

1 **JOAN MCPHEE*** (NY SBN 2082246) (joan.mcphee@ropesgray.com)
2 **ALEXANDER B. SIMKIN*** (NY SBN 4463691) (alexander.simkin@ropesgray.com)
3 **HELEN GUGEL*** (NY SBN 4910105) (helen.gugel@ropesgray.com)
4 **ROPES & GRAY LLP**
1211 Avenue of the Americas
New York, NY 10036-8704
Telephone: (212) 596-9000

5 **NICOLE HOROWITZ** (SBN 306828) (nicole.horowitz@ropesgray.com)
6 **ROPES & GRAY LLP**
Three Embarcadero Center
San Francisco, CA 94111
7 Telephone: (415) 315-6300

8 Counsel for Plaintiff-Petitioners
9 *Additional counsel listed on following page*

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’
NOTICE OF MOTION AND
MOTION FOR PRELIMINARY
INJUNCTION AND PROVISIONAL
CLASS CERTIFICATION**

Hon. Dana M. Sabraw

DATE: May 29, 2020

TIME: 10:00 a.m.

1 **SIRINE SHEBAYA*** (NY SBN 5094990) (sirine@nipnlg.org)
2 **MATTHEW VOGEL*** (LA SBN 35363) (matt@nipnlg.org)
3 **NATIONAL IMMIGRATION PROJECT**
4 **OF THE NATIONAL LAWYERS GUILD**
2201 Wisconsin Ave, NW, Suite 200
Washington, DC 20007
Telephone: (202) 656-4788

5 **MITRA EBADOLAH**I (SBN 275157) (mebadolahi@aclusandiego.org)
6 **BARDIS VAKILI** (SBN 247783) (bvakili@aclusandiego.org)
7 **SARAH THOMPSON** (SBN 323188) (sthompson@aclusandiego.org)
8 **DAVID LOY** (SBN 229235) (davidloy@aclusandiego.org)
9 **ACLU FOUNDATION OF SAN DIEGO &**
10 **IMPERIAL COUNTIES**
P.O. Box 87131
San Diego, CA 92138-7131
Telephone: (619) 398-4187

11 **GABRIEL ARKLES*** (NY SBN 4391918) (garkles@aclu.org)
12 **CLARA SPERA*** (NY SBN 5590229) (cspera@aclu.org)
13 **AMERICAN CIVIL LIBERTIES UNION FOUNDATION**
125 Broad Street, 18th Floor
New York, NY 10014
Telephone: (212) 549-2569

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

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1 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that the Medically Vulnerable Plaintiff-Petitioners
3 (“Petitioners”) hereby move this Court for an order provisionally certifying the
4 Pretrial and Post-Conviction Medically Vulnerable Subclasses described below,
5 and granting a preliminary injunction directing Defendant-Respondents to
6 immediately identify and release from custody, or in the alternative grant
7 enlargement or transfer to, all members of the Pretrial and Post-Conviction
8 Medically Vulnerable Subclasses from Otay Mesa Detention Center (“Otay
9 Mesa”), pursuant to the procedures recommended in the Proposed Order
10 respectfully submitted herewith.

11 The Medically Vulnerable Subclasses are defined as follows:

- 12 • **Pretrial Medically Vulnerable Subclass:** All current and future people
13 detained pretrial at Otay Mesa who are aged 45 years or older or who have
14 medical conditions that place them at heightened risk of severe illness or
15 death from COVID-19;
- 16 • **Post-Conviction Medically Vulnerable Subclass:** All current and future
17 people detained post-conviction, presentencing at Otay Mesa who are
18 aged 45 years or older or who have medical conditions that place them at
19 heightened risk of severe illness or death from COVID-19.¹

20 Petitioners’ Motion is based on this Notice of Motion; on the concurrently
21 filed Brief in Support of Petitioners’ Motion for Preliminary Injunction and
22 Provisional Class Certification; Petitioners’ Motion for Class Certification, ECF
23

24 ¹ Qualifying medical conditions for members of both Medically Vulnerable
25 Subclasses should be determined with reference to CDC guidelines. Pregnant
26 women will also be included in the Subclasses, as the CDC states that “[p]regnant
27 people have had a higher risk of severe illness when infected with viruses from the
28 same family as COVID-19.” See *Pregnancy and Breastfeeding*, CDC, Apr. 15,
2020, <https://bit.ly/2WYceNb>.

1 Nos. 3 & 3-1; on all papers, pleadings, records, and files in this case; on all matters
2 of which judicial notice may be taken; and on such other argument and/or evidence
3 as may be presented to this Court at a hearing on this motion.

4 Respectfully submitted,

5
6 **ROPES & GRAY LLP**

7 DATED: May 15, 2020

/s/ Joan McPhee

8
9 **JOAN MCPHEE**
(joan.mcphee@ropesgray.com)
10 **ALEXANDER B. SIMKIN**
(alexander.simkin@ropesgray.com)
11 **HELEN GUGEL**
(helen.gugel@ropesgray.com)
12 1211 Avenue of the Americas
New York, NY 10036-8704
13 Telephone: (212) 596-9000

14 **NICOLE HOROWITZ**
(nicole.horowitz@ropesgray.com)
15 Three Embarcadero Center
San Francisco, CA 94111
16 Telephone: (415) 315-6300

17 **NATIONAL IMMIGRATION**
PROJECT OF THE NATIONAL
18 **LAWYERS GUILD**

19 **SIRINE SHEBAYA**
(sirine@nipnlg.org)
20 **MATTHEW VOGEL**
(matt@nipnlg.org)
21 2201 Wisconsin Ave, NW
Suite 200
22 Washington, DC 20007
Telephone: (617) 227-9727

23 **ACLU FOUNDATION OF SAN**
DIEGO & IMPERIAL
24 **COUNTIES**

25 **MITRA EBADOLAH**
26 (mebadolahi@aclusandiego.org)

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BARDIS VAKILI
(bvakili@aclusandiego.org)
SARAH THOMPSON
(sthompson@aclusandiego.org)
DAVID LOY
(davidloy@aclusandiego.org)
P.O. Box 87131
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Telephone: (619) 398-4187

**AMERICAN CIVIL LIBERTIES
UNION FOUNDATION**

GABRIEL ARKLES
(garkles@aclu.org)
CLARA SPERA
(cspera@aclu.org)
125 Broad Street, 18th Floor
New York, NY 10014
Telephone: (212) 549-2569

Attorneys for Plaintiff-Petitioners

1 **JOAN MCPHEE*** (NY SBN 2082246) (joan.mcphee@ropesgray.com)
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**PLAINTIFF-PETITIONERS' BRIEF
 IN SUPPORT OF MOTION FOR
 PRELIMINARY INJUNCTION AND
 PROVISIONAL CLASS
 CERTIFICATION**

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Washington, DC 20007
Telephone: (202) 656-4788

5 **MITRA EBADOLAH**I (SBN 275157) (mebadolahi@aclusandiego.org)
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Telephone: (619) 398-4187

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21 *review and meta-analysis* (Mar. 20, 2020),
22 [https://www.medrxiv.org/content/10.1101/2020.03.17.20037572v](https://www.medrxiv.org/content/10.1101/2020.03.17.20037572v1.article-info)
23 [1.article-info](https://www.medrxiv.org/content/10.1101/2020.03.17.20037572v1.article-info) 3

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INTRODUCTION

1
2 There is a state of emergency at the Otay Mesa Detention Center (“Otay
3 Mesa”). Since Plaintiffs-Petitioners commenced this action less than three weeks
4 ago, the number of COVID-19 cases within that facility has increased
5 exponentially. Tragically, one detained individual has died of complications related
6 to the virus—a needless, preventable death. ECF No. 43. Despite these life-or-death
7 stakes, Respondents have continued with “business as usual” at Otay Mesa,
8 aggravating the risk to Petitioners’ health and safety. Without immediate Court
9 intervention, many more will suffer serious harm—including significant illness and
10 possibly death—in the facility. These unprecedented circumstances require swift,
11 decisive action to save lives.

12 The Medically Vulnerable Petitioners (“Petitioners”) thus move, on their
13 own behalf and on behalf of the Subclasses they seek to represent, to preliminarily
14 enjoin their continued detention at Otay Mesa. Individuals in the Medically
15 Vulnerable Subclasses are immunocompromised, elderly, or suffer from medical
16 conditions such as severe lung disease, hypertension, and diabetes that place them
17 at acute risk of serious illness or death should they contract COVID-19. That risk
18 is not hypothetical: in jails and prisons across the country, including Otay Mesa,
19 thousands of people have tested positive for COVID-19 and more than 100 have
20 died.¹ Petitioners’ declarations establish the impossibility for persons detained at
21 Otay Mesa to practice the social distancing and hygiene measures necessary to
22 protect them from the ongoing threat COVID-19 infection poses to their health and
23 safety. Respondents’ continued detention of the Medically Vulnerable Subclasses
24 endangers their lives and thus violates their constitutional rights under the Fifth and
25

26 ¹ See Gaby Galvin, *CDC: Nearly 5,000 Inmates and Detainees Infected with*
27 *COVID-19*, USA Today, May 6, 2020, <https://bit.ly/363al5S>.

1 Eighth Amendments. On account of their medical vulnerabilities, no remedy short
2 of release can protect these individuals from the deadly threat they currently face.

3 Accordingly, Petitioners now move this Court for a preliminary injunction
4 ordering release, enlargement, and/or transfer to home confinement for all people
5 detained by the U.S. Marshals Service (“USMS”) pretrial or post-conviction (pre-
6 sentencing) who are aged 45 or older or who have medical conditions that place
7 them at heightened risk of severe illness or death from COVID-19. So long as
8 medically vulnerable individuals remain detained at Otay Mesa, they face
9 unconstitutionally grave risks to their health and safety. An orderly process
10 providing for their release should immediately be implemented.

11 **STATEMENT OF FACTS**

12 COVID-19 is a rapidly spreading global pandemic. The consequences of
13 contracting this disease can be severe: those who do not die may experience serious
14 and potentially permanent damage to their lungs, heart, liver, or other major
15 organs.² COVID-19 often requires prolonged recovery periods, including extensive
16 rehabilitation to mitigate neurological damage, loss of respiratory capacity, and
17 organ failure.³ While some experience only mild symptoms, for older or medically
18 vulnerable individuals, the risk of serious illness or death from COVID-19 is grave.
19 Goldenson Decl. ¶ 29 (ECF No. 1-2); Amon Decl. ¶¶ 7, 8, 23, ECF No. 1-3.⁴ Most
20 people in higher-risk categories who develop serious illness need advanced support,
21

22 ² *Coronavirus disease 2019 (COVID-19): Situation Report–51*, World Health
Organization, (March 11, 2020), <https://bit.ly/2WyFStc>.

23 ³ Judith Graham, *What Recovery from COVID-19 Looks Like*, Scientific American
24 (Apr. 11, 2020), <https://bit.ly/3bwXJoV>.

25 ⁴ *FAQs: What You Should Know About COVID-19 and Chronic Medical*
26 *Conditions*, Cleveland Clinic (updated May 6, 2020), <https://cle.clinic/2Z5UrWV>;
27 *Xianxian Zhao, et al., Incidence, clinical characteristics and prognostic factor of*
28 *patients with COVID-19: a systematic review and meta-analysis* (Mar. 20, 2020),
<https://bit.ly/2z01rdo>.

1 including highly specialized equipment in limited supply and an entire team of care
 2 providers, including 1:1 or 1:2 nurse-to-patient ratios, respiratory therapists, and
 3 intensive care physicians.⁵ Moreover, the mortality rate for medically vulnerable
 4 individuals infected with COVID-19 is above 5%, Goldenson Decl. ¶ 9 (ECF No.
 5 1-2), and may be as high as 13% for certain conditions.⁶

6 The only effective measures to mitigate the risk of COVID-19 infection are
 7 social distancing and vigilant personal and environmental hygiene, including
 8 regular hand washing and routine disinfection of high-touch surfaces.⁷ These
 9 measures are impossible to implement at Otay Mesa, which currently has one of
 10 the worst COVID-19 outbreaks in the United States. As of May 12, there were at
 11 least 217 confirmed cases in the facility, including at least 68 individuals in USMS
 12 custody.⁸ Social distancing—maintaining at least six feet of distance from other
 13 people—is impossible for individuals detained at Otay Mesa. Goldenson Decl.
 14 ¶ 27. Despite the active outbreak of highly infectious disease within the facility,
 15 individuals remain housed together in “pods,” each of which contains between 60
 16 to 120 people. *Id.* ¶ 24. Within each pod, most individuals share small cells with
 17 two or three other people. *See, e.g.*, Lara-Soto Decl. ¶¶ 3, 4, 6 (ECF No. 1-9). When
 18

19 ⁵ Neil A. Halpern, MD, MCCM, SCCM & Kay See Tan, PhD, *United States*
 20 *Resource Availability for COVID-19*, Soc. Critical Care Medicine (May 12, 2020),
 21 <https://bit.ly/2z03XQQ>; Kevin McCoy and Katie Wedell, ‘*On-the-job emergency*
 22 *training*’: *Hospitals may run low on staff to run ventilators for coronavirus*
 23 *patients*, USA Today, Mar. 27, 2020, <https://bit.ly/3fOqDEe>.

24 ⁶ *Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19)*, WHO, at 12, Feb. 24, 2020, <https://bit.ly/2zKQfRG>.

25 ⁷ *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in*
 26 *Correctional and Detention Facilities*, Centers for Disease Prevention and Control,
 27 Mar. 23, 2020, at 8, <https://bit.ly/3bxswSl>.

28 ⁸ *See* Kate Morrissey, *Judge denies request to release medically vulnerable federal*
 inmates from Otay Mesa Detention Center, San Diego Union Tribune, May 11,
 2020, <https://bit.ly/3cCgEjt>; Supplemental Decl. of Warden C. LaRose ¶ 11, *United*
 States v. Cardenas-Garcia, No. 3:20-cr-644-GPC (May 12, 2020), ECF No. 52-1.

1 not inside their cells, detained persons share common spaces, in which it is
 2 impossible to maintain a six-foot distance from others.⁹ Shared telephones are
 3 positioned within an arms' length. Arreola-Bretado Decl. ¶ 6 (ECF No. 36-4).
 4 Chairs and tables in communal areas are bolted to the ground; chairs are less than
 5 three feet apart.¹⁰ To watch television, individuals have to sit in close proximity to
 6 one another.¹¹ Due to these immutable characteristics of the facility, it is impossible
 7 for people in USMS custody at Otay Mesa to establish or maintain six feet of
 8 distance from others at all times, despite clear guidance from the CDC and public
 9 health officials that the only meaningful way to protect medically vulnerable
 10 persons from COVID-19 is through social distancing.

11 Health care services at Otay Mesa are also inadequate to protect the
 12 Medically Vulnerable Subclasses from COVID-19. Individuals attest that, even
 13 when they have been ill with fevers and other symptoms consistent with COVID-
 14 19, they have received no treatment.¹² Other individuals have been given fever
 15 reducers but no other medical care.¹³ Many detained individuals with symptoms
 16 consistent with COVID-19 (coughing and fevers) are never taken to the medical

17 ⁹ See Drysdale Decl. ¶ 8, attached hereto as Exhibit A to Declaration of J. McPhee;
 18 Arreola-Bretado Decl. ¶ 6 (ECF No. 36-4); Szurgot Decl. ¶ 11 (ECF No. 1-6); Lara-
 19 Soto Decl. ¶ 42 (ECF No. 1-9); Ridley Decl. ¶ 8 (ECF No. 1-4); Doe Decl. ¶ 4 (ECF
 No. 1-5); Jamil-Smith Decl. ¶ 6 (ECF No. 1-10).

20 ¹⁰ See Ridley Decl. ¶ 7 (ECF No. 1-4); Doe Decl. ¶ 4 (ECF No. 1-5); Jamil-Smith
 Decl. ¶ 6 (ECF No. 1-10).

21 ¹¹ Crespo-Venegas Decl. ¶ 6 (ECF No. 1-11); Gonzalez-Soto Decl. ¶ 9 (ECF No.
 1-12); Lara-Soto Decl. ¶ 26 (ECF No. 1-9).

22 ¹² See Gonzalez-Soto Decl. ¶ 19 (ECF No.1-12) (“When I was feeling ill, and
 23 standing in front of a nurse, and wanted help. But they wouldn’t do it.”); Lara-Soto
 Decl. ¶ 46 (ECF No. 1-9) (attesting that ill individuals “were just told to gargle with
 24 salt water”).

25 ¹³ See Ramos Martinez Decl. ¶ 12, attached hereto as Exhibit B to Declaration of J.
 McPhee (“When I did go to medical, they gave me some pills and water and told
 26 me they could not do anything else for me. The medical staff said they weren’t
 responsible for us, and they couldn’t be responsible for any additional treatment
 27 because that was CoreCivic’s responsibility.”).

1 unit, and so remain in close contact with others in their pods.¹⁴ Those who are taken
 2 to the medical unit report extremely dirty conditions.¹⁵ Sick individuals are being
 3 returned from the medical unit to their shared pods and cells before they are
 4 symptom-free.¹⁶ COVID-19 testing is not consistently available.¹⁷ Some
 5 individuals are tested, only to be told that their tests have been “lost.”¹⁸

6 In addition to the impossibility of social distancing and lack of necessary
 7 medical care, crucial hygiene measures to protect the Medically Vulnerable
 8 Subclasses are also impossible to implement at Otay Mesa. Goldenson Decl. ¶ 30
 9 (ECF No. 1-2); Amon Decl. ¶ 53 (ECF No. 1-3). Individuals report receiving one
 10 disposable mask every two or three weeks, and not being given fresh masks upon
 11 request.¹⁹ They lack adequate surface disinfectants and other suitable cleaning
 12
 13

14 ¹⁴ See Alvarez Decl. ¶ 13 (ECF No. 1-7); Gonzalez-Soto Decl. ¶ 12 (ECF No. 1-
 15 12); Ramcharan Decl. ¶¶ 12–13 (ECF No. 1-13); Amon Decl. ¶ 34 (ECF No. 1-3)
 16 (“Numerous detainees report being symptomatic, reporting those symptoms, and
 remaining in a pod with dozens of asymptomatic individuals.”).

17 ¹⁵ See Arreola-Bretado Decl. ¶ 8 (ECF No. 36-4) (“I was placed in a room that did
 18 not appear to have been cleaned recently. The floor looked dirty. The bed looked
 filthy....when I looked more closely at the conditions, I got scared because it looked
 really dirty with bodily fluids.”).

19 ¹⁶ See Arreola-Bretado Decl. ¶ 11 (ECF No. 36-4); Jamil-Smith Decl. ¶ 24 (ECF
 20 No. 1-10).

21 ¹⁷ Ramos Martinez Decl. ¶ 13 (Exh. B) (“To my knowledge, no women in B-pod
 22 have gotten tests since April 30.”); Drysdale Decl. ¶ 11 (Exh. A); Lara-Soto Decl.
 ¶ 46 (ECF No. 1-9) (“The guards said that the jail could not perform COVID-19
 tests on all of those people because it is too expensive.”); Gonzalez-Soto Decl. ¶ 7.

23 ¹⁸ Arreola-Bretado Decl. ¶ 9 (ECF No. 36-4).

24 ¹⁹ Ramos Martinez Decl. ¶ 10 (Exh. B); Drysdale Decl. ¶ 10 (Exh. A); Cano Decl.
 25 ¶ 8 (ECF No. 40-1) (“An officer told me there is no option to switch out the masks.
 The officer told me to just wash it. I have had the same mask for about three
 26 weeks.”); Lara-Soto Decl. ¶ 17 (“[W]e were told that the masks would have to last
 for two weeks.”); Gonzalez-Soto Decl. ¶ 16 (ECF No. 1-12). Soap is not always
 27 available. Alvarez Decl. ¶ 6 (ECF No. 1-7); Lara-Soto Decl. ¶ 31 (ECF No. 1-9);
 Ramcharan Decl. ¶ 6 (ECF No. 1-13); Cano Decl. ¶ 10 (ECF No. 1-15).

1 supplies.²⁰ Communal areas and shared amenities like showers are not cleaned
2 between individual uses.²¹

3 Because of the severity of the ongoing COVID-19 outbreak within Otay
4 Mesa and the threat this disease poses to medically vulnerable individuals, public
5 health officials agree that the rapid release of such individuals is the only adequate
6 way to safeguard their health. Amon Decl. ¶¶ 50, 52 (ECF No. 1-3); Goldenson
7 Decl. ¶ 29 (ECF No. 1-2).²² Yet Respondents continue to confine medically
8 vulnerable individuals in Otay Mesa, with reckless indifference to their health and
9 well-being. Respondents' only articulated plan to protect medically vulnerable
10 persons is to house them all together in a single pod, essentially creating a nursing
11 home-like environment within Otay Mesa that would put people at *greater* risk of
12 harm. Absent relief from the Court, the Medically Vulnerable Subclasses are, quite
13 literally, in mortal peril.

14 ARGUMENT

15 **I. Petitioners are Entitled to the Relief They Seek.**

16 **A. Habeas is the appropriate vehicle for the Medically Vulnerable** 17 **Subclasses' claims because they challenge the fact of their** 18 **confinement and release is the only adequate remedy.**

19 Through this motion, the Medically Vulnerable Subclasses challenge the fact
20 of their confinement: the only remedy they seek is, and always has been, release
21 from detention at Otay Mesa.²³ *See* Pet. (ECF No. 1) at ¶ 12 (“By this action,

22 ²⁰ Drysdale Decl. ¶ 4 (Exh. A); Cano Decl. ¶ 8 (ECF No. 1-15); Amon Decl. ¶ 24
(ECF No. 1-13).

23 ²¹ Doe Decl. ¶ 6 (ECF No. 1-5); Ramcharan Decl. ¶ 5 (ECF No. 1-13); Gonzalez-
Soto Decl. ¶ 4 (ECF No. 1-12).

24 ²² *See, e.g.,* Josiah Rich, Scott Allen, and Mavis Nimoh, *We Must Release Prisoners*
25 *to Lessen the Spread of Coronavirus*, WASH. POST, Mar. 17, 2020,
<https://wapo.st/2JDVq7Y>.

26 ²³ *See* Pet. (ECF No. 1) at ¶ 12 (“By this action, Plaintiffs seek the immediate release
27 of the medically vulnerable Plaintiffs and subclasses . . .”); ¶¶ 69, 70 (release is the
only appropriate measure recommended by public health experts for those who are

1 Plaintiffs seek the immediate release of the medically vulnerable Plaintiffs and
 2 subclasses . . .”); ¶¶ 69, 70 (release is the only appropriate measure recommended
 3 by public health experts for those who are medically vulnerable); ¶ 71 (“[R]elease
 4 of vulnerable individuals is necessary . . .”); ¶ 74 (“Given the existing outbreak of
 5 COVID-19 at the facility and the availability of alternatives to confinement,
 6 continued pretrial detention lacks a reasonable relationship to any legitimate
 7 governmental purpose” and “is excessive in relation to the goals of pretrial
 8 detention”); Request for Relief b, c, e (seeking release of Medically Vulnerable
 9 Subclass members, and further remedial measures only for the remainder of the
 10 classes).

11 The *very fact of confinement* for the Medically Vulnerable Subclasses at Otay
 12 Mesa has become unconstitutional because Respondents have not protected them
 13 from contracting COVID-19, and cannot do so through any conditions reforms. Pet.
 14 ¶ 69. For the Medically Vulnerable Subclasses, any measure short of release is
 15 insufficient to safeguard their constitutional rights. The unprecedented COVID-19
 16 outbreak at Otay Mesa presents such a risk to medically vulnerable detained
 17 individuals’ health and safety that it renders the fact of their detention at that facility
 18 unlawful under the Fifth Amendment or, alternatively, under the Eighth
 19 Amendment. *See infra* at Section II.A.

20 Habeas relief is available to persons who are “in custody in violation of the
 21 Constitution or the laws or treaties of the United States.” 28 U.S.C. § 2241(c)(3).
 22 The Medically Vulnerable Subclasses meet both jurisdictional requirements: they

23 _____
 24 medically vulnerable); ¶ 71 (“[R]elease of vulnerable individuals is necessary . .
 25 .”); ¶ 74 (“Given the existing outbreak of COVID-19 at the facility and the
 26 availability of alternatives to confinement, continued pretrial detention lacks a
 27 reasonable relationship to any legitimate governmental purpose” and “is excessive
 28 in relation to the goals of pretrial detention”); Request for Relief b, c, e (seeking
 release of Medically Vulnerable Subclass members, and further remedial measures
 only for the remainder of the classes).

1 are in custody, and their continued detention at Otay Mesa is unconstitutional. Such
2 a claim lies “within the core of habeas corpus.” *Preiser v. Rodriguez*, 411 U.S. 475,
3 487 (1973). The Supreme Court has held repeatedly that “challenges to the validity
4 of any confinement or to particulars affecting its duration are the province of habeas
5 corpus.” *Muhammad v. Close*, 540 U.S. 749, 750 (2004); *see also Munaf v. Geren*,
6 553 U.S. 674, 693 (2008) (“habeas is at its core a remedy for unlawful executive
7 detention”). Thus, should this Court find a likelihood of a constitutional violation,
8 it has full authority to order the Medically Vulnerable Subclasses’ release to “ensure
9 that miscarriages of justice within [the writ’s] reach are surfaced and corrected.”
10 *Harris v. Nelson*, 394 U.S. 286, 291 (1969). *See also Boumediene v. Bush*, 553
11 U.S. 723, 779 (2008).

12 The Ninth Circuit has confirmed this point, holding that where “prisoners
13 would have been entitled to immediate release from prison [if successful], habeas
14 [i]s the exclusive remedy for their claims.” *Nettles v. Grounds*, 830 F.3d 922, 927
15 (9th Cir. 2016).²⁴ Because the Medically Vulnerable Subclasses would be entitled
16 to release if successful, habeas is the appropriate vehicle for their challenge to their
17 continued confinement at Otay Mesa.

18 More recently, the Sixth Circuit, in substantially similar circumstances,
19 reaffirmed that habeas corpus is the proper vehicle for detained persons to seek
20 release or enlargement due to the dangers posed by COVID-19. *Wilson v. Williams*,
21 No. 20-3447 (6th Cir. May 4, 2020). The *Wilson* Petitioners raised similar
22 allegations and claims to those the Petitioners raise here: they challenged the
23 constitutionality of their continued confinement based on the unique dangers
24

25 ²⁴ Although the *Nettles* Court declined to extend habeas jurisdiction to *state*
26 prisoners challenging conditions of confinement, the Ninth Circuit expressly stated
27 that it did *not* decide whether any such limits applied to individuals in federal
custody, like Petitioners here. 830 F.3d at 931.

1 COVID-19 poses to their health and safety and the absence of adequate protections
 2 at the facility where they were detained. *Compare* Pet. ¶¶ 2, 4, 29, 41, *Wilson v.*
 3 *Williams*, No. 4:20-cv-794-JG (N.D. Ohio Apr. 13, 2020), *with* Pet. ¶¶ 10, 68, 69,
 4 71. Although the *non*-medically vulnerable Petitioners and classes have sought
 5 other remedial measures, the Medically Vulnerable Subclasses *seek only release*
 6 *because no other remedy would suffice. See supra* I.A. (collecting cites to Petition).
 7 Such a claim is traditionally only—and most naturally—cognizable in habeas. *See,*
 8 *e.g., Engle v. Isaac*, 456 U.S. 107, 126 (1982); *Peyton v. Rowe*, 391 U.S. 54, 58
 9 (1968); *Price v. Johnston*, 334 U.S. 266, 269 (1948).²⁵

10 Petitioners’ release need not mean release from custody, but rather only from
 11 within the walls of Otay Mesa where they are in danger. Thus, release may take the
 12 form of an enlargement of custody, *i.e.*, the transfer of Petitioners and members of
 13 the Medically Vulnerable Subclasses to one or more locations where they can
 14 remain in Respondents’ custody yet be safe from harm. *See* Pet. ¶ 81; *see also, e.g.,*
 15 *Wilson v. Williams*, No. 4:20-cv-00794-JG, 2020 WL 1940882, at *4 (N.D. Ohio
 16 Apr. 22, 2020) (“Enlargement is not release, although some courts refer to it using
 17 the terms release or bail. When a court exercises its power to ‘enlarge’ the custody

18 ²⁵ Indeed: dozens of courts around the country have held that habeas jurisdiction is
 19 proper for actions challenging the *fact* of medically vulnerable individuals’
 20 confinement in light of the COVID-19 pandemic. *See, e.g., Bent v. Barr*, No. 19-
 21 cv-6123, 2020 WL 1812850, at *2 (N.D. Cal. Apr. 9, 2020); *Ortuño v. Jennings*,
 22 Case No. 20-cv-2064-MMC, 2020 WL 1701724, at *2 (N.D. Cal. Apr. 8, 2020);
 23 *Castillo v. Barr*, 2020 WL 1502864, at *3 (C.D. Cal. Mar. 27, 2020); *Vasquez-*
 24 *Barrera v. Wolf*, No. 20-cv-1241, 2020 WL 1904497, at *4 (S.D. Tex. Apr. 17,
 25 2020) (“The mere fact that Plaintiffs’ constitutional challenge requires discussion
 26 of conditions in immigration detention does not necessarily bar such a challenge in
 27 a habeas petition.”); *Malam v. Adducci*, No. 20-10829, 2020 WL 1672662, at *2–3
 28 (E.D. Mich. Apr. 5, 2020); *Coreas v. Bounds*, No. 20-0780, 2020 WL 1663133, at
 *7 (D. Md. Apr. 3, 2020); *Mays v. Dart*, No. 20 C 2134, 2020 WL 1812381, at *6
 (N.D. Ill. Apr. 9, 2020) (acknowledging that contentions that petitioners could not
 be held in conditions consistent with the Constitution’s requirements “*do* bear on
 the duration of their confinement” (emphasis original)); *A.S.M. v. Donahue*, No.
 20-CV-62, 2020 WL 1847158, at *1 (M.D. Ga. Apr. 10, 2020); *Wilson v. Williams*,
 No. 20 cv 794, 2020 WL 1940882, at *6 (N.D. Ohio, Apr. 22, 2020).

1 of a defendant pending the outcome of a habeas action, the [custodian] maintains
2 custody over the defendant, but the place of custody is altered by the court.”); *id.*
3 (“District courts have inherent authority to grant enlargement to a defendant
4 pending a ruling on the merits of that defendant's habeas petition.”). This Court may
5 order enlargement pursuant to Petitioners’ habeas petition. *See, e.g., id.* at *6
6 (“Notably, these Petitioners do not seek a commutation of their sentences, but rather
7 to serve their sentences in home confinement, parole, or in half-way houses at least
8 until the risk of the virus has abated. This claim is closer to a challenge to the
9 manner in which the sentence is served and is therefore cognizable under 28 U.S.C.
10 § 2241.”); *Tucker v. Carlson*, 925 F.2d 330, 331–32 (9th Cir. 1991) (holding that
11 § 2241 habeas was the proper vehicle for federal prisoner to challenge fact or
12 duration of confinement).

13 **B. Even if the PLRA were applicable to Petitioners’ habeas claims,**
14 **this Court nonetheless has the authority to order enlargement of custody**
or transfer to home confinement or a halfway house.

15 Because the Medically Vulnerable Subclasses seek immediate release
16 pursuant to a proper habeas petition, the Prison Litigation Reform Act (“PLRA”)
17 does not apply. 18 U.S.C. § 3626(g)(2) (“the term ‘civil action with respect to prison
18 conditions’ means any civil proceeding arising under Federal law with respect to
19 the conditions of confinement or the effects of actions by government officials on
20 the lives of persons confined in prison, but does not include habeas corpus
21 proceedings challenging the fact or duration of confinement in prison.”). But even
22 if Petitioners’ claims were conditions claims, which they are not, the PLRA still
23 would not preclude this Court from ordering the relief they seek through this
24 motion.²⁶

25 _____
26 ²⁶ The Ninth Circuit has not ruled on the question of whether persons in *federal*
27 custody may challenge the conditions of their confinement through habeas.
Numerous courts within this Circuit have, however, held that they may. *See, e.g.,*

1 First, although the PLRA precludes a single district judge from ordering the
 2 outright release of individuals from detention facilities due to overcrowding,
 3 Petitioners' claims in this case are materially different. *Cf. Brown v. Plata*, 563 U.S.
 4 493, 512 (2011) ("Under the PLRA, only a three-judge court may enter an order
 5 limiting a prison population."). Petitioners have alleged that their constitutional
 6 rights are violated as a result of the presence of a significant COVID-19 outbreak
 7 in Otay Mesa and Respondents' inability to mitigate the severe risk that outbreak
 8 poses to the Medically Vulnerable Subclasses and not because of overcrowding. In
 9 such circumstances, a single district court judge can order individuals removed
 10 from a detention facility, through methods not amounting to outright release,
 11 notwithstanding the PLRA. *See, e.g., Wilson*, 2020 WL 1940882, at *4 (ordering
 12 enlargement due to the "exceptional circumstances" created by COVID-19
 13 pandemic, and "grant[ing] a preliminary injunction, in aid of [the court's] authority
 14 to grant enlargements, ordering Respondents to determine the appropriate means of
 15 transferring medically vulnerable subclass members out" of the facility); *Pet. ¶ 81*;
 16 *Reaves v. Dep't of Correction*, 404 F. Supp. 3d 520, 522–23 (D. Mass. 2019)
 17 (affirming legal distinction between transfer and release in PLRA context); *Plata*
 18 *v. Brown*, 427 F. Supp. 3d 1211, 1222 (N.D. Cal. 2013) (holding that transferring

19 _____
 20 *Spring v. Langford*, No. CV 16-04664-JLS (DTB), 2017 WL 3326973, at *3 (C.D.
 21 Cal. May 22, 2017) (declining to extend *Nettles* to a federal prisoner's habeas
 22 petition challenging BOP restitution payment plan even though the petition
 23 "challenges neither the validity nor duration of petitioner's confinement"); *Miller*
 24 *v. Fox*, No. CV 15-06888 DMG (AFM), 2017 WL 1591939, at *2 (C.D. Cal. Feb.
 25 1, 2017) (declining to apply *Nettles* to a federal petitioner challenging his placement
 26 in administrative segregation); *McQuown v. Ives*, 2017 WL 359181, at *4 n.1 (D.
 27 Or. Jan. 24, 2017) (declining to extend *Nettles* to federal prisoners proceeding under
 28 28 U.S.C. § 2241); *Shakur v. Milusnic*, No. 5:18-cv-00628-SVW-AS, 2019 WL
 3207821, at *4–5 (C.D. Cal. Mar. 7, 2019) (holding that *Nettles* would not apply to
 a federal petitioner challenging a parole decision). Thus, even if the Court were to
 construe the medically vulnerable Petitioners and subclasses' challenge as being
 one about conditions of confinement—a construction with which these Petitioners
 respectfully disagree—habeas would still be the appropriate vehicle and
 enlargement would still be an available remedy.

1 prisoners from a facility due to risk of valley fever, rather than overcrowding, is not
2 a “prisoner release order” subject to PLRA requirements).

3 Second, although the PLRA traditionally requires entry of the narrowest
4 form of injunctive relief available, 18 U.S.C. § 3626; Am. Order Den. Mot. for
5 TRO, ECF No. 58, at 8, in this case there is no narrower form of relief that could
6 suffice for medically vulnerable individuals detained in Otay Mesa. *See Wilson*,
7 No. 20-3447, at 4 (6th Cir. May 4, 2020). For example, Petitioner and putative
8 subclass representative George Ridley suffers from blisters on his left lung and is
9 missing one third of his right lung; approximately 28% of people who have died
10 from COVID-19 have had pre-existing lung conditions, and 21.5% of people
11 hospitalized.²⁷ Petitioner and putative Subclass representative Jane Doe is HIV
12 positive; 13.2% of people hospitalized for COVID-19 have been
13 immunocompromised.²⁸ Petitioner and putative Subclass representative Michael
14 Jamil Smith suffers from hypertension, diabetes, and sleep apnea; approximately
15 20% of people who have died from COVID-19 have had hypertension, and 58.9%
16 of people hospitalized.²⁹

17 These Petitioners, and the subclasses they seek to represent, face a
18 constitutionally unacceptable risk of death or lifelong medical complications if they

19 ²⁷ *Provisional Death Counts for Coronavirus Disease (COVID-19): Weekly*
20 *Updates by Select Demographic and Geographic Characteristics*, Nat’l Ctr. for
21 Health Statistics, Ctrs. Disease Control and Prevention (updated May 9, 2020),
22 <https://bit.ly/2X0N40d>; *COVID-NET, A Weekly Summary of U.S. COVID-19*
Hospitalization Data, Ctrs. Disease Control and Prevention (May 2, 2020),
<https://bit.ly/2ZdiHqp>.

23 ²⁸ *COVID-NET, A Weekly Summary of U.S. COVID-19 Hospitalization Data*, Ctrs.
Disease Control and Prevention (May 2, 2020), <https://bit.ly/2WyzFxp>.

24 ²⁹ *Provisional Death Counts for Coronavirus Disease (COVID-19): Weekly*
25 *Updates by Select Demographic and Geographic Characteristics*, Nat’l Ctr. for
26 Health Statistics, Ctrs. Disease Control and Prevention (updated May 9, 2020),
<https://bit.ly/3dUPoNr>; *COVID-NET, A Weekly Summary of U.S. COVID-19*
Hospitalization Data, Ctrs. Disease Control and Prevention (May 2, 2020),
<https://bit.ly/2AxmEMd>.

1 were to contract COVID-19. Every public health guidance relating to people with
 2 high-risk medical conditions recommends self-isolation, social distancing, and
 3 vigilant hygiene measures that are simply impossible to undertake at Otay Mesa.
 4 *See* Pet. at 57; Amon Decl. ¶ 12 (ECF No. 1-3); Goldenson Decl. ¶ 27 (ECF No. 1-
 5 2).³⁰ Because there is no narrower form of relief that would adequately protect these
 6 Petitioners and the subclasses they seek to represent, this Court can and should
 7 order their release, through appropriate vehicles including transfer or enlargement.
 8 Such an order would be consistent with the PLRA.

9 **II. Petitioners Have Demonstrated That a Preliminary Injunction Is**
 10 **Justified and Necessary to Protect Medically Vulnerable People from**
 11 **the Unconstitutional, Imminent Risk of Severe Illness or Death.**

12 Petitioners, and the Medically Vulnerable Subclasses they seek to represent,
 13 satisfy the legal standard for a preliminary injunction under *Winter v. Natural*
 14 *Resources Defense Council, Inc.* 555 U.S. 7, 20 (2008).³¹ Accordingly, this Court
 15 should provisionally certify the Medically Vulnerable Subclasses and enter an order
 16 granting a preliminary injunction.³²

17
 18
 19 ³⁰ *How to Protect Yourself & Others*, Ctrs. Disease Control and Prevention (updated
 Apr. 24, 2020), <https://bit.ly/3dOg9mn>.

20 ³¹ This brief incorporates by reference the legal standards set forth in Petitioners'
 21 Memorandum of Points and Authorities in Support of Plaintiff-Petitioners' *Ex*
Parte Application Temporary Restraining Order and Order to Show Cause for
 Preliminary Injunction (ECF No. 2-2).

22 ³² Notwithstanding the stay on class certification briefing, ECF No. 32, Petitioners
 23 respectfully move for immediate provisional class certification for the Medically
 24 Vulnerable Subclasses so that a Preliminary Injunction may be ordered. As
 25 explained in Petitioners' motion for class certification (ECF Nos. 3 & 3-1),
 26 incorporated by reference herein, the four requirements of Federal Rule of Civil
 27 Procedure 23(a) are readily satisfied for the Medically Vulnerable
 Subclasses. Additionally, the requirements of Rule 23(b) are met, because
 Respondents' policies and practices deprive all Subclass members of fundamental
 constitutional rights by placing them at unreasonably high risk of contracting
 COVID-19.

1 **A. Petitioners Are Likely to Succeed on the Merits of Their**
2 **Constitutional Claims.**

3 Petitioners have a substantial likelihood of demonstrating that their
4 continued detention at Otay Mesa amidst the COVID-19 pandemic violates their
5 constitutional rights under the Fifth and Eighth Amendments. A “substantial
6 likelihood” does not mean “more likely than not” but, rather, “a fair chance of
7 success on the merits, or questions serious enough to require litigation.” *Guzman v.*
8 *Shewry*, 552 F.3d 941, 948 (9th Cir. 2009) (internal quotations omitted). Petitioners
9 have made such a showing. The Ninth Circuit has a sliding scale approach to the
10 *Winter* factors: a stronger showing under one element may offset a weaker showing
11 under another. *See Pimental v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012).

12 1. *Respondents Are Subjecting Petitioners to Unconstitutional*
13 *Punishment in Violation of the Fifth Amendment.*

14 The Fifth Amendment’s Due Process Clause prohibits punishment of
15 detained persons prior to “a formal adjudication of guilt in accordance with due
16 process of law.” *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979) (citation omitted).
17 Thus, the Fifth Amendment rights of detained individuals are violated when the
18 conditions of their confinement amount to punishment. *See Doe v. Kelly*, 878 F.3d
19 710, 720 (9th Cir. 2017) (quoting *Bell*, 441 U.S. at 539). A punitive condition can
20 be established “(1) where the challenged restrictions are expressly intended to
21 punish, or (2) where the challenged restrictions serve an alternative, non-punitive
22 purpose but are nonetheless excessive in relation to the alternative purpose, or are
23 employed to achieve objectives that could be accomplished in so many alternative
24 and less harsh methods.” *Jones v. Blanas*, 393 F.3d 918, 932 (9th Cir. 2004)
25 (citations and quotation marks omitted); *Doe*, 878 F.3d at 720.

26 Petitioners set out a compelling claim that their continued confinement at
27 Otay Mesa amounts to unconstitutional punishment in violation of the Fifth

1 Amendment. Given the scale of the COVID-19 outbreak inside the facility and
2 structural realities which prevent implementation of key risk mitigation
3 requirements (chief among which is consistent social distancing), Respondents
4 have not, and cannot, create conditions at Otay Mesa that are sufficiently safe for
5 medically vulnerable individuals.

6 For example, the cells at Otay Mesa—many of which are shared—make
7 maintaining six feet of distance impossible between cellmates.³³ Detained persons
8 are similarly unable to socially distance within common areas. For example, as one
9 Petitioner put it: “When we are outside of our cells, in the dining room and in the
10 hall watching TVs, we are back-to-back-to-back, almost touching each other.”
11 Crespo-Venegas Decl. ¶ 6 (ECF No. 1-11).³⁴ Tables and surrounding stools within
12 day rooms are bolted to the ground and situated in close proximity.³⁵ Shared phones
13 are spaced only a few feet apart, Arreola Decl. ¶ 6 (ECF No. 36-4); Gonzalez-Soto
14 Decl. ¶ 9 (ECF No. 1-12), as are communal showers. Ridley Decl. ¶ 7 (ECF No. 1-
15 4); Smith Decl. ¶ 6 (ECF No. 1-10). Thus, even if Respondents were taking
16 adequate measures to mitigate the risk of COVID-19—which they are not, as
17 discussed in Section II.A.2, below—the circumstances inherent in a congregate
18 environment like Otay Mesa make it so that even such measures could not
19 sufficiently protect Petitioners and the Medically Vulnerable Subclasses.

21 ³³ See, e.g., Broderick Decl. ¶ 9 (ECF No. 1-8) (“My cellmate and I are 3-4 feet
22 apart when we sleep and all throughout the day when we are in the cell.”); Cano
23 Decl. ¶ 5 (ECF No. 1-15) (“It is not possible for me and my cellmate to stay six feet
away from each other.”).

24 ³⁴ See also Lara-Soto Decl. ¶ 26 (ECF No. 1-9) (noting that detained persons “are
25 shoulder to shoulder when they watch TV and participate in activities.”); Szurgot
Decl. ¶ 11 (ECF No. 1-6) (“They tell us to stay six feet apart, but it’s not possible
to keep six feet apart when you’re outside your cell. There’s not enough space.”)

26 ³⁵ Arreola Decl. ¶ 6 (ECF No. 36-4); Ridley Decl. ¶ 7 (ECF No. 1-4); Smith Decl.
27 ¶ 6 (ECF No. 1-10).

1 Further, the number of confirmed positive cases at Otay Mesa has increased
 2 steadily since this case was filed—with at least 217 total confirmed cases, including
 3 68 individuals in USMS custody, as of May 12—making further transmission of
 4 the virus virtually inevitable.³⁶ Once COVID-19 is contracted, there is no known
 5 treatment or cure, and the risks of serious illness or injury are substantial. *See* Amon
 6 Decl. ¶ 6; Goldenson Decl. ¶ 15. At least one person held at Otay Mesa has already
 7 died as a result of COVID-19.³⁷

8 The existence of a significant COVID-19 outbreak poses an imminent and
 9 unconstitutional threat to Petitioners and Medically Vulnerable Subclass
 10 members.³⁸ This threat vastly outweighs any government interest in the continued
 11 confinement of Petitioners and Medically Vulnerable Subclass members at Otay
 12 Mesa—especially in light of the fact that the government’s objectives can readily
 13 be accomplished through alternatives to detention (including enlargement or
 14 transfer and electronic monitoring). Just as with persons in civil detention,
 15 Petitioners detained pretrial—who have not been convicted of any crime—may not
 16 be subjected to punishment. *See Jones*, 393 F.3d at 932 (“At a bare minimum, . . .
 17 an individual detained under civil process—*like an individual accused but not*
 18 *convicted of a crime*—cannot be subjected to conditions that “amount to
 19 punishment”) (quoting *Bell*, 441 U.S. at 536 (emphasis added)). The same is

20 _____
 21 ³⁶ *See supra* note 8; *see also* Petitioners’ Notice of Supplemental Facts, at 1 (ECF
 No. 43) (providing figures current through May 6).

22 ³⁷ Kate Morrissey, *First ICE detainee dies from COVID-19 after being hospitalized*
 23 *from Otay Mesa Detention Center*, San Diego Union Tribune, May 6, 2020,
<https://bit.ly/2X0NZxW>. *See also* ECF No. 43-1.

24 ³⁸ Indeed, this Court recently recognized that medically vulnerable petitioners in a
 25 parallel litigation brought by persons in ICE custody under substantially identical
 26 conditions at Otay Mesa demonstrated a substantial likelihood of success on the
 27 merits of their Fifth Amendment claim. *See* May 1 Order, *Alcantara v.*
Archambeault (the “ICE Case”), No. 3:20-cv-00756-DMS-AHG (S.D. Cal. May 1,
 2020), ECF No. 41; May 6 Order, *Alcantara*, No. 3:20-cv-00756-DMS-AHG, ECF
 No. 54.

1 arguably true for Petitioners detained post-conviction but pre-sentencing.³⁹
2 Respondents' continued detention of Petitioners and the Medically Vulnerable
3 Subclass members under circumstances that needlessly risk these individuals' lives
4 constitutes a violation of their Fifth Amendment rights.

5 The relief requested herein—release from custody or, at a minimum, release
6 from confinement within Otay Mesa through transfer or enlargement—is the best
7 and only way to prevent death and mitigate the proliferation of the virus among
8 those in USMS custody at Otay Mesa. In light of COVID-19, an orderly release
9 process similar to that occurring in the ICE Case or, alternatively, transfer or
10 enlargement, would achieve a safer alternative to continued confinement inside
11 Otay Mesa. *See* Apr. 30 Order, ICE Case, ECF No. 38. Transfer or enlargement
12 would not interfere with the government's objectives for detention (i.e., minimizing
13 flight risk and promoting public safety).⁴⁰ Given these facts and the ready
14 availability of alternatives to confinement at Otay Mesa, the continued detention of
15 Petitioners and the Medically Vulnerable Subclasses at the facility is excessive and
16 thus unconstitutional.

17
18
19 ³⁹ For the reasons described in Petitioners' Brief in Support of Motion for
20 Temporary Restraining Order, at 19 n.45 (ECF No. 2-2), Petitioners submit that the
21 Fifth Amendment's prohibition against punitive detention, and its objective
deliberate indifference standard, protects both persons detained pretrial and those
detained post-conviction, pre-sentencing.

22 ⁴⁰ At least one California district court has also recognized that continued
23 confinement of a medically vulnerable individual was excessive in relation to the
24 government's goal of protecting the community. *See Perez v. Wolf*, 2020 WL
25 1865303, at *13 (N.D. Cal. Apr. 14, 2020) (upholding release order for person in
26 immigration detention who had a criminal history including five DUIs and
27 reasoning that though the government had a legitimate purpose for detaining
petitioner, "namely to protect the community," petitioner's detention was
"excessive in relation to that purpose" because of health risks posed by his asthma,
28 hypertension, and latent tuberculosis (quoting *Ortuño v. Jennings*, 2002 WL
1701724, at * 4 (N.D. Cal. Apr. 8, 2002) (internal quotations omitted))).

1 2. *Respondents Have Acted with Deliberate Indifference to a*
 2 *Substantial Risk of Serious Harm to Petitioners in Violation of*
 3 *the Fifth and Eighth Amendments.*

4 Although Petitioners are undoubtedly at substantial risk of serious harm,
 5 Respondents have failed to act to protect them from the known dangers of COVID-
 6 19 in violation of their Fifth and/or Eighth Amendment rights. *See Gordon v. Cty.*
 7 *of Orange*, 888 F.3d 1118, 1125 (9th Cir. 2018) (under the Fifth Amendment, “an
 8 intentional decision” and failure to “take reasonable available measures to abate” a
 9 “substantial risk of suffering serious harm” constitutes deliberate indifference);
 10 *Farmer v. Brennan*, 511 U.S. 825, 842 (1994) (to demonstrate deliberate
 11 indifference under the Eighth Amendment Cruel and Unusual Punishments Clause,
 12 “it is enough that the official acted or failed to act despite his knowledge of a
 13 substantial risk of serious harm”).⁴¹

14 For example, in a cruel irony, Respondents have convened a series of Otay
 15 Mesa “town halls” to address the COVID-19 pandemic and instruct Petitioners to
 16 practice social distancing—yet Petitioners report that these meetings take place in
 17 a crowded room in which social distancing is impossible.⁴² Respondents’ own
 18 filings confirm that Petitioners are unable to practice social distancing, as more than
 19 half of the individuals in USMS custody at Otay Mesa still share cells with others,
 20 and one pod is still approximately two-thirds full. Johnson Decl. ¶ 14 (ECF No. 29-
 21 2). Notwithstanding that Otay Mesa is operating at an average capacity of 31
 22 percent, *id.*, and that Respondents purport to recognize the clear risks COVID-19
 23 poses, ECF No. 29 at 11–12 & 17, every named Petitioner has, by sworn

24 ⁴¹ As noted, Petitioners contend that the Fifth Amendment protects individuals
 25 detained post-conviction, pre-sentencing. Even if the Court were to decide the
 26 Eighth Amendment governs the Post-Conviction Medically Vulnerable Subclasses’
 27 claims, the Eighth Amendment standard has nonetheless been met.

28 ⁴² *See* Ridley Decl. ¶ 25 (ECF No. 1-4); Doe Decl. ¶¶ 20, 21 (ECF No. 1-5); Smith
 Decl. ¶ 13 (ECF No. 1-10).

1 declaration, reported that social distancing is impossible at the facility.⁴³ Moreover,
 2 “a facility operating at less than full capacity does not mean that social distancing
 3 is possible. . . even if it is operating at only one third capacity,” due to practices and
 4 factors including shared restroom facilities, housing, and food distribution
 5 practices, among others. *See* Cohen Decl. ¶ 10 (ECF 44-2).

6 Further, Respondents appear unable or unwilling even to identify which
 7 individuals in their custody are medically vulnerable (which, in turn, indicates that
 8 Respondents are incapable of providing timely and appropriate treatment to such
 9 individuals). Respondents’ silence about how many persons in their custody are
 10 medically vulnerable speaks volumes. Time is of the essence and urgent action is
 11 necessary to protect medically vulnerable individuals detained at Otay Mesa—yet
 12 Respondents appear supremely indifferent to these realities.⁴⁴ Failure to identify
 13 precedes a failure to protect. As one Otay Mesa staff member stated in response to
 14 detained individuals’ requests for COVID-19 testing, “Why do you want testing?
 15 There is nothing we can do anyway.” Smith Decl. ¶ 23 (ECF No. 1-10).

16 Respondents have acted with reckless indifference to Petitioners’ health.
 17 The immediate removal of Petitioners and the Medically Vulnerable Subclasses
 18

19 ⁴³ *See* Alvarez Decl. ¶¶ 3, 10 (ECF No. 1-7); Broderick Decl. ¶¶ 9, 12 (ECF No. 1-
 20 8); Cano Decl. ¶ 5 (ECF No. 1-15); Crespo-Venegas Decl. ¶¶ 5, 6 (ECF No. 1-11);
 21 Gonzalez-Soto Decl. ¶¶ 8, 9, 10 (ECF No. 1-12); Lara-Soto Decl. ¶ 42 (ECF No. 1-
 22 9); Ramcharan Decl. ¶¶ 3, 8 (ECF No. 1-13); Ridley Decl. ¶¶ 4, 8 (ECF No. 1-4);
 Smith Decl. ¶¶ 6, 20 (ECF No. 1-10); Szurgot Decl. ¶¶ 10, 11 (ECF No. 1-6); Doe
 Decl. ¶ 5 (ECF No. 1-5).

23 ⁴⁴ In the ICE Case, government officials only identified the medically vulnerable
 24 persons in ICE custody after another federal judge ordered them to do so. *See*
 25 *Fraihat v. U.S. Immigration and Customs Enf’t*, 2020 WL 1932393 (C.D. Cal Apr.
 26 20, 2020). Through April 28, Respondents in the ICE Case averred that there were
 27 just 8 medically vulnerable individuals in ICE custody. On April 29, however,
 Respondents “supplemented” their submissions to indicate there were actually
 “between” 51 to 69 persons in ICE custody who met the CDC definition for
 individuals at high COVID-19 risk. *See* ICE Case, LaRose Decl. ¶¶ 37–39 (ECF
 No. 26-1); ICE Case, Supplemental Briefing, at 2 (ECF No. 34).

1 from Otay Mesa is the only relief that will adequately protect these individuals from
 2 the acute risks they now face.⁴⁵ In light of these circumstances, therefore,
 3 Petitioners’ continued detention within Otay Mesa unconstitutionally places
 4 them—at the very least—at a substantial risk of “pain and suffering which no one
 5 suggests would serve any penological purpose.” *See Estelle v. Gamble*, 429 U.S.
 6 97, 103 (1976). Petitioners thus demonstrate a substantial likelihood of success on
 7 the merits even under the Eighth Amendment, and because “the guarantees of the
 8 Eighth Amendment provide a *minimum* standard of care for determining” an
 9 individual’s rights under the Due Process Clause, *Or. Advocacy Ctr. v. Mink*, 322
 10 F.3d 1101, 1120 (9th Cir. 2003) (quoting *City of Revere v. Mass. Gen. Hosp.*, 463
 11 U.S. 239, 244 (1983)), the Fifth Amendment standard is easily met here as well.

12 **B. Absent Relief, Petitioners Will Suffer Irreparable Harm.**

13 Petitioners have demonstrated that, absent this Court’s immediate
 14 intervention, they will be irreparably harmed in at least three different ways—any
 15 one of which is sufficient to merit injunctive relief.

16 First, as discussed in Section II.A, *supra*, Petitioners have demonstrated a
 17 deprivation of their constitutional rights. *Hernandez v. Sessions*, 872 F.3d 976, 994
 18 (9th Cir. 2017); *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012);
 19 *Warsoldier v. Woodford*, 418 F.3d 989, 1001–02 (9th Cir. 2005). Second,

21 ⁴⁵ Actions filed by two recent Otay Mesa detention officers after Petitioners filed
 22 the present case further demonstrate the hopeless circumstances within Otay Mesa
 23 and substantiate Petitioners’ allegations regarding the impossibility of social
 24 distancing, the unavailability of PPE and basic cleaning supplies, and unsanitary
 25 cleaning practices. For example, both complaints state that it was impossible for
 26 detained persons—even with cohorting—to practice social distancing given the
 27 facility’s layout, the number of detained persons in the housing units, and meal time
 28 practices. *See* Complaint ¶¶ 65, 78, *Smith v. CoreCivic of Tenn. LLC et al.*, No.
 20cv0808L (WVG), (S.D. Cal. Apr. 29, 2020) (ECF 36-5); Complaint ¶¶ 91, 101-
 02, *Arnold v. CoreCivic of Tenn. LLC et al.*, No. 20cv0809 (BEN) (RBB) (S.D. Cal.
 Apr. 29, 2020) (ECF 36-6).

1 Petitioners have demonstrated that they will suffer irreparable harm because they
 2 are at heightened risk of exposure to a highly contagious virus that can cause serious
 3 injury or death and has no known cure. *Padilla v. U.S. Immigration & Customs*
 4 *Enforcement*, 953 F.3d 1134, 1147 (9th Cir. 2020). Third, Petitioners have
 5 demonstrated that they will suffer irreparable harm by virtue of their inability to
 6 practice the only measures known to mitigate COVID-19 risk—social distancing
 7 and careful hygiene practices—at Otay Mesa, and that the medical care that is
 8 available to them within that facility in light of the pandemic is wholly inadequate
 9 and places them at a greater risk of serious injury or death.⁴⁶

10 Respondents’ decision to house medically vulnerable individuals together in
 11 a single pod (creating a nursing home-like environment within a detention center)
 12 runs contrary to consensus medical advice and does nothing to mitigate the danger
 13 to Petitioners and the Medically Vulnerable Subclasses,⁴⁷ and the lack of adequate
 14 medical care compounds the harm.⁴⁸ The increased risk of contracting COVID-19

15 _____
 16 ⁴⁶ See *M.R. v. Dreyfus*, 663 F.3d 1100, 1111 (9th Cir. 2011), as amended by 697
 17 F.3d 706 (9th Cir. 2012); *Indep. Living Ctr. of S. Cal., Inc. v. Shewry*, 543 F.3d
 18 1047, 1049–50 (9th Cir. 2008) (recognizing that Medi-Cal beneficiaries would
 19 suffer irreparable harm where new policy would limit access to pharmaceuticals).
 Brief of Public Health Experts, at 10 (ECF No. 47-2) (“USMS falls far short of
 identifying or implementing the . . . social distancing measures . . . that are
 necessary to prevent viral spread that is already occurring at OMDC.”).

20 ⁴⁷ Amon Decl. ¶ 35 (ECF No. 1-3) (“CDC guidance recommends that ‘Facilities
 21 should make every possible effort to place suspected and confirmed COVID-19
 22 cases under medical isolation individually. . . Cohorting should only be practiced if
 23 there are no other available options.’ . . [Otay Mesa] does not isolate suspected and
 24 confirmed COVID-19 cases individually. The facility has acknowledged that it is
 25 engaging in cohorting that includes asymptomatic individuals and those who have
 26 not tested positive for COVID-19.”).

27 ⁴⁸ The Ninth Circuit has recognized that irreparable harm exists where the
 28 government’s actions threaten an individual’s health. *M.R. v. Dreyfus*, 663 F.3d
 1100, 1111 (9th Cir. 2011), as amended by 697 F.3d 706 (9th Cir. 2012); *Indep.*
Living Ctr. of S. Cal., Inc. v. Shewry, 543 F.3d 1047, 1049–50 (9th Cir.
 2008). Here, the inability of Petitioners to access adequate medical care at Otay
 Mesa in light of the COVID-19 pandemic—where the virus is spreading and cannot
 be controlled—places them in grave danger and thereby plainly meets the standard
 for irreparable harm. Detention centers like Otay Mesa that are facing outbreaks of

1 and the potential of serious illness or death constitutes irreparable harm.

2 **C. The Balance of Equities and Public Interest Favor Granting a**
 3 **Preliminary Injunction.**

4 The final two *Winter* factors—the balance of equities and the public
 5 interest—favor injunctive relief. As discussed, Petitioners and the Medically
 6 Vulnerable Subclasses they seek to represent face life-threatening risks absent
 7 release from Otay Mesa. As stated above, the mortality rate for medically
 8 vulnerable individuals infected with COVID-19 is above 5%, Goldenson Decl. ¶ 9
 9 (ECF No. 1-2), and may be as high as 13% for certain conditions.⁴⁹ The main
 10 strategy to protect the medically vulnerable from these odds is social distancing,
 11 which is virtually impossible at Otay Mesa. Amon Decl. ¶ 12 (ECF No. 1-3);
 12 Goldenson Decl. ¶ 27 (ECF No. 1-2). Given the potential for serious illness or loss
 13 of life without intervention, the balance of equities tips sharply in Petitioners' favor.

14 _____
 15 COVID-19 are patently unable to address the medical needs of detained persons.
 16 Brief of Public Health Experts, at 9 (ECF No. 47-2). Clinical management for those
 17 infected with COVID-19, especially those in high-risk populations, is labor-
 18 intensive, requiring the presence of physicians with specialized backgrounds in
 19 infectious diseases, respiratory, cardiac and kidney care, and that nurses tend to a
 20 limited number of patients at a time. *Id.* The medical care provided by Otay Mesa
 21 is simply insufficient and plainly inadequate to handle the current pandemic. For
 22 example, Otay Mesa's Medical Unit possesses only seven negative air pressure
 23 cells for positive or presumed positive individuals and can house only 38
 24 individuals within unit. ICE Case, LaRose Decl. ¶ 51 (ECF No. 26-1). Given the
 25 167 positive COVID-19 tests at Otay Mesa as of April 30, 2020, the Medical Unit
 cannot possibly care for all those who are ill, especially when one takes into account
 those requiring medical care for non-COVID-related illnesses. *See* Amon Decl.
 ¶¶ 43, 44 (ECF No. 1-3) (“I am concerned that, independent of the current public
 health crisis, [Otay Mesa] has had significant challenges providing adequate
 medical care to individuals in their custody. There are indications that COVID-19
 has put a severe strain on this already strained system.”). Further, numerous
 testimonials paint a bleak picture of the medical care provided to detained persons
 at Otay Mesa, both in ICE and USMS custody where medical facilities are shared.
 ICE Case, LaRose Decl. ¶ 51 (ECF No. 26-1); *see, e.g.*, Arreola Decl. ¶ 8 (ECF No.
 36-4); Kopycinski Decl. ¶ 9 (ECF No. 36-7); Cano Decl. ¶ 15 (ECF No. 1-15);
 Crespo-Venegas Decl. ¶ 10 (ECF No. 1-11).

26 ⁴⁹ *Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-*
 27 *19)*, WHO, at 12, Feb. 24, 2020, <https://bit.ly/2zKQfRG>.

1 Petitioners and Subclass members’ interest in avoiding serious illness or
2 death outweighs any hardships Respondents may face in complying with an
3 injunction. An efficient and expedited process for the release, transfer, or
4 enlargement of medically vulnerable individuals’ confinement would not be
5 prohibitively burdensome to administer. Petitioners’ declarations demonstrate that
6 many members of the Medically Vulnerable Subclasses have available housing
7 options where they can self-quarantine and exercise social distancing.⁵⁰ An orderly
8 review process would determine the details and appropriate method of the relief
9 ordered. *See, e.g.*, Apr. 30 Order, ICE Case, ECF No. 38. Such a process would
10 help ensure that the relief granted strikes the correct balance between protecting
11 Petitioners and Subclass members from unconstitutional risks of harm while also
12 ensuring access to adequate food, personal hygiene equipment, or medical care
13 outside Otay Mesa.

14 Finally, Petitioners’ requested preliminary injunction is in the public interest.
15 Public health experts agree that “releasing [medically vulnerable detained persons]
16 not only will protect Plaintiffs and others who are detained, but also detention
17 facility staff, visitors and the public at large.” Brief of Public Health Experts, at 1
18 (ECF No. 47-2);⁵¹ *see also* Amon Decl. ¶ 53 (ECF No. 1-3) (“Releasing individuals
19 at highest risk who can then self-isolate provides a significantly better likelihood of
20 preventing infection, disease spread and death, both in the facility and in the
21 community at large.”). The district court, in ordering enlargement, recognized as
22 much in *Wilson v. Williams*, finding that “the transfer of prisoners from Elkton to
23

24 ⁵⁰ *See, e.g.*, Broderick Decl. ¶ 24 (ECF No. 1-8); Ramcharan Decl. ¶ 16 (ECF No.
25 1-13); Lara-Soto Decl. ¶ 50 (ECF No. 1-9); Doe Decl. ¶ 25 (ECF No. 1-5); Ridley
26 Decl. ¶ 1 (ECF No. 1-4); Smith Decl. ¶ 3 (ECF No. 1-10).

27 ⁵¹ The Motion for Leave to File Brief of *Amici Curiae* Public Health Experts, filed
28 May 11, 2020, remains pending before this Court. *See* ECF No. 47.

1 other means of confinement could accomplish the goal of protecting Elkton’s
2 vulnerable population while also protecting public safety.” No. 20-cv-00794 (N.D.
3 Ohio Apr. 22, 2020). A similar release or transfer to other means of confinement is
4 appropriate here to protect vulnerable Subclass members and the public.

5 **CONCLUSION**

6 For the foregoing reasons, this Court should grant the Medically Vulnerable
7 Subclasses’ Motion for a Preliminary Injunction.

8
9 Respectfully submitted,

10
11 **ROPES & GRAY LLP**

12 DATED: May 15, 2020

/s/ Joan McPhee

13
14 **JOAN MCPHEE**
(joan.mcphee@ropesgray.com)
15 **ALEXANDER B. SIMKIN**
(alexander.simkin@ropesgray.com)
16 **HELEN GUGEL**
(helen.gugel@ropesgray.com)
17 1211 Avenue of the Americas
New York, NY 10036-8704
18 Telephone: (212) 596-9000

19 **NICOLE HOROWITZ**
(nicole.horowitz@ropesgray.com)
20 Three Embarcadero Center
San Francisco, CA 94111
21 Telephone: (415) 315-6300

22 **NATIONAL IMMIGRATION**
PROJECT OF THE NATIONAL
23 **LAWYERS GUILD**

24 **SIRINE SHEBAYA**
(sirine@nipnlg.org)
25 **MATTHEW VOGEL**
(matt@nipnlg.org)
26 2201 Wisconsin Ave, NW
Suite 200
27

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Washington, DC 20007
Telephone: (617) 227-9727

**ACLU FOUNDATION OF SAN
DIEGO & IMPERIAL
COUNTIES**

MITRA EBADOLAH
(mebadolahi@aclusandiego.org)

BARDIS VAKILI
(bvakili@aclusandiego.org)

SARAH THOMPSON
(sthompson@aclusandiego.org)

DAVID LOY
(davidloy@aclusandiego.org)

P.O. Box 87131
San Diego, CA 92138-7131
Telephone: (619) 398-4187

**AMERICAN CIVIL LIBERTIES
UNION FOUNDATION**

GABRIEL ARKLES
(garkles@aclu.org)

CLARA SPERA
(cspera@aclu.org)

125 Broad Street, 18th Floor
New York, NY 10014
Telephone: (212) 549-2569

Attorneys for Plaintiff-Petitioners

1 **JOAN MCPHEE*** (NY SBN 2082246) (joan.mcphee@ropesgray.com)
2 **ALEXANDER B. SIMKIN*** (NY SBN 4463691) (alexander.simkin@ropesgray.com)
3 **HELEN GUGEL*** (NY SBN 4910105) (helen.gugel@ropesgray.com)

4 **ROPES & GRAY LLP**
5 1211 Avenue of the Americas
6 New York, NY 10036-8704
7 Telephone: (212) 596-9000

8 **NICOLE HOROWITZ** (SBN 306828) (nicole.horowitz@ropesgray.com)

9 **ROPES & GRAY LLP**
10 Three Embarcadero Center
11 San Francisco, CA 94111
12 Telephone: (415) 315-6300

13 Counsel for Plaintiff-Petitioners
14 *Additional counsel listed on following page*

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

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

26 Plaintiff-Petitioners,

27 v.

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

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

Donald W. WASHINGTON, Director
of the United States Marshals Service.

Defendant-Respondents.

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

**DECLARATION OF ATTORNEY
JOAN MCPHEE IN SUPPORT OF
PLAINTIFF-PETITIONERS'
MOTION FOR PRELIMINARY
INJUNCTION AND PROVISIONAL
CLASS CERTIFICATION**

Hon. Dana M. Sabraw

DATE: May 29, 2020

TIME: 10:00 a.m.

1 **SIRINE SHEBAYA*** (NY SBN 5094990) (sirine@nipnlg.org)
2 **MATTHEW VOGEL*** (LA SBN 35363) (matt@nipnlg.org)
3 **NATIONAL IMMIGRATION PROJECT**
4 **OF THE NATIONAL LAWYERS GUILD**
5 2201 Wisconsin Ave, NW, Suite 200
6 Washington, DC 20007
7 Telephone: (617) 227-9727

8 **MITRA EBADOLAH**I (SBN 275157) (mebadolahi@aclusandiego.org)
9 **BARDIS VAKILI** (SBN 247783) (bvakili@aclusandiego.org)
10 **SARAH THOMPSON** (SBN 323188) (sthompson@aclusandiego.org)
11 **DAVID LOY** (SBN 229235) (davidloy@aclusandiego.org)
12 **ACLU FOUNDATION OF SAN DIEGO &**
13 **IMPERIAL COUNTIES**
14 P.O. Box 87131
15 San Diego, CA 92138-7131
16 Telephone: (619) 398-4187

17 **GABRIEL ARKLES*** (NY SBN 4391918) (garkles@aclu.org)
18 **CLARA SPERA*** (NY SBN 5590229) (cspera@aclu.org)
19 **AMERICAN CIVIL LIBERTIES UNION FOUNDATION**
20 125 Broad Street, 18th Floor
21 New York, NY 10014
22 Telephone: (212) 549-2569

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

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DECLARATION OF JOAN MCPHEE

I, Joan McPhee, hereby declare as follows:

1. I am an attorney licensed to practice in New York, Massachusetts, and Rhode Island. I am a partner at the law firm of Ropes & Gray LLP, counsel for Plaintiff-Petitioners in the above captioned action, and have been admitted *pro hac vice* to practice before this Court.

2. To the best of my knowledge and belief, and based on my discussion with colleagues, I understand the following to be true:

3. Attached hereto as Exhibit A is a true and correct copy of the sworn Declaration of Kendra Drysdale, dated May 14, 2020.

4. Attached hereto as Exhibit B is a true and correct copy of the sworn Declaration of Cinthia Veronica Ramos Martinez, dated May 14, 2020.

I declare under penalty of perjury that the foregoing statements are true and correct.

Date: May 15, 2020

s/ Joan McPhee
Joan McPhee
ROPES & GRAY LLP
1211 Avenue of the Americas
New York, NY 10036
(212) 596-9443
Joan.McPhee@ropesgray.com

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LIST OF EXHIBITS

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Ex. A – Declaration of Kendra Drysdale	1
Ex. B – Declaration of Cinthia Veronica Ramos Martinez	10

Exhibit A

1 **JOAN MCPHEE*** (NY SBN 2082246) (joan.mcphee@ropesgray.com)
 2 **ALEXANDER B. SIMKIN*** (NY SBN 4463691) (alexander.simkin@ropesgray.com)
 3 **HELEN GUGEL*** (NY SBN 4910105) (helen.gugel@ropesgray.com)
 4 **ROPES & GRAY LLP**
 5 1211 Avenue of the Americas
 6 New York, NY 10036-8704
 7 Telephone: (212) 596-9000

8 **NICOLE HOROWITZ** (SBN 306828) (nicole.horowitz@ropesgray.com)
 9 **ROPES & GRAY LLP**
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Donald W. WASHINGTON, Director of
 the United States Marshal Service.

Defendant-Respondents.

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

**DECLARATION OF KENDRA
 DRYSDALE**

Hon. Dana M. Sabraw
 DATE: May 29, 2020
 TIME: 10:00 a.m.

1 **SIRINE SHEBAYA*** (NY SBN 5094990) (sirine@nipnlg.org)

2 **MATTHEW VOGEL*** (LA SBN 35363) (matt@nipnlg.org)

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6 Washington, DC 20007

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14 P.O. Box 87131

15 San Diego, CA 92138-7131

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

Declaration of Kendra Drysdale

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1. My name is Kendra Drysdale. I am 46 years old. I am from San Diego, California, and I am a U.S. citizen.

2. I have various health conditions and illnesses including: asthma, pre-diabetic, and urinary tract reflux which causes chronic kidney infections. Due to these kidney infections, I have damage to my right kidney. I have a tumor in my breast which was found in January 2020 and has not been checked to see if it is malignant. Currently, I have a kidney infection which was left untreated for 6 weeks because the incorrect antibiotic was prescribed on April 17, 2020 at Otay Mesa Detention Center, and I have a lung infection. Finally, I am COVID-19 positive and still feeling symptoms.

3. I have been at Otay Mesa Detention Center since September 29, 2019. I was housed in B-Pod until April 21, 2020, which is the day I was told I had tested positive for COVID-19. That day, I was moved to E-Pod where I remain now.

4. There are 12 of us women in E-Pod. We are all COVID-19 positive. We are housed one person per cell. Each cell has a bed and a toilet. We share an eating area and a dayroom where built-in chairs are spaced 2 feet apart. We also share two showers and three phones. Every 1-2 hours, we take turns cleaning the common areas re-using the same rags. We are given

1 chemicals to do the cleaning, but they are very watered down. We each
2 have our own individual bottle of liquid soap. A big bottle of this liquid
3 soap in the common area is for us to replenish our individual bottles.
4 Everyone touches this big bottle.
5

6 5. The 12 of us in E-Pod are not being treated for COVID-19. We are told to
7 sign up for sick calls, which I do daily. The nurse who handles these daily
8 sick calls tells us we are all faking being sick. We are isolated from other
9 inmates.
10

11 6. When I first arrived in E-Pod, I saw a notice to the guards posted on the
12 wall about four Chinese immigrants who had been housed there in
13 January 2020. The notice was an advisal to the guards about how to
14 interact with these immigrants because they had tested positive for
15 COVID-19.
16

17 7. On Tuesday, I fell on my back in the lunchroom and hurt my back. They
18 called an ambulance to take me to the hospital yesterday to get an x-ray to
19 see if I broke something. The ambulance would not come into the
20 building, so the officers had to take me outside to meet the ambulance.
21 While getting the x-ray, I had severe chest pains. I have had chest pains
22 since the end of March as explained below. The doctor at the hospital
23 informed me I have a lung infection and prescribed prednisone; I was also
24 prescribed a different antibiotic for the kidney infection.
25

1
2 8. When I returned to Otay Mesa Detention from the hospital yesterday, the
3 officers said I was cleared medically, and they tried to house me back in
4 B-pod. I refused and reminded them I am COVID-19 positive. The
5 officers kept insisting I had been medically cleared, and I kept saying I
6 was still sick. The officers threatened to put me in segregation, but since I
7 am a US Marshal inmate and had committed no violation, they could not
8 segregate me. Eventually, I was taken back to E-Pod where I am today.
9

10 9. At this detention facility, it is not possible to socially distance 100% of the
11 time, and we share items. We sit too close to each other since the chairs
12 are built into the floor. Also, we share certain items such as a microwave,
13 tables and one scooper for getting ice. The officers come within 6 feet of
14 us when they give us our food and supplies such as toilet paper.
15

16 10. Sometime between April 12-15, 2020- few days before I was tested for
17 COVID-19, we were given a mask to wear. They are the flimsy type that
18 remain open on the sides. We are given a new one every two weeks or so.
19 In the last 4 weeks or so, I have received four masks. Some, but not all, of
20 the guards wear their own homemade or bought masks. Only some of
21 them wear gloves. We inmates do not have gloves.
22

23 11. In middle to late March, I began feeling sick. First, I had severe diarrhea.
24 Then, I began experiencing severe chest pain. This chest pain was
25
26

1 different from anything I have felt in the past due to my asthma. A guard
2 told me to ask for a sick call. The next day I saw a nurse who told me I
3 was fine and probably pulled a muscle from exercising. I explained I had
4 only been walking and could not have pulled a chest muscle. She gave
5 me a new inhaler. I was returned to working in the kitchen and worked
6 there another two days. I only got sicker, though. I had a sore throat,
7 body aches and chills, plus a headache which felt like my head would
8 explode. I was waking up in the night in cold sweats, as though I was
9 breaking a fever. I also could not taste nor smell anything. I was given
10 Tylenol and ibuprofen. I was taken to medical isolation for one day on
11 March 22, 2020. I repeatedly asked to be tested for COVID-19, as did
12 some other women in my pod who were also feeling sick. Out of
13 approximately 98 women in B-Pod, around 80 of us were sick. They
14 would not test us.
15

16
17 12. After being sick for about three weeks, feeling worried and not getting
18 tested, I participated in a sit-down protest on April 16, 2020 with other
19 women in B-Pod. We huddled on the floor, refused to eat or lockdown
20 until a doctor was brought to see us. We demanded that we be tested for
21 COVID-19. Twelve officers lined up as if in the military and hovered
22 near us. We were scared but felt we had to do something to get tested
23 since we had been sick for so long and felt neglected. Hours later, a
24 doctor arrived in B-Pod to see us. We were tested for COVID-19 and
25
26

1 were told the results would arrive on April 17, 2020.
2

3 13. Everyone who was given a COVID-19 test also received a blood test to
4 check on renal function. I, however, have thin veins which are not visible
5 so I can only have blood drawn with the use of ultrasound or by
6 puncturing an artery. Since the medical unit of this detention facility does
7 not have the ability to draw blood in this manner, I must be taken
8 somewhere for the blood draw. I still have not been taken to get my
9 blood test. Four times I was told in the last month that I would be taken
10 for the blood test, and all four times it has been cancelled. Due to my
11 chronic kidney infections, I am very worried I have not received this
12 blood test and that my kidneys have not been checked.
13

14 14. My attorney informed me that the US Marshals notified her on April 20,
15 2020 that I tested positive for COVID-19. On April 21, 2020, I was told
16 to pack up my things in B-Pod and was taken to E-Pod. After I arrived
17 there, I was told about the positive test result.
18

19 15. Whenever another inmate gets sick, she gets put in E-Pod with us, and we
20 are quarantined all over again. Maybe that is why I have not gotten better.
21 I still have the excruciating headaches, severe chest pains and now have
22 lung pain on my back which I think is from the kidney infection. I also
23 have stomach problems- alternating between diarrhea and constipation.
24 Also, we are not being fed healthy meals, and we are not given vitamins to
25

1 supplement the lack of nutrition. We have been fed only these types of
2 meals: hamburger, hot dog or breaded chicken sandwich. We are also
3 given a bologna sandwich with each meal, and once a week we are given
4 a bean burrito. When we were in B-Pod, we were given healthier, more
5 varied hot meals.
6

7 16.It has been 14 days since the last person was put in E-Pod with us. Today
8 we were told we would return to B-Pod, but as far as I am aware, all of us
9 in E-Pod still have symptoms of COVID-19. If taken to B-Pod, I will
10 share a cell, sink, and toilet with a cell mate. The beds are within 4 feet of
11 each other. Since I am still sick, I am worried I will get other people sick,
12 too.
13

14 17.Since I started feeling ill in March, I began emailing everyone I could
15 asking for help. I emailed the warden, the assistant warden, the unit
16 manager, counselor and the US Marshals. After I was tested for COVID-
17 19 and was told the results would be in the following day, I emailed
18 asking for the test results. It took several days to get them. I think the
19 guards are angry at me for being so persistent, and I fear retaliation for
20 complaining. I feel like am getting worse, and I am not receiving the
21 medical care I need. I am very scared for my life.
22

23 Kendra Drysdale gave me authority to sign saying this is true and correct, 5:30
24 P.M., 5/14/20, /s/ *Mayra Garcia*
25
26

Exhibit B

1 **JOAN MCPHEE*** (NY SBN 2082246) (joan.mcphee@ropesgray.com)
 2 **ALEXANDER B. SIMKIN*** (NY SBN 4463691) (alexander.simkin@ropesgray.com)
 3 **HELEN GUGEL*** (NY SBN 4910105) (helen.gugel@ropesgray.com)
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 9 **ROPES & GRAY LLP**
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Defendant-Respondents.

Case No. 3:20-cv-00782-DMS-
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**DECLARATION OF CINTHIA
 VERONICA RAMOS
 MARTINEZ**

Hon. Dana M. Sabraw
 DATE: May 29, 2020
 TIME: 10:00 a.m.

1 **SIRINE SHEBAYA*** (NY SBN 5094990) (sirine@nipnlg.org)

2 **MATTHEW VOGEL*** (LA SBN 35363) (matt@nipnlg.org)

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Declaration of Cinthia Veronica Ramos Martinez

1. My name is Cinthia Veronica Ramos Martinez. I am 46 years old. I am from Tijuana, Baja California, Mexico, and am a Mexican citizen.
2. I have various health conditions including: asthma, pre-diabetes, and hypertension.
3. If released, I would be deported to Tijuana, Mexico and live with my family there.
4. I have been at Otay Mesa Detention Center since October 2019. I was in B-Pod, with the other women. There is another pod, E-pod, for the women who have confirmed cases of COVID-19. I was transferred to E-pod on April 23, 2020, when I received my positive diagnosis for COVID-19.
5. There are 11 women with me in the COVID-19 unit in E-pod. I think we are the only 11 people who have gotten the tests, and we have all gotten positive results. There may be one other person who tested negative, but she is sick so we think it was a false negative. In E-pod, we all have our own individual cells to sleep in, but continue to share common areas. The cells are small and it would be very stressful to stay in there all day. It would make me even more anxious and depressed than I am now. Staying alone in the cells would be no way to live.
6. The furniture in the common areas is still shared: including the tables and microwaves, when we use the phones to talk to our families and our lawyers, and the sinks and showers. We are right next to each other when we use any

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of those common areas. We cannot move them to achieve social distancing, even the chairs and tables, because they are nailed to the floor.

7. The food is bad. They are usually giving us sandwiches – mostly bologna and sometimes chicken that we have to heat in the microwave. They give us a packet with a sandwich, in a sealed packet with a paper bag. Sometimes we get fruit in the morning, like an apple, pear, banana, or celery or a muffin. They just began giving us milk in the morning, once or twice per week. We also recently got hot food once – rice and carrots and a flour tortilla.

8. We have some chemicals here in our pod. They make us clean the areas every hour, even when we are sick. The guards themselves never clean.

9. For a while at the beginning of the pandemic, the guards were saying that they were not allowed to wear masks and gloves when they were working there, and it put us all in danger. By the time the guards starting using the proper PPE, it was too late because so many of us were already sick. Just today, in the morning, one of the woman in my pod heard a guard admit that he, too, had tested positive but was still working.

10. The first mask they gave us was on April 10. They tried to get us to sign contracts in exchange for receiving the masks, but I did not sign it. Eventually, they gave each of us a disposable mask. We only receive new ones approximately every 2 weeks. I have only received three so far. I asked for a new one early because my second one broke, but they told me I could not get one. Luckily, it was right before the two weeks were up so I got

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another one shortly thereafter. During that day, I wasn't able to wear a mask at all.

11. I was feeling sick for several weeks before I finally got tested for COVID-19 on April 21 when it was my turn to go to medical. For a long time, I had body aches, headaches, throat pain, and trouble breathing. It was even worse because I have asthma. During that time, I repeatedly asked for medical attention but they would just look me in the eye, tell me I looked okay and didn't have a fever, and that I had to wait my turn to see the doctor. But I have chronic back problems so I take acetaminophen, which I think is why I didn't have a fever. After I took the test, I had to ask for my results before they would give them to me. Finally, I felt so bad that they took me back to the doctor, and it was only then that I got my test results.

12. When I did go to medical, they gave me some pills and water and told me they could not do anything else for me. The medical staff said they weren't responsible for us, and they couldn't be responsible for any additional treatment because that was CoreCivic's responsibility. I think that is wrong because we are detained here so if they are not responsible for us, no one is. I feel like we are going to die here.

13. To my knowledge, no women in B-Pod have gotten tests since April 30. Results of that round of tests came out on May 4, which was the last time anyone was transferred into the COVID-19 area. There are still women in B-pod who are sick and not getting tested.

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14.They still gather us together for “town hall”-style meetings when they need to tell us things. They did this most recently about a week ago. Sawyer and Hawkins are the ones leading the meetings.

15. I have not filed any official grievances. The last time Sawyer and Hawkins were around, I told them my complaints about the food and the medical treatment, and they said okay but never did anything. The same thing happened to other women in my pod. They always just look us in the eye when we complain and tell us we don’t need the medical help because we look okay to them.

16.We don’t have appropriate medical care and our families are worried about us. It is very frightening because we do not know what will happen to us. We need more tests, we need masks, we need to be safe. They are not doing anything for us. We have no rights here and we may die here. So many of us are sick that the guards even call us “the walking dead.” We are very scared.

17.With all due respect, I ask the court to remember us and the mistreatment we have suffered, as if you were with us here.

Cinthia Ramos Martinez gave me authority to sign saying this is true and correct,
12:03 P.M., 5/14/20, /s/ *Sarah Thompson*