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9  
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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  
23 States Marshal for the Southern District  
of California,

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

26 Respondents.  
27  
28

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

**RESPONDENTS' RESPONSE IN  
 OPPOSITION TO MOTION FOR  
 PRELIMINARY INJUNCTION AND  
 PROVISIONAL CLASS  
 CERTIFICATION**

**(PROPOSED CLASS ACTION)**

Date: May 29, 2020  
 Time: 10:00 a.m.  
 Hon. Dana M. Sabraw

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1 **I.**

2 **INTRODUCTION**

3 Respondents, Donald T. Washington, Director, United States Marshals Service  
4 (“USMS”), and Steven C. Stafford, United States Marshal for the Southern District of  
5 California, raise the following issues in opposition to Petitioners’ motion for a preliminary  
6 injunction and provisional class certification:

7 1. The standard for issuing a temporary restraining order (“TRO”) is identical to  
8 the standard for issuing a preliminary injunction. On April 25, 2020, Petitioners sought  
9 release from the Otay Mesa Detention Center (“OMDC”) via a TRO motion. The Court  
10 denied that motion on May 9, 2020. Now, Petitioners again seek release from OMDC, but  
11 this time via a preliminary injunction motion. Because the standards are identical, should  
12 this motion – like the TRO motion – be denied?

13 2. The Court denied Petitioners’ TRO motion, in part, because the Prison  
14 Litigation Reform Act (“PLRA”) “preclude[d] [it] from issuing the relief [Petitioners]  
15 seek.” ECF No. 46 at p. 4:22-23. Does the PLRA also preclude the Court from issuing a  
16 preliminary injunction here?

17 3. Litigants cannot obtain injunctive relief when there is an adequate remedy at  
18 law. Here, the Bail Reform Act (“BRA”) is the means by which prisoners seek release,  
19 through the judge assigned to their criminal case. In fact, at least four Petitioners have  
20 initiated this process. Can Petitioners obtain injunctive relief when the BRA provides them  
21 with an adequate legal remedy?

22 4. Petitioners seek class certification. But during the May 5, 2020 TRO hearing,  
23 Petitioners’ counsel admitted that, if granted, the Court would need to give “individualized  
24 consideration” to each class member’s request for release. Does this need for  
25 “individualized consideration” preclude class certification?

26 //

27 //

28 //

1 II.

2 **FACTUAL & PROCEDURAL HISTORY**

3 **A. Petitioners’ Criminal Cases**

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

- 7 • **Jacinto Victor Alvarez**, Case No. 19-cr-05093-LAB (related case 19-cr-4869).  
8 Mr. Alvarez is represented by Federal Defenders of San Diego, Inc. He is charged  
9 in a two-count Indictment with attempted unlawful entry by an alien, in violation  
10 of 8 U.S.C. § 1325 and attempted reentry of removed alien, in violation of 8 U.S.C.  
11 § 1326(a) and (b). At his bond hearing, the Magistrate Judge ordered Mr. Alvarez  
12 detained as a flight risk. On May 4, 2020, Mr. Alvarez moved for reconsideration  
13 of his order of detention, but the Magistrate Judge denied his motion on May 8,  
14 2020. On the same day, the District Court vacated the status hearing set for May 18,  
15 2020, and reset it for June 10, 2020. Further, the District Court excluded time under  
16 the Speedy Trial Act under 18 U.S.C. § 3161(h)(7)(A).
- 17 • **Joseph Broderick**, Case No. 19-cr-04780-GPC. Mr. Broderick is represented by  
18 Federal Defenders of San Diego, Inc. He is charged as a co-defendant in a 6-count  
19 Indictment with conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1349,  
20 five counts of wire fraud, in violation of 18 U.S.C. § 1343, and criminal forfeiture.  
21 Mr. Broderick and his co-conspirator submitted fraudulent loan applications for  
22 real estate loans and received loan proceeds based on these fraudulent applications.  
23 At his bond hearing, the Magistrate Judge ordered Mr. Broderick detained as a  
24 flight risk. Pursuant to a joint motion, the District Court ordered the Motion  
25 Hearing/Trial Setting continued to May 22, 2020 and excluded time under the  
26 Speedy Trial Act, 18 U.S.C. §§ 3161(h)(7)(A) and 3174. On April 20, 2020,  
27

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

1 Mr. Broderick filed a motion for reconsideration of his detention order, but the  
2 Magistrate Judge denied the motion on May 4, 2020.

- 3 • **Victor Lara-Soto**, Case No. 19-cr-04949-BAS. Mr. Lara-Soto is represented by  
4 Federal Defenders of San Diego, Inc. He is charged in a single count Information  
5 with importation of 48 kilograms of methamphetamine, in violation of 21 U.S.C.  
6 §§ 952 and 960. At his bond hearing, the court ordered Mr. Lara-Soto detained as  
7 a flight risk. The District Court ordered the Motion Hearing/Trial Setting set for  
8 May 18, 2020 continued to June 3, 2020, and excluded time under the Speedy Trial  
9 Act, 18 U.S.C. §§ 3161(h)(7)(A), (h)(7)(B)(i), (h)(B)(iv) and 3174. He has  
10 indicated intent to enter a guilty plea, and thus revisit his custodial status, in that  
11 matter.
- 12 • **George Martinez-Ridley**, Case No. 19-cr-04905-DMS. Mr. Martinez-Ridley is  
13 represented by Federal Defenders of San Diego, Inc. He is charged in a three-  
14 count Information with attempted sex trafficking of children, in violation of  
15 18 U.S.C., §§ 1591 and 1594, attempted enticement of a minor, in violation of  
16 18 U.S.C. § 2422(b), and conspiracy to engage in sex trafficking of children, in  
17 violation of 18 U.S.C. § 1594 (c). The Magistrate Judge ordered Mr. Martinez-  
18 Ridley detained as a danger to the community and as a flight risk. Mr. Martinez-  
19 Riley then moved for reconsideration of that order, but the Magistrate Judge denied  
20 the motion. Next, Mr. Martinez-Riley appealed the Magistrate Judge's decision to  
21 this District Court, but it affirmed after also finding that Mr. Martinez-Riley is a  
22 danger to the community and a flight risk. A hearing to address motions to compel  
23 discovery, preserve evidence, and for leave to file other motions is scheduled for  
24 June 5, 2020.
- 25 • **Leopaldo Szurgot**, Case No. 19-cr-4867-DMS. Mr. Szurgot is represented by  
26 Federal Defenders of San Diego, Inc. He entered a guilty plea to Count One of a  
27 two count Information alleging conspiracy to import 31 kilograms of  
28 methamphetamine, in violation of 21 U.S.C. §§ 952, 960 and 963. The Magistrate



1 Judge set a \$30,000 appearance bond for Mr. Szurgot, to be secured by the  
2 signature of two financially responsible adults. A Pre-Sentence Report is on file  
3 and the Court rescheduled Mr. Szurgot's Sentencing Hearing from May 8, 2020 to  
4 August 14, 2020. On May 11, 2020, pursuant to the bond conditions previously  
5 set, Mr. Szurgot was ordered released pending sentencing.

6 • **Jane Doe**, Case No. 19-cr-05184-MMA. Jane Doe is represented by Federal  
7 Defenders of San Diego, Inc. She is charged in a single count Information alleging  
8 attempted reentry of removed alien, in violation of 8 U.S.C. § 1326(a) and (b).  
9 Initially, the Magistrate Judge ordered Jane Doe detained pending trial, but it later  
10 set a \$40,000 appearance bond to be secured by two financially responsible adults  
11 with a \$4,000 cash deposit to be paid by a family member or surety. Jane Doe is  
12 also pending a revocation of supervised release in case number 18-cr-01417-  
13 MMA. The District Court vacated the Motion Hearing/Trial Setting set for  
14 May 18, 2020 and reset it for May 26, 2020.

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

- 1 • **Jose Crespo-Venegas**, Case No. 19-CR-5169-JLS. Mr. Crespo-Venegas is  
2 represented by Federal Defenders of San Diego, Inc. He entered a plea of guilty  
3 to a single count Information alleging attempted reentry of removed alien, in  
4 violation of 8 U.S.C. § 1326(a) and (b). At his bond hearing, the court ordered  
5 Mr. Crespo-Venegas detained as a flight risk. A Pre-Sentence Report is on file but  
6 a date for the Sentencing Hearing has not been set. On April 24, 2020, Mr. Crespo-  
7 Venegas filed a motion to reconsider his order of detention. On May 11, 2020, the  
8 Magistrate Judge denied his motion. On the same date, Mr. Crespo-Venegas  
9 appealed this denial to the District Court. A hearing is set for May 22, 2020.
- 10 • **Noe Gonzalez-Soto**, Case No. 19-cr-03858-BTM. Mr. Gonzalez-Soto is  
11 represented by Federal Defenders of San Diego, Inc. He entered pleas of guilty to  
12 a two-count Information alleging importation of 28 kilograms of  
13 methamphetamine, in violation of 21 U.S.C. §§ 952 and 960, and importation of  
14 26 kilograms of cocaine, in violation of 21 U.S.C. §§ 952 and 960. At his bond  
15 hearing, the court ordered Mr. Gonzalez-Soto detained as a flight risk. A  
16 Sentencing Hearing is scheduled for August 6, 2020.
- 17 • **Racquel Ramcharan**, Case No. 19-cr-00869-GPC. On May 6, 2020, the court  
18 sentenced Ms. Ramcharan to time served with three years of supervised release.  
19 She was released from the OMDC shortly afterwards.<sup>2</sup>
- 20 • **Michael Jamil Smith**, Case No. 19-cr-01270-W. Mr. Smith is represented by  
21 Federal Defenders of San Diego, Inc. He entered a plea of guilty to Count One of  
22 a five-count Indictment alleging felon in possession of a firearm, a double-barrel  
23 break-action shotgun, in violation of 18 U.S.C. § 922(g)(1). The court initially  
24 ordered Mr. Smith detained as a flight risk, but it later set a \$20,000 appearance  
25

---

26 <sup>2</sup> Despite receiving all the relief she seeks in this case (*i.e.*, her release from OMDC),  
27 Petitioners' counsel refuses to dismiss Ms. Ramcharan from this action. *See* email exchange  
28 between Assistant U.S. Attorney Brett Norris and Attorney Alexander Simkin, Exhibit A  
filed concurrently herewith.

1 bond secured by cash or a corporate surety. Mr. Smith's Sentencing Hearing with  
2 Pre-Sentence Report will take place on 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 ECF No. 30-1 at ¶ 9. The Committee's purpose is to ensure the orderly operation of the  
7 criminal justice process during the pandemic. *Id.* The Committee members include: the  
8 Chief Judge, the Presiding Magistrate Judge, the U.S. Attorney, the Executive Director of  
9 Federal Defenders of San Diego, Inc., the coordinator for the Criminal Justice Act Panel  
10 Attorneys, the Clerk of Court, the Chief of U.S. Probation, the Chief of U.S. Pretrial  
11 Services, the Warden of the Metropolitan Correctional Center, and the U.S. Marshal. *Id.*  
12 The Committee meets by telephone up to three times per week and their discussions include  
13 the impact of the pandemic on inmate housing. *Id.* As a result of the Committee's efforts,  
14 the overall inmate population in USMS custody decreased by thirty-three percent between  
15 February 25 and April 30, 2020, from 3,454 to 2,297. And at OMDC, it decreased by forty-  
16 two percent, from 537 to 310, during this same timeframe.<sup>3</sup> *Id.* at ¶ 13.

17 **C. Petitioners' Petition for Writ of Habeas Corpus**

18 On April 25, 2020, Petitioners filed a Petition for a Writ of Habeas Corpus. ECF  
19 No.1. Through that Petition, Petitioners challenge the "conditions of confinement" at the  
20 OMDC. *Id.* at p. 3:5-6. (Underline added.) They contend "the dangerous and unsanitary  
21 conditions" at the OMDC "imperil their lives . . . ." *Id.* at pp. 37:7 and 3:5-6. And to support  
22 their claims, Petitioners attach declarations from various individuals that generally criticize  
23 the conditions within detention facilities. The declaration of Dr. Joseph J. Amon, for  
24 example, contends that "[t]he conditions of detention facilities pose a heightened public  
25 health risk to the spread of COVID-19, even greater than other non-carceral institutions."

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

1 ECF No. 1-3 at p. 13, ¶ 17. (Underline added.) Given these allegations, Petitioners demand  
2 “various improvements to, and ongoing monitoring of, detention conditions at OMDC. . . .”  
3 *Id.* at p. 8:21-22.

4 Notably, Petitioners’ Petition does not challenge the fact or duration of their  
5 confinement. *Id.* (See also the Court’s May 9, 2020 Order, ECF No. 46 at p. 6:7-9,  
6 confirming that “Plaintiffs do not challenge the reason for their confinement, their  
7 conviction or charge, the length of their sentence, or a release determination based on good  
8 time credits . . . .”)

9 **D. Petitioners’ Motion for Temporary Restraining Order**

10 In addition to their writ of habeas corpus, Petitioners also filed a motion for a TRO  
11 on April 25, 2020. ECF No. 2. There, Petitioners demanded not only their own immediate  
12 release from the OMDC, but also the immediate release of an undefined number other  
13 criminal detainees within various “Medically Vulnerable Subclasses.” *Id.* at p. 5-10. The  
14 Petitioners’ TRO motion – like their Petition for habeas corpus – also challenged the  
15 conditions of confinement at OMDC. The motion argued:

- 16 • “Given the rapid spread of COVID-19 through incarcerated populations in the  
17 U.S., the fact that the facility has already been exposed to COVID-19, and the  
18 particular conditions at OMDC, it is only a matter of time before the disease  
19 becomes widespread among the detained population.” ECF No. 2-2 at p. 18:2-  
20 7.
- 21 • “In short, the communal conditions at [OMDC] force people to live in close  
22 quarters . . . . Food preparation is communal . . . . Detained persons share toilets,  
23 sinks, and showers . . . . These conditions make adequate social distancing  
24 impossible. *Id.* at p. 19:16-20. (Citations omitted.)
- 25 • “Not only is social distancing impossible in current conditions, the hygienic  
26 situation in the facility is inadequate to abate the spread of COVID-19.” *Id.* at p.  
27 19:23-24.

- 1 • “Despite these inadequate conditions and the existing positive COVID-19 cases,  
2 OMDC is not conducting widespread testing.” *Id.* at p. 20:22-23.
- 3 • “These harsh conditions and viable alternatives establish that Otay Mesa is  
4 punishing individuals . . . .” *Id.* at p. 27:1-3.
- 5 • “Defendants have failed to take the steps necessary to protect persons detained  
6 at Otay Mesa from conditions that present an unreasonable risk of serious  
7 damage to their future health . . . .” *Id.* at p. 29:23-27.

8 The Court denied the Petitioners’ TRO motion on May 9, 2020, after finding that  
9 Petitioners cannot satisfy the required TRO elements. ECF No. 46. First, it found that  
10 Petitioners cannot succeed on the merits because the PLRA “precludes this Court from  
11 issuing the relief they seek.” *Id.* at p. 4:22-23. In particular, it found that Petitioners’  
12 attempt to obtain relief via a habeas corpus petition is improper because they challenge the  
13 conditions of their confinement, not the fact or duration of their detention. *Id.* at p. 5:12 -  
14 6:4. Accordingly, the Court ruled that Petitioners may only assert their claims under the  
15 PLRA. *Id.* at pp. 9:3; and 7:25-27. Second, the Court determined that it could not issue  
16 relief without “intruding on the [Respondents’] operation of the prison system and defying  
17 Congress’ clear policy determinations regarding challenges to prison conditions and  
18 prisoner release orders.” *Id.* at p. 10:5-8. And third, the Court found that “public interest  
19 does not favor the immediate release of a class of inmates who may lack viable housing  
20 outside of the OMDC and may be deprived of access to food, means of personal hygiene,  
21 and medical care if released, all at once, from the facility.” *Id.* at p. 10:8-10.

#### 22 **E. Petitioners’ Motion for Preliminary Injunction**

23 Petitioners filed the present motion on May 15, 2020. ECF No. 61. And although  
24 packaged as a motion for a Preliminary Injunction, the motion seeks the same relief as  
25 Petitioners’ Petition and TRO motion: immediate release of themselves and all other  
26 “Medically Vulnerable” detainees from OMDC. ECF No. 61-1 at pp. 10:12-14 and 15:18-  
27 20. Petitioners’ present motion, however, differs from their other filings in one material  
28 respect. Previously, Petitioners openly challenged the conditions of their confinement. But

1 now, in this motion, Petitioners deny challenging the conditions of their confinement, and  
 2 instead claim that they are (and always have been) challenging the “fact of their  
 3 confinement.” *Id.* at p. 15:18-19.

4 Respondents oppose Petitioners’ motion.

### 5 III.

#### 6 STANDARD OF REVIEW

7 “The grant of a preliminary injunction is the exercise of a very far reaching power  
 8 never to be indulged in except in a case clearly warranting it.” *Dymo Indus., Inc. v.*  
 9 *Tapeprinter, Inc.*, 326 F.2d 141, 143 (9th Cir. 1964). Because an injunction is “an  
 10 extraordinary remedy,” it “may only be awarded upon a *clear* showing that the plaintiff is  
 11 entitled to such relief.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)  
 12 (emphasis added). Plaintiffs must demonstrate “[they are] likely to succeed on the merits,  
 13 that [they are] likely to suffer irreparable harm in the absence of preliminary relief, that the  
 14 balance of equities tips in [their] favor, and that an injunction is in the public interest.” *Am.*  
 15 *Trucking Ass’ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting  
 16 *Winter*, 555 U.S. at 20). A plaintiff “must demonstrate that it meets all four of the elements  
 17 of the preliminary injunction test established by *Winter*.” *DISH Network Corp. v. Federal*  
 18 *Communications Comm’n* 653 F. 3d 771, 776 (9th Cir. 2011). This is a “heavy burden.”  
 19 *Center for Competitive Politics v. Harris*, 784 F.3d 1307, 1312 (9th Cir. 2015). So heavy,  
 20 in fact, that courts have stated that plaintiffs “face a difficult task in proving that they are  
 21 entitled to this ‘extraordinary remedy.’” *Planned Parenthood Ass’n of Hidalgo County*  
 22 *Texas, Inc. v. Suehs*, 692 F.3d 343, 348 (5th Cir. 2012).

23 “Likelihood of success on the merits is the most important factor; if a movant fails to  
 24 meet this threshold inquiry, [the Court] need not consider the other factors.” *California v.*  
 25 *Azar*, 911 F.3d 558, 575 (9th Cir. 2018) (internal quotations and citation omitted). “The  
 26 Ninth Circuit has adopted a sliding scale approach under which a preliminary injunction  
 27 could issue where the likelihood of success is such that serious questions going to the merits  
 28 were raised and the balance of hardships tips *sharply* in [Plaintiffs’] favor.” *Protecting*

1 *Arizona's Res. & Children v. Fed. Highway Admin.*, No. CV-15-00893-PHX-DJH, 2016  
2 WL 9080879, at \*1 (D. Ariz. Oct. 26, 2016) (quoting *Alliance for the Wild Rockies v.*  
3 *Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011)) (emphasis added, internal quotations  
4 omitted). But under that sliding-scale approach, Plaintiffs must “*also show[] that there is a*  
5 *likelihood of irreparable injury and that the injunction is in the public interest.*” *Id.*  
6 (emphasis added).

#### 7 IV.

#### 8 ARGUMENT

9 The standard for issuing a preliminary injunction is identical to the standard for  
10 issuing a temporary restraining order. Court’s May 9, 2020 Order, ECF No. 46 at p. 4:6-7  
11 (citing *Lockheed Missile & Space Co., Inc. v. Hughes Aircraft Co.*, 887 F. Supp. 1320 1323  
12 (N.D. Cal. 1995)). *See also Kathrens v. Zinke*, 323 F. Supp. 3d 1142, 1148 (D. Mont. 2018)  
13 (citing *Stuhlberg Int’l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832 n. 7 (9th Cir. 2001)).  
14 On May 9, 2020, this Court denied Petitioners’ motion for a TRO. ECF No. 46. Because  
15 the same standard applies here, Petitioners’ motion for a preliminary injunction also fails.

#### 16 A. **Petitioners Cannot Succeed on the Merits**

17 In its May 9, 2020 Order, this Court found that Petitioners’ “claims rest entirely on  
18 the conditions of the Otay Mesa facility.” ECF No. 46 at p. 5:12-13. It also found that  
19 Petitioners’ “claims, under any good faith calculus, cannot be characterized as a ‘habeas  
20 corpus proceeding [] challenging the fact or duration of confinement in prison.” *Id.* at p.  
21 6:5-6 (citing U.S.C. § 3626(g)(2)). And based on those findings, the Court ruled that  
22 Petitioners’ attempt to obtain relief via this habeas corpus proceeding is improper. More  
23 specifically, it ruled that: (1) the only procedural vehicle for Petitioners’ claims is the PLRA;  
24 and (2) the PRLA precludes the Court from issuing the relief Petitioners seek. ECF No. 46  
25 at p. 9:1-4.

26 Petitioners now attempt to sidestep the Court’s May 9, 2020 Order. Despite  
27 repeatedly and persistently challenging the conditions of their confinement in their Petition  
28 and TRO motion, they now deny that they ever raised such a challenge. Instead, they

1 claim – for very the first time – that they are actually challenging “the fact of their  
2 confinement.” ECF No. 61-1 at p.15:18-19.

3 **i. Confinement Challenges: Fact or Duration vs. Conditions**

4 The Supreme Court has repeatedly drawn a line between “two broad categories of  
5 prisoner petitions: (1) those challenging the fact or duration of confinement itself; and (2)  
6 those challenging the conditions of confinement.” *McCarthy v. Bronson*, 500 U.S. 136, 140  
7 (1991). Challenges to the fact or duration of confinement are those in which the prisoner’s  
8 success would “necessarily imply the invalidity of their convictions or sentences.”  
9 *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005). Challenges to the conditions of confinement,  
10 on the other hand, are those in which petitioners “allege[] unconstitutional treatment of them  
11 while in confinement.” *Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973).

12 The categorization of a prisoner’s challenge has two important consequences. First,  
13 it determines whether the prisoner’s avenue for relief is through a petition for habeas corpus  
14 or a civil rights action. “[W]here an inmate seeks injunctive relief challenging the fact of  
15 his conviction or the duration of his sentence,” that claim “fall[s] within the ‘core’ of federal  
16 habeas.” *Nelson v. Campbell*, 541 U.S. 637, 643 (2004) (citation omitted). “By contrast,  
17 constitutional claims that merely challenge the conditions of a prisoner’s confinement,  
18 whether the inmate seeks monetary or injunctive relief, fall outside of that core.” *Nelson*,  
19 541 U.S. at 643.

20 Second, the distinction determines whether certain PLRA restrictions apply. The  
21 PLRA creates a carefully reticulated scheme for “the entry and termination of prospective  
22 relief in civil actions challenging prison conditions.” *Miller v. French*, 530 U.S. 327, 331  
23 (2000). And it broadly defines a “civil action with respect to prison conditions” as “any  
24 civil proceeding arising under Federal law with respect to the conditions of confinement or  
25 the effects of actions by government officials on the lives of persons confined in prison,”  
26 while excluding “habeas corpus proceedings challenging the fact or duration of confinement  
27 in prison.” 18 U.S.C. § 3626(g)(2). As the Supreme Court has explained, the PLRA tracks  
28 the basic distinction between habeas suits challenging the “fact or duration of confinement



1 itself,” and civil actions “challenging the conditions of confinement.” *Porter v. Nussle*, 534  
2 U.S. 516, 527-528 (2002)(citation omitted.)

3 **ii. Petitioners’ Petition Does Not Challenge the Fact of Their Confinement**

4 Here, Petitioners – in an attempt to avoid the PLRA and create jurisdiction – claim  
5 that they are challenging the fact, rather than the conditions, of their confinement. ECF No.  
6 61-1 at p. 15:18-19. But this argument fails because it is not true. As highlighted by the  
7 facts above, Petitioners’ previous filings (their Petition and TRO motion) repeatedly and  
8 consistently challenge the “conditions of their confinement.” *See e.g.*, ECF No. 1 at p. 3:5-  
9 6. And what is more, those same filings are devoid of any challenge to the fact of  
10 Petitioners’ confinement. Indeed, the Court’s most recent order confirms that Petitioners’  
11 Petition does “not challenge the reason for their confinement, their conviction or charge,  
12 the length of their sentence, or a release determination based on good time credits – claims  
13 that are often characterized as ‘the core of habeas corpus.’” *Id.* at p. 6:7-9 (citing *Preiser*,  
14 *supra*, 411 U.S. at 487). Accordingly, the Court ruled that Petitioners’ claims cannot,  
15 “under any good faith calculus,” be interpreted as “a ‘habeas corpus proceeding []  
16 challenging the fact or duration of confinement in prison.’” *Id.* at p. 6:5-6 (citing 18 U.S.C.  
17 § 3626(g)(2)). Petitioners’ attempt to distance themselves from their previous filings – and  
18 this Court’s ruling – fails.

19 **iii. Petitioners’ Motion Would Fail Even if They Had Challenged the Fact of**  
20 **Their Confinement**

21 Regardless, even if their Petition had challenged the fact or duration of their  
22 confinement, the law would still prohibit Petitioners from prevailing on the merits.  
23 Injunctive relief is not available when there is an adequate remedy at law. *Matthews v.*  
24 *Rodgers*, 284 U.S. 521, 525 (1932) (equitable injunctive relief is not available in federal  
25 court “in any case where plain, adequate and complete remedy may be had at law”); *Dillon*  
26 *v. Montana*, 634 F.2d 463, 466 (9th Cir. 1980); *Times Newspapers, Ltd. (of Great Britain)*  
27 *v. McDonnell Douglas Corp.*, 387 F. Supp. 189, Appx. A (C.D. Cal. 1974) (recognizing  
28 that an “[i]njunction won’t lie where there is adequate remedy at law”). Additionally, 28

1 U.S.C. § 2241 instructs courts to abstain from exercising jurisdiction over pretrial habeas  
2 petitions if the issues raised in the petition may be resolved by other procedures available  
3 in the pending criminal case. *Fay v. Noia*, 372 U.S. 391, 417-20 (1963); *Jones v. Perkins*,  
4 245 U.S. 390-92 (1918); *Riggins v. United States*, 199 U.S. 547, 550-51 (1905).

5 Here, Petitioners are barred from obtaining an injunction because there are other  
6 procedures available in each of their pending criminal cases under the Bail Reform Act  
7 (“BRA”). The BRA provides Petitioners – some who are pretrial detainees and some who  
8 are post-conviction inmates – with a means to seek release from custody during the  
9 pendency of their criminal proceedings. 18 U.S.C. §§ 3142-43. Under the BRA, a pretrial  
10 detainee can seek release pending trial where a “judicial officer” may consider, among other  
11 things, the individual “characteristics” of the defendant and his or her “physical and mental  
12 condition.” 18 U.S.C. § 3142(g)(3)(A). With regard to post-conviction inmates, they are  
13 still able to seek release pending sentencing. 18 U.S.C. § 3143. Where a Magistrate Judge  
14 has set bond or ordered detention, either a pretrial detainee or a post-conviction inmate may  
15 seek review of the Magistrate Judge’s order by the District Court Judge assigned to the  
16 respective criminal case. 18 U.S.C. § 3145. In the event that a defendant wishes to challenge  
17 the District Court’s determination in this regard, as it is a final order of the court, a defendant  
18 may appeal that order to the Court of Appeals. 18 U.S.C. § 3145(c); 28 U.S.C. § 1291.  
19 Petitioners here have more than ample opportunity to seek the relief now sought in their  
20 2241 petition. Again, attacks under 2241 to the fact or duration of confinement are  
21 inappropriate where that very issue will be fully and fairly litigated in their respective  
22 criminal cases. *See Fay*, 372 U.S. at 417–20; *Jones*, 245 U.S. at 391–92; *Riggins*, 199 U.S.  
23 at 550–51.

24 Thus, even if Petitioners had challenged the fact and duration of their confinement,  
25 their attempt to obtain injunctive relief via this habeas corpus proceeding would fail because  
26 the BRA provides the legal procedure for the remedy they seek. Under the BRA, inmates  
27 seek release through the judge already handling their criminal cases. In fact, some of the  
28 Petitioners involved here have already used that process at least once. Petitioners Jane Doe,

1 Smith, Cano, and Martinez-Ridley, have all sought bond modifications in their individual  
2 criminal cases in accordance with the BRA. (Jane Doe and Smith obtained bond  
3 modifications, Cano and Martinez-Ridley did not.) In short, even if Petitioners had  
4 articulated a cognizable habeas claim, it would be rendered moot by the BRA.

5 **B. Petitioners Fail to Establish the Remaining Injunctive Factors**

6 Because Petitioners cannot prevail on the merits, this Court is precluded from  
7 granting injunctive relief. *Martin v. Int’l Olympic Comm.*, 740 F.2d 670, 675 (9th Cir.  
8 1984), *All for the Wild Rockies v. Pena*, 865 F. 3d 1211, 1217 (9th Cir. 2017). Nevertheless,  
9 Respondents briefly addresses the remaining injunctive factors below.

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

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

28

1 Finally, the remaining two injunctive relief factors – the balance of equities and the  
2 public interest – also tilt squarely against injunctive relief. The Supreme Court has held  
3 that these two factors merge when, as here, “the Government is the opposing party.” *Nken*  
4 *v. Holder*, 556 U.S. 418, 435 (2009). In its May 9, 2020 Order denying Petitioners’ TRO  
5 motion, this Court correctly ruled that it “could not issue injunctive relief without unfairly  
6 intruding on [Respondents’] operation of the prison system and defying Congress’ clear  
7 policy determinations regarding challenges to prison conditions and prisoner release  
8 orders.” ECF No. 46 at p. 10:5-8. It also found that “the public interest does not favor the  
9 immediate release of a class of inmates who may lack viable housing outside of the OMDC  
10 and may be deprived of access to food, means of personal hygiene, and medical care if  
11 released, all at once, from the facility.” *Id.* at p. 10:8-10. Petitioners’ current motion  
12 presents no new information that would call these two findings into question. Accordingly,  
13 this motion, like the TRO motion, should be denied.

#### 14 **C. The Relief Petitioners Seek Will Interfere With Existing Court Orders**

15 In addition to the reasons set forth above, Petitioners’ motion must also be denied  
16 under the principles of inter-court comity, between this Court and sibling courts managing  
17 the myriad criminal matters implicated by Petitioners’ requested relief. *See Applied*  
18 *Medical Corp. v. Surgical Co. BV*, 587 F.3d 909, 913 (9th Cir. 2009) (before issuing  
19 injunctive relief potentially contradicting other courts, a district court must consider whether  
20 the parties and issues are the same, whether the judicial operations will frustrate one another,  
21 and the overall impact on comity between those courts). The Ninth Circuit has held that,  
22 when an injunction sought in one federal proceeding would interfere with another federal  
23 proceeding, considerations of comity require that injunctions should be granted only in the  
24 most unusual cases. *Bergh v. State of Wash.*, 535 F.2d 505, 507 (9th Cir. 1976).  
25 Furthermore, the Ninth Circuit has stated that where, as here, a federal court is of coordinate  
26 jurisdiction to one or more others, all of whose decisions are reviewed by the same Court  
27 of Appeals, the issuance of such an injunction is perhaps never justified. *Bergh*, 535 F.2d  
28 at 507 (*ref. United States v. American Radiator & Standard Sanitary Corp.*, 388 F.2d 201,

1 203-04 (3rd Cir. 1967), *cert. denied*, 390 U.S. 922 (1968)). Rather, declining injunctive  
 2 relief minimizes conflicts between courts administering the same law, conserves judicial  
 3 time and expense, and “has a salutary effect upon the prompt and efficient administration  
 4 of justice.” *Bergh*, at 507 (*ref. Brittingham v. Commissioner*, 451 F.2d 315, 318 (5th Cir.  
 5 1971)).

6 **D. Respondents Lack Authority to Release Petitioners**

7 In addition, Petitioners cite no authority for the notion that Respondents may simply  
 8 release them from OMDC. Petitioners are inmates, subject to valid, case-specific orders of  
 9 detention from federal judges in this district. *See* ECF No. 1 at ¶¶ 52, 112, pp. 38-40.  
 10 Although Respondents are the immediate custodians of Petitioners, Petitioners are not  
 11 subject to detention by any authority of Respondents. As discussed above, the PLRA and/or  
 12 the BRA are the only appropriate legal avenues through which Petitioners may seek release.  
 13 Because Petitioners may present these arguments in their criminal cases, and because  
 14 Respondents are unable to release Petitioners on their own authority in any event,  
 15 Petitioners’ motion must be denied.

16 **E. Individualized Considerations Prohibit Class Certification**

17 Petitioners’ motion is captioned, in part, as a motion for “Provisional Class  
 18 Certification,” but their points and authorities present no arguments on that issue. ECF No.  
 19 61 at p. 1; ECF No. 61-1. In any case, no argument is needed because Petitioners’ counsel  
 20 has already conceded that class certification is not possible. During the hearing on  
 21 Petitioners’ TRO motion, Petitioners’ counsel conceded that adjudicating the class claims  
 22 would require the Court to give “individualized consideration” to each class member’s  
 23 situation. For example, when asked if medically vulnerable detainees ought to be released  
 24 regardless of their current conviction, charged crime, or criminal history, Petitioners’  
 25 counsel gave the following response:

26 Your Honor, it is our position that there should be an order providing for their  
 27 release in a manner that allows for individualized consideration of particularly  
 28 extreme situations that might merit further consideration or an assessment of  
 what the appropriate conditions might be.

1 Transcript of May 9, 2020 Hearing at p. 10:4-9. (Underline added.) And later, counsel  
2 urged that, if the TRO motion was granted, there could “be an individualized consideration  
3 of the appropriate terms of release given . . . the various factors that your Honor pointed to.”  
4 *Id.* at p. 11:1-3. (Underline added.)

5 Petitioners’ concession that the release of all class members would require  
6 “individualized consideration” of each member’s situation not only weakens their request  
7 for class certification, it defeats it. Accordingly, Respondents respectfully ask the Court to  
8 deny Petitioners’ motion for “provisional class certification.”

9 **V.**

10 **CONCLUSION**

11 This Court denied Petitioners’ motion for a TRO. Because the same standard applies  
12 here, the Court should also deny Petitioners’ motion for a preliminary injunction. As  
13 confirmed by the Court’s Order on the TRO motion – and as demonstrated above –  
14 Petitioners cannot, as a matter of law, prevail on the merits. Moreover, Petitioners cannot  
15 show that they will suffer immediate and irreparable harm, nor can they show that the  
16 balance of equities and the public interest weigh in their favor. For each of these reasons,  
17 the Court should deny Petitioners’ motion for a preliminary injunction. Additionally, given  
18 Petitioners’ concession that “individualized considerations” would be needed to adjudicate  
19 each potential class member’s claim, the Court should also deny Petitioners’ motion for  
20 class certification.

21 DATED: May 22, 2020

22 Respectfully submitted,  
23 ROBERT S. BREWER JR.  
24 United States Attorney  
25 *s/ Brett Norris*  
26 BRETT NORRIS  
27 Deputy Chief, Civil Division  
28 *s/ Douglas Keehn*  
DOUGLAS KEEHN  
Assistant U.S. Attorney  
*s/ Paul Starita*  
PAUL STARITA  
Assistant U.S. Attorney  
Attorneys for Respondents

# **EXHIBIT A**

**From:** Norris, Brett (USACAS)  
**To:** Simkin, Alexander; Keehn, Douglas (USACAS); Starita, Paul (USACAS); dstruck@strucklove.com; rlove@strucklove.com; nacedo@strucklove.com; jlee@strucklove.com; mahoney@wmalawfirm.com  
**Cc:** davidloy@aclusandiego.org; mebadolahi@aclusandiego.org; sthompson@aclusandiego.org; sirine@nipnlq.org; bvakili@aclusandiego.org; matt@nipnlq.org; McPhee, Joan; Gugel, Helen; Horowitz, Nicole  
**Subject:** Case 3:20-cv-00782-DMS-AHG Alvarez et al v. LaRose  
**Date:** Friday, May 8, 2020 11:37:00 AM

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Mr. Simkin,

It is our understanding that Ms. Ramcharan was sentenced to time served yesterday and will be released from custody soon, if she has not been released already. We assume that you will file a notice of dismissal on behalf of Ms. Ramcharan after her release.

Thank you,

Brett Norris  
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Deputy Chief, Civil Division  
U.S. Attorney's Office  
Southern District of California  
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**From:** Simkin, Alexander  
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**Cc:** davidloy@aclusandiego.org; mebadolahi@aclusandiego.org; sthompson@aclusandiego.org; sirine@nipnlq.org; byakili@aclusandiego.org; matt@nipnlq.org; McPhee, Joan; Gugel, Helen; Horowitz, Nicole  
**Subject:** RE: Case 3:20-cv-00782-DMS-AHG Alvarez et al v. LaRose  
**Date:** Monday, May 11, 2020 4:53:14 PM

---

Mr. Norris,

We write in response to your emails from today and Friday.

*First*, we do not intend to file a notice of dismissal on behalf of Ms. Ramcharan. We do not believe one is required or appropriate under the law. *See Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975) (“[T]he termination of a class representative’s claim does not moot the claims of the unnamed members of the class . . . [where] other persons similarly situated will be detained under the allegedly unconstitutional procedures . . . [as] [t]he claim, in short, is one that is distinctly ‘capable of repetition, yet evading review.’”). In any event, we do not think it makes a difference as a practical matter given the presence of multiple other adequate class representatives and we respectfully submit that the parties should focus on addressing the substantive problems at the Otay Mesa detention facility rather than procedural wrangling.

*Second*, we do not agree to dismiss this action. Judge Sabraw’s order (the “Order”) expressly contemplates continued briefing and a hearing on a preliminary injunction.

*Third*, we propose the following briefing schedule for the preliminary injunction briefing referenced in footnote 4 of the Order. Please let us know Respondents’ position on this briefing schedule by tomorrow at noon PT so that we can contact the Court tomorrow afternoon.

- Petitioners to file their brief in support of preliminary injunction by Wednesday, May 13;
- Respondents to file their opposition by Friday, May 13 at 5pm PT
- Petitioners to file their reply by Monday, May 18 at noon PT
- Court hearing on Tuesday, May 19, or as soon thereafter as the Court is available.

Thank you for your consideration. We look forward to hearing from you.

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**From:** Norris, Brett (USACAS)  
**To:** Simkin, Alexander; Keehn, Douglas (USACAS); Starita, Paul (USACAS); dstruck@strucklove.com; rlove@strucklove.com; nacedo@strucklove.com; jlee@strucklove.com; mahoney@wmalawfirm.com  
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**Subject:** RE: Case 3:20-cv-00782-DMS-AHG Alvarez et al v. LaRose  
**Date:** Monday, May 11, 2020 9:55:00 PM

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Mr. Simkin,

Thank you for your response.

We disagree with your position regarding Ms. Ramcharan. Unlike *Gerstein v. Pugh*, the Court has not certified any class in this case. Thus, this is only a putative class action and Ms. Ramcharan is not a class representative.

We do not accept your proposed briefing schedule. We will defer to the Court to set an appropriate schedule.

Thank you,

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---

**From:** Simkin, Alexander <Alexander.Simkin@ropesgray.com>  
**Sent:** Monday, May 11, 2020 4:53 PM  
**To:** Norris, Brett (USACAS) <bnorris@usa.doj.gov>; Keehn, Douglas (USACAS) <dkeehn@usa.doj.gov>; Starita, Paul (USACAS) <PStarita@usa.doj.gov>; dstruck@strucklove.com; rlove@strucklove.com; nacedo@strucklove.com; jlee@strucklove.com; mahoney@wmalawfirm.com  
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**Subject:** RE: Case 3:20-cv-00782-DMS-AHG Alvarez et al v. LaRose

Mr. Norris,

We write in response to your emails from today and Friday.