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

12 Jacinto Victor ALVAREZ, Joseph
13 BRODERICK, Marlene CANO, Jose
14 CRESPO-VENEGAS, Noe
15 GONZALEZ-SOTO, Victor LARA-
16 SOTO, Racquel RAMCHARAN,
17 George RIDLEY, Michael Jamil
18 SMITH, Leopoldo SZURGOT, Jane
19 DOE, on behalf of themselves and
20 those similarly situated.
21 Plaintiff-Petitioners,

22 v.

23 Christopher J. LAROSE, Senior
24 Warden, Otay Mesa Detention Center,

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

28 Donald W. WASHINGTON, Director
of the United States Marshals Service.
Defendant-Respondents.

Case No. 3:20-cv-00782-DMS-AHG

**PLAINTIFF-PETITIONERS’
OPPOSITION TO RESPONDENTS’
EX PARTE APPLICATION FOR
CORRECTION TO MAY 9, 2020
ORDER**

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20 *Admitted *pro hac vice* / application for admission *pro hac vice* forthcoming

1 Respondents seek reconsideration of the Court’s May 9, 2020 order (the
2 “Order,” Docket No. 46). Specifically, Respondents ask the Court to reconsider,
3 on an *ex parte* basis, its finding that Defendants did not contest the substantive
4 allegations made by Petitioner concerning the conditions at Otay Mesa Detention
5 Center (“Otay Mesa”). *See* Order at 3:15-16. Respondents do not attempt to
6 argue that the standard for reconsideration is met here. *See, e.g., Singleton v.*
7 *Kernan*, No. 16-CV-02462-BAS-NLS, 2017 WL 4922849, at *2 (S.D. Cal. Oct.
8 31, 2017) (reconsideration of a TRO is appropriate only where the Court “(1) is
9 presented with newly discovered evidence, (2) committed clear error or [its]
10 initial decision was manifestly unjust, or (3) if there is an intervening change in
11 controlling law.”). Instead, Respondents’ contend that the Court’s finding was the
12 result of a “clerical mistake” or “oversight” by the Court. *See* Respondents’ Ex
13 Parte Application for Correction to May 9, 2020 Order [Fed. R. Civ. P. 60(a)]
14 (ECF No. 48), at 2, n.1. Respondents generically assert that they “do not
15 concede” any of Petitioner’s factual allegations, but they do not identify any place
16 where they contested any relevant factual allegation and, indeed, the record is
17 clear that the following key facts are undisputed:

- 18 • Otay Mesa is a private for-profit minimum/medium security detention
19 center that the United States Marshals Service (“USMS”) hired to house
20 certain low-risk detained persons;¹
- 21 • As of May 6, at least 66 of approximately 300 USMS detained persons at
22 Otay Mesa tested positive for COVID-19 (approximately 22%) and at least

25 ¹ *See, e.g.,* Compl. ¶ 2 (ECF No. 1); Respondents’ Reply in Support of
26 Petitioners’ Emergency Motion for Temporary Restraining Order (“TRO Reply”),
27 at 2, n.3 (ECF No. 36).

1 123 of approximately 600 ICE detained persons at Otay Mesa tested
2 positive for COVID-19 (approximately 21%);²

- 3 • As of May 6, at least one person died as a result of his exposure to COVID-
4 19 at Otay Mesa;³
- 5 • Respondents are not able or willing to implement CDC guidance and
6 consensus medical advice concerning social distancing and hygienic
7 practices in order to stop the spread of COVID-19 at Otay Mesa;⁴

8 ² See Petitioners' Notice of Supplemental Facts, at 1-2 (ECF No. 43). See also
9 Memorandum of Points and Authorities in Support of Motion for Leave to File
10 Brief of *Amici Curiae* Public Health Experts ("Public Health Experts Brief"), at 6-
11 7 (ECF No. 47-2) (noting that, as of May 4, 2020, Otay Mesa had over 100
12 confirmed cases of COVID-19 among ICE detained persons and at least 66
13 confirmed cases of COVID-19 among USMS detained persons.)

14 ³ See Petitioners' Notice of Supplemental Facts, at 1 (ECF No. 43).

15 ⁴ See, e.g., Johnson Decl. ¶ 14 (ECF No. 29-2); Ridley Decl. ¶ 25 (ECF No. 1-4);
16 Doe Decl. ¶¶ 20, 21 (ECF No. 1-5); Smith Decl. ¶ 13 (ECF No. 1-10); Alvarez
17 Decl. ¶¶ 3, 10 (ECF No. 1-7); Broderick Decl. ¶¶ 9, 12 (ECF No. 1-8); Cano Decl.
18 ¶ 5 (ECF No. 1-15); Crespo-Venegas Decl. ¶¶ 5, 6 (ECF No. 1-11); Gonzalez-
19 Soto Decl. ¶¶ 8, 9, 10 (ECF No. 1-12); Lara-Soto Decl. ¶ 42 (ECF No. 1-9);
20 Ramcharan Decl. ¶¶ 3, 8 (ECF No. 1-13); Ridley Decl. ¶¶ 4, 8 (ECF No. 1-4);
21 Smith Decl. ¶¶ 6, 20 (ECF No. 1-10); Szurgot Decl. ¶¶ 10, 11 (ECF No. 1-6); Doe
22 Decl. ¶ 5 (ECF No. 1-5); Alvarez Decl. ¶ 6 (ECF No. 1-7) ("We are given hygiene
23 supplies once a week. I get a small bar of soap, the size of a chocolate and a small
24 amount of shampoo that has to last me all week. If we run out we can ask for
25 more but sometimes were told the jail has run out and we have to wait for a new
26 shipment. This week we were out of toilet paper for two days and were told we
27 had to wait for a shipment. We are not given hand sanitizer."); Ramcharan Decl. ¶
28 6 (ECF No. 1-13) ("They don't really give us a lot of hygiene products."); Ridley
Decl. ¶ 10 (ECF No. 1-5) ("The cleaning supplies are highly diluted. The color
should be darker. We do not have bleach."). See also Public Health Experts
Brief"), at 1-2, 4, 6-8 (ECF No. 47-2) ("Detention centers, which are enclosed,
congregate environments in which it is impossible to implement and enforce
social distancing, are at a heightened risk for the spread of coronavirus.
Numerous public health officials have recognized that outbreaks of contagious
diseases are more common in detention settings than in communities at large.").

- 1 • Respondents are unable or unwilling to identify who the medically
2 vulnerable people are in USMS custody at Otay Mesa and where they are
3 housed;
- 4 • Respondents’ stated approach of trying to house medically vulnerable
5 people together in a single housing pod (*i.e.*, essentially creating a nursing
6 home-like facility within the detention center) is contrary to consensus
7 medical advice;⁵
- 8 • The Court found that the conditions at Otay Mesa likely violate the Fifth
9 Amendment with respect to medically vulnerable persons detained by ICE;⁶
10 and
- 11 • Respondents seek to dismiss the petition solely on procedural grounds
12 rather than address the substantive problems at Otay Mesa.⁷

13 Accordingly, the Court’s finding concerning the absence of a factual
14 dispute about the actual conditions at Otay Mesa is correct, and not a “clerical
15 mistake” or “oversight.” To the extent the Court finds a revision to the Order
16 appropriate, Petitioners respectfully suggest that the most that could be required is
17 to change the word “concede” to “do not contest” (*i.e.*, Defendants do not contest
18 Plaintiffs’ factual allegations...).

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21 ⁵ See Amon Decl. ¶ 35 (ECF No. 1-3). See also Public Health Experts Brief”), at
22 8 (ECF No. 47-2).

23 ⁶ See May 1 Order, *Alcantara v. Archambeault*, No. 3:20-cv-00756-DMS-AHG
24 (S.D. Cal. May 1, 2020) (ECF No. 41); May 6 Order, *Alcantara v. Archambeault*,
25 No. 3:20-cv-00756-DMS-AHG (S.D. Cal. May 6, 2020) (ECF No. 54).

26 ⁷ See Respondents’ Response in Opposition to Motion for Emergency Temporary
27 Restraining Order, and for Class-Wide Preliminary Injunction (ECF No. 29); see
28 also Respondents’ Motion for Order Denying Writ of Habeas Corpus and
 Injunctive Relief and Declaratory Relief (ECF No. 31).

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Respectfully submitted,

ROPES & GRAY LLP

/s/ Joan McPhee

DATED: May 12, 2020

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