this district.

3 **B. The Petition Fails Because Petitioners Have Not Exhausted Their**
4 **Administrative Remedies**

5 Independently, the Petition must be denied for failure to state a claim because
6 Petitioners did not exhaust their administrative remedies prior to filing this lawsuit. *See*
7 *Johnson v. California*, 543 U.S. 499, 528 n.1 (2005) (dissent, noting that PLRA plaintiff’s
8 failure to exhaust may be raised as a defense even if non-jurisdictional).

9 **1. Petitioners Did Not Exhaust Their Administrative Remedies**

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

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

23 **2. The Narrow Exceptions for Failure to Exhaust Do Not Apply Here**

24 Failure to exhaust may be excused only (1) where the remedy “operates as a simple
25 dead end – with officers unable or consistently unwilling to provide any relief to aggrieved
26 inmates”; (2) where the administrative scheme is “so opaque that it becomes, practically
27 speaking, incapable of use;” or (3) where “prison administrators thwart inmates from taking
28 advantage of a grievance process through machination, misrepresentation, or intimidation.”

1 *Ross v. Blake*, 136 S. Ct. 1850, 1853-54, 1859-60 (2016). None of those three narrow
2 exceptions applies here. Nothing in the Petition suggests that Petitioners' pursuit of
3 administrative remedies was hindered "through machination, misrepresentation, or
4 intimidation." *Ross*, 136 S. Ct. at 1859-60.

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

18 **C. The Petition Does Not Provide a Valid Jurisdictional Basis for Conditions-Of-** 19 **Confinement Relief**

20 The first stated jurisdictional basis for the Petition and the relief it seeks, and the only
21 jurisdictional basis Petitioners attempt to explain, is the habeas statute. See ECF Doc. No.
22 1 ¶¶ 14, 79-81. Indeed, "[h]abeas is at its core a remedy for unlawful executive detention,"
23 and "[t]he typical remedy for such detention is, of course, release." *Munaf v. Geren*, 553
24 U.S. 674, 693 (2008); see also *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) ("At its historical
25 core, the writ of habeas corpus has served as a means of reviewing the legality of Executive
26 detention, and it is in that context that its protections have been strongest."). But Petitioners'
27 requested relief falls far outside a challenge to the fact or duration of confinement. *See*
28 *Allen v. McCurry*, 449 U.S. 90, 104 (1980) ("[T]he purpose of [the writ of habeas corpus]

1 is not to redress civil injury, but to release the applicant from unlawful physical
2 confinement.”). Rather, courts as a general matter have recognized that a non-habeas civil
3 action is the proper method of challenging “conditions of confinement.” *Preiser v.*
4 *Rodriguez*, 411 U.S. 475, 484-99 (1973). And other courts have held that habeas is an
5 inappropriate collateral attack when pretrial detainees can seek release in their pending
6 criminal cases, as they can here. *Reese v. Warden Philadelphia FDC*, 904 F.3d 244, 246–
7 48 (3d Cir. 2018); *Medina v. Choate*, 875 F.3d 1025, 1029 (10th Cir. 2017); *Falcon v. U.S.*
8 *Bureau of Prisons*, 52 F.3d 137, 139 (7th Cir. 1995); and *Fassler v. United States*, 858 F.2d
9 1016, 1017–19 (5th Cir. 1988).

10 Indeed, Respondents are unaware of a Ninth Circuit court that has addressed this
11 issue in the COVID-19 context – and neither, evidently, are Petitioners. *See* ECF Doc. No.
12 1 ¶¶ 14, 79-81. For although Petitioners bear the burden of asserting jurisdiction, they have
13 not set forth how habeas corpus, “the traditional function of [which] is to secure release
14 from illegal custody[,]” entitles them to release from *lawful* custody. *DaimlerChrysler*, 547
15 U.S. at 342, n.3; *Preiser*, 411 U.S. at 484-99; ECF Doc. No. 1 ¶¶ 79-81.

16 Though filed in the universally apprehensive context of a public health crisis, the
17 Petition requires application of the longstanding view that such challenges must be sought
18 and exhausted in an administrative or civil rights action, not in a habeas action.

19 **D. The Petition Must Be Denied to the Extent It Seeks an Injunction Requiring**
20 **Respondents to Release Detainees Subject to Conditions of Release or Order of**
21 **Detention From a Federal Court**

22 Even if Petitioners could overcome each of the foregoing barriers (they cannot),
23 Respondents lack the authority to provide the primary relief they seek in this lawsuit: their
24 release from detention. ECF Doc. No. 1 at 39-41, Request for Relief. Although Respondents
25 are the immediate custodian for Petitioners, they are not subject to detention by any
26 authority of Respondents. Rather, Petitioners are subject to conditions of release or
27 detention by order of one of the District’s Magistrate Judges and those orders are subject to
28 review by the District Court Judge assigned in each of their pending criminal cases. 18

1 U.S.C. § 3142. Petitioners cite no authority for the extraordinary proposition that
2 Respondents may reduce the detainee population at OMDC when those detainees are
3 subject to valid, case-specific orders of detention from other federal judges in this district.
4 ECF Doc. No. 1 at 39-41, Request for Relief.

5 As discussed above, the bail process is the only appropriate legal avenue through
6 which Petitioners may seek release due to the threat to health and safety posed by COVID-
7 19. A bail application or motion for reconsideration of bond or detention order, which must
8 be raised before one of the District’s Magistrate Judges, may be made at any time. In
9 addition to the standard motions for release by pretrial defendants, 18 U.S.C. § 3142(b), or
10 for post-conviction release, 18 U.S.C. § 3143, or bail pending appeal, 18 U.S.C. §
11 3143(b)(1), a defendant may seek release under 18 U.S.C. § 3142(i), which provides that a
12 “judicial officer may, by subsequent order, permit the temporary release of [a] person, in
13 the custody of a United States marshal or another appropriate person, to the extent that the
14 judicial officer determines such release to be necessary for preparation of the person’s
15 defense or for another compelling reason.” Certain extreme medical circumstances may
16 present “compelling reasons” that could warrant a highly circumscribed release.

17 In sum: Petitioners may seek release *at any time* in their criminal cases. Respondents
18 therefore ask the Court to deny the Petition to the extent Petitioners seek release here.
19 Allowing Petitioners to seek release in this manner would implicate concerns that
20 appropriately arise in parallel proceedings, frustrating judicial economy, and all but
21 ensuring confusion and conflicting orders. See, e.g., *Gon v. Gonzales*, 534 F. Supp. 2d 118,
22 120 (D.D.C. 2008) (“In Gon’s criminal case, Magistrate Judge Kay ordered Gon to be
23 detained pre-trial under the federal bail statute. The court docket in Gon’s case reflects that
24 he is challenging the detention order before the assigned district judge. That is the
25 appropriate path for Gon to follow. Filing this petition, by contrast, potentially abuses the
26 writ of habeas corpus, unduly duplicates judicial efforts, and circumvents traditional
27 remedies afforded to safeguard Gon’s liberty interests.”).

28

V.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully ask the Court to deny the Petition for lack of subject matter jurisdiction and for failure to state a claim on which relief can be granted pursuant to Rule 12(b)(1) and Rules 12(b)(6) of the Federal Rules of Civil Procedure.

DATED: May 1, 2020

Respectfully submitted,
ROBERT S. BREWER JR.
United States Attorney

s/ Brett Norris
BRETT NORRIS
Assistant U.S. Attorney
Deputy Chief, Civil Division

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

s/ Paul Starita
PAUL STARITA
Assistant U.S. Attorney

Attorneys for Respondents

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

Page 2

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 25th and April 30th 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



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 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.*)

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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.

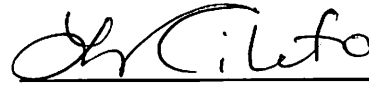
22 I declare under penalty of perjury under the laws of the United States and the
23 State of California that the foregoing is true and correct to the best of my
24 knowledge.

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



L. MILETO

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