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U.S. DISTRICT COURT
N.D. OF ALABAMA

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION**

ARCHILLA, *et al.*,

Petitioners-Plaintiffs,

v.

WITTE, *et al.*,

Respondents-Defendants.

Case No. 4:20-cv-596-RDP-JHE

REPLY

INTRODUCTION

Plaintiff-Petitioners (Petitioners) seek modest relief in light of extraordinary circumstances. These seventeen medically vulnerable Petitioners do not seek any class wide relief nor do they aim to set aside any criminal conviction or to challenge their underlying grounds for removal. As *civil* immigration detainees, the Fifth Amendment's Due Process Clause requires that their detention bear a reasonable relationship to a legitimate government interest. And, while Petitioners concede the government has a legitimate interest in preventing flight and ensuring appearances in removal proceedings, Immigration and Custom's Enforcement's (ICE) own data show alternatives to detention assure appearances nearly 100% of the time. In light of the potentially lethal danger Petitioners now face and the alternatives to detention, Petitioners' continued detention during this health crisis has become unreasonable.

Reported COVID-19 cases are exploding in ICE detention centers and are necessarily underreported given the near categorical failure to test individuals and facilities in Alabama

remain particularly vulnerable. The actions that officials of the Etowah County Detention Center (ECDC) have taken have not been effective in stopping the spread of a this uniquely dangerous disease. In these unprecedented circumstances, anything short of Petitioners' release will subject them to irreparable harm. Accordingly, as numerous courts have found,[1] this court has authority via habeas to find a Due Process violation and order their release. Doing so will protect these seventeen individuals and the public from grave harm.

SUPPLEMENTAL FACTS

I. ICE Detention Centers Have An Alarming And Undercounted Rate of Growth of COVID-19 Cases.

ICE has lost control of the COVID-19 in its detention centers. On April 7, 2020, ICE reported 19 confirmed cases of COVID-19 among detained people; less than a month later, the number exploded to 705.[2] ICE has tested less than five percent of its detained population.[3] Of the over 29,675 immigrants held in ICE detention, only 1,460 ICE detainees nationwide have been tested and nearly half of those tested have tested positive.[4] COVID-19 rates are therefore likely to be much more prevalent in ICE detention centers, especially in Alabama.[5] Following the regional and national trend, ICE detention centers under the jurisidciton of the New Orleans Field Office (which includes Etowah) have an alarming rate of COVID-19 infections, now iwth

[1] *See, e.g. Dada v. Witte*, No. 1:20-CV-00458 at *21 (M.D. La. Apr. 30, 2020) (report and recommendation); *Vazquez-Berrera v. Wolf*, No. 20-cv-1241, 2020 WL 1904497, at *5 (S.D. Tex. Apr. 17, 2020); *Malam v. Adducci*, No. 20-10829 (E.D. Mich. Apr. 20, 2020); *Coronel v. Decker*, No. 1:20-cv-02472-AJN, 2020 U.S. Dist. LEXIS 53954 (S.D.N.Y. Mar. 27, 2020); *Calderon Jimenez v. Wolf*, No. 18-10225 (MLW), ECF No. 507 (D. Mass. Mar. 26, 2020); *Hope v. Doll*, No. 1:20-cv-00562-JEJ (M.D. Pa. Apr. 7, 2020); *Coreas v. Bounds*, No. CV TDC-20-0780, 2020 WL 1663133, at *7 (D. Md. Apr. 3, 2020); *Basank. v. Decker, et al.*, No. 1:20-cv-02518-AT, 2020 U.S. Dist. LEXIS 53191 (S.D.N.Y. Mar. 26, 2020); *Hope v. Doll*, No. 1:20-cv-5622020, U.S. Dist. LEXIS 63970 (M.D. Pa. Apr. 7, 2020); *United States v. Martin*, No. 19 Cr. 140-13, 2020 U.S. Dist. LEXIS 46046, at *2 (D. Md. Mar. 17, 2020).

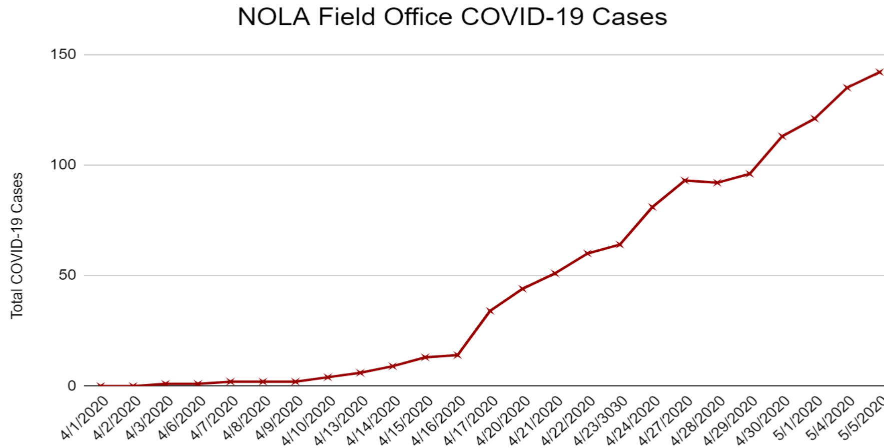
[2] ICE COVID-19 Guidance, https://www.ice.gov/coronavirus (last accessed May 6, 2020).

[3] *Id.*

[4] *Id.*

[5] Eaton Decl. ¶ 15.

over one hundred confiremd cases.[6] As of May 4, ICE acknowledged one COVID-19 case at Etowah.[7]



Richwood Correctional Center, which, like ECDC, holds both civil immigration and pretrial criminal detainees, provides a cautionary tale as to the failure of ICE to contain COVID-19. There, COVID-19 has already killed two guards as positive cases rose from one to 61 in the span of three weeks.[8] Given the hyper-contagious nature of COVID-19 and Respondents' failures to implement sufficient safeguards at ECDC, an outbreak may have already begun there.

II. Respondents Are Incapable of Containing COVID-19.

Respondents have failed to comply with basic CDC guidelines, thereby imperiling Petitioners:

- **Communications Systems:** Dr. Homer Venters, a physician, epidemiologist, and former Chief Medical Officer of the New York City jail system with two years experience analyzing medical care in ICE's detention network, has found that ICE lacks the systems necessary to prevent a COVID-19 outbreak. Ex. 24, Declaration of Dr. Homer Venters ¶¶

[6] ICE COVID-19 Guidance, supra n. 2; Huber. Decl. Addendum A.
[7] *Id*.
[8] WIFR, *2 guards at ICE jail die after contracting coronavirus* (Apr. 29, 2020), https://www.wifr.com/content/news/2-guards-at-ICE-jail-die-after-contracting-coronavirus-570057531.html; There are now 64 confirmed cases at Richwood according to ICE. *See* ICE COVID-19 Guidance, *supra* n. 2.

1-4. For example, ICE's guidance "creates an unwieldy and unrealistic process for facilities to notify ICE headquarters regarding high risk detainees," lacks "capacity to provide daily clinical guidance to all of the clinical staff" in light of fast evolving COVID-19 care guidelines, and "fails to establish or mandate a respiratory protection program, a critical guideline of the CDC." *Id.* ¶¶ 24, 26, 28.

- **Social distancing:** ICE's guidance only requires social distancing "whenever possible," [9] but a distance of 6 feet from any other people must be maintained at all times. Hassig Decl. ¶ 7; Venters Decl. ¶ 34. Nor do Respondents have any discernible social distancing plan for "showers and bathrooms, medication lines, medical and mental health clinics, hallways, sallyports." Venters Decl. ¶ 33(e). The CDC recommends that higher-risk individuals "should not be cohorted with other quarantined individuals" and requires that if such cohorting is unavoidable, jailers should make "all possible accommodations to reduce exposure risk for the higher-risk individuals."[10] However, Respondents rely heavily on cohorting as a mitigation strategy, even for asymptomatic detained people who have been in contact with a known COVID-19 case. *See* ECF No. 11, Resp. at 9. No arrangements have been made to identify and reduce exposure of higher risk individuals like Petitioners. Respondents decided to consolidate over 100 detained people, including all Petitioners, into a single unit. ECF No. 11-1, Declaration of Bryan S. Pitman ["Pitman Facility Decl."] ¶ 13. While even ICE's own guidance directs it to reduce density, Respondents have chosen to increase the density as ECDC. Directing detainees to stay 6 feet apart is meaningless if it is impossible to stay 6 feet away from other detained

[9] ICE Enforcement and Removal Operations, *COVID-19 Pandemic Response Requirements*, 13-14 (April 10, 2020), *available at* https://www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities.pdf.
[10] CDC, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, *available at* https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf.

individuals. Hassig Decl. ¶ 11. Additionally, while Respondents attest to measures they have taken to increase social distancing and hygiene within this single ICE unit, they do not provide "any case information on the [non-ICE] inmate population," even though that population shares a medical unit, hallways, and ECDC staff with Petitioners. Resp. at 11 n.3; *Id*. ¶ 18.

- **Transfers**: To limit the spread of COVID-19, the CDC guidance[11] provides that all transfers of detained persons should be suspended, and should only occur when "absolutely necessary."[12] Respondents make no representation that they have attempted to limit transfers or new admissions, either for county or for ICE detainees. In fact, Respondents have brought at least 248 new county detainees into ECDC since the CDC promulgated its March 23, 2020 detention facility guidance,[13] and continue to admit new ICE detainees. Ex. 25, Supplemental Declaration of Randane Williams ¶ 3; Ex. 26, Supplemental Declaration fo Karim Golding ¶ 3. Respondents purport to deny entry "to any incoming detainee who exhibits a fever and/or respiratory symptoms unless that detainee has tested negative for COVID-19."[14] This is patently untrue. Respondents have transferred visibly ill detainees.[15] Inexplicably and in contravention of its own policy, Respondents even chose to bring a COVID-19 positive man into ECDC, repeating the mistake it made at Pine Prairie ICE Processing Center. Pitman Facility Decl. ¶ 18. There, ICE similarly chose to bring a COVID-19 positive man into the detention center, and a

[11] *Id*.
[12] *Id*.
[13] Etowah County Sheriff's Office, *Booked Last 24 Hours*, http://etowahcountysheriff.com/mugshots.php (accessed May 5, 2020).
[14] Resp. at 9.
[15] Kimberly Kindy, Emma Brown and Dalton Bennett, *'Disaster waiting to happen': Thousands of inmates released as jails and prisons face coronavirus threat,* (March 25, 2020). https://www.washingtonpost.com/national/disaster-waiting-to-happen-thousands-of-inmates-released-as-jails-face-coronavirus-threat/2020/03/24/761c2d84-6b8c-11ea-b313-df458622c2cc_story.html

month later, 26 detained people have tested positive.[16] Although negative pressure rooms are critical in preventing the airborne spread to neighboring units and staff, Respondents do not purport to house their confirmed COVID-19 positive man in a negative pressure room. *Id*.

- **Hygiene:** Per CDC guidelines, hand sanitizer or soap should be available to each detainee before and after meals, toileting, and frequently throughout the day. In reality, conditions for ICE detainees at the Etowah County Detention Center limit access to soap, hand hygiene and require close contact with detainees.[17] Further, although the CDC does not recommend using fog-based disinfection because of safety and efficacy issues, Respondents purport to clean Petitioners' unit with a machine that "distributes a disinfectant solution into the air and on surfaces in order to disinfect common areas."[18] Though the CDC warns against using these fog machines in inhabited spaces, Respondents do not move Petitioners from their unit before fogging.[19] Moreover, even if this disinfection method were to work, Respondents fail to describe any cleaning interventions, "which are essential to implement in tandem with disinfection."[20]
- **Masks:** The CDC also recommends that surgical masks only be used once.[21] However, Respondents state only generally that "[d]etainees, inmates, and staff are all provided with a face mask to wear" without specifying that any arrangements have been made to

[16] *Id.*
[17] Eaton Decl. ¶16; Williams Suppl. Decl. ¶¶5-6.
[18] Eaton Decl. ¶¶ 30-31, R. at 12.
[19] Golding Suppl. Decl. ¶ 8.
[20] Venters Decl. ¶ 33(d).
[21] CDC, *Understanding the Difference (surgical masks, N95 FFRs, and Elastomerics) Infographic*, *available at* https://www.cdc.gov/niosh/npptl/pdfs/UnderstandingDifference3-508.pdf

replace said masks.[22] In fact, Petitioners receive only one single-use surgical style mask every 3 weeks.[23]

- **Testing:** Respondents notably do not disclose how many tests have been conducted at ECDC. The CDC categorizes symptomatic people in "congregate living settings, including prisons" as high risk.[24] The White House Coronavirus Task Force has emphasized the need for testing of asymptomatic people in congregated settings.[25] However, in lieu of expanding testing capabilities, Respondents "increased medical screenings in the form of daily vital sign checks of all detainees in order to further mitigate the spread of the virus."[26] This measure does little to mitigate the impact and reach of COVID-19 because "as many as 30 to 50 percent of individuals with COVID-19 will have no signs or symptoms of disease despite being infectious (e.g. asymptomatic shedding)."[27] Further, this approach is likely to miss staff as they bring in and transmit the virus while asymptomatic.[28] Despite the known risks, Respondents mention no plans for widespread testing and contact tracing necessary to control a COVID-19 outbreak.[29] Under these circumstances, COVID-19 cases may not be detected until there is already a full-blown outbreak.

II. Petitioners Are Longtime Residents with Extensive Family and Community Ties in the U.S. and Safe Places to Shelter and Self-Isolate Upon Release.

[22] Resp. at 13.
[23] Golding Suppl. Decl. ¶ 7; Williams Suppl. Decl. ¶ 7.
[24] CDC, *Evaluating and Testing Persons for Coronavirus Disease 2019 (COVID-19)*, *available at* https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-criteria.html.
[25] The White House, *Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Briefing* (Apr. 27, 2020), *available at* https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-briefing-33/
[26] Resp. at 11.
[27] Eaton Decl. ¶ 33.
[28] Venters Decl. ¶ 14(A).
[29] *Id*.

All seventeen Petitioners who remain in detention have deep roots and extensive family and community ties in the United States. All but one has lived in the U.S. for well over a decade (the remaining Petitioner, Ms. Mbendeke, has resided in the U.S. for eight and a half years). Many have lived here since they were minor children[30] or young adults.[31] All Petitioners have close family members—including spouses, parents, grandparents, and children—who are U.S. citizens or lawful permanent residents (LPRs). Most Petitioners are represented by immigration counsel on a pending petition for review[32] or in agency proceedings on remand.[33] Every Petitioner has a safe place to self-isolate for at least fourteen days if they are released, and to comply with applicable local orders and public health guidelines thereafter.

Below is a summary of each Petitioner's length of residence and family ties in the United States. Unless specifically noted, this information is not disputed by Respondents:

- **Sarail Michael Archilla** was brought to the U.S. from Canada by his mother in or around 1981, when he was about five or six years old. Archilla Decl. ¶ 9.[34] He has two U.S. citizen children, a U.S. citizen girlfriend, and various family members with lawful status in the U.S. *Id*. ¶¶13, 14.

- **Maxime P. Blanc** has resided in the U.S. since 1994. Blanc Decl. ¶ 10.[35] He later became an LPR. *Id*. He is represented by counsel in his removal case before the Eleventh Circuit Court of Appeals. *Id*. ¶ 10. The immigration judge in his case concluded that he has "extensive family ties in the United States, consisting of siblings, cousins, nieces and nephews, and godchildren." *Id*. ¶ 14.

- **Geovanny Gerardo Castellano** has resided in the U.S. since 1979. Castellano Decl. ¶ 9. He has various U.S. citizen and LPR family members in California. *Id*. ¶ 14.

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[30] *See* Archilla Decl. ¶ 9, Garcia Rivera Decl. ¶¶ 1, 7, Golding Decl. ¶ 6, Miller Decl. ¶ 8, Olano Decl. ¶ 8, Webster Decl. ¶ 8, Williams Decl. ¶ 9.
[31] *See* Blanc Decl. ¶ 10, Castellano Decl. ¶ 9, Castro Decl. ¶ 11, Flores Decl. ¶ 9, Quito Decl. ¶ 9.
[32] See Blanc Decl. ¶ 10, Golding Decl. ¶ 8, Mbendeke Decl. ¶ 5 (sealed document), Williams Decl. ¶ 10.
[33] *See* Flores Decl. ¶ 12. Additionally, undersigned counsel is currently assisting Mr. Garcia Rivera to identify legal counsel to investigate his claim of U.S. citizenship.
[34] ICE claims that Mr. Archilla "is believed to be from Jamaica." Pitman Detainees Decl. ¶ 13.
[35] Respondents incorrectly state that Mr. Blanc is a citizen of the Dominican Republic. Resp. at 24. He is a native and citizen of Dominica. Blanc Decl. ¶ 1.

- **Antonio Melquezideth Castro** entered U.S. on a visa in 2000 and later adjusted to LPR status. Castro Decl. ¶ 11. He has three young U.S. citizen children and an LPR cousin who is willing to host him if he is released. *Id.* ¶¶ 15-16.

- **Edson Flores** has resided in the U.S. since 1991. Flores Decl. ¶ 9. The Second Circuit recently granted his petition for review and remanded his case to the BIA, and his pro bono counsel has agreed to continue representing him in agency proceedings. *Id.* ¶ 12. He has various U.S. citizen family members, including his mother. *Id.* ¶ 17.

- **Ray Fuller** entered the U.S. on a spousal visa in 1999 and later adjusted to LPR status. Fuller Decl. ¶ 9. His three children and two sisters are U.S. citizens. *Id.* ¶ 13.

- **Jose Antonio Garcia Rivera** is a U.S. citizen by birth. Garcia Rivera Decl. ¶ 1.[36] He has resided in the U.S. since he was a teenager. *Id.* ¶ 7. He has a U.S. citizen partner and son. *Id.* ¶ 10.

- **Karim Tahir Golding** has resided in the U.S, since 1994, when he was nine years old. Golding Decl. ¶ 6. He is represented by counsel in his removal case before the Second Circuit Court of Appeals. *Id.* ¶ 8. His mother is a U.S. citizen. *Id.* ¶ 12.

- **Alex Hernandez** has resided in the U.S. for over three decades. ECF No. 11-2, Declaration of Bryan S. Pitman [hereinafter "Pitman Detainees Decl."] ¶ 10. He is represented by counsel in his removal case before the Ninth Circuit Court of Appeals.

- **Bakhodir Madjitov** has resided in the U.S. since 2006. Pitman Decl., ECF No. 11-2, ¶ 17. His wife and three children are U.S. citizens. *See* Madjitov Decl. ¶¶ 30-31. He is represented by counsel in his removal case before the Eleventh Circuit Court of Appeals, and in legal proceedings related to his injury during ICE's attempt to unlawfully deport him. He has no criminal convictions.

- **Kenneth Manning** has resided in the U.S. since 1985. Manning Decl. ¶ 7. The Second Circuit recently granted his petition for review and remanded his case to the BIA for further review of his claim that he will be tortured if deported to Jamaica because of his cooperation with U.S. law enforcement authorities investigating gang activity in that country. *Id.* ¶ 9.

- **Landry (Emily) Mbendeke** has resided in the U.S. since 2011. Pitman Detainees Decl. ¶ 24. She has immediate family members with lawful status. Mbendeke Decl. ¶ 16 (sealed document). She is represented by counsel in her removal case before the Second Circuit Court of Appeals. *Id.* ¶ 5; Pitman Detainees Decl. ¶ 24.

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[36] ICE disputes Mr. Garcia Rivera's identity and biographical information, claiming that his name is Domingo Castillo and that he is a citizen of the Dominican Republic. *See* Garcia Rivera Decl. ¶ 3; Pitman Detainees Decl. ¶ 21. According to ICE, he entered the U.S. at an unknown date and time. Pitman Detainees Decl. ¶ 21.

- **Tesfa Miller** has resided in the U.S. since 1990, when he was about eight years old. Miller Decl. ¶ 8. He obtained LPR status through his mother. *Id*. He has various U.S. citizen family members, including his mother, grandmother, and daughter. *Id*. ¶ 15.

- **Allen Roger Olano Esparza** has resided in the U.S. since 1997, when he was 14 years old. Olano Decl. ¶ 8. He later adjusted to LPR status. *Id*. His mother and three-year-old daughter are U.S. citizens. *Id*. ¶ 13.

- **Sergio Quito** has resided in the U.S. since 1994. Quito Decl. ¶ 9. His daughter and most of his wife's family are U.S. citizens. *Id*. ¶ 13.

- **Churvin Webster** has resided in the U.S. since the 1960s, when he was a small child. Webster Decl. ¶ 8. He obtained LPR status in the 1970s. *Id*. He has two U.S. citizen sisters and extensive employment, family, and community ties in New Jersey. *Id*. ¶ 12.

- **Randane Williams** has resided in the U.S. since 2004, when he was fourteen years old. Williams Decl. ¶ 9. He was granted LPR status as a special immigrant juvenile. *Id*. He is represented by counsel in his removal case before the Ninth Circuit Court of Appeals. *Id*. ¶ 10. He has aunts, nephews, niece and cousins who are U.S. citizens and two LPR brothers. *Id*. ¶ 13.

Publically available data from DHS and the Department of Justice demonstrate that the overall appearance rate for non-detained individuals in removal proceedings in the U.S. is approximately 80 percent. *See* Ex. 27, Declaration of Aaron Reichlin-Melnick ¶ 10. That rate increases to 88 percent for individuals who have been in the U.S. for over one year, and over 91 percent for individuals—like nearly all Petitioners—who have resided in this country for over ten years. *Id*. ¶ 18. Appearance rates for individuals represented by immigration counsel nears 100 percent. *Id*. ¶ 11. And previously detained individuals released from ICE custody are even *more likely* to appear than individuals who have never been detained. *Id*. ¶ 17.

ARGUMENT

I. THE COURT HAS JURISDICTION OVER THE HABEAS CLAIMS BECAUSE THE ONLY REMEDY SOUGHT IS RELEASE, AND IT INDEPENDENTLY HAS JURISDICTION AND AUTHORITY TO ORDER RELEASE UNDER RULE 65.

Contrary to Respondents' narrow characterization, Petitioners do not bring their § 2241 habeas claims in order to challenge their conditions of confinement. As an emerging consensus

of courts confronting similar arguments have held, because the facts and expert testimony show that the only viable remedy for the unconstitutional conditions is release from detention, their claims sit at the core of habeas. And, habeas is a broad, flexible remedy that fully authorizes release. The court independently has federal question jurisdiction pursuant to 42 U.S.C. § 1331 to consider their constitutional claims and to issue a TRO ordering release pursuant to Rule 65 and the court's inherent equitable authority.

A. Because Plaintiffs Seek Release, Not Alterations of Conditions, Their Claims are at the Core of Habeas.

Respondents correctly note that courts have distinguished between claims brought in habeas that challenge the "fact or duration" of detention and claims brought in habeas that seek to alter unlawful "conditions of confinement," and correctly observe that the Supreme Court has left open the question of whether habeas provides courts the authority to bring "conditions of confinement" claims. *See* Resp. Br. at 38. They note that there is a circuit split on the question of whether conditions claims can be brought in habeas, *compare, e.g. Aamer v. Obama*, 742 F.3d 1023, 1031-38 (D.C. Cir. 2014) (permitting habeas claim challenging allegedly unconstitutional force feeding of prisoners) *with Graham v. Broglin,* 922 F.2d 379, 381 (7th Cir.1991) (habeas not available to challenge prison's rules regarding work permission), and posit that the Eleventh Circuit should be counted among the Circuits who would deny conditions claims brought via habeas. But this theoretical question is irrelevant to resolving this case.

Here, contrary to Defendants' formulaic conception, Plaintiffs do not seek judicial intervention in order to improve their conditions of confinement of the sort of attempted by habeas petitioners in the cases Defendants rely upon, *see* Resp. Br. 38-39,[37] nor could they bring

[37] The cases Defendants rely upon that foreclose habeas seek remediation of inadequate conditions; they do not seek release because of irremediable conditions, as do Plaintiffs. *See Gomez v. United States*, 899 F.2d 1124, 1125 (11th Cir. 1990) (rejecting habeas where petitioner challenged the "medical treatment" during the course of

such a civil rights claim. The conditions are what compels release. As the Southern District of Texas stressed in granting a similar TRO under § 2241, "The mere fact that Plaintiffs' constitutional challenge requires discussion of conditions in immigration detention does not necessarily bar such a challenge in a habeas petition." *Vazquez Barrera v. Wolf*, No. 20-cv-1241, 2020 WL 1904497, at *4 (S.D. Tex. Apr. 17, 2020). Indeed, the very premise of the habeas petition – supported by uncontroverted record evidence – is that the conditions producing irreparable harm in these circumstances cannot be remediated by any judicial order, which therefore renders the *fact* of their continued detention unlawful under due process. *See Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973) ("a determination that [the petitioner] is entitled to immediate [ ] or a speedier release" is proper habeas claim); *see also Dada v. Witte*, No. 1:20-CV-0458, Dkt. 17 at *9 (W.D. La. Apr. 30, 2020) (Report and Recommendation) (explaining that "the remedy for conditions claims is generally corrective. The remedy for fact claims, however, generally terminates the detention altogether, or alters it such that a new form of custody or control is imposed" and recommending release of 13 petitioners under § 2241); *Vazquez Barrera*, 2020 WL 1904497, at *4 ("Because Plaintiff's are challenging the fact of their detention as unconstitutional and seek relief in the form of immediate release, their claims fall squarely in the realm of habeas corpus").

Respondents' reliance on *A.S.M. v. Donahue*, No. 7:20-CV-62 (CDL), 2020 WL 1847158, at *1 (M.D. Ga. Apr. 10, 2020) is curious, as the court there "agrees that the general principle eschewing habeas relief as a means for remedying condition of confinement constitutional violations rests upon the assumption that eliminating the contested confinement

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detention.); *Vaz v. Skinner*, 634 Fed. Appx. 778, 781 (11th Cir. 2015) (rejecting habeas petition seeking better medical treatment.); *Cook v. Baker*, 139 Fed. Appx. 167, 169 (11th Cir. 2005) (dismissing § 1983 action as frivolous because habeas corpus was the exclusive remedy for petitioner's claim challenging the propriety of his conviction.); *Daker v. Warden*, No. 18-13800, 2020 WL 751817, at *2 (11th Cir. Feb. 14, 2020) (rejecting habeas petition seeking adequate food and medical care.)

conditions is possible without releasing the detainee from detention," and thus accepted the possibility of COVID-19 release claims in habeas, even as it concluded the factually weaker record in that case did not demonstrate release was necessary. Otherwise, Defendants rest their argument almost entirely on one case, *Toure v. Hott*, No. 1:20-cv-395, 2020 WL 2092639, *6 (E.D. Va. Apr. 29, 2020). The case is contrary to another holding in the same circuit, *see Coreas v. Bounds*, No. CV TDC-20-0780, 2020 WL 1663133, at *7 (D. Md. Apr. 3, 2020) ("First, and most fundamentally, although the grounds on which they seek release relate to their conditions of confinement, Petitioners seek complete release from confinement, which is 'the heart of habeas corpus.'") and runs contrary to an emerging consensus that recognizes such claims sound in habeas.[38]

Defendants argue that accepting this principle would permit litigants to pull the wool over a judge's eyes because, "virtually all claims would be cognizable under section 2241 so long as the petitioner includes a prayer for release." Resp. Br. 37. But habeas is not so manipulable. No judge would accept a habeas claim to seek, say, more recreation or halal meals, as a "fact of detention" claim simply because a petitioner demanded release from such inadequate conditions. The *A.S.M.* case upon which Defendants rely proves the point: the court recognized that habeas claims could be brought where conditions were so bad that release was

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[38] *See Vazquez Barrera*, 2020 WL 1904497, at *8; *Essien v. Barr*, No. 20-CV-1034-WJM, 2020 WL 1974761, at *3 (D. Colo. Apr. 24, 2020) ("In theory, these causes of action are oil and water: a habeas claim may lead to an order releasing the prisoner or detainee or nothing at all; whereas a conditions-of- confinement claimant may only lead to an order requiring the government to improve the conditions of confinement, but not an order releasing the prisoner or detainee."); *Mays v. Dart*, No. 20 C 2134, 2020 WL 1812381, at *6 (N.D. Ill. Apr. 9, 2020) ("The plaintiffs' claims, as they have framed them, do bear on the duration of their confinement (they contend, ultimately, that they cannot be held in the Jail consistent with the Constitution's requirements), and they are not the sort of claims that are, or can be, appropriately addressed via a claim for damages."); *Malam v. Adducci*, No. 20-10829, 2020 WL 1672662, at *3 (E.D. Mich. Apr. 5, 2020), as amended (Apr. 6, 2020) ("Supreme Court and Sixth Circuit precedent support the conclusion that where a petitioner claims no set of conditions would be sufficient to protect her constitutional rights, her claim should be construed as challenging the fact, not conditions, of her confinement and is therefore cognizable in habeas."); *Sheikh v. Gillis*, No. 5:19-cv-134 Dkt 19 at 4 (S. D. Miss. Apr. 29, 2020) (Report and Recommendation); *Wilson v. Williams*, No. 20 cv 794, Dkt. 22 at 10-11 (N.D. Ohio Apr. 22, 2020); *Basank v. Decker*, No. 20 CIV. 2518, 2020 WL 1481503, at *6 (S.D.N.Y. Mar. 26, 2020).

the required remedy, but found as a matter of fact the limited evidence in the case did not make that showing. 2020 WL 1847158, at *1. Here the overwhelming evidence, from Plaintiffs, from multiple experts, and from Defendants themselves, shows that the only remedy to cure these distinct and unprecedented circumstances is release.[39]

B. Both Habeas and the Federal Courts Inherent Equitable Authority Fully Authorize the Requested Relief.

1. § 2241 Authorizes Release

"Habeas is at its core a remedy for unlawful executive detention." *Munaf v. Geren*, 553 U.S. 674, 693 (2008). It invests in federal courts broad, equitable authority to "dispose of the matter as law and justice require," 28 U.S.C. § 2243, as the "very nature of the writ demands that it be administered with… initiative and flexibility." *Harris v. Nelson*, 394 U.S. 286, 291 (1969); *see Boumediene v. Bush*, 553 U.S. 723, 780 (2008) ("Habeas is not 'a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose.'") (quoting *Jones v. Cunningham*, 371 U.S. 236, 243 (1963)).

A court is fully empowered to remediate the particular illegality here – an outbreak of lethal and unavoidable virus that threatens petitioners and violates their constitutional rights to be free from arbitrary and punitive detention – by ordering their release. Habeas corpus is, "above all, an adaptable remedy," *Boumediene*, 553 U.S. at 780, and federal courts retain "broad discretion in conditioning a judgment granting habeas relief . . . 'as law and justice require'." *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987) (quoting 28 U.S.C. § 2243). That authority

[39] The fact that there is a parallel class action, *Fraihat v. ICE*, 5:19-cv-01546-JGB-SHK (C.D. Cal.), which requires ICE to make custody redeterminations for individuals, including petitioners in no way forecloses the relief this Court should provide. Petitioners' independent habeas claims need be considered independently based on the particular exigencies of these cases. Critically, despite undertaking a review of Petitioners' they are choosing to detain all but Petitioner Soho, Resp. Br. 16. This demonstrates that the Fraihat injunction cannot remedy the ongoing constitutional violations before the Court in this case. Absent court intervention, these Petitioners face irreparable, even life-threatening, harm.

includes an order of release, *Boumediene*, 553 U.S. at 779, so as "to insure that miscarriages of justice within [the writ's] reach are surfaced and corrected." *Harris*, 394 U.S. at 291.[40]

2. Rule 65 and the Court's Inherent Equitable Authority Authorize Release

The Court has subject matter jurisdiction under 28 U.S.C. § 1331, and federal courts have enjoyed equitable authority for over a century to fashion injunctive relief to remediate unconstitutional governmental action. *See Ex Parte Young*, 209 U.S. 123 (1908). That authority includes – independent of habeas – issuing "orders placing limits on a prison's population" to remediate unconstitutional conditions. *Brown v. Plata*, 563 U.S. 493, 511 (2011); *see also Duran v. Elrod*, 713 F.2d 292, 297- 98 (7th Cir. 1983), *cert. denied*, 465 U.S. 1108 (1984) (affirming order releasing low-bond pretrial detainees as necessary to reach a population cap); *Mobile Cty. Jail Inmates v. Purvis*, 581 F. Supp. 222, 224-25 (S.D. Ala. 1984) (exercising remedial powers to order a prison's population reduced to alleviate unconstitutional conditions.)

Defendants assert that a TRO is only permitted where a plaintiff seeks to preserve the status quo, but that here "release would change the status quo." Resp. Br. 42. This is incorrect for two reasons. First, even if, as Defendants assume, the proper baseline status quo to examine is Petitioners' detention ICE custody, release from physical detention does not necessarily change that status quo. *See Rumsfeld v. Padilla*, 542 U.S. 426, 437 (2004) ("[O]ur understanding of custody has broadened to include restraints short of physical confinement"); *Duran v. Reno*, 193 F.3d 82, 84 (2d Cir. 1999) (holding that custody for habeas corpus purposes is not limited to actual, physical confinement). Even if released, and especially if placed on supervisory release, Petitioners are still under ICE's supervision and obligated to attend removal proceedings. More fundamentally, however, Defendants miss the pressing status quo that must be preserved:

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[40] Contrary to Defendants' unexplained assertion, Petitioners are *presently* being held "in custody in violation of the Constitution or laws or treaties of the United States," 28 U.S.C. §2241, and so seek an order now – not based on a future contingency – ordering release.

Petitioners' health and safety. Petitioners seek a TRO in order to ensure they do not fall ill, or die. As detailed below, preserving that status quo is of the highest order in the TRO calculus.

II. PETITIONERS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIM THAT THE CONTINUED DETENTION OF MEDICALLY VULNERABLE INDIVIDUALS WHERE THERE ARE READILY AVAILABLE ALTERNATIVES TO DETENTION VIOLATES DUE PROCESS.

Respondents are entirely unclear as to what standard this court should apply when examining Petitioners'– individuals in *civil* detention – Fifth Amendment claims; they refer only cursorily to the governing reasonable relationship test articulated in *Bell v. Wolfish*, 441 U.S. 520, 561 (1979), and then conflate the deliberate indifference standard with the professional judgment standard. Defs' Br. at 3, 45. To be clear: Eleventh Circuit and Supreme Court precedent require, first and foremost, that civil confinement must be "reasonably related to a legitimate governmental objective," and if the confinement is "excessive" in relation to that purpose then it constitutes impermissible punishment. *Bell*, 441 U.S. at 561; *Jacoby v. Baldwin Cty.*, 835 F.3d 1338, 1345 (11th Cir. 2016); *Magluta v. Samples*, 375 F.3d 1269, 1273 (11th Cir. 2004).

It is unquestionably excessive to continue detaining Petitioners at a facility with known COVID-19 infection when Respondents have plenty of alternative methods to effectuate their articulated governmental objective. Respondents miss the mark in arguing that, generally, the government has an interest in detaining individuals so as to effectuate removal. Resp. Br. at 3. That may be true in the ordinary course. However, these are not ordinary circumstances. *See Alcantara v. Archambeault*, No. 1:20-cv-756 (DMS), at *16 (C.D. Cal. May 1, 2020) ("Although 'under normal circumstances' the confinement of ICE detainees pending removal proceedings is rationally related to the legitimate governmental interest of ensuring their appearance for their deportation proceedings and preventing danger to the community, the current circumstances [in

ICE detention facility with rapid increase of spread of COVID-19 cases]… are anything but normal.") (citations omitted). Any reason for detention must be forward-looking in order to support a continuing, legitimate purpose and must be based on an individual's particular circumstances. *Foucha v. Louisiana*, 504 U.S. 71 (1992). While the government may possess a general legitimate interest in detaining some individuals in removal proceedings and pending removal, that interest dissipates where, as here, continuing detention puts those individuals' lives at imminent risk.

Thus, the relevant inquiry here is whether it is excessive to continue to detain these medically vulnerable Petitioners in a facility where an unprecedented viral infection with no known treatment is present, and where it is impossible for Petitioners to protect themselves from the risk of death or serious bodily harm. *See Vazquez Barrera,* 2020 WL 1904497, at *6 ("[r]equiring medically vulnerable individuals to remain in a detention facility where they cannot properly protect themselves from transmission of a highly contagious virus with no known cure is not rationally related to a legitimate government objective..."); *Dada*, No. 1:20-CV-00458 at *21 (immigrant plaintiffs are likely to succeed in showing that detention during COVID-19 does not reasonably relate to a legitimate governmental objective); *Hope v. Doll*, No. 1:20-cv-00562-JEJ (M.D. Pa. Apr. 7, 2020) (continued detention of immigrant plaintiffs during COVID-19 not reasonably related to governmental objective).

Continued detention is especially excessive because Respondents have alternative methods of ensuring that Plaintiffs attend their check-ins or removal hearings after release, and the chances of Petitioners absconding, particularly given COVID-19-related travel restrictions, are virtually nonexistent. A study of ICE data reveals that non-detained immigrants overall appear at immigration court more than 80% of the time; those released from detention appear at

higher rates than those who were never detained; those who are represented by attorneys, as the Petitioners have been, appear at every scheduled immigration hearing at a rate of 97%; and longtime residents, like all Petitioners, have overall higher rates of appearance. *See* Declaration of Aaron Reichlin-Melnick, Reply Exhibit 3, ¶¶ 6, 17. Moreover, the appearance rate for individuals, like all Petitioners, who have put down roots and have resided in the U.S. for over a year is at 84% and the appearance rate for those who have been here for ten years or more reaches 91%. *Id*. ¶18. As Judge Ellison stressed in *Vazquez Barrera*, "ICE has many other means besides physical detention to monitor noncitizens and ensure that they are present at removal proceedings and at time of removal," including routine check ins. 2020 WL 1904497 at *6. Given the availability of alternatives to detention, requiring Plaintiffs to remain in a detention facility with COVID-19 infection present is unquestionably excessive.[41]

In addition to detaining Petitioners under punitive conditions, Respondents' choice to not release them from a facility where COVID-19 infection is present demonstrates deliberate indifference to a substantial risk of harm to Petitioners, which is also prohibited under the Fifth Amendment. *Hamm v. DeKalb County*, 774 F.2d 1567, 1574 (11th Cir. 1985). The risks from COVID-19 are open and notorious, producing guidance from the CDC, nearly nationwide lockdowns, and daily, front-page news. Respondents undoubtedly know that this highly infectious disease spreads rapidly, and in congregative settings such as ECDC, it is simply impossible to implement the measures required to stop its spread. Eaton Decl. ¶ 29. Release is the *only* constitutional measure to address the risk faced by Petitioners. What measures Respondents claim to have adopted (ECF 11-1), are patently ineffective or entirely lacking, as described *supra*. *See also* Venters Decl. ¶¶ 14-29 (detailing insufficiency of nationwide

[41] To state the obvious, Defendants can ensure that Plaintiffs are present at removal proceedings and at removal only if Plaintiffs are able to protect themselves from serious illness or death from COVID-19.

responses of ICE); *id.* ¶¶ 30-35 (detailing severe insufficiency of measures taken at ECDC specifically). Moreover, contrary to Respondents' assertions, Petitioners uniformly report unsanitary conditions, inadequate access to cleaning and protective supplies, continued transfers of new detainees into the facility, and lack of medical responsiveness to individuals with symptoms consistent with COVID-19. *Compare* ECF. No. 11-1 *with* ECF 2-1 at 8-9, Golding Supp. Decl. ¶¶ 4, 7, 8; Williams Supp. Decl. ¶¶5, 6, 7, 8, 10; Venters Decl. ¶34.

Given the dozens of courts nationwide that have ordered the release of individuals from ICE detention, and ICE's own review and release of some individuals, it is clear that Respondents are fully aware of the substantial risks of continued detention and the benefits of release. By continuing to detain Petitioners despite this knowledge, Respondents demonstrate deliberate indifference. *See Malam v. Adducci*, No. 20-10829, 2020 WL 1899570, at *6 (E.D. Mich. Apr. 17, 2020) ("the public health evidence before the Court shows that, even given current precautionary measures, the risk is substantial and unreasonable. Additionally, Respondent… has additional precautionary measures at her disposal: the release of Petitioner... Accordingly, any response short of authorizing release from [immigration detention] for this Petitioner, whose underlying health conditions expose her to a high risk of an adverse outcome if infected by COVID-19, demonstrates deliberate indifference to a substantial risk."); *Gayle v. Meade*, No. 20-21553-CIV, 2020 WL 2086482, at *4 (S.D. Fla. Apr. 30, 2020) (S. D. Fla. Apr. 30, 2030) (adopting report and recommendation) ("it is clear that ICE fully understands the benefit of reducing the detainee population. Thus, to the extent that ICE fails to commit to addressing the conditions complained of, ICE has demonstrated deliberate indifference."); *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (government acts with deliberate indifference when

it "ignore[s] a condition of confinement that is sure or very likely to cause serious illness and needless suffering").

Indeed, ICE chooses to ignore known risks in its detention facilities, in order to, as ICE Director Albence recently admitted, prove that ICE is "enforcing our immigration laws."[42] That ICE would prioritize public relations over the known health risks of a vulnerable population is the height of deliberate indifference and arbitrary detention.

Respondents fail even under the professional judgment standard articulated in *Youngberg v. Romeo*, which Respondents cite to: they continue to detain Petitioners under circumstances where it is impossible to practice social distancing and ensure adequate hygiene, contrary to the basic, widely accepted public health standards that are imperative to protect from infection. 457 U.S. 307, 323 (1982) (liability may be imposed on government "when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment."); *see also In re Kumar*, 402 F. Supp. 3d 377, 384 (W.D. Tex. 2019) (applying professional judgment standard to claims brought by an individual in immigration detention).

III. ABSENT AN INJUNCTION PETITIONERS WILL SUFFER IRREPARABLE HARM, AND THE PUBLIC INTEREST IN PUBLIC HEALTH AND BALANCE OF EQUITIES FAVOR RELEASE

The Eleventh Circuit requires only a "substantial likelihood" of irreparable injury. *Siegel v. LePore*, 234 F.3d 1163, 1179 (11th Cir. 2000). Aside from the harm Petitioners demonstrate through a showing that Respondents have violated their constitutional rights, *Cunningham v.*

[42] Press Release, U.S. House of Representatives Committee on Oversight and Reform, DHS Officials Refuse to Release Asylum Seekers and Other Non-Violent Detainees Despite Spread of Coronavirus (April 17, 2020), https://oversight.house.gov/news/press-releases/dhs-officials-refuse-to-release-asylum-seekers-and-other-non-violent-detainees.

Adams, 808 F.2d 815, 822 (11th Cir. 1987), the imminent risk to Petitioners' health and their lives suffices to establish irreparable harm.

A court "need not await a tragic event" to afford injunctive relief. *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (noting, "It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them.). *Thakker, et. al. v. Doll, et. al.*, No 1:20-cv-00480-JEJ *6 (M.D. Pa. Mar. 31, 2020) (plaintiffs need not wait "until the pandemic erupts in our prisons."); *Chambers v. Coventry Health Care of Louisiana, Inc.*, 318 F. Supp. 2d 382, 389 (E.D. La. 2004) (irreparable harm found where late detection of cancer could lead to death). The totality of the evidence reveals that Petitioners' continued detention places them at risk of significant and imminent injury—if not death, lasting and severe medical complications. *See* ECF. Doc. 2-20 ¶ 38. Although Respondents aver that Etowah only has one case of COVID-19, ECF Doc. 11-1 ¶ 18(a), it is impossible to obtain a realistic number because of chronic government under-testing—as of May 6, 2020, ICE had tested only 1,460 people out of the over 30,000 it detains.[43] Far from the rigorous testing and contact tracing that has allowed other nations to halt the spread of the virus,[44] the most Respondents can muster are "daily vitals and weight checks." ECF 11-1 ¶ 18(a). Similar palliative deficiencies abound throughout Etowah, Venters Decl. ¶¶ 30-35, and this unfortunate reality is exacerbated by Respondents' own admission that individuals are still being transferred into the facility, jeopardizing the health of all those within. ECF 11-1 ¶ 24-26.

[43] ICE Guidance on COVID-19, Confirmed Cases (last visited May 6, 2020), https://www.ice.gov/coronavirus; Golding Supp. Decl. ¶¶ 3, 5.

[44] Max S. Kim, *Seoul's Radical Experiment in Digital Contact Tracing*, The New Yorker (Apr. 17, 2020) (last accessed May 5, 2020, 05:24 p.m), https://www.newyorker.com/news/news-desk/seouls-radical-experiment-in-digital-contact-tracing

As described above, at least 248 new county detainees have been transferred into ECDC *since* the CDC promulgated its March 23, 2020 detention facility guidance.[45]

Respondents' argument that some Petitioners are members of the *Fraihat* class and thus cannot suffer irreparable harm should not persuade this Court. As an initial matter, even if Respondents had provided those Petitioners individualized custody determinations pursuant to the *Fraihat* order, that still would not afford them the "the maximum relief available on their claims," ECF Doc. 11 p. 43, because outright release is still possible. *See* ECF Doc. 2-1 n.35 (citing cases). While Respondents' brief seems to imply that custody reviews were done pursuant to *Fraihat* the Pittman declaration only states that ICE conducted an initial search to determine *who may be eligible* for a *Fraihat* review. *See* ECF Doc. 11-2 ¶ 27.[46] Setting aside this sleight of hand, even though *Fraihat* was ordered on April 20, over two-and-a-half weeks ago, only one Petitioner has been released pursuant to any form of ICE review.

In any event, ICE cannot simultaneously argue that its discretionary custody determination is an adequate substitute to a court-ordered release and yet deny relief in nearly every case. This Court still has a role. *See Zepeda Rivas v. Jennings*, No. 20-cv-02731-VC, 2020 WL 2059848, at *4 (N.D. Cal. Apr. 29, 2020) ("It does not appear that Judge Bernal intended, by the general nationwide relief he ordered, to interfere with the ability of facility-specific litigation to proceed. Nor, in any event, does a nationwide class action covering specific relief at specific facilities seem manageable.").

An injunction is also in the public interest and the balance of the equities tips in Petitioners' favor. Respondents' asserted interest in enforcing U.S. immigration law is an

[45] Etowah County Sheriff's Office, Booked Last 24 Hours (accessed May 5, 2020), *available at* http://etowahcountysheriff.com/mugshots.php

[46] Respondents deny that Sergio Quito and Randane Williams are *Fraihat* class members, but given their comorbidities, they too are at immediate risk of irreparable harm in any event. *See* Eaton Decl. ¶¶ 38(o), (r).

insufficient counterweight to the grave public health consequences that continued detention presents. First, Respondents routinely release scores of immigrants—even those with criminal convictions detained under 236(c)—a practice that has not yet brought the system to its knees.[47] Both ICE and this Court have authority to order release of individuals detained pursuant to 236(c). *See, e.g.*, *Cabral v. Decker*, 331 F. Supp. 3d 255, 259 (S.D.N.Y. 2018) (collecting cases). Second, "ICE has a number of alternative tools available to it to ensure enforcement, which it is free to use with Petitioners" including "ICE's conditional supervision program." *Vazquez Barrera*, 2020 WL 1904497 at *7. This alternative supervision program is highly effective, with a 99% attendance rate at all immigration court hearings and a 95% attendance rate at final hearings among supervised individuals.[48] Respondents are not bound to detain Petitioners—especially not during a global pandemic—and any assertions to the contrary should be ignored.

Defendants predictable assertion that Petitioners are not entitled to release to avoid potentially lethal illness because of prior criminal convictions is contrary to law. *See, e.g.*, *United States v. Muniz*, Case No. 4:09-cr-199, Dkt. No. 578 (S.D. Tex. Mar. 30, 2020) (releasing defendant serving 188-month sentence for drug conspiracy in light of vulnerability to COVID-19); *United States v. Grobman*, No. 18-cr- 20989, Dkt. No. 397 (S.D. Fla. Mar. 29, 2020) (releasing defendant convicted after trial of fraud scheme in light of "extraordinary situation of a medically-compromised detained person being housed at a detention center"); *United States v. Meekins*, Case No. 1:18-cr- 222-APM, Dkt. No. 75 (D.D.C. Mar. 31, 2020) (post-plea, pre-

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[47] *See, e.g, Detainees Leaving ICE Detention from the El Paso Service Processing Center*, TRAC https://trac.syr.edu/immigration/detention/201509/EPC/exit/ ("ICE also has discretionary authority to "parole" individuals . . . with serious medical conditions . . . and individuals whose parole is considered by ICE in the 'public interest.'"); *see* 8 U.S.C. § 1182(d)(5)(A).

[48] U.S. Gov't Accountability Office, GAO-15-26, *Alternatives to Detention: Improved Data Collection and Analyses Needed to Better Assess Program Effectiveness* 30 (Nov. 2014), https://www.gao.gov/assets/670/666911.pdf.

sentence release order releasing defendant with three pending assault charges due to extraordinary danger COVID-19 poses to people in detention).

Releasing Petitioners would also promote public health and safety, considerations that traditionally weigh heavily in the movant's favor. *See Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 472 (5th Cir. 2017). Multiple courts have ordered detained individuals released citing the public's interest in preventing or mitigating outbreaks, which invariably spread to correctional officers and other staff members, their families, and the public. *See Dada*, No. 1:20-cv-00458-DDD-JPM at *27; *Vazquez Barrera*, 2020 WL 1904497 at *7 (S.D. Tex. Apr. 17, 2020); *United States v. Raihan*, No. 20-cr-68-BMC- JO, E.C.F. No. 20, Proc. At 10:12-19 (E.D.N.Y. Mar. 12, 2020) E.C.F. No. 20 ("[t]he more people we crowd into that facility, the more we're increasing the risk to the community"). Defendants suggestion, Resp. Br. 48, that Petitioners would be safer in the tinderbox of ICE detention rather than in the safety of a home – even homes in the Northeast – cannot be taken seriously; Dr. Venters thoroughly discredits such magical thinking. Venters Decl. ¶¶ 8-14. Nor could the end of a shelter-in-place order, Resp. Br. 50, change the realities of the inevitable spread of COVID-19 inside ICE facilities such as ECDC. Venters Decl. ¶¶ 8-14.

Recently, the Western District of Louisiana noted that "public health and safety are served best by rapidly decreasing the number of individuals detained in confined, unsafe conditions." *Dada*, No. 1:20-cv-00458-DDD-JPM at *27 (quotations omitted). And, as Judge Ellison explained in *Vazquez Barrera*, "an outbreak among the . . . detainee population will inevitably spread through the surrounding community, as MPC staff members, who live outside the detention facility, will be exposed to sick detainees . . . [and] will put additional strain on

hospitals and health care resources in the community." 2020 WL 1904497, at *7. This too supports a finding that Petitioners' release would be in the public interest.

CONCLUSION

For the foregoing reasons, Plaintiffs Petitioners' respectfully request that this Court grant the motion for a temporary restraining order and order their immediate release from custody.

Dated: May 6, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2020, I electronically filed the foregoing document and accompanying exhibits with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent to all counsel of record by operation of the Court's electronic filing system. I also certify that there are no non-CM/ECF participants to this action.

Dated: May 6, 2020

/s/ Jessica Myers Vosburgh
Jessica Myers Vosburgh

FILED
2020 May-06 PM 11:59
U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

ARCHILLA, et al.

Petitioners-Plaintiffs,

v.

WITTE, et al.

Respondents-Defendants.

DECLARATION IN FURTHER SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER

No. 4:20-cv-596-RDP-JHE

DECLARATION OF JESSICA MYERS VOSBURGH

I, Jessica Myers Vosburgh, declare pursuant to 28 U.S.C. § 1746, as follows:

1. I am an attorney with Adelante Alabama Worker Center in Birmingham, Alabama. I represent Petitioners-Plaintiffs in this case.

2. For the convenience of the Court, I submit this declaration to attach copies of certain documents referred to in Petitioners' Reply Memorandum in Support of Motion for a Temporary Restraining Order.

3. The tables below list the exhibits attached to this declaration. Each exhibit is a true and correct copy of the document described in the second column.

Exhibit No.	Declarations
23	Declaration of Katrina Huber
24	Declaration of Homer Venters, M.D.
25	Supplemental Declaration of Randane Williams
26	Supplemental Declaration of Karim Tahir Golding
27	Declaration of Aaron Reichlin-Melnick

Exhibit No.	Other Exhibits
28	*Alcantara v. Archambeault*, No. 1:20-cv-756, Dkt. No. 41 (C.D. Cal. May 1, 2020) *Dada v. Witte*, No. 1:20-cv-0458, Dkt. No. 17 (W.D. La. Apr. 30, 2020) (Report and Recommendation) *United States v. Muniz*, No. 4:09-cr-199, Dkt. No. 578 (S.D. Tex. Mar. 30, 2020) *United States v. Grobman*, No. 18-cr-20989, Dkt. No. 397 (S.D. Fla. Mar. 29, 2020) *United States v. Meekins*, No. 1:18-cr-222-APM, Dkt. No. 75 (D.D.C. Mar. 31, 2020)

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 6th day of May, 2020 in Birmingham, Alabama.

s/ *Jessica Vosburgh*
Jessica Myers Vosburgh
ADELANTE ALABAMA WORKER CENTER

FILED
2020 May-06 PM 11:59
U.S. DISTRICT COURT
N.D. OF ALABAMA

EXHIBIT 23

Declaration of Katrina Huber

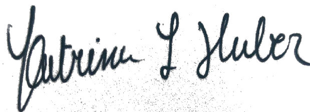
I attest to the below under penalty of perjury:

1. My name is Katrina Huber and I work as a Project Coordinator for the Southern Poverty Law Center's Southeast Immigrant Freedom Initiative ("SIFI"). SIFI provides pro-bono legal services to immigrants detained in multiple detention centers in Georgia and Louisiana. My job requires me to maintain contact with individuals in detention centers through in-person visits, video calls, or phone calls.

2. I have been tracking the confirmed cases of COVID-19 in ICE detention since ICE first began posting the numbers of confirmed cases at each facility on March 28, 2020. As of May 6, 2020, there were 142 confirmed positive cases at detention centers in the jurisdiction of the New Orleans ICE Field Office- Adams County Correctional Center, Catahoula Correctional Center, Etowah Correctional Center, LaSalle ICE Processing Center, Pine Prairie ICE Processing Center, Richwood Correctional Center, River Correctional Center, and Winn Correctional Center. This number is significant because the Field Office often transfers detained people between detention centers within its jurisdictions.

3. Even during this COVID-19 pandemic, our clients have told me of frequent transfers from to and from most of the detention centers mentioned above. For example, on May 6, 2020, a client detained at River Correctional Center reported to me that he was transferred into River from Catahoula Correctional Center in early April 2020 along with 17 other detained people. Two of these individuals were symptomatic for COVID-19 and later tested positive.

4. The figures I used likely are undercounts of the total extent of COVID-19 at Louisiana facilities because many people with symptoms are not being tested and because ICE does not report positive cases of the private prison company contractors that are almost exclusively responsible for the day to day operation of the detention centers. Graphs displaying the daily growth in confirmed cases are attached to my declaration at Addendum A.



Signature

05/06/2020
Date

FILED
2020 May-06 PM 11:59
U.S. DISTRICT COURT
N.D. OF ALABAMA

EXHIBIT 24

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF ALABAMA

ARCHILLA, *et al.*, *Petitioners-Plaintiffs*, v. WITTE, *et al.*, *Respondents-Defendants*.	Civil Action No.: 4:20-cv-596-RDP-JHE

DECLARATION OF HOMER VENTERS, M.D.

I, Homer Venters, declare the following under penalty of perjury pursuant to 28 U.S.C. § 1746 as follows:

1. I am a physician, internist and epidemiologist with over a decade of experience in providing, improving and leading health services for incarcerated people. I make this declaration in order to (i) explain the distinct threat that COVID-19 poses for rapid spread inside Immigration and Customs Enforcement (ICE) detention settings; (ii) the current inability of ICE generally to manage the spread of the COVID-19 in its detention facilities; [iv] the failure of ICE to abide by current guidance mandated by the Centers for Disease Control to prevent and isolate the spread of the virus and to treat and contain once it is present inside a facility; [v] why, given the absence of regularized testing and the possibility of transmission by asymptomatic persons, the already serious infection within the Etowah County Detention Center is grossly underestimated and predictably will accelerate to dangerous levels in the coming weeks.

QUALIFICATIONS

2. My clinical training includes a residency in internal medicine at Albert Einstein/Montefiore Medical Center (2007) and a fellowship in public health research at the New York University School of Medicine (2009). My experience in correctional health includes two years visiting immigration detention centers and conducting analyses of physical and mental health policies and procedures for persons detained by the U.S. Department of Homeland Security. This work included and resulted in collaboration with ICE on numerous individual cases of medical release, formulation of health-related policies as well as testimony before the U.S. Congress regarding mortality inside ICE detention facilities.

3. After my fellowship training, I became the Deputy Medical Director of the NYC Jail Correctional Health Service. This position included both direct care to persons held in NYC's 12 jails, as well as oversight of medical policies for their care. This role included oversight of chronic care, sick call, specialty referral and emergency care. I subsequently was promoted to the positions of Medical Director, Assistant Commissioner, and Chief Medical Officer. In the latter two roles, I was responsible for all aspects of health services including physical and mental health, addiction, quality improvement, re-entry and morbidity and mortality reviews as well as all training and oversight of physicians, nursing and pharmacy staff. In these roles I was also responsible for evaluating and making recommendations on the health implications of numerous security policies and practices including use of force and restraints.

   a. During this time, I managed multiple communicable disease outbreaks including H1N1 in 2009, which impacted almost a third of housing areas inside the adolescent jail, multiple seasonal influenza outbreaks, a recurrent legionella infection and several other smaller outbreaks.

4. In March 2017, I left Correctional Health Services of NYC to become the Director of Programs for Physicians for Human Rights. In this role, I oversaw all programs of Physicians for Human Rights, including training of physicians, judges and law enforcement staff on forensic evaluation and documentation, analysis of mass graves and mass atrocities, documentation of torture and sexual violence, and analysis of attacks against healthcare workers.

5. Between December 2018 and April 30, 2020, I served as the Senior Health and Justice Fellow and subsequently as the President for Community Oriented Correctional Health Services (COCHS), a nonprofit organization that promotes evidence-based improvements to correctional practices across the U.S. As of May 1, 2020, I left COCHS to focus exclusively on COVID-19 response work as a medical expert. I wrote a book on the health risks of jail (*Life and Death in Rikers Island*) which was published in early 2019

by Johns Hopkins University Press. A copy of my curriculum vitae, which includes my publications, a listing of cases in which I have been involved and a statement of my compensation, is attached to this report.

TRANSMISSION OF COVID-19

6. Information and understanding about the transmissibility of the coronavirus disease of 2019 (COVID-19) is rapidly evolving. New information is relevant to the health of ICE detainees and staff.

    a. In addition to transmission by aerosolized droplets expelled from the mouth by speaking, coughing, sneezing, and breathing, COVID-19 appears to be transmissible through aerosolized fecal contact. This is relevant because the plume of aerosolized fecal material that occurs when a toilet is flushed is not addressable in many detention centers because ICE detainee toilets generally lack lids. This mode of transmission would pose a threat to anyone sharing a cell with a person who has COVID-19 and could occur before a person becomes symptomatic. This mode of transmission could also extend beyond cellmates, especially in circumstances where common bathrooms exist or where open communication between cells exists.[1]

    b. CDC and state guidance now recommend the use of protective masks for anyone who is in close contact with others, at less than 6 feet distance.[2] This recommendation applies to staff and detainees alike.

THE RAPID SPREAD OF COVID-19 IN ICE DETENTION

7. COVID-19 is a viral pandemic. This is a novel virus for which there is no established curative medical treatment and no vaccine.

8. ICE has not been able to stop the spread of COVID-19 in detention centers. ICE reported that, as of April 7, there were 19 detained people in 11 facilities, 11 ICE employees in 6 facilities, and 60 ICE employees not assigned to a facility who had all tested positive for COVID-19. As of April 20, less than two weeks later, ICE reported a jump to 220 detained people in 28 facilities, 30 ICE employees in 9 facilities, and 86 ICE employees not assigned to a facility who had tested positive for COVID-19. On May 4, 2020, ICE reported 606 cases (of 1285 tested) of detained people in 37 facilities, 39 ICE employees in 13 facilities, and 99 employees not assigned to a facility who had tested positive for

[1] https://www.medpagetoday.com/infectiousdisease/covid19/85315.
[2] https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html.

COVID-19.[3] These numbers, which do not include non-ICE staff and contractors at the facilities, are likely just the tip of the iceberg in terms of the number of ICE staff and detainees who are already infected but are unaware due to the lack of testing nationwide, and the fact that people who are infected can be asymptomatic for several days.

9. When COVID-19 impacts a community, it will also impact the detention facilities. In New York, one of the areas of early spread in the U.S., multiple correctional officers and jail and prison inmates have become infected with COVID-19. The medical leadership in the NYC jail system have announced that they will be unable to stop COVID from entering their facilities and have called for release as the primary response to this crisis. Staff are more likely to bring COVID-19 into a facility, based solely on their movement in and out every day.

10. Once COVID-19 is inside a facility, ICE will be unable to stop the spread of the virus throughout the facility given long-existing inadequacies in ICE's medical care and also in light of how these facilities function. ICE has faced longstanding challenges in maintaining adequate health staffing for many years, and the outbreak of this pandemic will dramatically worsen this problem.

11. I have been inside multiple ICE detention facilities, both county jails that house ICE detainees and dedicated facilities. My experience is that the densely packed housing areas, the structure of health services, food services, recreation, bathroom and shower facilities for detained people, as well as the arrangement of entry points, locker rooms, meal areas, and control rooms for staff, all contribute to many people being in small spaces.

12. Detention facilities are designed to force close contact between people and rely on massive amounts of movement every day from one part of the facility to another, e.g., for programming, access to cafeterias, commissary, and medical, just to name a few. This movement is required of detained people as well as staff. My experience managing smaller outbreaks is that it is impossible to apply hospital-level infection control measures on security staff. In a hospital or nursing home, staff may move up and down a single hallway over their shift, and they may interact with one patient at a time. In detention settings, officers move great distances, are asked to shout or yell commands to large numbers of people, routinely apply handcuffs and operate heavy doors/gates, operate large correctional keys and are trained in the use of force. These basic duties cause the personal protective equipment they are given to quickly break and become useless, and even when in good working order, may impede their ability to talk and be understood, in the case of masks. For officers working in or around patients at risk or

[3] *ICE Guidance on COVID-19*, IMMIGRATION & CUSTOMS ENFORCEMENT (Updated Apr. 20, 2020), https://www.ice.gov/coronavirus.

with symptoms, there may be an effort to have them wear protective gowns, as one would in any other setting with similar clinical risks. These gowns cover their radios, cut down their ability to use tools and other equipment located on their belts and in my experience working with correctional staff, are basically impossible to use as a correctional officer.

13. Efforts to lock detained people into cells will worsen, not improve this facility-level contribution to infection control. Units that are comprised of locked cells require additional staff to escort people to and from their cells for showers and other encounters, and medical, pharmacy and nursing staff move on and off these units daily to assess the welfare and health needs of these people, creating the same movement of virus from the community into the facilities as if people were housed in normal units.

14. ICE's detention procedures and practices have manifestly failed to mitigate the rapid spread of the novel coronavirus within their facilities. As of the date of this declaration, there is 1 confirmed case of COVID-19 among the detained people at Etowah County Detention Center ("ECDC").[4] This likely underestimates the number of people infected, as ICE only tests people who meet the CDC's definition of a person under investigation;[5] that is, someone exhibiting symptoms of COVID-19. Many carriers of coronavirus are asymptomatic, and thus would not qualify for testing by ICE. In addition, ECDC is managed by the Etowah County Sheriff's Department, a private contractor, and ICE does not report on confirmed cases among staff of private contractors.

15. I am on record having detailed the ways in which those protocols are fundamentally deficient in limiting the spread of COVID-19 (through social isolation, sanitation, restricted outside entrances and testing) and in containing and treating cases once they appear. (*See, e.g., Fraihat v. Wolf*, 5:20-cv-00590 (C.D. Cal. 2020). Here I summarize these analyses and make some particular observations about the general insufficiency of prevention, containment and treatment protocol at ECDC specifically.

A. The April 4, 2020 Docket Review Guidance

16. None of the ICE COVID-19 protocols set forth sufficient policies or protocols addressing release of medically vulnerable detained people in light of the significant risks to those people posed by COVID-19. **This must be done immediately and is in contrast to the efforts made in many prison and jail systems across the country**.

17. The April 4 list of risk factors for serious illness and death from COVID-19 infection developed by ICE is inconsistent with CDC guidelines and fails to adequately advise

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[4] https://www.ice.gov/coronavirus.

[5] Id.

facilities on which detainees are at elevated risk. This list is included in a memo to Field Office Directors regarding Docket Review, and fails to include very basic risk factors identified by the CDC, including body mass index over 40 and being a current or former smoker.[6] By apparently assigning this process to field directors and their staff, who are not medical professionals, advising security staff to check with medical professionals after the fact, and failing to include CDC-identified risk factors, this docket review process will likely leave many people with true risk factors in detention. This is particularly the case if they're detained under certain immigration law provisions, where the guidance recommends officers not release them despite risks. Thus, the guidance appears to be just that – guidance, and the risk factors are not determinative. In fact, the guidance appears to not make these risk factors determinative for release—even for people who are not subject to mandatory detention. ICE also identifies people under the age of 60 in this cohort, but the age of 55 is appropriate. Because detained people have consistently been identified as having higher levels of health problems that reflect that they are 10-15 years more progressed than chronological age, numerous organizations and research studies have used the age of 55 to define the lower limit of older detainees.[7] ICE also limits the high risk period for women to 2 weeks after child birth, yet one of the most serious increased risk during pregnancy is hypercoagulable state, which increases the risk of blood clots in the large veins of the lower extremities, and sometimes in the lung which can prove fatal. This risk extends to 6 weeks post-partum and also occurs independently with COVID-19 infection.[8] Accordingly, ICE should include these definitions in its list of risk factors. ICE should also put in place a mechanism to ensure that risk factors reflect the evolving science and data concerning COVID-19, since it is likely that additional risk factors will emerge as more data is collected.

18. The April 4 promulgation of an incomplete list of risk factors in a memo relating to discretion for release occurs in a complete vacuum of guidance on special protection and clinical management of people with those risk factors while in detention. **This Memo describes an overly discretionary decision-making process for release that does not sufficiently favor depopulation as public health requires and that has no urgency to it. Reviews and releases must be undertaken immediately**.

19. The April 4 ICE memo to Field Directors on identification and release of detained people with risk factors for serious illness and death from COVID-19 infection is both incomplete and revelatory. **ICE has omitted multiple important risk factors identified by the CDC in its own list** but has also failed to create any surveillance of the outbreak

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[6] https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html and https://www.cdc.gov/mmwr/volumes/69/wr/mm6913e2.htm.
[7] https://nicic.gov/aging-prison and https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3464842/.
[8] https://www.acog.org/patient-resources/faqs/womens-health/preventing-deep-vein-thrombosis and https://www.medpagetoday.com/infectiousdisease/covid19/85865.

across facilities that includes the number of patients experiencing symptoms, confirmed COVID-19 infection or hospitalization by presence or absence of CDC risk factors.

B. The April 10, 2020 ERO Document

20. The ERO document identifies multiple areas of COVID-19 response that all facilities holding ICE detainees must supposedly adhere to. Multiple sections of this document reflect inconsistencies or critical omissions from CDC Detention Guidelines for response to COVID-19. In addition, ICE is unlikely to ensure compliance with the policies laid out in this document due to longstanding lack of information systems, quality assurance and oversight mechanisms that are standard in other carceral or detention settings. These inconsistencies and omissions increase the risk that facilities holding ICE detainees will not follow evidence-based practices in infection control and that ICE detainees will experience higher risks of serious illness and death because of these deficiencies.

21. The ERO document directs that "[u]pon being informed of a detainee who may potentially be at higher risk for serious illness from exposure to COVID-19, ERO will review the case to determine whether continued detention is appropriate."

22. But the ERO document identifies a list of high-risk conditions that is inconsistent with the guidance given by ERO just days earlier and fails to adhere to CDC guidelines.

    a. The new ERO document fails to identify pregnant or post-partum women. The ERO docket review guidelines dated April 4, 2020, failed to identify smoking history or body mass index over 40 as risk factors, both of which are included by the CDC. The new ERO document also fails to specify hypertension as a risk factor.

    b. The age for older detainees was indicated as 65 in the new ERO document and 60 in the prior document. The correct age, based on correctional standards, should be 55.

23. The purpose of the ERO document's identification of high-risk patients is unclear beyond custody review. In fact it fails to establish any higher level of protection from COVID-19 infection for high-risk patients. No guidance is given about how these high-risk patients can be protected from being infected with COVID-19, unless and until they are in a quarantine area or have been identified as symptomatic.

24. The ERO document creates an unwieldy and unrealistic process for facilities to notify ICE headquarters regarding high risk detainees. The process of requiring every facility to send emails about every individual detainee with risk factors is unwieldy and unlikely to be effective. It creates an unreliable and error prone system for finding the most

vulnerable detainees inside ICE facilities. The net effect to this cumbersome and inefficient process will be that it will move unacceptably slowly in a fast-changing situation, far fewer detainees with risk factors will actually be released than could have occurred based on policies, and more high-risk patients will be at risk of serious illness and death in ICE detention.

25. The ERO document fails to include vital elements of CDC guidelines on preventing the spread of COVID-19 inside detention settings, including social distancing in common areas such as intake pens, medication lines, and bathroom and shower areas, or communication with detained people about social distancing and hygiene. It also fails to include many critical aspects of cleaning and disinfection outlined in CDC guidelines or to recommend against transfer of detainees in ICE custody between facilities, as a means to prevent the regional spread of COVID-19.

26. The ERO document fails to establish or mandate a respiratory protection program, a critical guideline of the CDC, which recommends "**a respiratory protection program as appropriate, to ensure that staff and incarcerated/detained persons are fit tested for any respiratory protection they will need within the scope of their responsibilities.**" Simply giving out N95 or other masks to staff and detainees and failing to train them and identify the high-risk tasks or scenarios they will encounter serves only to decrease the overall effectiveness of infection control and increase the risk of serious illness and death in ICE facilities. The ERO document gives some details about cloth masks, but there is no mention of any plan to train, record or supervise members of the respiratory protection team, despite the CDC clearly including security personnel in this team.[9]

C. Critical Issues that ICE Has Failed to Address Absent Direct CDC Guidance

27. ICE does not have any mechanisms to monitor or promote the health of all people in its charge. This failure is documented in many reports about ICE's inadequate healthcare system, but now poses a grave risk to their survival as ICE struggles to mount a competent response to COVID-19 across more than 150 facilities, on behalf of roughly 30,000 detainees and almost as many direct and contract staff. ICE's failure to properly monitor and oversee medical care at its detention centers has been a chronic concern in the health services provided to ICE detainees prior to this outbreak and has been cited as a core failure of ICE in its obligations to establish quality assurance throughout its detention network.[10] There is no indication that ICE can adequately monitor the response across its system to COVID-19. Absent robust and centralized oversight, ICE will not be

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[9] https://www.cdc.gov/niosh/npptl/hospresptoolkit/programeval.html. CDC definition of healthcare personnel includes "paid and unpaid persons who provide patient care in a healthcare setting or support the delivery of healthcare by providing clerical, dietary, housekeeping, engineering, security, or maintenance services."

[10] https://www.oig.dhs.gov/sites/default/files/assets/2019-02/OIG-19-18-Jan19.pdf; https://www.oig.dhs.gov/sites/default/files/assets/2019-06/OIG-19-47-Jun19.pdf.

able to provide a coordinated response informed by on-the-ground data from detention centers. This is in stark contrast to many prison systems across the country that are coordinating their efforts, including with health departments.

28. ICE has no plan or even capacity to provide daily clinical guidance to all of the clinical staff it relies on to care for ICE detainees, whether at ICE-operated facilities or contract facilities. The differing levels of oversight and clinical involvement across the various types of ICE facilities means that ICE is unable to promulgate and support a consistent set of clinical practices for all ICE detainees This is a core failure because of the new nature of COVID-19 and constantly changing clinical guidance on how to treat patients. Daily briefings with health administrators and medical and nursing leadership should be held; both are a core aspect of outbreak management and provide a critical avenue for receiving feedback on real-time conditions inside facilities. ICE has not articulated any plan to ensure that this type of basic communication is in place across its network of detention settings. This guidance should also include uniform recommendations on when and how to transport patients to the hospital. Failure to implement this kind of procedure—particularly in light of the other defects described herein—poses a significant risk to the health and lives of ICE detainees.

29. As ICE determines to release people from detention, they should be afforded symptom screening akin to what is done with staff, but the release of detainees to the community will lower their own risks of infection and will also serve to flatten the overall epidemic curve by decreasing the rate of new infections and the demands on local hospital systems. From a medical and epidemiologic standpoint, people are safer from COVID-19 infection when not detained, and **the epidemic curve of COVID-19 on the general community is flattened by having fewer people detained**.

DEFICIENCIES IN THE COVID-19 RESPONSE OF ETOWAH COUNTY DETENTION CENTER (ECDC)

30. In order to assess the adequacy of the COVID-19 response for ICE detainees held at Etowah County Detention Center ("ECDC"), I have been provided with the following documents for review;
    - Two Declarations of Bryan Pitman dated 5/4/2020, one that deals with COVID-19 response in general, and one that deals with specific petitioners.

Based on my review of these documents, I have the following concerns about the adequacy of the COVID-19 response inside ECDC;

Lack of COVID-19 Plan in Place for ECDC.

31. The April 10 ERO Pandemic Response Requirements mandate that every facility holding ICE detainees have a COVID-19 mitigation plan in place. The document specifies:

    "Consistent with ICE detention standards, all facilities housing ICE detainees are required to have a COVID-19 mitigation plan that meets the following four objectives:
    - To protect employees, contractors, detainees, visitors to the facility, and stakeholders from exposure to the virus;
    - To maintain essential functions and services at the facility throughout the pendency of the pandemic;
    - To reduce movement and limit interaction of detainees with others outside their assigned housing units, as well as staff and others, and to promote social distancing within housing units; and
    - To establish means to monitor, cohort, quarantine, and isolate the sick from the well." Ex. E.

    The declarations provided by Mr. Pitman fail to identify such a plan.

32. The key aspects of the CDC guidance regarding COVID-19 response involve active preparation before the arrival of COVID-19, clear and evidence-based responses once cases are identified. Preparation includes communication with staff and inmates about risks infection control and that reflect an evidence-based emergency COVID-19 plan that is widely disseminated. Once COVID-19 arrives, this plan is updated and may evolve, but the plan itself is a document that every person in the facility understands and is part of, much like a suicide prevention or sexual abuse reporting plan.

33. The policies that are described by Mr. Pitman raise the following concerns;
    a. First, there is **no mention of widespread testing of any detained people or staff**, a crucial component of managing the spread of COVID-19. As COVID-19 outbreak starts in a detention facility, there is a pressing need to implement testing of the following groups of people;
        i. Staff and detainees with symptoms of COVID-19
        ii. Staff and detainees with risk factors that make them high-risk for serious illness and death from COVID-19
        iii. Persons identified in contact tracing of newly identified COVID-19 cases
        iv. Consideration of testing for newly admitted detainees.
    b. There **does not appear to be any mention of a process to identify and protect high-risk detained people other than a docket review for potential release**.
        i. The following interventions are critical to identify and protect high-risk detainees from serious illness and death from COVID-19;
            1. Utilize medical and pharmacy records to identify people with elevated risk for serious illness or death from COVID-19 based on CDC criteria.
            2. Provide COVID-19 testing to these detainees.

3. Cohort high risk detainees in specialized housing areas that receive twice daily sign and symptoms checks, have increased levels of infection control and staff training.

c. There is no mention as to whether daily sick call requests being reviewed for the presence of COVID-19 symptoms and whether those reviews result in 1) expedited clinical evaluation of anyone reporting a COVID-19 symptoms, and 2) daily gathering of information about COVID-19 symptoms that is aggregated into a tracking that monitors COVID-19 symptoms throughout the facility and over time.

d. There is no mention of heightened levels of cleaning and disinfection regarding response to know or suspected COVID-19 cases, whether among staff or detainees, including who will clean equipment, office spaces, cells, bedrolls, personal effects in these high-risk scenarios and what level of training and PPE they will have. In discussing quarantine units, the declaration of Mr. Pitman makes reference to a disinfection process that involves a forced air machine. This section makes no mention of cleaning (removal of germs on surfaces) interventions, which are essential to implement in tandem with disinfection (killing but not removing germs on surfaces).[11]

e. There is no mention of how social distancing will be implemented for detainees in critical situations including in housing area showers and bathrooms, medication lines, medical and mental health clinics, hallways, sallyports. In addition, there is no mention at all of social distancing training or policies for staff, who represent the most likely vector for bringing COVID-19 virus into the facility. The practice of having up to four people per cell essentially eliminates any potential of social distancing and increases the speed with which COVID-19 can transmit throughout the facility. The close quarters created by ECDC leadership in housing all of the ICE detainees in housing area #9 is likely to significantly worsen the pace of this outbreak, particularly because staff appear not to follow basic infection control guidelines (below).

f. There is no mention of how ECDC will conduct contact tracing among staff and detainees who identify close contact with COVID-9 cases, and how staff identified to have close contact with a COVID-19 case in this contact tracing will be instructed to either remain at home for 14 days, or the circumstances and protections under which they may continue to work during that period. **This represents a risk to the broader community outside the facility**.

g. The cohorting of the original 110 ICE detainees in a 'sterile unit' mentioned in the Pitman declaration fails to identify increased levels of staff PPE and infection control will be utilized to protect these detainees from COVID-19.

34. Further, review of the declarations of people currently detained at ECDC housing area #9 reveals the following failures in basic infection control;
    - Ongoing new transfers of people into the 'Sterile' unit #9
    - Lack of adequate access to soap
    - Lack of consistent wearing of mask and gloves by both staff and detainees

[11] https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cleaning-disinfection.html

- Lack of social distancing in housing areas
- Lack of adequate access to masks for detainees
- Lack of appropriate protecting equipment for cleaning detail workers
- Lack of adequate cleaning supplies including paper towels
- Lack of screening for COVID-19 among people who report symptoms including fevers.
- Lack of communication to detainees about the status of the outbreak or basic updates on number of infected people.

Increased risk of serious illness and death for high-risk detainees in ECDC.

35. It has been incorrectly asserted that high risk detainees, such as the plaintiffs, may be somehow safer inside ECDC than in the community. "Petitioners face additional risk from their transport and release to places with significantly larger COVID-19 outbreaks than Etowah County"[12] The rates of infection in detention settings overwhelmed by COVI-19 far exceed the rates in even the hardest hit communities, including NYC and Chicago.[13] In addition, ECDC's grossly deficient response to the COVID-19 pandemic, including the failure to take measures to identify and protect detained people at high risk of death or serious illness from COVID-19 creates a heightened risk for this group of people. By herding the ICE detainees into one very crowded unit, hosing area #9, and by failing to implement basic infection control measures inside the unit, and well as among staff who come to work every day in this unit, ICE and ECDC have placed these detainees, especially those with risk factors for serious illness and death from COVID-19 at dramatically higher risk than they would experience in the community. Daily experiences on this unit, including sharing a cell with up to three other people, as well as very close contact with dozens of people in eating, sitting in the day room, receiving medication or health services, and other basic operations results in far more close physical contact than one would experience if home engaging in social distancing.

I declare under penalty of perjury that the statements above are true and correct to the best of my knowledge.

Signed this 6th day of May, 2020 in Port Washington, NY.

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[12] Resp. at 48.

[13] https://www.freep.com/story/news/local/michigan/2020/04/16/infection-rate-michigan-prison-exceeds-new-york-chicago-jail-hotspots/2987935001/ and https://legalaidnyc.org/covid-19-infection-tracking-in-nyc-jails/

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HEALTH ADMINISTRATOR PHYSICIAN EPIDEMIOLOGIST

Professional Profile

- International leader in provision and improvement of health services to patients with criminal justice involvement.
- Innovator in linking care of the incarcerated to Medicaid, health homes, DSRIPs.
- Successful implementer of nations' first electronic health record, performance dashboards and health information exchange among pre-trial patients.
- Award winning epidemiologist focused on the intersection of health, criminal justice and human rights in the United States and developing nations.
- Human rights leader with experience using forensic science, epidemiology and public health methods to prevent and document human rights abuses.

Professional Experience

Medical/Forensic Expert, 3/2016-present

- Review COVID-19 policies and procedures in detention settings.
- Conduct analysis of health services and outcomes in detention settings.
- Conduct site inspections and evaluations in detention settings.
- Produce expert reports, testimony regarding detention settings.

President, Community Oriented Correctional Health Services (COCHS), 1/1/2020-4/30/20.

- Lead COCHS efforts to provide technical assistance, policy guidance and research regarding correctional health and justice reform.
- Oversee operations and programmatic development of COCHS
- Serve as primary liaison between COCHS board, funders, staff and partners.

Senior Health and Justice Fellow, Community Oriented Correctional Health Services (COCHS), 12/1/18-12/31/2018

- Lead COCHS efforts to expand Medicaid waivers for funding of care for detained persons relating to Substance Use and Hepatitis C.
- Develop and implement COCHS strategy for promoting non-profit models of diversion and correctional health care.

Director of Programs, Physicians for Human Rights, 3/16-11/18.

- Lead medical forensic documentation efforts of mass crimes against Rohingya and Yazidi people.
- Initiate vicarious trauma program.
- Expand forensic documentation of mass killings and war crimes.
- Develop and support sexual violence capacity development with physicians, nurses and judges.

- Expand documentation of attacks against health staff and facilities in Syria and Yemen.

Chief Medical Officer/Assistant Vice President, Correctional Health Services, NYC Health and Hospitals Corporation 8/15-3/17.

- Transitioned entire clinical service (1,400 staff) from a for-profit staffing company model to a new division within NYC H + H.
- Developed new models of mental health and substance abuse care that significantly lowered morbidity and other adverse events.
- Connected patients to local health systems, DSRIP and health homes using approximately $5 million in external funding (grants available on request).
- Reduced overall mortality in the nation's second largest jail system.
- Increased operating budget from $140 million to $160 million.
- Implemented nation's first patient experience, provider engagement and racial disparities programs for correctional health.

Assistant Commissioner, Correctional Health Services, New York Department of Health and Mental Hygiene, 6/11-8/15.

- Implemented nation's first electronic medical record and health information exchange for 1,400 staff and 75,000 patients in a jail.
- Developed bilateral agreements and programs with local health homes to identify incarcerated patients and coordinate care.
- Increased operating budget of health service from $115 million to $140 million.
- Established surveillance systems for injuries, sexual assault and mental health that drove new program development and received American Public Health Association Paper of the Year 2014.
- Personally care for and reported on over 100 patients injured during violent encounters with jail security staff.

Medical Director, Correctional Health Services, New York Department of Health and Mental Hygiene, 1/10-6/11.

- Directed all aspects of medical care for 75,000 patients annually in 12 jails, including specialty, dental, primary care and emergency response.
- Direct all aspects of response to infectious outbreaks of H1N1, Legionella, Clostridium Difficile.
- Developed new protocols to identify and report on injuries and sexual assault among patients.

Deputy Medical Director, Correctional Health Services, New York Department of Health and Mental Hygiene, 11/08-12/09.

- Developed training program with Montefiore Social internal medicine residency program.
- Directed and delivered health services in 2 jails.

Clinical Attending Physician, Bellevue/NYU Clinic for Survivors of Torture, 10/07-12/11.

Clinical Attending Physician, Montefiore Medical Center Bronx NY, Adult Medicine, 1/08-11/09.

Education and Training

Fellow, Public Health Research, New York University 2007-2009. MS 6/2009
Projects: Health care for detained immigrants, Health Status of African immigrants in NYC.
Resident, Social Internal Medicine, Montefiore Medical Center/Albert Einstein University7/2004- 5/2007.
M.D., University of Illinois, Urbana, 12/2003.
M.S. Biology, University of Illinois, Urbana, 6/03.
B.A. International Relations, Tufts University, Medford, MA, 1989**.**

Academic Appointments, Licensure

Clinical Associate Professor, New York University College of Global Public Health, 5/18-present.

Clinical Instructor, New York University Langone School of Medicine, 2007-2018.

M.D. New York (2007-present).

Media

TV
i24 Crossroads re Suicide in U.S. Jails 8/13/19.

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Honors and Presentations (past 10 years)

Keynote Address, Academic Correctional Health Conference, April 2020, Chapel Hill, North Carolina.

TedMed Presentation, Correctional Health, Boston MA, March 2020.

Finalist, Prose Award for Literature, Social Sciences category for *Life and Death in Rikers Island*, February, 2020.

Keynote Address, John Howard Association Annual Benefit, November 2019, Chicago IL.

Keynote Address, Kentucky Data Forum, Foundation for a Healthy Kentucky, November 2019, Cincinnati Ohio.

Oral Presentation, Dual loyalty and other human rights concerns for physicians in jails an prisons. Association of Correctional Physicians, Annual meeting. 10/16, Las Vegas.

Oral Presentation, Clinical Alternatives to Punitive Segregation: Reducing self-harm for incarcerated patients with mental illness. American Public Health Association Annual Meeting, November 2015, Chicago IL.

Oral Presentation, Analysis of Deaths in ICE Custody over 10 Years . American Public Health Association Annual Meeting, November 2015, Chicago IL.

Oral Presentation, Medication Assisted Therapies for Opioid Dependence in the New York City Jail System. American Public Health Association Annual Meeting, November 2015, Chicago IL.

Oral Presentation, Pathologizing Normal Human Behavior: Violence and Solitary Confinement in an Urban Jail. American Public Health Association Annual Meeting, November 2014, New Orleans, LA.

Training, International Committee of the Red Cross and Red Crescent, Medical Director meeting 10/15, Presentation on Human Rights and dual loyalty in correctional health.

Paper of the Year, American Public Health Association. 2014. (Kaba F, Lewis A, Glowa-Kollisch S, Hadler J, Lee D, Alper H, Selling D, MacDonald R, Solimo A, Parsons A, Venters H. Solitary Confinement and Risk of Self-Harm Among Jail Inmates. *Amer J Public Health*. 2014. Vol 104(3):442-7.)

Oral Presentation, Pathologizing Normal Human Behavior: Violence and Solitary Confinement in an Urban Jail. *American Public Health Association* Annual Meeting, New Orleans LA, 2014.

Oral Presentation, Human rights at Rikers: Dual loyalty among jail health staff. American Public Health Association Annual Meeting, New Orleans LA, 2014.

Poster Presentation, Mental Health Training for Immigration Judges. American Public Health

Association Annual Meeting, New Orleans LA, 2014.

Distinguished Service Award; Managerial Excellence. Division of Health Care Access and Improvement, NYC DOHMH. 2013.

Oral Presentation, Solitary confinement in the ICE detention system. American Public Health Association Annual Meeting, Boston MA, 2013.

Oral Presentation, Self-harm and solitary confinement in the NYC jail system. American Public Health Association Annual Meeting, Boston MA, 2013.

Oral Presentation, Implementing a human rights practice of medicine inside New York City jails. American Public Health Association Annual Meeting, Boston MA, 2013.

Poster Presentation, Human Rights on Rikers: integrating a human rights-based framework for healthcare into NYC's jail system. *American Public Health Association* Annual Meeting, Boston MA, 2013.

Poster Presentation, Improving correctional health care: health information exchange and the affordable care act. *American Public Health Association* Annual Meeting, Boston MA, 2013.

Oral Presentation, Management of Infectious Disease Outbreaks in a Large Jail System. American Public Health Association Annual Meeting, Washington DC, 2011.

Oral Presentation, Diversion of Patients from Court Ordered Mental Health Treatment to Immigration Detention. *American Public Health Association* Annual Meeting, Washington DC, 2011.

Oral Presentation, Initiation of Antiretroviral Therapy for Newly Diagnosed HIV Patients in the NYC Jail System. *American Public Health Association* Annual Meeting, Washington DC, 2011.

Oral Presentation, Medical Case Management in Jail Mental Health Units. *American Public Health Association* Annual Meeting, Washington DC, 2011.

Oral Presentation, Injury Surveillance in New York City Jails. *American Public Health Association* Annual Meeting, Washington DC, 2011.

Oral Presentation, Ensuring Adequate Medical Care for Detained Immigrants. Venters H, Keller A, American Public Health Association Annual Meeting, Denver, CO, 2010.

Oral Presentation, HIV Testing in NYC Correctional Facilities. Venters H and Jaffer M, *American Public Health Association,* Annual Meeting, Denver, CO, 2010.

Oral Presentation, Medical Concerns for Detained Immigrants. Venters H, Keller A, *American Public Health Association* Annual Meeting, Philadelphia, PA, November 2009.

Oral Presentation, Growth of Immigration Detention Around the Globe. Venters H, Keller A, *American Public Health Association* Annual Meeting, Philadelphia, PA, November 2009.

Oral Presentation, Role of Hospital Ethics Boards in the Care of Immigration Detainees. Venters H, Keller A, *American Public Health Association* Annual Meeting, Philadelphia, PA,

November 2009.

Oral Presentation, Health Law and Immigration Detainees. Venters H, Keller A, *American Public Health Association* Annual Meeting, Philadelphia, PA, November 2009.

Bro Bono Advocacy Award, Advocacy on behalf of detained immigrants. Legal Aid Society of New York, October 2009.

Oral Presentation, Deaths of immigrants detained by Immigration and Customs Enforcement. Venters H, Rasmussen A, Keller A, *American Public Health Association* Annual Meeting, San Diego CA, October 2008.

Poster Presentation, Death of a detained immigrant with AIDS after withholding of prophylactic Dapsone. Venters H, Rasmussen A, Keller A, *Society of General Internal Medicine* Annual Meeting, Pittsburgh PA, April 2008.

Poster Presentation, Tuberculosis screening among immigrants in New York City reveals higher rates of positive tuberculosis tests and less health insurance among African immigrants. *Society of General Internal Medicine* Annual Meeting, Pittsburgh PA, April 2008.

Daniel Leicht Award for Achievement in Social Medicine, Montefiore Medical Center, Department of Family and Social Medicine, 2007.

Poster Presentation, Case Findings of Recent Arestees. Venters H, Deluca J, Drucker E. *Society of General Internal Medicine* Annual Meeting, Toronto Canada, April 2007.

Poster Presentation, Bringing Primary Care to Legal Aid in the Bronx. Venters H, Deluca J, Drucker E. *Society of General Internal Medicine* Annual Meeting, Los Angeles CA, April 2006.

Poster Presentation, A Missed Opportunity, Diagnosing Multiple Myeloma in the Elderly Hospital Patient. Venters H, Green E., *Society of General Internal Medicine* Annual Meeting, New Orleans LA, April 2005.

Grants: Program

San Diego County: Review of jail best practices (COCHS), 1/2020, $90,000.

Ryan White Part A - Prison Release Services (PRS). From HHS/HRSA to Correctional Health Services (NYC DOHMH), 3/1/16-2/28/17 (Renewed since 2007). Annual budget $ 2.7 million.

Ryan White Part A - Early Intervention Services- Priority Population Testing. From HHS/HRSA to Correctional Health Services (NYC DOHMH), 3/1/16-2/28/18 (Renewed since 2013). Annual budget $250,000.

Comprehensive HIV Prevention. From HHS to Correctional Health Services (NYC DOHMH), 1/1/16-12/31/16. Annual budget $500,000.

HIV/AIDS Initiative for Minority Men. From HHS Office of Minority Health to Correctional Health Services (NYC DOHMH), 9/30/14-8/31/17. Annual budget $375,000.

SPNS Workforce Initiative, From HRSA SPNS to Correctional Health Services (NYC DOHMH), 8/1/14-7/31/18. Annual budget $280,000.

SPNS Culturally Appropriate Interventions. From HRSA SPNS to Correctional Health Services (NYC DOHMH), 9/1/13-8/31/18. Annual budget $290,000.

Residential substance abuse treatment. From New York State Division of Criminal Justice Services to Correctional Health Services (NYC DOHMH), 1/1/11-12/31/17. Annual budget $175,000.

Community Action for Pre-Natal Care (CAPC). From NY State Department of Health AIDS Institute to Correctional Health Services (NYC DOHMH), 1/1/05-12/31/10. Annual budget $290,000.

Point of Service Testing. From MAC/AIDS, Elton John and Robin Hood Foundations to Correctional Health Services (NYC DOHMH), 11/1/09-10/31/12. Annual budget $100,000.

Mental Health Collaboration Grant. From USDOJ to Correctional Health Services (NYC DOHMH), 1/1/11-9/30/13. Annual budget $250,000.

Teaching

Instructor, Health in Prisons Course, Bloomberg School of Public Health, Johns Hopkins University, June 2015, June 2014, April 2019.

Instructor, Albert Einstein College of Medicine/Montefiore Social Medicine Program Yearly lectures on Data-driven human rights, 2007-present.

Other Health & Human Rights Activities

DIGNITY Danish Institute Against Torture, Symposium with Egyptian correctional health staff regarding dual loyalty and data-driven human rights. Cairo Egypt, September 20-23, 2014.

Doctors of the World, Physician evaluating survivors of torture, writing affidavits for asylum hearings, with testimony as needed, 7/05-11/18.

United States Peace Corps, Guinea Worm Educator, Togo West Africa, June 1990- December 1991.

-*Primary Project;* Draconculiasis Eradication. Activities included assessing levels of infection in 8 rural villages and giving prevention presentations to mothers in Ewe and French

-*Secondary Project;* Malaria Prevention.

Books

Venters H. *Life and Death in Rikers Island*. Johns Hopkins University Press. 2/19.

Chapters in Books

Venters H. Mythbusting Solitary Confinement in Jail. In Solitary Confinement Effects, Practices, and Pathways toward Reform. Oxford University Press, 2020.

MacDonald R. and **Venters H.** Correctional Health and Decarceration. In Decarceration. Ernest Drucker, New Press, 2017.

Membership in Professional Organizations

American Public Health Association

Foreign Language Proficiency

French Proficient
Ewe Conversant

Prior Testimony and Deposition

Benjamin v. Horn, 75 Civ. 3073 (HB) (S.D.N.Y.) as expert for defendants, 2015

Rodgers v. Martin 2:16-cv-00216 (U.S.D.C. N.D.Tx) as expert for plaintiffs, 10/19/17

Fikes v. Abernathy, 2017 7:16-cv-00843-LSC (U.S.D.C. N.D.AL) as expert for plaintiffs 10/30/17.

Fernandez v. City of New York, 17-CV-02431 (GHW)(SN) (S.D.NY) as defendant in role as City Employee 4/10/18.

Charleston v. Corizon Health INC, 17-3039 (U.S.D.C. E.D. PA) as expert for plaintiffs 4/20/18.

Gambler v. Santa Fe County, 1:17-cv-00617 (WJ/KK) as expert for plaintiffs 7/23/18.

Hammonds v. Dekalb County AL, CASE NO.: 4:16-cv-01558-KOB as expert for plaintiffs 11/30/2018.

Mathiason v. Rio Arriba County NM, No. D-117-CV-2007-00054, as expert for plaintiff 2/7/19.

Hutchinson v. Bates et. al. AL, No. 2:17-CV-00185-WKW- GMB, as expert for plaintiff 3/27/19.

Lewis v. East Baton Rouge Parish Prison LA, No. 3:16-CV-352-JWD-RLB, as expert for plaintiff 6/24/19.

Belcher v. Lopinto, No. 2:2018cv07368 - Document 36 (E.D. La. 2019) as expert for plaintiffs 12/5/2019.

Imoerati v. Semple, U.S. District Court, CT. No 3:18cv01847 (RNC), on behalf of plaintiffs, 3/11/20.

Fee Schedule

Case review, reports, testimony $500/hour.
Site visits and other travel, $2,500 per day (not including travel costs).

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2020 May-06 PM 11:59
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N.D. OF ALABAMA

EXHIBIT 25

SUPPLEMENTAL DECLARATION OF RANDANE WILLIAMS

I, Randane Williams, hereby declare under penalty of perjury that the following is true and correct to the best of my knowledge:

1. I recently learned that someone in a different unit has COVID-19 and I am worried.

2. Around March, they moved everybody from unit 10 – where I was – to unit 9. It was a lot of us. The whole unit was full. We have four-man cells and two-man cells. Right now, all the four-man cells are packed. I have been housed in the same two-man cell since being moved.

3. People are still being transferred to our unit. Since moving to unit 9, I have seen at least four inmates move to our unit. Just last week, one inmate was moved into our unit.

4. In terms of the staff, they have shifts of different people every day. It's common for me to see completely new staff members I have not seen before. Yesterday they had someone completely new. Staff members only have masks on, they do not wear gloves and they do not have hand sanitizer in the unit.

5. They give us each six small bars of soap every Thursday and I have stopped getting shampoo. If I run out of soap, they won't give you more. I have run out of soap and have asked for more but they told me I had to wait till Thursday. They do not provide disinfectant or hand sanitizer.

6. To use the restroom, I usually have to use the toilet in my cell. Otherwise, there is one toilet outside of my cell for the whole unit. We do not get any supplies to clean the toilet. The only people who get cleaning supplies are the cleaning workers in the unit. They only clean the showers and that one communal toilet. I have been using shampoo that I bought in the commissary to clean my own toilet. The shower area is like a communal place with thirteen shower heads. Inmate workers clean the bathroom and showers only once every other day.

7. Two days ago, they provided us with one new mask each after having had the same mask for about three or four weeks. It's the same type of mask. They did not provide information on when they will give us new masks. They did not tell us about whether we need to clean the masks or how to clean it. After you put them on for hours they get sweaty and you can't really put them back on your face.

8. They do not regularly clean the common areas and things like phones, the seats we sit on and the commissary area. Maybe every 12 hours. The phone I'm using right now, I don't know if they have cleaned it.

9. We get food in a hard tray with four different spots for food. The tray is not covered in plastic. I don't know if it's disinfected or cleaned. They don't tell us and I don't work in the kitchen.

10. All the information I get from COVID-19 is from the news. They have not come here to speak with us about it and made no announcement about COVID-19. I asked a CO about COVID-19 a few weeks back and was told it's not in Alabama. We heard rumors that the unit downstairs has one COVID-19 positive case. Someone asked the staff and they confirmed.

11. This declaration was read to me in English, and I swear it is true. I have authorized Khaled Alrabe, National Immigration Project of the National Lawyers Guild, to sign for me.

Executed this 6th day of May 2020.

s/Khaled Alrabe
Randane Williams

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2020 May-06 PM 11:59
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N.D. OF ALABAMA

EXHIBIT 26

Supplemental Declaration of Karim Golding

1. I have reviewed the declarations Supervisory Deportation Officer Pttman submitted in this case.

2. As of April the 3rd, 2020 ICE detainees in Unit 10 were merged with detainees in Unit 9. There are now 99 detainees crammed into Unit 9. Some of us are in four man cells and while others are in two man cells. The entire unit was never quarantined in a single unit for 14 days with detainees in an individual cell. It is not physically possible to house 100 detainees in a unit whose capacity is 128 and for each detainee to have an individual cell.

3. There was no test issued when the two units merged. When detainees asked to get tested for the virus they were discouraged by the medical staffing team. We were not moved to any other "sterile" unit. Since the units merged, there have been at least more than three detainees that have been introduced into the community. This is quite contrary to the statement made by officer Pitman in paragraph 13 of his affidavit. We are in constant contact with staff and correction officers. Detainees are still being brought to and fro to medical.

4. There were at least four detainees that came into contact with other detainees who were in contact with multiple confirmed cases of COVID-19. These detainees were transferred from Baltimore after Howard detention center was closed down because of the pandemic. They came into contact with detainees from New York detention centers. These detainees were then moved to the LaSalle ICE center but were barred from entering the dormitory as other detainees rioted against their intake into the dorm. They were then brought to ECDC and have since been on the unit without any test or quarantine measures. This is in direct opposition to the statement made by Officer Pitman in paragraph 14.

5. Detainees have been told that there are no tests at ECDC, which is the reason why we were unable to get tested. Dr. Page, a doctor here, told us that they have screening, but no testing. On March 23, 2020, I went the medical unit with a headache, shortness of breath, throat drip, and diarrhea. The medical staff told me that COVID-19 test was painfil and unnecessary and just gave me tylenol and allergy medications.

6. Detainees have not been informed of any confirmed case in ECDC, medical personnel do not perform medical screenings in the form of daily vital sign checks of all the detainees in order to mitigate the spread of the virus in opposition. Officer's Pitman's statements in paragraph 18, section b are untrue.

7. In direct opposition to paragraph 20 ofOfficer Pitman's statement, ECDC does not provide industrial cleaner, frequent soap, paper towels or effective face masks. They issue only 1 mask designed to be used for only 8 hours. I have received 1 mask in 3 weeks.

8. In direct opposition to paragraph 20 of Officer Pitman's statement, our access to disinfectant is limited. Disinfectant is only issued once a week and we are advised by the staff to stretch it. The daily forced air machine only distributes disinfectant solutions for less than 2 minutes. We are not removed from our unit when the forced machine air is used. We are not given the extra supply of hand soap for the shower or the sink as described. They are limited even to the amount of toilet paper and bath soap needed. There are no disinfectant dispensers with the unit or paper towels. Everyday supplies are not routinely checked or available.

9. Given the ongoing COVID-19 crisis, I have authorized my attorney Jeremy Jong to sign for me. I can provide my original signature upon request.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. I understood and verified its contents in full.

Executed on May 5, 2020 in Etowah County Detention Center.

Jeremy Jong signing on behalf of Karim Golding

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2020 May-06 PM 11:59
U.S. DISTRICT COURT
N.D. OF ALABAMA

EXHIBIT 27

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

ARCHILLA, *et al*., *Petitioners-Plaintiffs*, v. WITTE, *et al*., *Respondents-Defendants*.	Civil Action No.: 4:20-cv-596-RDP-JHE

DECLARATION OF AARON REICHLIN-MELNICK

I, Aaron Reichlin-Melnick, make the following declaration based on my personal knowledge and declare under the penalty of perjury pursuant to 28 U.S.C. § 1746, that the following is true and correct.

1. I am a Policy Counsel at the American Immigration Council ("Immigration Council"), a nonprofit and non-partisan organization whose mission includes the use of facts to educate the public on the important and enduring contributions that immigrants make to America.

2. I make this Declaration in order to show that, based on comprehensive available data, the vast majority of noncitizens who are in removal proceedings, but who are not detained, nevertheless appear for scheduled removal hearings. Individuals who have been in the United States for at least one year appear for removal hearings 88% of the time, rising to 91% for those who have been in the United States for more than ten years. For those noncitizens who have

counsel, the appearance rate approaches 100%. As every plaintiff in this case is a long-time resident of the United States, this data demonstrates, in my opinion, that the asserted governmental interest in ensuring appearance at court hearings and preventing flight risk does not justify declining to release noncitizens who are at risk of contracting COVID-19.

Basis for Opinion

3. At the Immigration Council, I track and analyze immigration-related statistics produced by the Department of Homeland Security ("DHS") and the Executive Office for Immigration Review ("EOIR"), including trends in the appearance rate of asylum seekers and other noncitizens placed into detention. In my role as Policy Counsel, I have previously submitted declarations analyzing government-produced immigration statistics.[1]

4. I am familiar with the universe of relevant public statistics published by DHS and EOIR. One of the key statistics that I study in my role as Policy Counsel is the appearance rate of noncitizens who are placed into removal proceedings. I am the principal author of a July 2019 Immigration Council publication on the rate that noncitizens appear in removal proceedings.[2] I am also the author of an op-ed for the Wall Street Journal explaining the fundamental flaws in EOIR's current methodology for reporting the rate at which noncitizens appear in court.[3]

5. In preparation for this declaration I have extensively reviewed all public material produced by EOIR on the appearance rates of noncitizens in court, as well as data on removal hearings from Fiscal Year ("FY") 2001 through March 2020 that is made public through

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[1] *Innovation Law Lab v. Wolf*, 3:19-cv-00807-RS (N.D. Cal. filed Feb. 14, 2019), *Padilla v. ICE*, No. 2:18-cv-00928-MJP (W.D. Wash. filed June 25, 2018), *East Bay Sanctuary Coalition II v. Wolf*, 3:19-cv-04073-JST (N.D. Cal filed July 16, 2019).

[2] American Immigration Council, Immigrants and Families Appear in Court: Setting the Record Straight (2019), *available at* https://www.americanimmigrationcouncil.org/research/immigrants-and-families-appear-court.

[3] Aaron Reichlin-Melnick, *Trump's Bad Immigration Math: In absentia' rates grossly overstate asylum-seekers' propensity to skip court.*, W.S.J., July 30, 2019, https://www.wsj.com/articles/trumps-bad-immigration-math-11564526852.

Syracuse University's Transactional Records Access Clearinghouse Center ("TRAC"), a nonpartisan academic center which obtains EOIR data through the Freedom of Information Act.

6. Analysis of this data reveals that most noncitizens placed in removal proceedings appear in court. Over the past decade, more than 80% of all noncitizens placed in removal proceedings inside the United States[4] appeared for every scheduled removal proceeding. Those represented by counsel were overwhelmingly likely to appear for every scheduled hearing, at a rate of 97%. Furthermore, since Fiscal Year 2014, noncitizens released from detention were *more* likely to appear in court than those who had never been detained in the first place.

Background of Removal and Appearance Process

7. When a respondent in immigration court fails to appear, an immigration judge will generally order the respondent removed for failure to appear.[5] Importantly, the issuance of a removal order for failure to appear does not mean that the respondent absconded. Many people fail to appear through no fault of their own, either because they were not properly served with a hearing notice or because an extraordinary circumstance prevented their appearance. In many of those situations, individuals may file a motion to reopen. *See* 8 C.F.R. § 1003.23(b)(4)(ii).

8. Many respondents successfully overturn an order of removal for failure to appear. Accounting for cases in which a removal order for failure to appear is overturned "significantly impacts and reduces the [failure to appear] rates." *See* TRAC, What Happens When Individuals

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[4] Throughout this declaration, I have excluded all cases of noncitizens placed into the Migrant Protection Protocols ("MPP"), a DHS program in which asylum seekers are not permitted to enter the United States but are instead placed into removal proceedings and sent to Mexico, where they must periodically return to a port of entry to access their scheduled removal proceedings. Because MPP cases are categorically different than those that occur inside the United States, they have been excluded.

[5] 8 C.F.R. 1003.26(c) provides that when a respondent "fails to appear, the Immigration Judge shall order the alien removed in absentia if" the government proves by clear and convincing evidence that the respondent is removable and that the respondent received notice of the hearing and of the consequences of failing to appear.

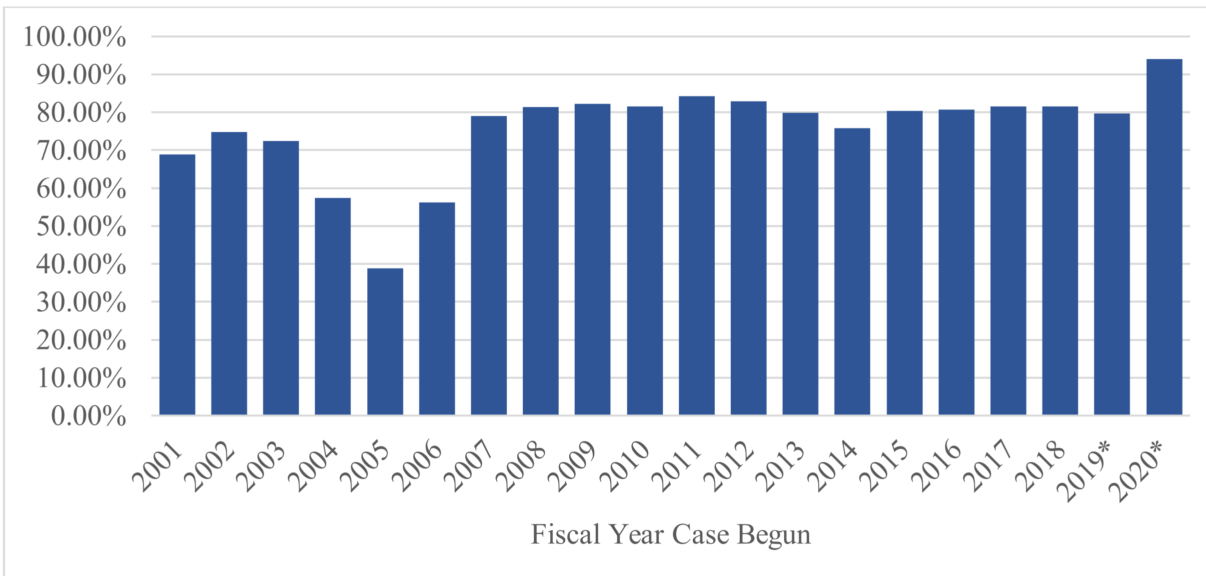
Are Released On Bond in Immigration Court Proceedings?, at n. 7 (Sept. 14, 2016), available at https://trac.syr.edu/immigration/reports/438/.

9. Qualitative research into "in absentia" orders of removal suggests that filing errors at either DHS or EOIR are the underlying cause of many failures to appear. CLINIC & Urban Justice Ctr., *Denied a Day in Court: The Government's Use of In Absentia Removal Orders Against Families Seeking Asylum* (Mar. 2019), *available at* https://cliniclegal.org/resources/removal-proceedings/denied-day-court-governments-use-absentia-removal-orders-against. One example of this kind of bureaucratic mistake included in the report is an asylum seeker who received two letters in the mail on the same day, one telling her to appear in court the week prior, and another telling her she had been ordered removed for missing that hearing. *Id.* at 19. She successfully reopened her case. *Id.* As part of the report, attorneys successful overturned 34 out of 36 orders of removal for failure to appear.

Data Analysis Demonstrating that a Significant Majority of Noncitizens Appear for Every Removal Proceedings

10. From FY 2009 through March 2020, a total of 1,948,699 cases have been filed in which at least one scheduled hearing for a person who was not detained ("nondetained hearing") has occurred. Out of these nearly two million cases, the noncitizen has appeared for every scheduled nondetained hearing in 1,571,923 cases—80.7% of the time. This roughly 80% appearance rate for all noncitizens placed in nondetained removal proceedings has been largely consistent since about FY 2007 (see Figure 1).

Fig. 1: Percent of Nondetained Respondents That Appeared at Every Hearing
by fiscal year that a case was begun

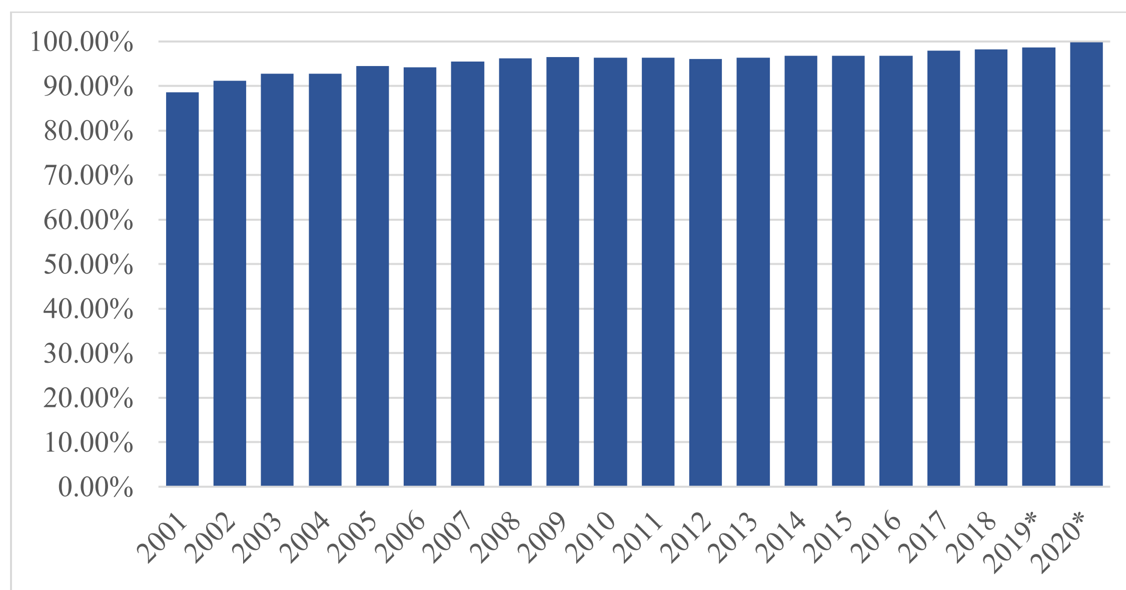


Source: TRAC, *State and County Details on Deportation Proceedings in Immigration Court*, https://trac.syr.edu/phptools/immigration/nta/
* MPP cases excluded from FY2019 and FY2020

11. Those noncitizens who are represented by counsel are even more likely to appear. From FY 2009 through March 2020, a total of 1,364,641 cases were filed in which the respondent was represented by counsel and at least one scheduled nondetained hearing has occurred. Out of these cases, the noncitizen has appeared for every scheduled nondetained hearing in 1,326,274 cases—97.2%.

12. This extremely high appearance rate for respondents who are represented by counsel has been consistent for decades (see Figure 2). This is one of the reasons why representation by counsel may be the most significant factor in the outcome of removal proceedings. *See* American Immigration Council, *Access to Counsel in Immigration Court* (Sept. 2016) (noting that "Represented immigrants who were never detained were nearly five times more likely than their unrepresented counterparts to obtain relief if they sought it.").

Fig. 2: Percent of Represented Nondetained Respondents That Appeared at Every Hearing
by fiscal year that a case was begun



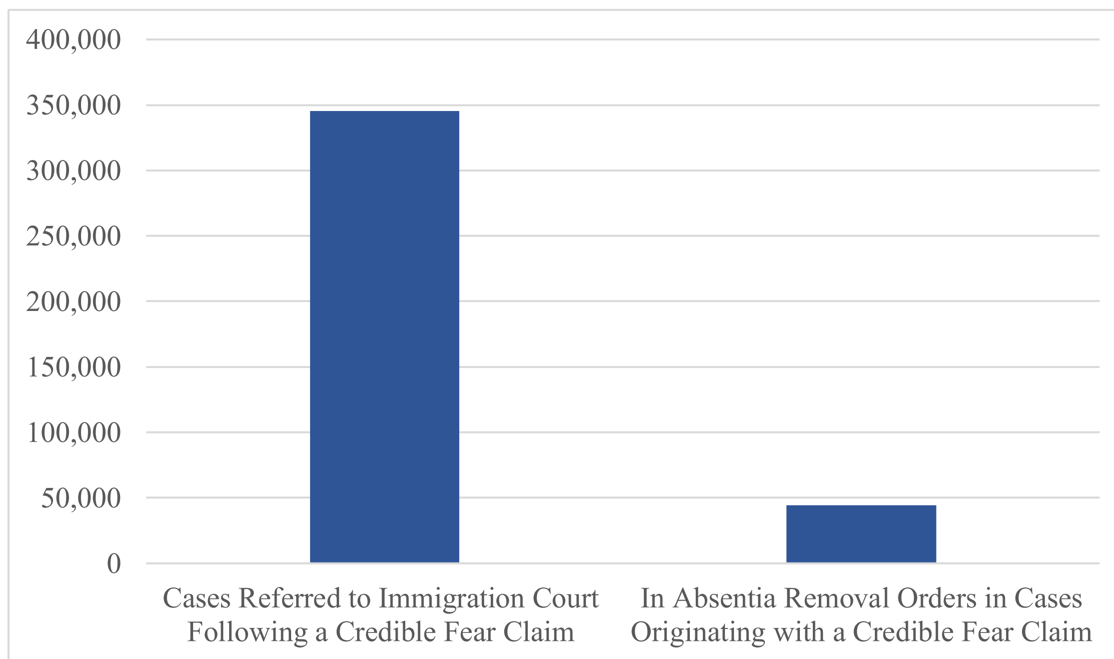
Source: TRAC, *State and County Details on Deportation Proceedings in Immigration Court*, https://trac.syr.edu/phptools/immigration/nta/
* MPP cases excluded from FY2019 and FY2020

13. Appearance rates vary among different groups placed into removal proceedings. Three groups in particular have a higher appearance rate than the average: asylum seekers who have been found to have a credible fear of persecution, individuals released from ICE detention, and individuals who have been present in the United States for significant periods of time and have put down roots—that is, made a home here.

14. Over the last decade, an order of removal for failure to appear was issued in an estimated 12.6% of cases originating with a credible fear claim. From FY 2008 through FY 2018, a total of 345,356 cases were referred to the immigration courts following a credible fear claim (see Fig. 2). *See* EOIR, *Rates of Asylum Filings in Cases Originating with a Credible Fear Claim* (Nov. 2, 2018), *available at* https://www.justice.gov/eoir/page/file/1062971/download. Over the same time period, immigration judges issued 43,476 orders of removal in absentia for failure to appear in cases originating with a credible fear claim (see Fig. 1). *See* EOIR, *In*

Absentia Removal Orders in Cases Originating with a Credible Fear Claim (Oct. 23, 2019), *available at* https://www.justice.gov/eoir/page/file/1116666/download. Thus, over the past decade, evidence suggests that at least 87.4% of asylum seekers who went through the credible fear process appeared in immigration court for their scheduled removal proceedings, although some of those noncitizens may have been detained during proceedings.[6]

Figure 3: Orders of Removal For Failure to Appear in Credible Fear Cases
FY 2008 to FY 2018



15. This high appearance rate for asylum seekers is supported by an Immigration Council report analyzing EOIR data from 2001-2016, which found that 86 percent of all families released from immigration detention had a perfect court attendance rate. Ingrid Eagly, Steven Shafer, & Jana Whalley, *Detaining Families: A Study of Asylum Adjudication in Family*

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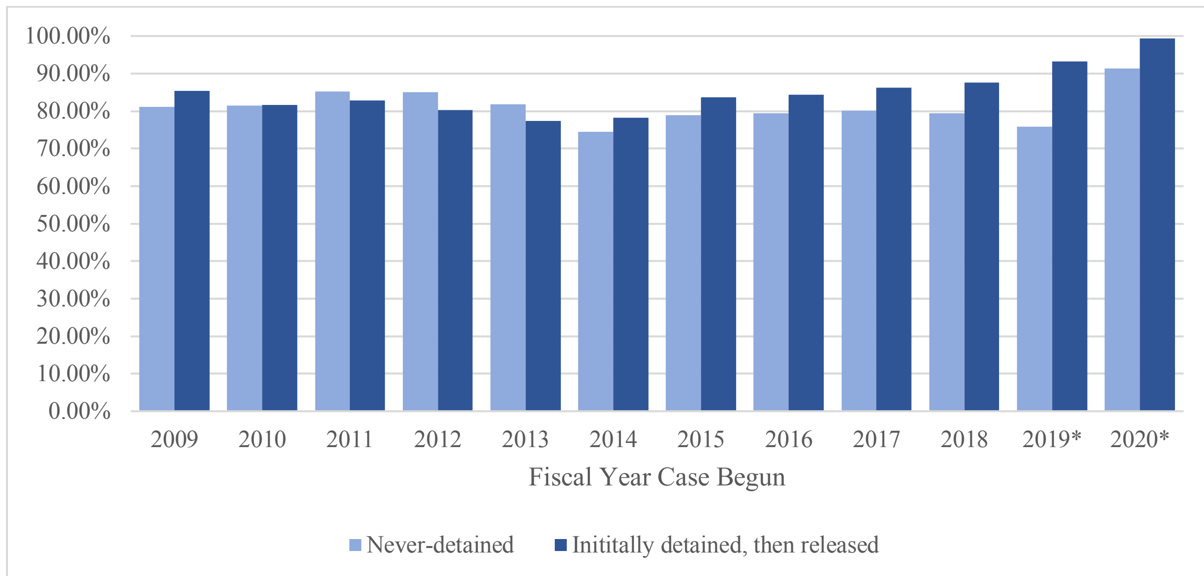
[6] EOIR data does not distinguish between proceedings that occurred inside detention with proceedings which occurred outside of detention. Therefore, this 87.4% appearance rate cannot be viewed as the appearance rate for all non-detained noncitizens who passed a credible fear interview. However, that asylum seekers would have a higher appearance rate than average is supported by the American Immigration Council study, *infra*.

Detention (2018), *available at* https://www.americanimmigrationcouncil.org/research/detaining-families-a-study-of-asylum-adjudication-in-family-detention. For families who managed to obtain counsel, the attendance rate rose to 96 percent. *Id.* at 23.

16. As with asylum seekers, those noncitizens who have been released from detention are also more likely to appear in court than the average rate of around 80%. From FY 2009 to March 2020, noncitizens who had been released from detention appeared in court 84.2% of the time, compared to just 79.5% of the time for noncitizens who had never been detained.

17. In every year since FY 2014, individuals released from ICE detention have appeared in court at higher rates than those never been detained in the first place (see Figure 4).

<u>Fig. 4: Percent of Nondetained Respondents That Appeared at Every Hearing</u>
by custody status and fiscal year that a case was begun

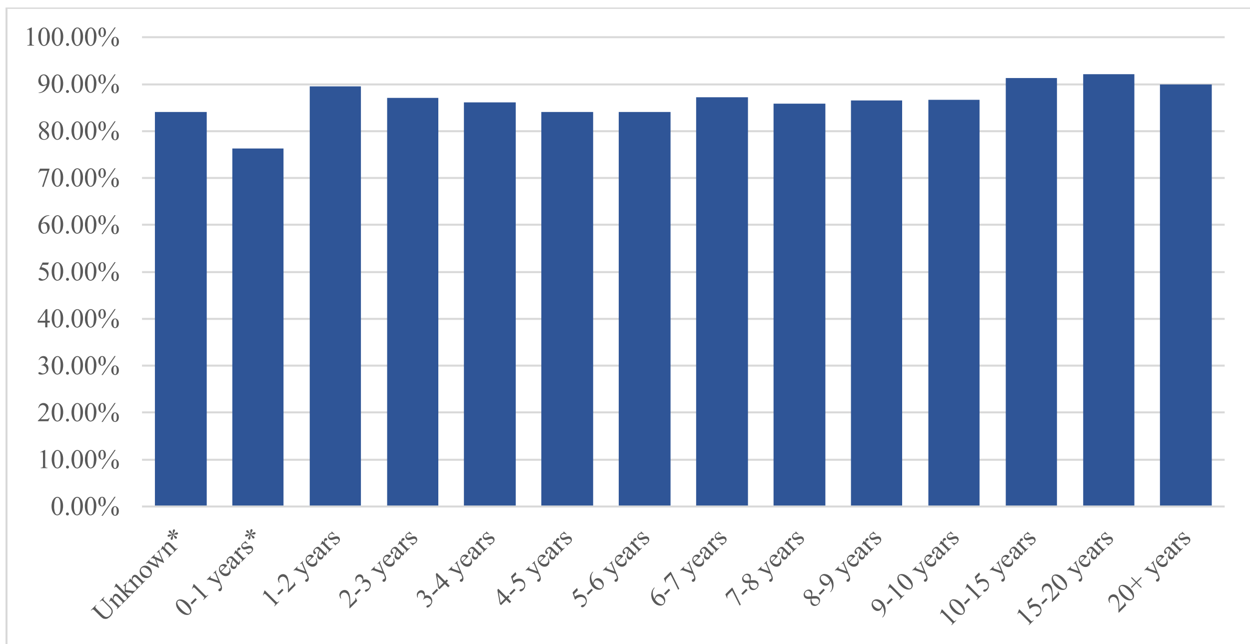


Source: TRAC, *State and County Details on Deportation Proceedings in Immigration Court*, https://trac.syr.edu/phptools/immigration/nta/
* MPP cases excluded from FY2019 and FY2020

18. Individuals who have been present in the United States for years—long enough to put down roots—are also more likely to appear in court than those who are recent arrivals at the border. For those respondents who have been present for at least one year, the appearance rate

never falls below 84% (see Figure 5). Noncitizens who have been present in the United States for ten or more years are overwhelmingly likely to appear. From FY 2009 through March 2020, a total of 117,894 cases were filed in which 1) at least one nondetained hearing occurred *and* 2) EOIR data indicates that the respondent had been present for at least ten years. Of these cases, the respondent appeared at every nondetained hearing in 107,507 cases—91.2%.

Fig. 5: Percent of Nondetained Respondents That Appeared at Every Hearing
by time in the United States at initiation of removal proceedings, FY 2009 to March 2020



Source: TRAC, *State and County Details on Deportation Proceedings in Immigration Court*, https://trac.syr.edu/phptools/immigration/nta/
* Excludes MPP cases

EXECUTED this 6th day of May, 2020.

AARON REICHLIN-MELNICK

FILED
2020 May-06 PM 09:51
U.S. DISTRICT COURT
N.D. OF ALABAMA

EXHIBIT 28

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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 ADRIAN RODRIGUEZ ALCANTARA;
11 YASMANI OSORIO REYNA; MARIA
12 FLOR CALDERON LOPEZ; MARY DOE; on behalf of themselves and all
13 others similarly situated,
14 Plaintiffs-Petitioners,
15 v.
16 GREGORY ARCHAMBEAULT, San Diego Field Office Director, Immigration
17 and Customs Enforcement; et al.,
18 Defendants-Respondents.
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Case No.: 20cv0756 DMS (AHG)

ORDER (1) GRANTING IN PART PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND (2) GRANTING PLAINTIFFS' MOTION FOR SUBCLASS-WIDE EMERGENCY TEMPORARY RESTRAINING ORDER

20 This case is one of many that have been filed throughout the country concerning the
21 detention of immigration detainees during the COVID-19 pandemic. The facilities at issue
22 in this case are Otay Mesa Detention Center ("Otay Mesa" or "OMDC") and Imperial
23 Regional Detention Facility. Currently there are no COVID-19 cases at Imperial.
24 However, Otay Mesa is "home to the largest confirmed COVID-19 outbreak in any federal
25 immigration detention facility in the entire country[.]" (Compl. ¶4.) As of April 30, 2020,
26 ninety-eight (98) Immigration and Customs Enforcement ("ICE") detainees at Otay Mesa
27 had tested positive for COVID-19. Over the course of the pandemic, six ICE detainees
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from Otay Mesa have been hospitalized, four have been discharged, two remain hospitalized, and one, an individual with diabetes, has recently been placed on a ventilator.

One of the Plaintiffs in this case is Adrian Rodriguez Alcantara, a 31-year-old asylum seeker from Cuba with HIV. In February 2020, he passed his credible fear interview, and he is currently awaiting a merits hearing on his asylum claim. (*Id.* ¶33.) When the present case was filed, Mr. Rodriguez Alcantara was detained at Otay Mesa. Since that time, he has been granted parole subject to the posting of a $4,000 bond and final medical clearance, (Fed. Defs.' Opp'n to Mot. at 6), but as of April 28, 2020, he was still in custody. In the present case, Mr. Rodriguez Alcantara seeks to represent "All civil immigration detainees incarcerated at the Otay Mesa Detention Center who are age 45 years or older or who have medical conditions that place them at heightened risk of severe illness or death from COVID-19" ("the Otay Mesa Medically Vulnerable Subclass"). (Compl. ¶155.) Mr. Rodriguez Alcantara alleges Defendants are violating Plaintiffs' Fifth Amendment rights to substantive due process by subjecting Plaintiffs "to punishment or unreasonable heightened risk of contracting COVID-19" for no legitimate reason or justification. (*Id.* ¶167.) He also alleges Defendants' practices, "including but not limited to maintaining population levels too high for social distancing to be possible," subjects Plaintiffs "to an unreasonable risk of serious harm, including severe illness and death, in violation of their due process rights." (*Id.*)

In the present motions, Plaintiffs request that the Court provisionally certify the Otay Mesa Medically Vulnerable Subclass and issue an emergency temporary restraining order, preliminary injunction and writ of habeas corpus securing the immediate release of all members of that Subclass. The Federal Defendants and Defendant Christopher LaRose, the Warden of Otay Mesa, each filed an opposition to the motion, and Plaintiffs filed a reply. The motions came on for hearing on April 28, 2020. After the hearing, Warden LaRose filed a supplemental brief indicating that the number of high risk ICE detainees at Otay Mesa was not the 8 represented in his brief and at oral argument, but was in the range of 51-69. Plaintiffs filed a response to that brief, and the Court thereafter held a status

conference with counsel to discuss the newly discovered facts. During that conference, counsel for Warden LaRose represented to the Court that he received the updated numbers from the Federal Defendants as part of their compliance with a preliminary injunction issued in another class action case, *Fraihat v. U.S. Immigration and Customs Enforcement*, ___ F.Supp.3d ___, No. EDCV 19-1546 JGB (SHKx), 2020 WL 1932570 (C.D. Cal. Apr. 20, 2020). At the conclusion of that conference, the Court issued an oral ruling granting in part Plaintiffs' motion to certify the Otay Mesa Medically Vulnerable Subclass and granting the emergency motion for a TRO. In that oral ruling and in the order that followed, (ECF No. 38), the Court stated it would set out its reasoning for those decisions in a more detailed order to follow. This order sets out that reasoning.

I.
BACKGROUND

Otay Mesa Detention Center houses both ICE detainees and United States Marshals Service detainees. (Decl. of Warden C. LaRose in Supp. of Opp'n to Mot. ("LaRose Decl.") ¶7.) It has a design capacity of 1,970 detainees, (*id.* ¶8), but as of April 26, 2020, was operating at 50% capacity, with 987 detainees. (*Id.* ¶12.) Six hundred sixty-two of those detainees are ICE detainees, 649 of which are in the general population and 13 of which are assigned to Restricted Housing Units ("RHUs"). (*Id.*)

OMDC has instituted a number of new policies and practices to address the spread of COVID-19 in the facility, including (1) the suspension of new detainee admissions, social visits, volunteer entry and regularly scheduled facility audits, (2) health screening of all persons entering the facility, (3) posting educational materials throughout the facility, (4) increased sanitation, (5) provisions of masks to detainees, and (6) requiring employees to use personal protective equipment.

OMDC has also instituted the practice of protective cohorting and medical quarantine/isolation strategies. (*Id.* ¶28.) "Protective cohorts are considered 'protective areas,' the opposite of a containment area, the objective being to keep the space free of the COVID-19 virus." (*Id.* ¶36.)

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> The purpose of establishing protective cohorts is to limit contact between the identified vulnerable detainees and the general population and thus eliminate or decrease COVID-19 exposure and infection to those deemed high-risk. General population detainees who are at heightened risk of infection from COVID-19 due to age (currently 60 or over), heart disease, diabetes, lung disease, etc., but have not been exposed to the virus are moved into housing pods, separate from the lower risk population.

(*Id.* ¶35.) According to Warden LaRose,

> [c]ohort housing/quarantine is not a punitive measure, nor [ ] does it mean that detainees are subjected to conditions of confinement in line with heightened restrictions placed on RHU detainees. Rather, detainees are provided with the same activities and opportunities as their normal general population status, including access to recreation, dayroom time, programming, commissary, legal visitation (including virtual visits when possible,), video court appearances, telephone calls, detainee mail operations, legal research via housing pod kiosks, library access via request/delivery from the librarian, and legal copy requests via the facility librarian, subject to COVID-19 restricted movement protocols that now bring services to the pod versus detainees moving throughout the facility for the same.

(*Id.* ¶42.) During the April 30 status conference, counsel for Warden LaRose acknowledged that OMDC instituted the practice of protective cohorting even though ICE's Health Service Corps ("IHSC"), which provides healthcare service to ICE detainees at Otay Mesa, (*id.* ¶8), does not do so.

Consistent with this practice of protective cohorting, on or about March 23, 2020, IHSC produced "a list of 15 ICE OMDC detainees … identified as having heightened COVID-19 risk-factors." (*Id.* ¶37.) OMDC staff thereafter "moved the identified vulnerable ICE detainees into previously empty units to establish protective cohorts, separated from the rest of the detainee population." (*Id.* ¶38.) Those detainees are currently housed in R Pod. (*Id.* ¶39.) R Pod has capacity for 128 detainees,[1] but as of

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[1] In his Declaration, Warden LaRose initially represented that R Pod had capacity for 64 detainees, but during the April 30 status conference, his counsel clarified that R Pod is actually a 128-bed unit.

April 26, 2020, was housing only 20 ICE detainees, all male.[2] (*Id.*) As of April 28, 2020, the number of high-risk detainees in R Pod had decreased to eight. "Detainees in R Pod have not had any positive COVID-19 tests." (*Id.*)

This practice of protective cohorting, however, does not appear to be working as planned. As mentioned above, there are somewhere between 43 and 61 additional detainees in Otay Mesa who IHSC has recently identified as being at high risk for severe complications from COVID-19. As of April 30, 2020, Warden LaRose did not know where those detainees were being housed, *i.e.*, whether they were in a protective cohort or in one of the other ten available housing units,[3] all of which, save one (J Pod), had at least one confirmed case of COVID-19.

As for the J Pod, Warden LaRose states it has capacity for 128 detainees, although as of April 26, 2020, it was housing only 102 detainees. Warden LaRose explains that J Pod is an open sleeping bay unit, which is apparent in the photographs attached to his Declaration. (LaRose Decl., Attach. 12.) In addition to the open sleeping bays, J Pod has a dayroom area where detainees are allowed to congregate. Although OMDC promotes social distancing in these areas, it does not require social distancing between detainees, and claims there is no way for it to enforce that practice. Indeed, OMDC admits that detainees are not social distancing from each other, which is confirmed in the photos of J Pod. (*Id.*)

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[2] According to Warden LaRose, female detainees "identified as having heightened COVID-19 risk factors have left OMDC." (*Id.*)

[3] It appears there are fifteen housing units at OMDC. (*Id.* ¶102.) One (R Pod) is currently being used as a protective cohort for high risk detainees. Four others (Pods E, H, K and L) are currently being used as Medical Unit Housing overflow. (*Id.* ¶52.)

II.

MOTION FOR CLASS CERTIFICATION[4]

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)). To qualify for the exception to individual litigation, the party seeking class certification must provide facts sufficient to satisfy the requirements of Federal Rule of Civil Procedure 23(a) and (b). *Doninger v. Pacific Northwest Bell, Inc.*, 564 F.2d 1304, 1308-09 (9th Cir. 1977). "The Rule 'does not set forth a mere pleading standard.'" *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (quoting *Dukes*, 564 U.S. at 350). "Rather, a party must not only 'be prepared to provide that there are *in fact* sufficiently numerous parties, common questions of law or fact,' typicality of claims of defenses, and adequacy of representation, as required by Rule 23(a). The party must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b)[.]" *Id.* (quoting *Dukes*, 564 U.S. at 350) (internal citation omitted).

Federal Rule of Civil Procedure 23(a) sets out four requirements for class certification—numerosity, commonality, typicality, and adequacy of representation. A showing that these requirements are met, however, does not warrant class certification. The plaintiff also must show that one of the requirements of Rule 23(b) is met. Here, Plaintiffs assert they meet the requirements of Rule 23(b)(2).

Rule 23(b)(2) allows class treatment when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole[.]" Fed. R. Civ. P. 23(b)(2). Because the relief requested in a (b)(2) class is prophylactic, enures to the benefit of each class member, and is based on accused conduct that applies uniformly

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[4] In accordance with the Court's April 24, 2020 Order Setting Hearing and Providing Guidance on Further Briefing, the discussion that follows relates only to the Otay Mesa Medically Vulnerable Subclass.

to the class, notice to absent class members and an opportunity to opt out of the class is not required. *See Dukes*, 564 U.S. at 361-62 (noting relief sought in a (b)(2) class "perforce affect[s] the entire class at once" and thus, the class is "mandatory" with no opportunity to opt out).

The district court must conduct a rigorous analysis to determine whether the prerequisites of Rule 23 have been met. *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982). It is a well-recognized precept that "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978) (quoting *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963)). However, "[a]lthough some inquiry into the substance of a case may be necessary to ascertain satisfaction of the commonality and typicality requirements of Rule 23(a), it is improper to advance a decision on the merits to the class certification stage." *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 480 (9th Cir. 1983) (citation omitted); *see also Nelson v. United States Steel Corp.*, 709 F.2d 675, 680 (11th Cir. 1983) (plaintiff's burden "entails more than the simple assertion of [commonality and typicality] but less than a prima facie showing of liability") (citation omitted). Rather, the court's review of the merits should be limited to those aspects relevant to making the certification decision on an informed basis. *See* Fed. R. Civ. P. 23 advisory committee notes. If a court is not fully satisfied that the requirements of Rule 23(a) and (b) have been met, certification should be refused. *Falcon*, 457 U.S. at 161.

B. Rule 23(a)

Rule 23(a) and its prerequisites for class certification—numerosity, commonality, typicality, and adequacy of representation—are addressed in turn.

1. Numerosity

Rule 23(a)(1) requires the class to be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1); *Staton v. Boeing Co.*, 327 F.3d 938, 953 (9th Cir. 2003). The plaintiff need not state the exact number of potential class members; nor is a specific minimum number required. *Arnold v. United Artists Theatre Circuit, Inc.*, 158

F.R.D. 439, 448 (N.D. Cal. 1994). Rather, whether joinder is impracticable depends on the facts and circumstances of each case. *Id.*

Here, Plaintiffs asserted in their motion that there were at least 15 detainees in Otay Mesa who were medically vulnerable to COVID-19. (Mot. for Class Cert. at 13.) Defendants initially asserted there were only 8 high risk ICE detainees in Otay Mesa, and based on that number, Defendants argued the numerosity requirement was not satisfied. (Opp'n to Mot. for Class Cert. at 6 n.6.) However, they have withdrawn that argument in light of the updated numbers set out in Warden LaRose's supplemental brief. In light of that filing, the Court finds the numerosity requirement is satisfied.

2. Commonality

The second element of Rule 23(a) requires the existence of "questions of law or fact common to the class[.]" Fed. R. Civ. P. 23(a)(2). This element has "'been construed permissively,' and '[a]ll questions of fact and law need not be common to satisfy the rule.'" *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998)). "However, it is insufficient to merely allege any common question[.]" *Id.* Instead, the plaintiff must allege the existence of a "common contention" that is of "such a nature that it is capable of classwide resolution[.]" *Dukes*, 564 U.S. at 350. As summarized by the Supreme Court:

> What matters to class certification ... is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of commons answers.

Id. (quoting Richard A. Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. Rev. 97, 132 (2009)).

In this case, Plaintiffs assert the commonality requirement is met because all subclass members are confined in Otay Mesa, and all are at high risk for severe illness or death from COVID-19. Defendants do not dispute these assertions. Instead, they raise other arguments, none of which is persuasive.

First, Defendants argue that although each subclass member is at high risk, each has a different risk profile. (Opp'n to Mot. for Class Cert. at 9.) This may be true, but it does not detract from the undisputed common feature of the subclass, which is that each member is at high risk.

Second, Defendants assert Plaintiffs have failed to present evidence that the subclass members are subject to a common practice at Otay Mesa. However, Plaintiffs' claim is not based on any specific policy or practice. Rather, Plaintiffs are challenging their continued confinement and the conditions of that confinement in a congregate environment that is in the midst of the worst outbreak of COVID-19 in any ICE detention facility in the country. As so construed, Defendants' argument does not defeat a finding of commonality.

Third, Defendants contend that commonality does not exist here because "the Court must determine whether the facility was aware of each detainee's vulnerable condition and consider the measures taken to abate their specific risk." (*Id.* at 10.) Contrary to Defendants' argument, however, Plaintiffs' claim does not require a showing that Defendants were aware of the medical vulnerabilities of each subclass member, nor does it require investigation into the measures taken to protect each one individually. The only test for Plaintiffs' claim is whether the continued confinement or conditions of confinement of subclass members in Otay Mesa, in light of the spread of COVID-19 throughout the facility, amounts to punishment. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). That is a question common to the subclass, and its answer will drive resolution of the case.

Defendants' other arguments about whether each subclass member is suitable for release, and that conditions should be placed on each subclass members' release, are addressed in the Court's temporary restraining order, and thus they do not defeat a finding of commonality. On the contrary, the Court finds there are questions of law and fact common to this subclass.

3. Typicality

The next requirement of Rule 23(a) is typicality, which focuses on the relationship of facts and issues between the class and its representatives. "[R]epresentative claims are

'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020. "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (citation and internal quotation marks omitted). The typicality requirement will occasionally merge with the commonality requirement, *Parsons*, 754 F.3d at 687, because "[b]oth serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Dukes*, 564 U.S. at 349 n.5.

Here, Plaintiffs rely on the arguments raised on commonality to support a showing of typicality, namely, that Mr. Rodriguez Alcantara is detained in Otay Mesa and is medically vulnerable to COVID-19. Again, Defendants do not dispute these facts, but they argue Mr. Rodriguez Alcantara is nonetheless atypical of the proposed subclass. Specifically, they assert he does not meet the CDC guidelines for medical vulnerability because he has not shown his HIV is "poorly controlled." (Opp'n to Mot. for Class Cert. at 13.)

In support of their argument, Defendants cite to a CDC website, but that link is no longer active. Based on the Court's review of the CDC website, people who are immunocompromised, including those having "HIV with a low CD4 cell count or not on HIV treatment," may be at higher risk. https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html. In his Declaration, Mr. Rodriguez Alcantara states OMDC staff have tested his blood, but they have not provided him with the results of those tests, including his CD4 count and viral load. (Decl. of Adrian Rodriguez Alcantara in Supp. of Mot. for Class Cert. ¶5.) Thus, Mr. Alcantara does not know whether he is currently suffering from a low CD4 cell count. Defendants did not provide that

information in their briefing, therefore the Court is also unable to make that determination. Nevertheless, Mr. Rodriguez Alcantara's HIV status, in itself, appears to place him in the category of "immunocompromised" individuals who may be at higher risk from COVID-19. As such, his claim is typical of the claims of subclass members.

4. Adequacy of Representation

The final requirement of Rule 23(a) is adequacy. Rule 23(a)(4) requires a showing that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This requirement is grounded in constitutional due process concerns; "absent class members must be afforded adequate representation before entry of a judgment which binds them." *Hanlon*, 150 F.3d at 1020 (citing *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940)). In reviewing this issue, courts must resolve two questions: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Id.* (citing *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978)). The named plaintiffs and their counsel must have sufficient "zeal and competence" to protect the interests of the rest of the class. *Fendler v. Westgate-California Corp.*, 527 F.2d 1168, 1170 (9th Cir. 1975).

Here, Plaintiffs assert there is no conflict between Mr. Rodriguez Alcantara and his counsel and other subclass members, and that they will vigorously represent the class. Defendants do not dispute that the adequacy requirement is met, and the Court so finds.

C. Rule 23(b)

Having satisfied the requirements of Rule 23(a), the next issue is whether Plaintiffs have shown that at least one of the requirements of Rule 23(b) is met. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614-15 (1997). Here, Plaintiffs assert they have met the prerequisites of certification for a class under Rule 23(b)(2).

Under Rule 23(b)(2), class certification may be appropriate where a defendant acted or refused to act in a manner applicable to the class generally, rendering injunctive and declaratory relief appropriate to the class as a whole. Fed. R. Civ. P. 23(b)(2).

> The key to the (b)(2) class is "the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." [citation omitted] In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant.

Dukes, 564 U.S. at 360.

Here, Plaintiffs argue the subclass is particularly suited for certification under Rule 23(b)(2) because Defendants are acting on grounds generally applicable to the subclass, and the injunctive relief sought is appropriate for the subclass as a whole. Defendants do not address Rule 23(b)(2), but the Court agrees with Plaintiffs that this case meets its requirements.

The only other issue on certification is whether the *Fraihat* decision precludes certification of the subclass in this case. In *Fraihat*, the court granted provisional class certification to two subclasses that could possibly overlap with the Otay Mesa Medically Vulnerable Subclass proposed here. Those subclasses include detainees in ICE custody who (1) are over 55 years of age and have certain Risk Factors that place them at heightened risk of severe illness and death upon contracting COVID-19 and (2) have certain disabilities that place them at heightened risk of severe illness and death upon contracting COVID-19. *Fraihat v. Immigration and Customs Enforcement*, No. EDCV 19-1546 JGB (SHKx), 2020 WL 1932393, at *1 (C.D. Cal. Apr. 20, 2020). Plaintiffs here argue the Otay Mesa Medically Vulnerable Subclass is different in that it includes people age 45 and older. They also assert the relief sought in this case is different from that ordered in *Fraihat*.

Although there is some overlap between this case and *Fraihat*, this Court declines to find that *Fraihat* precludes certification of the Otay Mesa Medically Vulnerable Subclass. As stated in a recent decision addressing this issue, "It does not appear that Judge Bernal intended, by the general nationwide relief he ordered, to interfere with the ability of facility-specific litigation to proceed. Nor, in any event, does a nationwide class action

covering specific relief at specific facilities seem manageable." *Zepeda Rivas v. Jennings*, ___ F.Supp.3d ___, No. 20-cv-02731-VC, 2020 WL 2059848, at *4 (N.D. Cal. Apr. 29, 2020). This Court agrees with that reasoning, and thus declines to deny the present motion in light of *Fraihat*.

In light of the above, the Court grants Plaintiffs' motion for certification of the Otay Mesa Medically Vulnerable Subclass, with one modification: Plaintiffs request certification of a subclass of detainees age 45 years or older on the ground that people in this age group may be at higher risk of severe illness or death from COVID-19. Notably, CDC guidelines do not cover this age group. Rather, they define "older adults" at higher risk from COVID-19 as persons "65 years old and older[,]" https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html, and ICE considers detainees at higher risk if they are age 60 or older. (Decl. of Kelley Beckhelm Assistant Officer in Charge of Immigration and Customs Enforcement Enforcement and Removal Operations Otay Mesa Detention Facility ¶21 n.3.) Given the CDC and ICE guidelines, and the lack of accepted evidence to support a finding that people between the ages of 45 and 59 are at the same heightened risk as those 60 years old and above, the Court declines to include them in the Otay Mesa Medically Vulnerable Subclass. With that modification, the Court provisionally certifies the following subclass under Federal Rule of Civil Procedure 23(b)(2):

> All civil immigration detainees incarcerated at the Otay Mesa Detention Center who are age 60 or over or who have medical conditions that place them at heightened risk of severe illness or death from COVID-19 as determined by CDC guidelines.

Plaintiff Rodriguez Alcantara is appointed as Subclass Representative, and Counsel from the ACLU Foundation of San Diego and Imperial Counties are appointed as counsel for this Subclass pursuant to Federal Rule of Civil Procedure 23(g).

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III.

EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER

Turning to Plaintiffs' motion for a TRO, the purpose of a TRO is to preserve the status quo before a preliminary injunction hearing may be held; its provisional remedial nature is designed merely to prevent irreparable loss of rights prior to judgment. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 439 (1974). The standard for issuing a temporary restraining order is identical to the standard for issuing a preliminary injunction. *Lockheed Missile & Space Co., Inc. v. Hughes Aircraft Co.*, 887 F. Supp. 1320, 1323 (N.D. Cal. 1995). Injunctive relief is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). To meet that showing, Plaintiffs must demonstrate "'[they are] likely to succeed on the merits, that [they are] likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is in the public interest.'" *Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting *Winter*, 555 U.S. at 20).[5]

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[5] Warden LaRose argues Plaintiffs are requesting a mandatory injunction rather than a prohibitory injunction. The Ninth Circuit applies separate standards for injunctions depending on whether they are prohibitory, *i.e.* they prevent future conduct, or mandatory, *i.e.* "they go beyond 'maintaining the status quo[.]'" *Hernandez v. Sessions*, 872 F.3d 976, 997 (9th Cir. 2017). To the extent Plaintiffs are requesting mandatory relief, that request is "subject to a higher standard than prohibitory injunctions," namely that relief will issue only "when 'extreme or very serious damage will result' that is not capable of compensation in damages,' and the merits of the case are not 'doubtful.'" *Id.* at 999 (quoting *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009)). The Ninth Circuit recognizes that application of these different standards "is controversial[,]" and that other Circuits have questioned this approach. *Id.* at 997-98. This Court need not, and does not, address that discrepancy here. To the extent some portion of Plaintiffs' requested relief is subject to a standard higher than the traditional standard for injunctive relief, Plaintiffs have met their burden for the reasons set out below.

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A. Likelihood of Success[6]

"The first factor under *Winter* is the most important—likely success on the merits." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015). While Plaintiffs carry the burden of demonstrating likelihood of success, they are not required to prove their case in full at this stage but only such portions that enable them to obtain the injunctive relief they seek. *See Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).

As stated above, the only claim alleged in this case is that Defendants are violating Plaintiffs' rights to substantive due process under the Fifth Amendment. To prevail on this claim, Plaintiffs must show their continued confinement or their conditions of confinement amount to punishment. *Bell*, 441 U.S. at 535. In *Bell*, the Supreme Court stated that "if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.'" *Id.* at 539. "Conversely, if a restriction or condition is not reasonably related to a legitimate goal-if it is arbitrary or purposeless-a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees." *Id.* The Ninth Circuit, expanding upon *Bell*, has held that a condition or restriction of confinement "is 'punitive' where it is intended to punish, or where it is 'excessive in relation to [its non-punitive] purpose,' or is 'employed to achieve objectives that could be accomplished in so many alternative and less harsh methods[.]'" *Jones v. Blanas*, 393 F.3d 918, 934 (9th Cir. 2004) (citations omitted).

Numerous courts across the country have considered whether, in light of the COVID-19 pandemic, the continued confinement of ICE detainees or conditions of confinement at federal detention facilities amounts to punishment in violation of the Fifth

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[6] Defendants argue the Court lacks jurisdiction over Plaintiffs' habeas petition, therefore Plaintiffs' do not have a likelihood of success on the merits of their claim. Defendants raised this same argument in *Habibi v. Barr*, No. 20cv0618 BAS(RBB), 2020 WL 1864642 (S.D. Cal. Apr. 14, 2020). The *Habibi* court rejected the argument, *id.* at *2 n.2, and this Court adopts that reasoning and conclusion here.

Amendment's substantive due process clause. *See*, *e.g.*, *Zepeda Rivas*, ___ F.Supp.3d ___, 2020 WL 2059848 (N.D. Cal. Apr. 29, 2020); *Doe v. Barr*, No. 20-CV-02263-RMI, 2020 WL 1984266 (N.D. Cal. Apr. 27, 2020); *Martinez Franco v. Jennings*, No. 20-CV-02474-CRB, 2020 WL 1976423 (N.D. Cal. Apr. 24, 2020); *Fraihat*, 2020 WL 1932570; *Singh v. Barr*, No. 20-CV-02346-VKD, 2020 WL 1929366 (N.D. Cal. Apr. 20, 2020); *Lopez-Marroquin v. Barr*, No. 20cv0682 LAB(MDD), 2020 WL 1905341 (S.D. Cal. Apr. 17, 2020); *Habibi*, 2020 WL 1864642; *Perez v. Wolf*, No. 5:19-CV-05191-EJD, 2020 WL 1865303 (N.D. Cal. Apr. 14, 2020); *Bent v. Barr*, No. 19-CV-06123-DMR, 2020 WL 1812850 (N.D. Cal. Apr. 9, 2020); *Ortuño v. Jennings*, No. 20-CV-02064-MMC, 2020 WL 1701724 (N.D. Cal. Apr. 8, 2020); *Dawson v. Asher*, No. C20-0409JLR-MAT, 2020 WL 1704324 (W.D. Wash. Apr. 8, 2020); *Xuyue Zhang v. Barr*, ___ F.Supp.3d ___, No. ED CV 20-00331-AB(RAOX), 2020 WL 1502607 (C.D. Cal. Mar. 27, 2020); *Castillo v. Barr*, ___ F.Supp.3d ___, No. CV 20-00605 TJH (AFMX), 2020 WL 1502864 (C.D. Cal. Mar. 27, 2020). In the Ninth Circuit, the majority of district courts that have considered the issue have concluded there is a likelihood plaintiffs will prevail on those claims. *See*, *e.g.*, *Zepeda Rivas*, 2020 WL 2059848; *Doe*, 2020 WL 1984266; *Singh*, 2020 WL 1929366; *Fraihat*, 2020 WL 1932570; *Perez*, 2020 WL 1865303. This Court agrees with that majority.

Although "under normal circumstances" the confinement of ICE detainees "pending removal proceedings is rationally related to the legitimate governmental interest of ensuring their appearance for their deportation proceedings and preventing danger to the community[,]" *Lopez-Marroquin*, 2020 WL 1905341, at *5, the current circumstances, and in particular, the circumstances at Otay Mesa, are anything but normal. As of April 30, 2020, there have been 490 confirmed cases of COVID-19 among those in ICE custody out of 1,030 detainees who have been tested, https://www.ice.gov/coronavirus, which translates to a near fifty-percent infection rate. Otay Mesa currently has the highest number of cases (98) in any ICE detention facility, *id.*, and all but one of its available housing units are currently under quarantine with at least one confirmed case of COVID-19.

Under these circumstances, then, the question becomes whether the continued confinement of the Otay Mesa Medically Vulnerable Subclass is excessive in relation to its purpose, namely preventing danger to the community and ensuring appearance at deportation hearings, or if that purpose could be achieved by less severe alternatives. There is no dispute that such alternatives are available. Accordingly, Plaintiffs have demonstrated a likelihood of success on their due process claim.

B. Irreparable Injury and Balance of Equities

Turning to the next two factors, Plaintiffs must show they are "'likely to suffer irreparable harm in the absence of preliminary relief[,]'" and demonstrate that "'the balance of equities tips in [their] favor.'" *Hernandez*, 872 F.3d at 995 (quoting *Winter*, 555 U.S. at 20). Plaintiffs have met their burden.

The subclass at issue here is comprised of individuals who are medically vulnerable to severe illness and death if they contract COVID-19. That these individuals are more susceptible to severe and dire consequences is not reasonably in dispute. Defendants do dispute whether these individuals are at any greater risk of contracting COVID-19 in the first place, but given the circumstances under which these individuals are being held, it is clear they are at high risk. As stated above, Otay Mesa currently has the highest number of confirmed COVID-19 cases among all ICE detention facilities. The number of positive cases has gone from 25 on April 15 to 98 as of April 30, which is nearly a four-fold increase. Furthermore, although Defendants have instituted new policies and procedures in response to the COVID-19 outbreak, it is clear those policies and procedures are insufficient to protect the medically vulnerable population. Indeed, Warden LaRose admitted he did not have an accurate count of the medically vulnerable detainees in Otay Mesa until yesterday, and he was unable to tell the Court where the overwhelming majority of those detainees were currently being housed. Given the significant number of additional medically vulnerable detainees identified yesterday (43-61), the evidence that only two pods are currently free of COVID-19 infection, and one of those pods, the J Pod, is currently at near 80% capacity and detainees in that Pod are not practicing social distancing, the Otay Mesa

Medically Vulnerable Subclass is at great risk of contracting COVID-19. Thus, there is a likelihood of irreparable harm in the absence of a TRO.

The balance of equities also weighs in favor of a TRO. On Plaintiffs' side, the issuance of a TRO will reduce the likelihood that subclass members will contract COVID-19, and hopefully mitigate the spread of the virus in Otay Mesa. Defendants argue the equities weigh in their favor, as the government has an interest in addressing flight risk and protecting the public from dangerous persons. As stated above, however, flight risk may be addressed through alternatives to detention, and the Court's TRO preserves Defendants' discretion to maintain custody of individuals who may present a danger to the community. The Court's TRO also addresses Defendants' concern about setting appropriate conditions for release. For these reasons, the Court finds the balance of equities weighs in favor of issuance of the TRO.

C. Public Interest

The final factor for consideration is the public interest. *See Hernandez*, 872 F.3d at 996. To obtain the requested relief, "[p]laintiffs must demonstrate that the public interest favors granting the injunction 'in light of [its] likely consequences,' i.e., 'consequences [that are not] too remote, insubstantial, or speculative and [are] supported by evidence.'" *Id.* (quoting *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009)).

As with the balance of equities discussed above, the public interest here also weighs in favor of issuing the TRO. As Plaintiffs point out, the public has an interest in preventing the spread of the coronavirus, both in the general population and elsewhere. It also has an interest in protecting the most vulnerable from the severe repercussions they face if infected with the coronavirus. These interests, combined with Defendants' continued ability to exercise their discretion to determine who is to be released and under what conditions, are all served by the issuance of the TRO.

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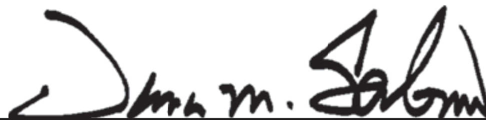
IV.

CONCLUSION

For these reasons, and for the reasons set out during the April 30 status conference and the order that followed, the Court grants in part Plaintiffs' motion for class certification, as set out above. The Court also confirms its issuance of the TRO set out in its April 30, 2020 Order (ECF No. 38).

IT IS SO ORDERED.

DATED: May 1, 2020



DANA M. SABRAW
United States District Judge

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

TATALU HELEN DADA, *ET AL.* **Petitioners**	**CIVIL DOCKET NO. 1:20-CV-00458**
VERSUS	**JUDGE DRELL**
DIANNE WITTE, *ET AL.* , **Respondents**	**MAGISTRATE JUDGE PEREZ-MONTES**

REPORT AND RECOMMENDATION

Petitioners are civil immigration detainees. All await removal or other immigration proceedings. All attest that they are particularly vulnerable to the novel coronavirus, or "COVID-19." And all seek immediate release from custody to until they are removed from the United States or their immigration proceedings are resolved. Respondents are the Department of Homeland Security/United States Immigration and Customs Enforcement ("ICE") and various officials responsible for some aspect of Petitioners' detention. Respondents oppose Petitioners' release on jurisdictional and substantive grounds.

Both sides advance legitimate positions. And together, they have established a substantial record. The Court must decide whether Petitioners are entitled to release given the risk factors associated with their detention, including their individual vulnerabilities to COVID-19.

Petitioners may seek habeas corpus relief under 28 U.S.C. § 2241 and injunctive relief under Fed. R. Civ. P. 65. The Due Process Clause of the Fifth

Amendment requires release if, given a particular situation, a Petitioner's detention is no longer reasonably related to legitimate governmental purposes.

The relevant facts facing Petitioners, ICE, correctional officers, and the public, may also favor release. Under ordinary circumstances, ICE often releases civil detainees who do not pose a risk of flight or danger. Under these extraordinary circumstances, release is an even more viable option. Densely-populated facilities endanger those detained and working inside. That danger spills into surrounding communities. For these reasons, thousands of federal prisoners, state prisoners, and ICE detainees have already been conditionally released from detention facilities.[1]

In this case, 13 of the 16 Petitioners should also be conditionally released. One remaining Petitioner has tragically tested positive for COVID-19. Another has been released. And another has failed to establish a present right to release. All Petitioners' immigration proceedings will proceed as normal, and any other detainee's circumstances remain unchanged. But these Petitioners have established that their detention poses a grave and unconstitutional risk while failing to meaningfully serve ICE's or the public's interest. As such, injunctive relief is warranted under the Due Process Clause of the Fifth Amendment.

[1] The United States Bureau of Prisons has released 1,805 prisoners to home confinement. *COVID-19 Home Confinement Information*, https://www.bop.gov/coronavirus/index.jsp (last visited Apr. 30, 2020). And the Chief Justice of the Louisiana Supreme Court has urged Louisiana judges to "minimize the number of people detained in jails where possible." *Letter to the Louisiana District Judges*, Apr. 2, 2020, https://www.lasc.org/COVID19/2020-04-02-LASC-ChiefLetterReCOVID-19andjailpopulation.pdf.

I. Background

A. Procedural Background

Counsel for Petitioners originally filed this lawsuit in the United States District Court for the Eastern District of Louisiana. *Dada v. Witte*, No. CV 20-1093, 2020 WL 1674129 (E.D. La. Apr. 6, 2020). But Petitioners are all presently detained in this District. So the Eastern District dismissed the suit without prejudice under the "immediate custodian rule," which requires Petitioners to seek relief in the district of their confinement. *See id.* at *3.

Petitioners then refiled before this Court, seeking the same relief, including a TRO. *See* ECF Nos. 1, 2. Shortly after filing, the undersigned set an expedited briefing schedule and an evidentiary hearing (hereinafter, the "Hearing"). ECF No. 6. The parties submitted briefs and numerous exhibits.

At the Hearing, counsel for both sides argued, but did not offer additional evidence or testimony. All counsel confirmed that the record before the Court was adequate, and that additional briefing and evidence were unnecessary. However, since the Hearing, counsel for Petitioners have submitted notices and supplemental evidence. Tragically, among these submissions was: (1) a Notice that one Petitioner recently tested positive for COVID-19 (ECF No. 15); and (2) a news article indicating that two guards at Richwood Correctional Center have died after exhibiting symptoms consistent with COVID-19 (ECF No. 16-2).

Petitioners' Motion for TRO (ECF No. 2) remains pending before the Court and ripe for disposition.

B. Factual Background

1. The COVID-19 pandemic threatens human life and vital institutions, particularly at detention centers.

At this juncture, there is likely no need to describe the COVID-19 pandemic in detail. As to its disruption of daily life, one court stated that "[t]he virus has . . . upended American economic and social life, causing schools and businesses to shutter, and even the nominally unaffected to wear masks and stand six feet apart in public." *Adams & Boyle, P.C. v. Slatery*, No. 20-5408, 2020 WL 1982210, at *2 (6th Cir. Apr. 24, 2020). As to its devastating toll upon human life, according to the Centers for Disease Control and Prevention ("CDC"), 1,005,147 cases and 57,505 deaths have been reported in the United States.[2] In Louisiana, 28,001 cases and 1,862 deaths have been reported.[3] And in the Louisiana parishes home to the detention facilities housing Petitioners: (1) Ouachita Parish – 706 cases, 16 deaths; (2) LaSalle Parish – 23 cases; (2) Winn Parish – 32 cases, 2 deaths; (4) Catahoula Parish – 36 cases, 2 deaths; (5) Jackson Parish – 34 cases, 2 deaths; and (6) Evangeline Parish – 49 cases, 1 death.[4]

Given those tragic realities, the United States Court of Appeals for the Fifth Circuit has stated that "COVID-19 poses risks of harm to all Americans." *Valentine v. Collier*, No. 20-20207, 2020 WL 1934431, at *5 (5th Cir. Apr. 22, 2020). At present,

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[2] *Cases in the U.S.*, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (last visited Apr. 30, 2020).

[3] *Louisiana Coronavirus (COVID-19) Information,* available at http://ldh.la.gov/coronavirus/ (last visited Apr. 30, 2020).

[4] *Id.*

COVID-19 remains medically "incurable" in the sense that "[t]here are no drugs or other therapeutics . . . approved by the . . . [(FDA)] to prevent or treat COVID-19."[5] COVID-19 appears to be highly infectious and transmissible, particularly where people are in close physical proximity with one another.[6] "The best way to prevent illness is to avoid being exposed to this virus," specifically by avoiding close contact with others, sanitizing, and wearing protective face covers.[7]

In large part due to these characteristics, COVID-19 has severely impacted detention facilities. This Court and many others have noted particular concern regarding the effect of COVID-19 in prisons. *See, e.g.*, *United States of America v. Vacarra Rogers*, No. CR 3:15-00058-01, 2020 WL 1987350, at *2 (W.D. La. Apr. 27, 2020). The cause is apparent: "As warned by the CDC, conditions of confinement inherently prevent one's ability to socially distance, which, until a treatment is discovered, or a vaccine developed, is the best measure to reduce the spread of the disease." *Sallaj v. U.S. Immigration & Customs Enf't ("ICE")*, No. CV 20-167-JJM-LDA, 2020 WL 1975819, at *3 (D.R.I. Apr. 24, 2020). Thus, "[t]he CDC has acknowledged the particular challenges faced by correctional and detention facilities in controlling the transmission of COVID-19 and has provided some guidance, as

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[5] *CDC Information for Clinicians on Investigational Therapeutics for Patients with COVID-1,* https://www.cdc.gov/coronavirus/2019-ncov/hcp/therapeutic-options.html (last visited Apr. 29, 2020).

[6] *See* How *COVID-19 Spreads*, available at https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Coronavirus-Disease-2019-Basics (last visited Apr. 29, 2020).

[7] *See How to Protect Yourself & Others*, available at https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html (last visited Apr. 29, 2020).

several courts have recognized." *See United States v. Morris*, No. 3:19-CR-573-B, 2020 WL 1694301, at *4 (N.D. Tex. Apr. 6, 2020).

Moreover, "older adults [age 65 and older] and people of any age who have serious underlying medical conditions might be at higher risk for severe illness from COVID-19."[8] Underlying medical conditions may include: (1) chronic lung disease; (2) moderate to severe asthma; (3) serious heart conditions; (4) immunocompromising conditions, including cancer treatment, smoking, bone marrow or organ transplantation, immune deficiencies, poorly controlled HIV or AIDS, and prolonged use of corticosteroids and other immune weakening medications; (5) severe obesity; (6) diabetes; (7) chronic kidney disease undergoing dialysis; and (8) liver disease.[9]

2. Petitioners seek relief specific and limited relief.

Petitioners do not challenge their underlying immigration or removal proceedings. Petitioners also do not seek corrective relief for the specific conditions of their confinement. Instead, and in relevant part, Petitioners seek immediate release given their individual circumstances.

II. Law and Analysis

A. Jurisdiction

1. The Court need only address jurisdiction under 28 U.S.C. § 2241.

"“Federal courts must resolve questions of jurisdiction before proceeding to the merits." *Ashford v. United States*, 463 F. App'x 387, 391-92 (5th Cir. 2012).

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[8] *People Who Are at Higher Risk for Severe Illness*, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html (last visited Apr. 29, 2020).

[9] *Id.*

Petitioners assert several potential bases of jurisdiction. Among them is habeas corpus jurisdiction. Under 28 U.S.C. § 2241(c)(3), a district court may grant a writ of habeas corpus where an individual is "in custody in violation of the Constitution or laws or treaties of the United States."

2. The Court has jurisdiction under § 2241 because Petitioners challenge the "fact and duration" of their detention, not their "conditions of confinement."

Respondents argue that the Court lacks jurisdiction to consider Petitioners' claims under 28 U.S.C. § 2241. This argument is based upon the distinction between "conditions of confinement" claims ("conditions claims") and "fact or duration of confinement" claims ("fact claims"). The parties agree that a petitioner may, and should, assert fact claims under § 2241. *See Poree v. Collins,* 866 F.3d 235, 243 (5th Cir. 2017). But the parties dispute which type of claim Petitioners assert, and which "procedural vehicle" is appropriate for conditions claims. Because Petitioners assert fact claims, not conditions claims, the question regarding the correct procedural vehicle for conditions claims is not addressed. [10]

Like the parties here, courts have long disagreed on these issues. But the United States Supreme Court and the Fifth Circuit have provided meaningful guidance. In *Muhammad v. Close*, for instance, the Supreme Court upheld a state prisoner's right to assert a damages claim under 42 U.S.C. § 1983. 540 U.S. 749, 124

[10] Many courts have approved ICE detainee conditions claims under § 2241. Respondents correctly point out that decisions in this circuit, while consistently skeptical, have not explicitly approved or prohibited § 2241 conditions claims. *See, e.g.*, *Poree*, 866 F.3d at 243 ("While 'fact or duration' claims must be brought under habeas, the Supreme Court [and some other circuit courts] ha[ve] not foreclosed the use of habeas for other kinds of claims.").

S. Ct. 1303, 158 L. Ed. 2d 32 (2004). The prisoner had been convicted of a disciplinary offense and claimed to have suffered damages while detained for that conviction. *See id.* However, the prisoner did not ultimately challenge his conviction; he sought only damages, not expungement or reversal. *See id.* at 754.

The Court emphasized the distinction at issue here:

> Federal law opens two main avenues to relief on complaints related to imprisonment: a petition for habeas corpus, 28 U.S.C. § 2254, and a complaint under the Civil Rights Act of 1871, Rev. Stat. § 1979, as amended, 42 U.S.C. § 1983. Challenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus, *Preiser v. Rodriguez*, 411 U.S. 475, 500, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973); requests for relief turning on circumstances of confinement may be presented in a § 1983 action.

Id. at 750. The Court cited *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), a case which bars § 1983 actions that "would implicitly question the validity of conviction or duration of sentence." *Muhammad*, 540 U.S. at 751. The Court then clarified that the *Heck* prohibition does not apply to "a prisoner's challenge that threatens no consequence for his conviction or the duration of his sentence," in part because "there is no need to preserve the habeas exhaustion rule and no impediment under *Heck* in such a case." *Id.* at 751-52.

Though not directly on point, *Muhammad* is clearly instructive. Petitioners do not attack their underlying immigration proceedings. Like the prisoner in *Muhammad*, Petitioners seek relief that would not risk or affect the validity of their underlying immigration cases.

Still, Respondents argue that claims implicating "conditions" associated with a detention facility must be "conditions claims." But the cases cited by Respondents reveal why it misses the mark, particularly here.

First, Respondents cite cases addressing conditions claims obviously centered upon the "conditions" themselves. To reconcile these cases, Respondents argue that Petitioners here attack the conditions of their confinement as well, including the physical space, sanitary conditions, and available medical care. But in the cited conditions cases and others, *the conditions are the targeted harm*. When fact claims are mentioned, however, *conditions are indicators of the targeted harm: the confinement itself*. *See, e.g.*, *Poree*, 866 at 242 (holding that a challenge to a judge's decision denying a prisoner's transfer to a transitional home and ordering that the prisoner remain in a mental health facility was a fact claim properly asserted as a habeas claim); *Schipke v. Van Buren*, 239 F. App'x 85 (5th Cir. 2007) ("Schipke raised numerous claims pertaining to perceived injustices regarding her medical treatment and the conditions of her detention.").

Second, the remedy for conditions claims is generally corrective. The remedy for fact claims, however, generally terminates the detention altogether, or alters it such that a new form of custody or control is imposed. *See Poree*, 866 F.3d at 244 (""A request for relief from an initial civil confinement institution to a transitional home is similar [to a request for physical release]. Residence in a transitional home—a condition of Poree's release from ELMHS—bridges the gap between his total confinement and total freedom."); *Schipke*, *239 F. App'x at 85* (holding that "a

prisoner cannot avail herself of habeas corpus relief when seeking injunctive relief that, as in this case, is unrelated to the cause of her detention," where a prisoner "sought an order for injunctive relief modifying the conditions of her detention"); *Hernandez v. Garrison*, 916 F.2d 291, 293 (5th Cir. 1990) (a prisoner's Eighth Amendment and discrimination claims, seeking transfer to another facility due to "overcrowding, and denial of medical treatment and access to an adequate law library," were "not a proper subject for a habeas corpus petition"); *Sarres Mendoza v. Barr*, No. CV H-18-3012, 2019 WL 1227494, at *3 (S.D. Tex. Mar. 15, 2019) (dismissing a detainee's damages claims because "compensatory or monetary damages are not available in a habeas corpus proceeding," but deciding the lawfulness of the detainee's continued detention).

These cases and others illustrate that Respondents' arguments must fall short. As a general premise, "the Supreme Court has clearly found jurisdiction under . . . § 2241 in [statutory and constitutional] challenges to post-final-order-of-removal detention." *Ali v. Dep't of Homeland Sec.*, No. 4:20-CV-0140, 2020 WL 1666074, at *2 (S.D. Tex. Apr. 2, 2020) (citing *Clark v. Martinez*, 543 U.S. 371, 386–87 (2005);*Zadvydas v. Davis*, 533 U.S. 678, 688 (2001)). Adopting Respondents' position here would contravene that general premise.

Returning to the distinction between conditions and fact claims, Respondents seem to use the mere mention of a "condition" as the line of demarcation. But the jurisprudence indicates that two different characteristics actually separate conditions claims from fact claims: (1) the nature of the claim; and (2) the remedy

requested. *See, e.g.*, *Preiser v. Rodriguez*, 411 U.S. 475, 500, 93 S. Ct. 1827, 1841, 36 L. Ed. 2d 439 (1973) ("[W]hen a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus.").

As to the first characteristic, by nature, a fact claim challenges the detention itself. Conversely, by nature, a conditions claim attacks circumstances associated with the detention. As to the second characteristic, if a petitioner seeks immediate release or similar relief, the petitioner must do so through a fact claim. But if a petitioner seeks correction of a circumstance or event associated with detention, the petitioner must do so through a conditions claim. *See Coleman v. Dretke*, 409 F.3d 665, 669 (5th Cir. 2005) ("[I]t is well established that release from physical confinement in prison constitutes release from custody for habeas purposes, even though the state retains a level of control over the releasee.").

These characteristics may be "blurry" in some situations. *Poree* 866 F.3d at 168. But the Fifth Circuit clearly endorses them: "Which statutory vehicle to use depends on the nature of the claim and the type of relief requested. . . . '"[R]elease from physical confinement . . . constitutes release from custody for habeas purposes, even though the state retains a level of control over the releasee."' *Id.* (quoting *Coleman v. Dretke*, 409 F.3d 665 (5th Cir. 2005), and collecting other Fifth Circuit cases); *see also Carson v. Johnson*, 112 F.3d 818, 820–21 (5th Cir. 1997) ("If a favorable determination . . . would not automatically entitle [the prisoner] to

accelerated release, . . . the proper vehicle is a § 1983 suit.") (internal citation and quotations omitted). And if Petitioners can neither seek immediate release under § 1983 nor seek immediate release through habeas corpus, alternative remedies would be scarce, if available at all. *Sacal-Micha v. Longoria, No. 1:20-CV-37, 2020 WL 1815691, at *8 (S.D. Tex. Apr. 9, 2020)* (noting, but dismissing, the same concern, because the petitioner had "not demonstrated an absence of alternative remedies that would warrant recognizing his cause of action directly under the Fifth Amendment").

Applying the first characteristic, Petitioner's claims center upon the fact of their detention as the harm to be redressed. Petitioners reference "conditions" associated with their detention only to establish that the fact of detention is no longer "reasonably related to a legitimate government objective" – in other words, to establish that their detention is "punitive" under the circumstances, and therefore, unconstitutional. Applying the second characteristic, Petitioners seek relief available traditionally, if not only, through habeas corpus: release.

Critically, the "conditions" facing Petitioners likely would be implicated by either type of claim. But "[t]he mere fact that Plaintiffs' constitutional challenge requires discussion of conditions in immigration detention does not necessarily bar such a challenge in a habeas petition." *Vazquez Barrera v. Wolf*, No. 4:20-CV-1241, 2020 WL 1904497, at *4 (S.D. Tex. Apr. 17, 2020).[11]

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[11] Respondents also argue that Petitioners' claims are not related to the "cause of detention." The Court disagrees.

The Fifth Circuit has stated that the "sole function" of a habeas corpus petition "is to grant relief from unlawful imprisonment or custody." *Pierre v. United States*, 525 F.2d 933, 935-36 (5th Cir. 1976). The "legality of custody," or the "cause of detention," is its only legitimate

Finally, Respondents suggest that some of the Petitioners' detention is mandatory. But mandatory detention statutes must, and often do, give way to the dictates of the Constitution, including Petitioners' rights under the Fifth Amendment. *See Malam v. Adducci,* No. 20-10829, 2020 WL 1672662, at *13 (E.D. Mich. Apr. 5, 2020), as amended (Apr. 6, 2020) ("Petitioner's continued detention is in violation of the United States Constitution, to which 8 U.S.C. § 1226(c) must give way.").[12] "[T]he Supreme Court has consistently allowed for habeas challenges to

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aim in habeas; "collateral administrative relief" or other unrelated matters are beyond its proper scope. *Id.* Petitioners argue that the "causes" that justified detention have now shifted. *See Vazquez Barrera v. Wolf*, No. 4:20-CV-1241, 2020 WL 1904497, at *6 (S.D. Tex. Apr. 17, 2020) The same logic separates the claims and mechanisms available to pretrial detainees and other civil detainees, and those available to convicted prisoners.

[12] At the Hearing, Respondents argued that the United States had not waived its sovereign immunity regarding Petitioners' claims. Respondents conceded that "§ 2241 waives sovereign immunity," but does not concede to waiver of sovereign immunity for issuance of a TRO. Because Petitioners seek and are entitled to fact claim relief, the appropriate remedy for that relief is a petition for habeas corpus under § 2241. *See Preiser v. Rodriguez,* 411 U.S. 475, 500, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973) (If a Plaintiff wishes to challenge "the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus."); *see also Poree v. Collins*, 866 F.3d 235, 243 (5th Cir. 2017) ("Typically, habeas is used to challenge the fact or duration of confinement, and 42 U.S.C. § 1983 is used to challenge conditions of confinement."); *Anekwu v. Immigration & Customs Enf't*, 1:18-CV-1567-P, 2019 WL 2147931, at *1 (W.D. La. Feb. 14, 2019), *report and recommendation adopted*, 1:18-CV-1567-P, 2019 WL 2134538 (W.D. La. May 15, 2019).

In a factually similar case, the United States District Court for the Eastern District of Michigan found sovereign immunity did not apply in this context, and even if it did, that it had been waived. *See Malam v. Adducci*, 20-10829, 2020 WL 1672662, at *5 (E.D. Mich. Apr. 5, 2020), *as amended* (Apr. 6, 2020) ("Sovereign immunity does not apply in this instance, and even if it did, it has been statutorily waived. Federal courts may exercise the traditional powers of equity in cases within their jurisdiction to enjoin violations of constitutional rights by government officials."). The undersigned agrees entirely with the *Malam* court's reasoning.

detention statutorily mandated by the Immigration and Nationality Act." *See Vazquez Barrera*, 2020 WL 1904497, at *5; *see also Basank v. Decker*, No. 20 CIV. 2518 (AT), 2020 WL 1481503, at *6 (S.D.N.Y. Mar. 26, 2020) ("[C]ourts have the authority to order those detained in violation of their due process rights released, notwithstanding § 1226(c).").[13]

Each day, courts across the country are deciding similar cases arising from the COVID-19 pandemic. Unfortunately, consensus still eludes us. But so far, this Court has identified the same distinction in a different context, and has not reached a contrary result.[14] Other courts – a growing majority, it seems – have arrived at the

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[13] At the Hearing, respondents also pointed out that Petitioners have different personal situations and are housed in different facilities. Petitioners have not sought class certification or formally requested permissive joinder, but instead simply filed the action together as Petitioners. Respondents have not filed a motion requesting that Petitioners' claims be severed or separated into 16 lawsuits. As such, no issue regarding the presence of multiple Petitioners was brought to the Court for decision.

Nevertheless, the Court notes that joinder of Petitioners' claims here is appropriate. The joint adjudication of habeas corpus claims is neither prohibited nor unprecedented, especially where interests of all litigants and judicial economy would be best served. *Hatfield v. Young*, No. 5:18-CV-01265, 2019 WL 4196613, at *6 (S.D.W. Va. June 7, 2019), *report and recommendation adopted,* No. 5:18-CV-01265, 2019 WL 4197117 (S.D.W. Va. Sept. 3, 2019), *aff'd,* 790 F. App'x 547 (4th Cir. 2020) ("[W]hile the joinder of two or more petitioners in one petition is not a common practice in habeas corpus proceedings, joinder is permitted by Rule 20 of the Federal Rules of Civil Procedure and Rule 12 of the Rules Governing Habeas Corpus Cases. . . . Furthermore, [i]n this case, permissive joinder may be preferable, given that the Petitioners wish to pursue relief together and a single action would aid the goal of judicial economy.") (internal quotation omitted). And in the COVID-19 context, other courts are routinely granting relief to multiple detainees in different facilities. *See, e.g.*, *Thakker v. Doll*, No. 1:20-CV-480, 2020 WL 1671563, at *9 (M.D. Pa. Mar. 31, 2020) (ordering that 13 inmates in three facilities be immediately released on their own recognizance).

[14] *See Riggs v. Louisiana,* No. CV 3:20-0495, 2020 WL 1939168, at *1 (W.D. La. Apr. 22, 2020) ("Newton indeed challenges the general prison conditions, but he seeks an accelerated release from prison, which is properly asserted as a habeas action, not as a civil rights action."); *Livas, et al. v. Myers, et al.,* No. 2:20-CV-00422, 2020 WL 1939583, at *7 (W.D. La. Apr. 22,

same or similar results as the results reached here.[15] And others have reached either different or contrary results.[16]

2020) ("[Petitioners] bring this action [for immediate release] under § 2241, which is the proper vehicle for challenging 'the fact or length of confinement.'").

[15] *See, e.g.*, *Vazquez Barrera*, 2020 WL 1904497, at *8 (granting in part a motion for TRO as a preliminary injunction and ordering a detainee's immediate release subject to appropriate conditions); *Essien v. Barr*, No. 20-CV-1034-WJM, 2020 WL 1974761, at *3 (D. Colo. Apr. 24, 2020) ("In theory, these causes of action are oil and water: a habeas claim may lead to an order releasing the prisoner or detainee or nothing at all; whereas a conditions-of-confinement claimant may only lead to an order requiring the government to improve the conditions of confinement, but not an order releasing the prisoner or detainee."); *Martinez Franco v. Jennings*, No. 20-CV-02474-CRB, 2020 WL 1976423, at *3 (N.D. Cal. Apr. 24, 2020) ("[I]t is "fairly well established" that a federal detainee can challenge the conditions of his confinement in an action brought under 28 U.S.C. § 2241."); *Doe v. Barr*, No. 20-CV-02141-LB, 2020 WL 1820667, at *8 (N.D. Cal. Apr. 12, 2020) ("[T]he court can address the petitioner's challenges to the conditions of confinement in a § 2241 petition."); *A.S.M. v. Donahue*, No. 7:20-CV-62 (CDL), 2020 WL 1847158, at *2 (M.D. Ga. Apr. 10, 2020) ("The remedy for this type of claim, however, is modification of the conditions of confinement to eliminate the constitutional violation. Release from custody is not a remedy for this type of claim."); *Mays v. Dart*, No. 20 C 2134, 2020 WL 1812381, at *6 (N.D. Ill. Apr. 9, 2020) ("The plaintiffs' claims, as they have framed them, *do* bear on the duration of their confinement (they contend, ultimately, that they cannot be held in the Jail consistent with the Constitution's requirements), and they are not the sort of claims that are, or can be, appropriately addressed via a claim for damages."); *Malam v. Adducci*, No. 20-10829, 2020 WL 1672662, at *3 (E.D. Mich. Apr. 5, 2020), *as amended* (Apr. 6, 2020) ("Supreme Court and Sixth Circuit precedent support the conclusion that where a petitioner claims no set of conditions would be sufficient to protect her constitutional rights, her claim should be construed as challenging the fact, not conditions, of her confinement and is therefore cognizable in habeas."); *Coreas v. Bounds*, No. CV TDC-20-0780, 2020 WL 1663133, at *7 (D. Md. Apr. 3, 2020) ("First, and most fundamentally, although the grounds on which they seek release relate to their conditions of confinement, Petitioners seek complete release from confinement, which is "the heart of habeas corpus.").

[16] *See, e.g.*, *Jose D. v. Barr, et al.*, No. CV 20-4031 (KM), 2020 WL 1969893, at *4 (D.N.J. Apr. 24, 2020) ("Here, Petitioner is directly challenging the decision to deny his request for parole, which this Court is not authorized to review. Accordingly, this Court lacks jurisdiction over Petitioner's first claim for relief."); *Saillant v. Hoover, et al.*, No. 1:20-CV-00609, 2020 WL 1891854, at *3 (M.D. Pa. Apr. 16, 2020) (holding that immigration detainees stated a conditions claim, but finding the claim cognizable under § 2241 because the circumstances represented an "extreme case"); *Sacal-Micha v. Longoria*, No. 1:20-CV-37, 2020 WL 1815691, at *4 (S.D. Tex. Apr. 9, 2020) (finding a conditions of confinement claim where an elderly immigration detainee requested immediate release, but repeatedly complained that he was held in inadequate or unsafe "conditions").

But the logic of the majority comports with Supreme Court and Fifth Circuit precedent. ICE detainees who are at elevated risk of contracting COVID-19 in a detention facility, and who seek immediate release, may do so through "fact or duration" claims asserted under 28 U.S.C. § 2241.

C. Injunctive Relief

Petitioners seeking immediate injunctive relief in the form of release from custody. ECF No. 2. A TRO is a form of equitable injunctive relief that preserves the status quo until there is an opportunity to hold a full hearing on an application for a preliminary injunction. *Atakapa Indian de Creole Nation v. Louisiana*, CV 18-0190, 2019 WL 660558, at *1 (W.D. La. Jan. 11, 2019) (citing Fed. R. Civ. P. 65(b)).

Rule 65(b) of the Federal Rules of Civil Procedure states, in pertinent part:

> (b)(1) Issuing Without Notice. The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if: (A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss or damage will result to the movant before the adverse party can be heard in opposition; and (B) the movant's attorney certifies in writing any efforts made to give the notice and the reasons why it should not be required.

Here, there has been a full hearing on the application for injunctive relief, and Respondents have been heard. "After an adverse party has been given notice, the court may properly convert a motion for a temporary restraining order into a request for a preliminary injunction." *Confident Care Home Health Servs., Inc. v. Azar*, CV H-18-3604, 2019 WL 3318135, at *2 (S.D. Tex. July 24, 2019) (citing *Esparza v. Board of Trustees*, 182 F.3d 915 (5th Cir. 1999) ("But when the adverse party has notice, the

protective provisions of rule 65(b) do not control, and the court has discretion to consider granting more lasting relief under a [preliminary injunction].")).

For a preliminary injunction, a Petitioner must show: (1) a substantial likelihood that he will prevail on the merits, (2) a substantial threat that he will suffer irreparable injury if the injunction is not granted, (3) that his threatened injury outweighs the threatened harm to the party whom he seeks to enjoin, and (4) that granting the preliminary injunction will not disserve the public interest. *Bhatia v. Warden*, 1:16-CV-1125, 2017 WL 1026054, at *1 (W.D. La. Jan. 24, 2017), report and recommendation adopted, 1:16-CV-1125;, 2017 WL 1017634 (W.D. La. Mar. 15, 2017) (citing *Planned Parenthood of Houston & Southeast Texas v. Sanchez*, 403 F.3d 324, 329 (5th Cir. 2005)).

A preliminary injunction "is an extraordinary and drastic remedy, not to be granted routinely, but only when the movant, by a clear showing, carries a burden of persuasion." Black Fire Fighters Ass'n of Dallas v. City of Dallas, Tex., 905 F.2d 63, 65 (5th Cir. 1990). "The denial of a preliminary injunction will be upheld where the movant has failed sufficiently to establish any one of the four criteria." Black Fire Fighters Ass'n, 905 F.2d at 65; see also Flores, 442 F. App'x at 165.

1. Petitioners may be substantially likely to prevail on the merits.

Petitioners are civil detainees. As a result, Petitioners' detention must remain "nonpunitive in purpose and effect." *Zadvydas v. Davis*, 533 U.S. 678, 690, 121 S. Ct. 2491, 2499, 150 L. Ed. 2d 653 (2001). Prior criminal convictions do not affect this

legal status. *See, e.g.*, *Castillo v. Barr*, No. CV2000605TJHAFMX, 2020 WL 1502864, at *3 (C.D. Cal. Mar. 27, 2020)) (citing *Zadvydas*, 533 U.S.C. at 690).

Civil immigration detainees are specifically entitled to the protections of the Fifth Amendment to the United States Constitution. Its Due Process Clause, in relevant part, forbids the government to "depriv[e]" any "person . . . of . . . liberty . . . without due process of law." Civil detention thus implicates the Due Process Clause: "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects." *Zadvydas*, 533 U.S. at 690. "[T]he Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *See id.* at 693.

The Supreme Court has long held that civil detention must be justified: "[G]overnment detention violates that Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, or, in certain special and 'narrow' nonpunitive 'circumstances,' where a special justification, such as harm-threatening mental illness, outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Zadvydas*, 533 U.S. at 690 (internal citations and quotations omitted). Civil detention becomes unconstitutional when "punitive" in nature, meaning "not [or no longer] reasonably related to a legitimate, non-punitive governmental objective." *Scott v. Moore*, 114 F.3d 51, 53 (5th Cir. 1997).

Thus, it is well settled that a civil immigration detainee is "the equivalent of a pretrial detainee," whose "constitutional claims are considered under the due process

clause instead of the Eighth Amendment." *See Edwards v. Johnson*, 209 F.3d 772, 778 (5th Cir. 2000). However, the parties dispute the standard for Petitioners' claims. Respondents argue that Petitioners must prove ICE officials acted with "subjective deliberate indifference." Petitioners claim that they may prevail by proving that detention is not "reasonably related to a legitimate governmental objective," and therefore "punitive." *Bell v. Wolfish*, 441 U.S. 520, 539, 99 S. Ct. 1861, 1874, 60 L. Ed. 2d 447 (1979). Petitioners also argue, in the alternative, that they have established "subjective deliberate indifference" in ICE's response to COVID-19.

Here, yet another two-part distinction must be considered. And to compound the difficulty, on one side of the distinction are challenges to "general conditions of confinement." The term has different meaning here. On the other side of the distinction are challenges to a "particular act or omission."

The former category of claims is concerned with "constitutional challenges to conditions, practices, rules, or restrictions." *See Hare v. City of Corinth, Miss.*, 74 F.3d 633, 644 (5th Cir. 1996). These challenges are subject to the "reasonable relationship" test outlined by the Supreme Court in *Wolfish*, and restated above. *See Scott v. Moore*, 114 F.3d 51, 53 (5th Cir. 1997). The latter category concerns "episodic acts or omissions" committed by specific officials. *Hare*, 74 F.3d at 644. These challenges require a finding of deliberate indifference. *See Scott*, 114 F.3d at 53.

The Fifth Circuit has described this distinction as well, and in so doing, has clarified that the distinction is separate from "conditions claims" discussed in the habeas corpus context:

> [A] condition may take the form of "a rule," a "restriction," "an identifiable intended condition or practice," or "acts or omissions" by a jail official that are "sufficiently extended or pervasive." *Estate of Henson v. Wichita Cty. Tex.*, 795 F.3d 456, 468 (5th Cir. 2015) (quoting *Duvall v. Dallas Cty.*, 631 F.3d 203, 207 (5th Cir. 2011)). "In some cases, a condition may reflect an unstated or *de facto* policy, as evidenced by a pattern of acts or omissions 'sufficiently extended or pervasive, or otherwise typical of extended or pervasive misconduct by [jail] officials, to prove an intended condition or practice.'" *Shepherd v. Dallas Cty.*, 591 F.3d 445, 452 (5th Cir. 2009) (quoting *Hare*, 74 F.3d at 645). But "isolated examples of illness, injury, or even death, standing alone, cannot prove that conditions of confinement are constitutionally inadequate." *Id.* at 454. To prevail on a claim of unconstitutional conditions of confinement, a plaintiff must show: "(1) 'a rule or restriction or ... the existence of an identifiable intended condition or practice ... [or] that the jail official's acts or omissions were sufficiently extended or pervasive'; (2) which was not reasonably related to a legitimate governmental objective; and (3) which caused the violation of [the inmate's] constitutional rights." *Duvall*, 631 F.3d at 207 (quoting *Hare*, 74 F.3d at 645).

Cadena v. El Paso Cty., 946 F.3d 717, 727 (5th Cir. 2020); *see also Shepherd v. Dallas Cty.*, 591 F.3d 445, 452 (5th Cir. 2009) (a petitioner challenging general conditions "is relieved from the burden of demonstrating a municipal entity's or individual jail official's actual intent to punish"); *contra. Sacal-Micha*, 2020 WL 1815691, at *6 (S.D. Tex. Apr. 9, 2020) ("Sacal [an immigration detainee] does not allege that the conditions under which he is being held amount to punishment.").

In this case, Petitioners' claims challenge extended, pervasive circumstances that they claim are – by act, omission, or plain necessity – prevalent in ICE detention facilities, including the facilities housing them. Petitioners' are more similar to, for instance, a challenge to the "number of bunks in a cell or . . . television or mail privileges." *See Scott*, 114 F.3d at 53. Therefore, Petitioners' claims are subject to the reasonable relationship test, not the deliberate indifference standard. *See id.*; *see*

also Vazquez Barrera, 2020 WL 1904497, at *5 (S.D. Tex. Apr. 17, 2020) (applying the *Wolfish* reasonable relationship standard to ICE detainees' request for immediate release in light of the COVID-19 pandemic); *contra Coronel*, 2020 WL 1487274, at *10 (applying the deliberate indifference standard to immigration detainees' substantive due process claims, but ordering detainees' release).

Under this standard, Petitioners may succeed on their substantive due process claims by establishing that detention does not *reasonable relate* to a legitimate governmental purpose. They may make this showing, for example, by proving that, due to their age, immune deficiencies, or other comorbidities, they face an elevated risk of contracting the virus, or suffering serious illness from it; that their particular circumstances also heighten these risks; and that preventive measures are difficult or impossible, leaving them unduly exposed to contracting the virus. *See Vazquez Barrera*, 2020 WL 1904497, at *5 ("Here, the Court finds that detention of Plaintiffs, who are at high risk of serious illness or death if they contract COVID-19, in MPC, where social distancing and proper hygiene are impossible, does not reasonably relate to a legitimate governmental purpose.").

Importantly, Petitioners' claims must be distinct in some respect. *See Martinez Franco v. Jennings*, No. 20-CV-02474-CRB, 2020 WL 1976423, at *3 (N.D. Cal. Apr. 24, 2020) ("Franco does not identify, and the Court has not seen, a case finding that increased likelihood of contracting the virus rendered unconstitutional the detention of a person without underlying medical conditions or some other vulnerability."). The Fifth Circuit has explained that "[t]he incidence of diseases or

infections, standing alone,' do not 'imply unconstitutional confinement conditions, since any densely populated residence may be subject to outbreaks.'" *Valentine v. Collier*, No. 20-20207, 2020 WL 1934431, at *3 (5th Cir. Apr. 22, 2020) (quoting *Shepherd v. Dallas Cty.*, 591 F.3d 445, 454 (5th Cir. 2009)). This Court has already concluded the same: "[P]risoners are not entitled to release or transfer based solely on generalized COVID-19 fears and speculation." *Riggs v. Louisiana*, No. CV 3:20-0495, 2020 WL 1939168, at *2 (W.D. La. Apr. 22, 2020).[17] Otherwise, the claims of any prisoner or detainee would be equally meritorious – or equally meritless – notwithstanding their individual situations. That result would be untenable.

To separate meritorious claims from generalized risk, some courts have focused upon underlying detainees' medical conditions, detainees' criminal histories or tendency toward violance, and the detention facility's response to the pandemic. *See Vazquez Barrera*, 2020 WL 1904497, at *6. Another court distilled a "non-exhaustive list of factors" to be considered. *Saillant,* 2020 WL 1891854, at *4. The best solution in this case may be to reconcile and supplement those salient approaches. In addressing the merits of Petitioners' requests for habeas relief, the undersigned thus considers the following non-exhaustive list of factors:

> (1) whether the petitioner has been diagnosed with COVID-19 or is experiencing symptoms consistent with the disease;

[17] And so have many others. *See, e.g.*, *United States v. Clark*, No. CR 17-85-SDD-RLB, 2020 WL 1557397, at *4 (M.D. La. Apr. 1, 2020) ("Defendant cites no authority for the proposition that the *fear* of contracting a communicable disease warrants a sentence modification."); *Saillant v. Hoover, et al.,* No. 1:20-CV-00609, 2020 WL 1891854, at *5 (M.D. Pa. Apr. 16, 2020) (denying habeas relief in part because the petitioner sought habeas corpus relief merely because he was "detained and subjected to a generalized risk of contracting COVID-19").

> (2) whether the petitioner is among the group of individuals that is at higher risk of contracting COVID-19 as identified by the CDC, due to the petitioner's age or an underlying health condition;
>
> (3) whether the petitioner has been, or has likely been, directly exposed to COVID-19;
>
> (4) the physical space in which the petitioner is detained, and how that physical space affects his risk of contracting COVID-19;
>
> (5) the efforts that detention facility officials have made to prevent or mitigate the spread of, or harm caused by, COVID-19;
>
> (6) any danger to the community, or to the petitioner's immigration proceedings, that may be posed by the petitioner's release; and
>
> (7) any other relevant factors.

See Saillant, 2020 WL 1891854, at *4; *Vazquez Barrera*, 2020 WL 1904497, at *6.

2. Petitioners may face irreparable harm if not released.

In order to satisfy the "irreparable harm" requirement, Petitioners must establish that "irreparable injury is *likely* in the absence of an injunction." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 129 S. Ct. 365, 375, 172 L. Ed. 2d 249 (2008). But a court "need not await a tragic event" to afford injunctive relief. *Helling v. McKinney*, 509 U.S. 25, 33, 113 S. Ct. 2475, 2481, 125 L. Ed. 2d 22 (1993). Instead, the following familiar principles would apply:

> Perhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered." 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2948.1 (3d ed. 2013) [hereinafter Wright & Miller]. The focus of this inquiry is not so much the magnitude but the irreparability of the threatened harm. *See Callaway*, 489 F.2d at 575. The Fifth Circuit has defined irreparable harm to mean "harm for which there is no adequate remedy at law," such as monetary damages. *Daniels Health Scis., L.L.C. v. Vascular*

> *Health Scis., L.L.C.*, 710 F.3d 579, 585 (5th Cir.2013); *accord Janvey v. Alguire*, 647 F.3d 585, 600 (5th Cir.2011).
>
> Plaintiffs must show that "irreparable injury is *likely* in the absence of an injunction." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). "[A] preliminary injunction will not be issued simply to prevent the possibility of some remote future injury." *Id.* (alteration in original) (quoting Wright & Miller, *supra*, § 2948.1); *Morrell v. City of Shreveport*, 536 Fed.Appx. 433, 435 (5th Cir.2013). There must be more than "an unfounded fear on the part of the applicant." *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir.1985). Accordingly, the party seeking a preliminary injunction must show that the threatened harm is "more than mere speculation." *Janvey*, 647 F.3d at 601; *see also Connecticut v. Massachusetts*, 282 U.S. 660, 674, 51 S.Ct. 286, 75 L.Ed. 602 (1931) ("[An injunction] will not be granted against something merely feared as liable to occur at some indefinite time in the future."); *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C.Cir.1985) ("[T]he injury must be both certain and great; it must be actual and not theoretical."). Therefore, "[a] presently existing actual threat must be shown." *Morrell*, 536 Fed.Appx. at 435 (alteration in original) (quoting *United States v. Emerson*, 270 F.3d 203, 262 (5th Cir.2001)).

Monumental Task Comm., Inc. v. Foxx, 157 F. Supp. 3d 573, 582–83 (E.D. La. 2016), *aff'd sub nom. Monumental Task Comm., Inc. v. Chao*, 678 F. App'x 250 (5th Cir. 2017).

Here, a Petitioner could establish irreparable harm in two ways. First, "[t]he alleged violation of a constitutional right is sufficient for a court to find irreparable harm." *Malam*, 2020 WL 1672662, at *10. Second, a Petitioner may prove that detention constitutes a significant and heightened risk that they will contract COVID-19. *See Coreas v. Bounds*, No. CV TDC-20-0780, 2020 WL 1663133, at *13 (D. Md. Apr. 3, 2020) ("Petitioners have introduced uncontroverted evidence that contracting COVID-19 would put them at serious risk of severe medical complications and even death."). It is difficult to dispute that an elevated risk of contracting

COVID-19 poses a threat of irreparable harm. *See, e.g.*, *Thakker, et al. v. Doll, et al.,* No. 1:20-CV-480, 2020 WL 1671563, at *7 (M.D. Pa. Mar. 31, 2020) (collecting data and cases). A colleague court described the general implications upon immigration detainees with comorbidities as follows:

> The COVID-19 pandemic has reached every state in our nation, and the numbers of infected and dead increase daily. According to the CDC, those with particular medical vulnerabilities, including Plaintiffs, are particularly susceptible to serious illness and death. There is currently no vaccine or cure for COVID-19. Medical experts have also concluded that continued detention in ICE facilities during the current pandemic presents an "imminent risk to the health and safety of immigrant detainees." Letter from Scott A. Allen, MD, FACP & Josiah Rich, MD, MPH to Committee Chairpersons and Ranking Members of House and Senate Committee on Homeland Security and Committee on Oversight and Reform 3 (Mar. 19, 2020), https://whistleblower.org/wp-content/uploads/2020/03/Drs.-Allen-and-Rich-3.20.2020-Letter-to-Congress.pdf.

Vazquez Barrera, 2020 WL 1904497, at *6; *see also Basank v. Decker*, No. 20 CIV. 2518 (AT), 2020 WL 1481503, at *4 (S.D.N.Y. Mar. 26, 2020) ("Courts have also recognized this health risk to be particularly acute—and of constitutional significance—for inmates who are elderly or have underlying illnesses.").

Unfortunately, Petitioners already have powerful evidence that the threat to them could be immediate: one of their number has already contracted COVID-19 during the course of this proceeding.

3. Petitioner's likely injuries may outweigh any legitimate government interest or injury.

The potential injuries facing Petitioners are of the gravest kind. Those who contract COVID-19 often suffer physically and mentally. That is especially true of the elderly or the sick. They endure severe and protracted illness, discomfort, and

pain. They may suffer permanent injuries or disabilities. They may die. Again, one Petitioner is already facing these prospects. And to the extent they can prove particularized risk, the remaining Petitioners could as well.

Respondents have legitimate countervailing interests: to protect the public and to ensure that Petitioners appear for future immigration proceedings or removal. *See Vazquez Barrera*, 2020 WL 1904497, at *7; *Engelund v. Doll*, No. 4:20-CV-00604, 2020 WL 1974389, at *9 (M.D. Pa. Apr. 24, 2020. The Court acknowledges and values those interests. But their weight ilimited in several respects:

> [D]etention is not *necessary* to further Defendants' interest in preventing [detainees] from absconding. Rather, ICE has a number of alternative tools available to it to ensure enforcement, which it is free to use with [detainees] if they are released from detention. For example, ICE's conditional supervision program uses a combination of electronic ankle monitors, biometric voice recognition software, unannounced home visits, employer verification, and in-person reporting requirements to supervise individuals released from detention. (Doc. No. 12-1, at 27). An initial study of ICE's alternatives to detention reported a 99% attendance rate at all immigration court hearings and a 95% attendance rate at final hearings among supervised individuals. U.S. Gov't Accountability Office, GAO-15-26, *Alternatives to Detention: Improved Data Collection and Analyses Needed to Better Assess Program Effectiveness* 30 (2014).

Vazquez Barrera, 2020 WL 1904497, at *7.

To the contrary, a Petitioner's extended detention may actually place added strain on the already overburdened medical system, or delay, if not derail, immigration proceedings or deportation. *Ali v. Dep't of Homeland Sec.*, No. 4:20-CV-0140, 2020 WL 1666074, at *5 (S.D. Tex. Apr. 2, 2020) ("If Petitioner endured significant exposure to those affected by the virus, that alone could further delay Petitioner's ultimate deportation.").

4. <u>Petitioner's release may not disserve the public interest.</u>

Courts have referenced a detainee's criminal history and history of violence as public interest factors. *Vazquez Barrera*, 2020 WL 1904497, at *7. Of course, a detainee's criminal history cannot be decisive, because civil detention cannot masquerade for continued criminal detention for a prior offense. *See Vazquez Barrera*, 2020 WL 1904497, at *7. But again, the Court values these interests.

However, courts have also noted the public's interest in preventing or mitigating outbreaks, which invariably spread to correctional officers and other staff members, their families, and the public. *See Vazquez Barrera*, 2020 WL 1904497, at *7; *see also Thakker,*, 2020 WL 1671563, at *8 (Physical detention itself will place a burden on community healthcare systems and will needlessly endanger Petitioners, prison employees, and the greater community. We cannot see the rational basis of such a risk."). And yet again, the public interest may, in some situations, favor release: "In the highly unusual circumstances posed by the COVID-19 crisis, the continued detention of aging or ill civil detainees does not serve the public's interest. . . . "" To the contrary, public health and safety are served best by rapidly decreasing the number of individuals detained in confined, unsafe conditions." *Basank*, 2020 WL 1481503, at *6.

D. <u>Detention Facilities and Petitioners</u>

ICE has promulgated a set of Performance-Based National Detention Standards (the "National Detention Standards") which govern the conditions and circumstances under which detainees are held in custody and detention facilities are

operated.[18] The PBNDS require ICE detention facilities to follow "guidelines for the prevention and control of infectious and communicable diseases."[19]

The CDC has issued "Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities."[20] The "Guidance" sets forth operational and medical recommendations to detention facilities facing suspected or actual COVID-19 cases.

Respondents argue that ICE has taken measures, including some steps listed in the Guidance, in the six facilities now housing Petitioners. Again to their credit, Respondents are careful not to overstate the case, and even clarify that ICE's responsive measures are "are "admittedly not perfect." ECF No. 8 at 17. Respondents state that ICE will screen all necessary visitors, and will isolate detainees with or suspected of having COVID-19.

Through declarations, Respondents submit that staff and detainees have been educated on COVID-19, and as of April 22, 2020, all facilities have hand sanitizer, disinfection spray, soap, hot water, and gloves "in every housing unit." ECF No. 8-2 at 5. But no amounts are provided for these materials. Further, ICE is reviewing its detained population of people who are "at higher risk for severe illness" as identified by the CDC to determine if detention remains appropriate, "considering the

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[18] *2011 Operations Manual ICE Performance-Based National Detention Standards*, https://www.ice.gov/detention-standards/2011 (last visited Apr. 29, 2020).

[19] *Id.* § 4.3 (II)(10).

[20] Available at https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html (last visited Apr. 29, 2020).

detainee's health, public safety and mandatory detention requirements, and adjusted custody conditions, when appropriate, to protect health, safety and well-being of its detainees." ECF No. 8-2 at 5-6. But no time frames were (or reasonably could) be provided for these decisions. *See Coronel v. Decker*, No. 20-CV-2472 (AJN), 2020 WL 1487274, at *7 (S.D.N.Y. Mar. 27, 2020) ("Petitioners are uniquely vulnerable to COVID-19. The longer they spend in civil detention, the greater their chances of contracting the disease. A hearing *weeks* from now may be no relief at all, because Petitioners may contract COVID-19 in the interim and face serious health consequences—including death.").

Overall, despite the best efforts of ICE officials and officers braving to report for work in detention facilities, "individuals housed within detention centers," especially including these 16 Petitioners, "remain particularly vulnerable to infections." *Ali v. Dep't of Homeland Sec.*, No. 4:20-CV-0140, 2020 WL 1666074, at *5 (S.D. Tex. Apr. 2, 2020) (and sources cited therein). Unlike other courts, the undersigned cannot find that the corrective measures evidenced by Respondents are, in and of themselves, enough to moot Petitioners' claims altogether. This is particularly true when considering the declarations and evidence submitted by Petitioners which indicates that the corrective measures are either woefully inadequate to protect them, or not being implemented at all.

Moreover, a number of Petitioners have been convicted of, and served sentences for, criminal offenses. As discsussed above, however, and as decided by numerous other courts, a conviction alone cannot justify an alien's otherwise punitive

or unconstitutional detention. The Court will consider, however, criminal convictions to the extent they may indicate violent or dangerous tendencies, especially when likely to be directed at identifiable individuals.

1. **The LaSalle Ice Processing Center ("LIPC") currently houses nine Petitioners: Taluta Helen Dada, Griselda Del Bosque, Suresh Kumar, Nadira Sampath-Grant, Matilde Flores de Saavedra, Pardeep Kumar, Rosabel Carrera, Sonia Lemus-De Jasso, and Helen Saleh.**

LIPC is a private detention center run by The GEO Group, Inc. ("GEO"). ECF No. 8-1 at 2. As of April 21, 2020, there were 904 detainees housed at the facility, which has capacity to house 1,170 detainees. ECF No. 8-1 at 2. Also as of April 21, 2020, three detainees had confirmed cases of COVID-19 at LIPC, and there was one suspected case. ECF No. 8-2 at 4. These detainees were isolated from all other detainees. *Id.* However, according to ICE, seven detainees had confirmed cases of COVID-19 as of April 28, 2020.

Given the known circumstances at LIPC, Petitioners housed there are all at moderate to high risk of exposure.

a. **Petitioner Taluta Helen Dada should be released.**

Dada has neither tested positive nor reported, of record, symptoms of COVID-19. And while Dada, at age 40, is younger than the CDC's risk threshold, Dada suffers from underlying medical issues that place her at elevated risk. ECF No. 8-1 at 3. Dada states that she suffers from Graves' Disease, which has required hospitalizations, radiation, and immunosuppressants. ECF No. 2-7 at 1. Dada also alleges that she suffers from hypothyroidism, asthma, malnutrition, and is immunocompromised. *Id.* at 1-2.

Dada alleges that she is housed in dorm Falcon-D, which is at capacity with 80 detainees. ECF No. 2-7 at 2. Her dorm shares three working toilets, six showers, and eight telephones. *Id.* The toilets, showers, and telephones are sprayed by other detainees in the voluntary work program once a day, but those detainees do not wear masks. *Id.* Detainees in her dorm sleep in bunk beds about a yard and a half apart, and there is no hand sanitizer available. *Id.*

Dada was convicted in this District Court of conspiracy to defraud the United States to obtain immigration status, making false statements in connection with immigration documents, and mail fraud with forfeiture allegations. *See id.; United States v. Dada,* 3:18-CR-0086 (W.D. La.). She is currently awaiting a hearing with the immigration court. ECF No. 8-1 at 3. Therefore, she is not subject to a final order of removal. Dada alleges that she would live with her sister in Ruston, Louisiana if released. ECF No. 2-7 at 3.

Respondents did not state whether it considers Dada "at higher risk," or whether it has evaluated the appropriateness of her detention, specifically.

Dada's immigration and related convictions, while significant, do not indicate particularized risks of harm to the public, and do not outweigh the significant health risks she faces and the other factors favoring her release.

b. Petitioner Griselda Del Bosque should be released.

Del Bosque is 57 years-old and reportedly suffers from asthma, which puts her at elevated risk for COVID-19 complications. Her asthma is only partially controlled by the inhaler she was provided at LIPC. ECF No. 2-8 at 1. Del Bosque "has had

numerous asthma attacks and coughing fits while she has been detained." ECF No. 1 at 13. She also suffers from glaucoma and chronic arm, back, and knee pain. *Id.* She has neither tested positive nor reported, of record, symptoms of COVID-19.

Del Bosque states that she is housed in dorm Alpha-D with 80 other women whose beds are "less than a foot" apart. ECF No. 2-8 at 1. These 80 detainees also share three toilets, six showers, and eight telephones. *Id.*

Like Dada, Griselda Del Bosque (Del Bosque) is awaiting a hearing with the immigration court. She has not been ordered removed. ECF No. 8-1 at 4. Del Bosque recently completed a 235-month sentence for conspiracy to possess with intent to distribute a controlled substance, and she has been in ICE custody since January 3, 2020. ECF No. 8-1 at 3-4. Del Bosque maintains that she would reside with her daughter in Dallas, Texas, if released. ECF No. 2-8.

Respondents did not state whether it considers Del Bosque "at higher risk," or whether it has evaluated the appropriateness of her detention, specifically.

Del Bosque's narcotics conviction clearly arose from a serious offense. But she served her sentence, and has been in federal custody for a substantial amount of time. The nature of the offense, while significant, does not indicate violent tendencies or a particularized risk of harm. In fact, the length of the associated sentence and subsequent immigration custody mitigates the risk of harm to the public. And Del Bosque's criminal history does not outweigh the significant health risks she faces and the other factors favoring her release. This is particularly true given her asthmatic condition, which is respiratory in nature.

c. **Petitioner Suresh Kumar should be released.**

Kumar is only 37 years old, but he is at risk due to severe malnutrition resulting from a hunger strike. ECF No. 1 at 14. Kumar reports being force-fed liquid nutrients through a tube that runs through his nose and into his esophagus. ECF No. 2-13 at 1. S. Kumar alleges that he was diagnosed with Hepatitis C and a chronic liver infection. *Id.* He has neither tested positive nor reported, of record, symptoms of COVID-19.

Kumar reports that he is confined with Pardeep Kumar "in a 10 x 10 small room in the medical unit." ECF No. 2-13 at 1. S. Kumar alleges that the doctors do not wear masks when force-feeding him. *Id.*

Although Suresh Kumar ("Kumar") was ordered removed on July 11, 2019, his appeal of that order still is pending with the Board of Immigration Appeals. ECF No. 8-1 at 4. Respondents do not allege that Kumar was ever convicted of a crime in the United States. The Court is also unaware of any criminal history. If released, Kumar will reside with his brother-in-law in Grants Pass, Oregon. ECF No. 2-13 at 2.

Respondents did not state whether it considers S. Kumar "at higher risk," or whether it has evaluated the appropriateness of his detention, specifically.

Relevant factors – particularly Kumar's health conditions and attendant risks of contracting COVID-19, and Kumar's lack of criminal history – favor his release.

d. **Petitioner Pardeep Kumar should be released.**

Pardeep Kumar ("P. Kumar") is also at increased risk due to severe malnourishment from a hunger strike. ECF No. 1 at 14. P. Kumar reportedly

suffered a kidney infection in March 2020. P. Kumar has neither tested positive nor reported, of record, symptoms of COVID-19.

Respondents do not claim that P. Kumar was convicted of a crime in the United States. The Court is also unaware that he has any criminal history. P. Kumar's appeal of his order of removal is also pending with the Board of Immigration Appeals. ECF No. 8-1 at 5. Although ICE attempted to deport P. Kumar in February, 2020, the pilot refused due to P. Kumar's emaciated appearance. ECF No. 2-12 at 1. P. Kumar will reside with his uncle in Kent, Washington if released. ECF No. 1-12 at 2.

Respondents do not state whether it considers P. Kumar "at higher risk," or whether it has evaluated the appropriateness of his detention, specifically.

For the same reasons as stated regarding Petitioner Kumar above, relevant factors favor P. Kumar's release.

e. Petitioner Nadira Sampath-Grant should be released.

Nadira Sampath-Grant ("Sampath-Grant") is at great risk because she suffers from diabetes and diabetic-related complications such as neuropathy and issues with her kidneys. She relies on oral medication for her diabetic care. ECF No. 1 at 13. Sampath-Grant is 53 years old. ECF No. 2-18 at 1. Sampath-Grant has neither tested positive nor reported, of record, symptoms of COVID-19.

Sampath-Grant is also housed in dorm Falcon-D with 80 detainees. As of the date of her declaration, Sampath-Grant reports that masks, gloves, and sanitizer were not available to detainees. ECF No. 2-18 at 1. Sampath-Grant submitted an

updated declaration dated April 21, 2020, indicating continued soap shortages. ECF No. 9-5 at 1. Sampath-Grant indicates that she has waited days waiting for soap. *Id.* Sampath-Grant also indicated that a detainee with fever was returned to the dorm after requesting medical care. *Id.*

ICE states that Sampath-Grant was convicted of conspiracy to dispense and distribute oxycodone in the United States District Court for the Southern District of Florida. After service of her sentence, she was ordered removed. ECF No. 8-1 at 4. ICE is "attempting to obtain travel documents" for her removal. *Id.* Of course, there is no certain information as to if or when travel documents will be obtained. If released, she would reside with her husband and son in Ft. Lauderdale, Florida. ECF No. 2-18 at 2.

Respondents do not state whether it considers Sampath-Grant "at higher risk," or whether it has evaluated the appropriateness of her detention, specifically.

For the same reasons stated above as to Petitioner Del Bosque, Sampath-Grant's narcotics-related criminal history, while significant, does not outweigh the severe risks posed by her detention.

f. Matilde Flores de Saavedra

Factors also weigh in favor of releasing Matilde Flores de Saavedra ("Flores de Saavedra"), who is at increased risk of complications from COVID-19 due to her age and medical conditions. Flores de Saavedra is 78 years old and was recently diagnosed with diabetes, which remains uncontrolled, and hypertension. ECF No. 2-

10 at 1; No. 1 at 21. Flores de Saavedra has neither tested positive nor reported, of record, symptoms of COVID-19.

Flores de Saavedra is also housed in dorm Falcon-D, with close bunks and once-daily cleaning by detainees without masks. ECF. No. 2-10 at 1.

Like Dada and Del Bosque, Flores de Saavedra is awaiting a hearing with the immigration court. Last year she completed an eight-month sentence for conspiracy to transport undocumented aliens. ECF No. 8-1 at 4. If released, Flores de Saavedra would reside with her son in Falfurrias, Texas.

Respondents did not state whether it considers Flores de Saavedra "at higher risk," or whether it has evaluated the appropriateness of her detention, specifically.

For the same reasons stated above, Flores de Saavedra's immigration and related offenses, while significant, do not outweigh the other factors favoring her release, including her advanced age and the severe health risks she faces if detained.

g. Petitioner Rosabel Carrera should be released.

Rosabel Carrera ("Carrera") is also at a severely heightened risk of complications if she contracts COVID-19. She is a 59-year-old with obesity, diabetes, and hypertension. ECF No. 2-6 at 1. She also has a history of heart attack and stroke. *Id.*

Carrera is also housed in dorm Falcon-D. She, too, reported the 80 women in her dorm sharing three working toilets and six showers, with no access to disinfectants. ECF No. 2-6 at 1. In an updated declaration, Carrera reports that she recently went to the medical unit for a sore throat, "[a]mong other complaints," and

she was not tested for COVID-19. ECF No. 9-8 at 1. Carrera also states that "guards sometimes wear masks, but sometimes they do not." *Id.* Detainees are sometimes left without soap and a shortage of cleaning supplies. *Id.*

An immigration judge terminated removal proceedings against Carrera in 2019, but ICE successfully appealed the decision. Carrera is now awaiting a hearing with the immigration court. ECF No. 8-1 at 5.

Respondents do not state whether it considers Carrera "at higher risk," or whether it has evaluated the appropriateness of her detention, specifically.

While Carrera reported one generalized symptom consistent with COVID-19, she has not tested positive, she has not reported it was severe, and she has not reported other symptoms or a protracted period of illness. She does, however, face a substantial risk of contracting the virus if detained, and no other factors strongly favor her detention.

h. Petitioner Sonia Lemus Tejada Dejaso should be removed.

Sonia Lemus Tejada Dejaso ("Dejaso") is 53 years old and suffers from health conditions that leave her vulnerable to complications if she contracts COVID-19. Dejaso reportedly has heart disease and hypertension. Dejaso has neither tested positive nor reported, of record, symptoms of COVID-19.

After her conviction of harboring an alien for private gain, Dejaso was ordered removed. Her appeal is pending. ECF No. 8-1 at 5.

Respondents do not state whether it considers Dejaso "at higher risk," or whether it has evaluated the appropriateness of her detention, specifically.

Dejaso's immigration convictions, while significant, do not indicate particularized risks of harm to the public, and do not outweigh the significant health risks she faces and the other factors favoring her release.

i. **Petitioner Hasan Saleh should be released.**

Factors also weigh in favor of release for Hasan Saleh ("Saleh"). Saleh is 62 years old, and he suffers from diabetes, hypertension, and high cholesterol. ECF No. 1 at 15. Saleh has neither tested positive nor reported, of record, symptoms of COVID-19.

Saleh is housed in dorm Eagle-Charlie with about 72 other men. As of the date of his declaration, none of the guards or detainees had masks or gloves. ECF No. 2-17 at 1.

Saleh was ordered removed in February 2020 after service of his sentence for conspiracy to commit food stamp and wire fraud. ECF No. 8-1 at 5-6. Saleh would reside with his wife and five children in Ft. Lauderdale, Florida if he is released. ECF No. 2-17 at 1.

Respondents do not state whether it considers Saleh "at higher risk," or whether it has evaluated the appropriateness of his detention, specifically.

Saleh's financial crimes convictions, while significant, do not indicate particularized risks of harm to the public, and do not outweigh the significant health risks he faces and the other factors favoring his release. In parciular, his advanced age and underlying health conditions place him at elevated risk if detained.

2. **Richwood Detention Center currently houses one Petitioner: Abraham Gebremedhim Gebremichael**

According Hartnett's declaration, Richwood Detention Center ("Richwood") is a private detention center run by LaSalle Corrections Corporation ("LCC"). ECF No. 8-1 at 2. As of April 21, 2020, there were 306 detainees housed at the facility, which has capacity to house 1,000 detainees. ECF No. 8-1 at 2. The ICE detainees are housed separately from other detainees. ECF No. 8-2 at 3.

As of April 21, 2020, Richwood had 29 detainees with confirmed cases of COVID-19 and five suspected cases. Many of the detainees with COVID-19 were transferred to Richwood from other facilities. ECF No. 8-2 at 4. These detainees "are isolated when possible" and are separated from the other population. *Id.* According to ICE, 45 detainees at Richwood had confirmed cases of COVID-19 as of April 28, 2020. And according to news reports cited above, two correctional officers have died of symptoms consistent with COVID-19.

Petitioner housed at this detention facility faces an elevated risk of exposure to, and contraction of, COVID-19.

a. **Petitioner Abraham Gebremedhim Gebremichael should be released.**

Although Abraham Gebremedhim Gebremichael ("Gebremichael")'s age of 33 does not put him at high risk according to the CDC, he suffers from bradycardia and a slow heartbeat, which leaves his body without sufficient oxygen. ECF No. 2-11 at 1. He also experiences shortness of breath and fatigue as a result of his medical conditions. *Id.*

Gebremichael states he is housed in Unit C, with 110 other people. ECF No. 2-11 at 1. Gebremichael states that, as of the date of his declaration, there were insufficient cleaning supplies and soap. ECF No. 2-11 at 2.

In his declaration, Gebremichael alleges that he has a cough, along with six or seven other people in his unit. He says one other detainee had a high fever, but still slept in the Unit C. ECF No. 2-11 at 2.

Gebremichael has been in ICE custody since August 13, 2019. He had a scheduled immigration court hearing on April 29, 2020. ECF No. 8-1 at 6. Respondents do not allege that Gebremichael was ever convicted of a crime.

Respondents do not state whether it considers Gebremichael "at higher risk," or whether it has evaluated the appropriateness of his detention, specifically. If released, he would reside with his cousin in Houston, Texas. ECF No. 1 at 14.

Gebremichael has experienced one generalized symptom consistent with COVID-19, but he has not tested positive or reported a protracted illness or other symptoms. symptoms consistent with COVID-19. With no criminal history, and a lengthy period of immigration detention, relevant factors, weigh in favor of his release.

3. **Catahoula Correctional Center currently houses two Petitioners: Ronaldo Alex Colon and Karthikeyan Ponnusamy.**

According Hartnett's declaration, Catahoula Correctional Center ("CCC"). CCC is a private detention center run by LaSalle Corrections Corporation ("LCC"). ECF No. 8-1 at 2. As of April 21, 2020, there were 529 detainees housed at the facility, which has capacity to house 750 detainees. ECF No. 8-1 at 3.

Also as of April 21, 2020, CCC had one detainee that had tested positive for COVID-19, but he was transferred to Richwood. There were also three suspected cases who were isolated until their COVID-19 tests came back negative. ECF No. 8-2 at 4. According to ICE, seven detainees at CCC tested positive for COVID-19 as of April 28, 2020.

With growing reported cases, Petitioners housed in this facility face a moderate to high risk of exposure or contraction.

a. Petitioner Ronaldo Alex Colon should be released.

Ronaldo Alex Colon ("Colon") is a 47-year-old detainee with hypertension and high cholesterol. ECF No. 1 at 15. Colon alleges that he is in Room B with 100 others, sharing three toilets, one urinal, and six showers. ECF No. 2-4 at 1. As of the date of his declaration, Colon alleges that CCC is lacking cleaning supplies, gloves, and masks. *Id.* He also alleges that several people had flu-like symptoms. *Id.*

Colon submitted an updated declaration on April 22, 2020. ECF NO. 9-7 at 1. Colon states that he was provided a "basic piece of cloth" to cover his mouth, but not a medical mask. *Id.* Colon says there are "still more than 100 people in the dorms closed in together for 23 hours of the day." *Id.* Colon alleges that utensils are rinsed only with hot water, and bathrooms only have small bars of soap. *Id.* Colon states that new detainees are still arriving daily. *Id.* Colon also states that CCC guards recently threw tear gas into the dorms. *Id.* Colon indicates that he recently had flu-like symptoms, but does not state that he was tested for COVID-19. *Id.*

Colon has been detained for over a year since entering the United States. ECF No. 2-4 at 1; ECF No. 8-1 at 6. He has not been convicted of a crime. Colon's appeal of his removal order is pending. ECF No. 8-1 at 6.

Respondents do not state whether it considers Colon "at higher risk," or whether it has evaluated the appropriateness of his detention, specifically. If released, Colon would reside with his sister in New York, New York. ECF No. 2-4 at 1.

For all of the reasons stated regarding Petitioner Gebremichael above, relevant factors favor Petitioner Colon's release.

b. Petitioner Kathikeyan Ponnusamy should be released.

Although Karthikeyan Ponnusamy is only 41, he suffers from a host of medical conditions that put him at greater risk of complications from COVID-19. Specifically, Ponnusamy has diabetes, hypertension, and Low Lactate Dehydrogenase—a blood thickening disease. ECF No. 2-15 at 1. Ponnusamy also reports suffering from depression, anxiety, and insomnia. *Id*. Ponnusamy has neither tested positive nor reported, of record, symptoms of COVID-19.

Ponnusamy has been in custody since August 2019, and was ordered removed in January 2020. His appeal of the removal order is pending. ECF No. 8-1 at 6-7. There are no claims that he has ever been convicted of a crime.

Respondents do not state whether it considers Ponnusamy "at higher risk," or whether it has evaluated the appropriateness of his detention, specifically. If released, he would reside in Austin, Texas. ECF No. 2-15 at 2.

Relevant factors – including a lack of criminal history and serious underlying health conditions – favor Ponnusamy's release.

4. Jackson Parish Correctional Center currently houses one Petitioner: Aracelio Rodriguez.

According Hartnett's declaration, Jackson Parish Correctional Center ("JPCC") is a private detention center run by LCC. ECF No. 8-1 at 3. As of April 21, 2020, the date of his declaration, there were 502 detainees housed at the facility, which has capacity to house 1,000 detainees. ECF No. 8-1 at 3.

As of the dates of Hartnett's declaration, JPCC had no suspected or confirmed cases of COVID-19. According to the ICE website, there has been no change.

a. Petitioner Aracelio Rodriguez should not be released.

Aracelio Rodriguez is 61 years old and has "severe asthma." ECF No. 1 at 15. Rodriguez reports that he has "trouble breathing every day." ECF No. 2-16 at 1. Rodriguez has neither tested positive nor reported, of record, symptoms of COVID-19.

Rodriguez is housed in "one big dorm of about 100 people and there are only about 3 feet between each bed." ECF No. 2-16 at 2. As of the date of his declaration, he often lacked soap to wash his hands, and the staff did not wear masks or gloves. *Id.*

Rodriguez has been in ICE custody since applying for entry to the United States in October 2019. He was ordered removed on March 5, 2020, and his removal to Cuba is being arranged. ECF No. 8-1 at 7. ICE does not report any criminal

history. Rodriguez provides that he would reside with his son in West Palm Beach, Florida if he is released. ECF No. 2-16 at 2.

Respondents do not state whether it considers Rodriguez "at higher risk," or whether it has evaluated the appropriateness of his detention, specifically.

Rodriguez is a high-risk detainee due to his advanced age and underlying medical conditions. But the risk of exposure at JPCC seems to be minimal at this point, with no confirmed or suspected cases having been reported, and minor shortcomings in sanitization having been reported. Accordingly, relevant factors do not presently favor Rodriguez's release.

5. <u>Pine Prairie ICE Processing Center currently houses one Petitioner: Desmond Nkobenei.</u>

According Hartnett's declaration, Pine Prairie ICE Processing Center ("PPIPC") is a private detention center run by GEO. ECF No. 8-1 at 3. As of Hartnett's declaration, there were 441 detainees housed at the facility, which has capacity to house 730 detainees. ECF No. 8-1 at 3.

Hartnett's declaration also reports seven detainees with confirmed cases of COVID-19 and one suspected case at PPIC. According to ICE's website, 19 detainees at PPIC had confirmed cases of COVID-19 as of April 29, 2020.

Petitioners at this facility face a moderate to high risk of exposure or contraction.

a. <u>Petitioner Desmond Nkobenei should be released.</u>

Desmond Nkobenei is only 25 years old, but suffers from hypertension. Nkobenei states that his medication has been increased several times. ECF No. 2-14

at 1. Nkobenei has neither tested positive nor reported, of record, symptoms of COVID-19.

Nkobenei states that he is housed with 70 to 74 people in a small dorm with bunks less than a meter apart. Detainees share two working toilets, and there is no sanitizer or disinfectant. ECF No. 2-14 at 1. Nkobenei submitted an updated declaration on April 21, 2020, indicating that he and other detainees were each provided one single-use surgical mask and instructed to wash after each use. ECF No. 9-6 at 1. Nkobenei alleges that guards first threatened to withhold pay if he did not sign a form stating he had received an N95 mask. Nkobenei also states that his dorm is under quarantine. *Id.* Nkobenei also reports 17 new detainees were transferred into the facility on April 19, 2020. *Id.*

Nkobenei has been in custody since August 2019 when he entered the United States. He was ordered removed in February 2020, and his appeal is pending. ECF No. 8-1 at 7. If released, Nkobenei would reside with his cousin in Capitol Heights, Maryland. ECF No. 1 at 16.

Relevant factors – including his lack of criminal history, and his underlying medical conditions, which are among the conditions that place individuals at highest risk – favor Nkobenei's release.

6. Winn Correctional Center currently houses two Petitioners: Sigous Asgari and Eduardo Devora Espinosa.

According Hartnett's declaration, Winn Correctional Center ("WCC") is a private detention center run by LCC. ECF No. 8-1 at 2. As of April 21, 2020, there

were 795 ICE detainees housed at the facility, which has capacity to house 1,553 detainees. ECF No. 8-1 at 2.

As of April 21, 2020, WCC had three detainees with confirmed cases of COVID-19 and one suspected case. ECF No. 8-1 at 2. According to ICE's website, the numbers have not changed.

Petitioners housed at this facility face moderate to high risk of exposure and contraction.

a. Petitioner Sigous Asgari should not be released.

According to updated filings from Petitioners' counsel, Sigous Asgari ("Asgari") has tested positive for COVID-19. ECF No. 15. Asgari has also developed a blood clot. *Id.* Asgari is 59 years old and has a history of Grade 2 Fatty Liver Disease as well as "hypertension and a chronic lung condition which has led to several lung infections and bouts with pneumonia." *Id.*; ECF No. 1 at 12. Asgari's medical conditions put him at great risk of complications from COVID-19.

At last reporting, Asgari is reportedly under medical supervision in a negative pressure isolation unit at Winn. ECF No. 15. Although counsel for Asgari claims that ICE's care is, generally, deficient and dangerous to detainees like Asgari, the record presently contains no other specific information beyond those representations as to Asgari's actual treatment at Winn. Counsel for Respondents has maintained at least some contact with Winn medical personnel, who reported Asgari remained under medical supervision.

Asgari was scheduled for removal in March and April 2020, but the flights were cancelled due to COVID-19 restrictions. ECF No. 8-1 at 6. Asgari would reportedly live with a daughter in Redwood City, California if released. ECF No. 1 at 12.

Asgari's circumstances – again, at present and given what little has been reported of record – do not warrant release. Nor is the Court, at present, convinced that Asgari's release would not endanger the public, and would necessarily improve, his medical condition. Should more information become known, this calculus may change. But given Asgari's unfortunate circumstances, and the lack of known details or alternatives at present, Asgari should not be released.

b. Petitioner Eduardo Devora Espinosa has already been released.

According to Hartnett's declaration, Eduardo Devora Espinosa ("Espinosa") was released on parole on April 15, 2020. Therefore, his request for release is moot.

III. Conclusion

IT IS RECOMMENDED that the Court GRANT IN PART Petitioners' Motion for Temporary Restraining Order (ECF No. 2) in the form of a PRELIMINARY INJUNCTION requiring the IMMEDIATE RELEASE of the Petitioners identified above pending resolution of their immigration proceedings or removal, and under CONDITIONS to be specified by DHS/ICE but to exclude subsequent arrest and detention, unless an identified Petitioner violates another condition of release, attempts to abscond, or commits any criminal offense.

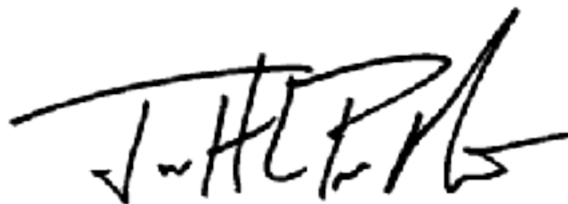
IT IS FURTHER RECOMMENDED that the Court decline to require any Petitioner released to post a bond or other security. *See* Fed. R. Civ. P. 65(c); *A.T.N.*

Indus., Inc. v. Gross, 632 F. App'x 185, 192 (5th Cir. 2015) ("[U]nder Rule 65(c), a court may elect to require no security at all.") (internal citation and quotation omitted).

IT IS FURTHER RECOMMENDED that the Motion for Temporary Restraining Order (ECF No. 2) be DENIED IN PART in all other respects, and as to all other Petitioners.

IT IS FURTHER ORDERED that, given the urgency of the relief sought and recommended above, the objections periods set forth in 28 U.S.C. § 636(b)(1)(c) and Fed. R. Civ. P. 72(b) be EXPEDITED, and that any party wishing to object to this Report and Recommendation do so on or before Monday, May 4, 2020. The District Judge will consider timely objections before issuing a final ruling. A party's failure to file written objections to the proposed factual findings, conclusions, and recommendations contained in this Report and Recommendation shall bar that party from attacking either the factual findings or the legal conclusions accepted by the District Judge, except upon grounds of plain error.

THUS DONE AND SIGNED in Alexandria, Louisiana, on this 30th day of April 2020.



JOSEPH H.L. PEREZ-MONTES
UNITED STATES MAGISTRATE JUDGE

United States District Court
Southern District of Texas
ENTERED
March 30, 2020
David J. Bradley, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,	§	
	§	
VS.	§	**CRIMINAL ACTION NO. 4:09-CR-0199-1**
	§	
PEDRO MUNIZ,	§	
	§	
Defendant.	§	
	§	

MEMORANDUM AND ORDER

Defendant Pedro Muniz pleaded guilty to conspiracy to possess with intent to distribute a controlled substance in violation of Title 21, United States Code, Sections 846, 841(a)(1), (b)(1)(A)(ii), and (b)(1)(A)(viii) in January 2010. Defendant was sentenced to a term of 235 months, but his sentence was reduced to 188 months on May 29, 2015 pursuant to 18 U.S.C. § 3582(c)(2). (Doc. No. 517). Defendant has been in custody since April 20, 2009.

Defendant now moves for compassionate release because of concerns about his medical condition and the potential spread of the novel coronavirus at the Federal Medical Center Butner, in Bahama, North Carolina, where he is currently incarcerated. Defendant has exhausted all possible avenues for administrative release, and if released plans to live under the care of his mother in Conroe, Texas.

Under 18 U.S.C. § 3582, a court may modify a defendant's sentence upon motion of the Director of the Bureau of Prisons or "upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden

of the defendant's facility, whichever is earlier." 18 U.S.C. § 3582(c)(1)(A). Upon such a motion, a court may modify a defendant's sentence after considering the factors set forth in § 3553(a) to the extent applicable if it finds that "extraordinary and compelling reasons warrant such a reduction" and "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." *Id.* § 3582(c)(1)(A)(i).

The policy statement regarding compassionate release sets forth three circumstances that are considered "extraordinary and compelling reasons." U.S. Sentencing Guidelines, § 1B1.13(1)(A) & cmt. n.1. Among these are the "medical condition of the defendant," including where the defendant is "suffering from a serious physical or medical condition . . . that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover." *Id.* § 1B1.13 cmt. 1. The policy statement also requires that the defendant not pose a danger to the safety of the community. *Id.* § 1B1.13(2).

The Court is persuaded that Defendant presents an extraordinary and compelling reason for compassionate release and that such release is consistent with applicable policy considerations. In so concluding, the Court is grievously aware of the current global health crisis caused by COVID-19. The President has declared a National Emergency due to the spread of the novel coronavirus and states and localities across the nation have implemented measures to stymie its rapid spread. And while the Court is aware of the measures taken by the Federal Bureau of Prisons, news reports of the virus's spread in detention centers within the United States and beyond our borders in China and Iran demonstrate that individuals housed within our prison systems nonetheless remain particularly vulnerable to infection. *See, e.g.*, Danielle Ivory, *"We Are Not a Hospital": A Prison Braces for the Coronavirus*, N.Y. Times (March 17, 2020),

https://www.nytimes.com/2020/03/17/us/coronavirus-prisons-jails.html (citing densely populated living conditions, dearth of soap, hand sanitizer, and protective gear, and impossibility of maintaining safe distance between inmates and guards as reasons prisoners are at particular risk of infection). The virus's spread at the Cook County jail in Chicago provides an alarming example: in a single week, the county jail went from two diagnoses to 101 inmates and a dozen employees testing positive for the virus. *See* Timothy Williams et al., *As Coronavirus Spreads Behind Bars, Should Inmates Get Out?*, N.Y. Times (March 30, 2020), https://www.nytimes.com/2020/03/30/us/coronavirus-prisons-jails.html.

Indeed, news reports indicate that the virus has already begun infiltrating federal prisons; in one prison in Louisiana, an inmate died after testing positive for the virus and at least 30 other inmates and staff have tested positive. *See* Kimberly Kindy, *An Explosion of Coronavirus Cases Cripples a Federal Prison in Louisiana*, Wash. Post (March 29, 2020), https://www.washingtonpost.com/national/an-explosion-of-coronavirus-cases-cripples-a-federal-prison-in-louisiana/2020/03/29/75a465c0-71d5-11ea-85cb-8670579b863d_story.html (hereinafter, *An Explosion of Coronavirus Cases*). To date, at least one inmate and one staff member have tested positive for the virus in FMC Butner, where Defendant is housed. *See* COVID-19, Fed. Bureau of Prisons (March 29, 2020), https://www.bop.gov/coronavirus/.

In this case, Defendant has been diagnosed with serious medical conditions that, according to reports from the Center for Disease Control, make him particularly vulnerable to severe illness from COVID-19. These include, inter alia, end stage renal disease, diabetes, and arterial hypertension. *See People Who Are at Higher Risk for Severe Illness*, CDC (March 26, 2020) https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fspecific

-groups%2Fhigh-risk-complications.html. The Court notes that the inmate in Louisiana who died after testing positive from the virus was only two years older than Defendant and also suffered from long-term, preexisting medical conditions. *See* Kindy*, An Explosion of Coronavirus Cases*. Defendant has also undergone amputation of his right foot, which has left him wheelchair-bound and significantly hinders his mobility. This further diminishes his ability to care for himself in a prison environment. While it is true that Defendant's request for a sentence reduction and subsequent administrative appeal to the Board of Prisons were denied, those requests and denials occurred in March and July of 2019—long before the coronavirus was understood to be such a public health crisis. Because Defendant is at high-risk for severe illness from COVID-19 and because inmates in detention facilities are particularly vulnerable to infection, the Court finds that Defendant has demonstrated an extraordinary and compelling reason for compassionate release.

Moreover, the Court is persuaded that the applicable § 3553(a) factors support Defendant's request for compassionate release and that Defendant will not pose a threat to the community. While the Court acknowledges the seriousness of Defendant's offense, Defendant has been in custody since April 2009—over ten years—and has served approximately 80 percent of his reduced sentence. The length of Defendant's incarceration adequately expresses the seriousness of the offense, deters criminal conduct, and protects the public under § 3553(a). Moreover, the Court notes that Defendant's offense was not a violent one, and due to Defendant's serious medical conditions Defendant is confined to a wheelchair and requires medical assistance. If released Defendant will be under the care of his mother in Conroe, Texas. Because of Defendant's serious medical conditions and the length of time already served, the Court is persuaded that Defendant will not pose a threat to the community.

Pursuant to 18 U.S.C. § 3582(c)(1)(A), the Court finds that extraordinary and compelling reasons warrant a reduction of Defendant's sentence, that Defendant does not pose a danger to any other person or the community, that the § 3553(a) factors support a reduction, and that the reduction is consistent with currently applicable Sentencing Commission policy statements. The Court therefore **GRANTS** Defendant's Motion for Compassionate Release and orders release of Defendant.

IT IS SO ORDERED.

SIGNED at Houston, Texas, on this the 30th of March, 2020.

HON. KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 18-CR-20989-[2] ALTMAN/GOODMAN

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHNNY GROBMAN, et al.,

Defendant.

_________________________________/

ORDER ON DEFENDANT GROBMAN'S
AMENDED MOTION FOR RELEASE PENDING SENTENCING

A federal jury convicted Defendant Johnny Grobman of all charges arising from a fraud scheme. United States District Judge Roy K. Altman remanded him to the U.S. Marshal's custody after the verdict, and Mr. Grobman is now in the Federal Detention Center ("FDC"), awaiting sentencing. His sentencing was scheduled for April 23, 2020, but he asked the Court to postpone it. Judge Altman granted [ECF No. 391] that motion and the sentencing is now set for June 17, 2020.

Framed by this background, Grobman has filed [ECF No. 387] an "Updated and Amended Motion for Release Pending Sentencing," which Judge Altman referred to me [ECF No. 383]. The United States filed an opposition response [ECF No. 390] and Grobman filed a reply [ECF No. 393].

Based on the unique circumstances presented here, the Undersigned **grants** the motion -- but with additional conditions and restrictions not mentioned in the motion. This order arises from Grobman's serious health issues, which place him in a high-risk category of dangerous and potentially deadly complications should he contract the rapidly-expanding COVID-19 Coronavirus.

So, the Undersigned is confronted with an extraordinary situation of a medically-compromised detainee being housed at a detention center where it is difficult, if not impossible, for Grobman and others to practice the social distancing measures which government, public health and medical officials all advocate.

Because this Order arises from *one* defendant's individual medical condition, it should not be viewed as a determination that FDC is unable to adequately provide medical screening or treatment to its detainees, that detention at FDC is generally unsafe, or that detention there is generally inappropriate or unduly risky. This Order flows from a detailed and comprehensive bond package, which defense counsel have organized in an effort to demonstrate that Grobman is not a flight risk. Therefore, as noted, this is one ruling about one man involved in one fact-specific scenario.

I. <u>Grobman's Position</u>

By way of summary, Grobman seeks release for five reasons: (1) he was convicted of only a "non-violent offense"; (2) "breaking events surrounding the Coronavirus"; (3) the shutdown of FDC to all visitors, including legal visitors, for at least 30 days; (4) Mr.

Grobman's health; and (5) "potential issues for appeal." [ECF No. 387, pp. 1-2].

Grobman's motion proposes three separate ten percent bonds totaling $2 million (one for $1 million, one for $850,000 and one for $150,000 -- with reinstatement of the $15,000 held by the Clerk in connection with the pre-trial bond) and two personal surety bonds totaling $1.5 million. The total bond package would be $3.5 million, and several co-signers, including his wife, would also be on the financial hook.

Concerning his health, Grobman advises that he is in an "at risk" category. [ECF No. 387, p. 2]. He is pre-diabetic and is being treated with metformin. *Id.* Significantly, he has been diagnosed with Discoid Lupus Erythematosus, an auto-immune deficiency disease which the Centers for Disease Control and Prevention has categorized as most-at-risk for contracting COVID-19. *Id.* The motion explains that his doctor said that his notes indicate that Grobman was "not suffering a Lupus outbreak at the time of his last visit," but "could suffer one at any time." *Id.* at p. 3.

Moving from his own medical condition to the conditions at FDC, Grobman alleges that confinement "creates the ideal environment for the transmission of contagious disease." *Id.* at p. 5. He says that he and other FDC prisoners are confined to their rooms for 22 hours per day. *Id.* He also alleges that no kosher food is being provided to him. *Id.* Although not expressly stated, Grobman's motion implicitly asserts that he keeps kosher for religious or health reasons (or both).

Grobman also notes that other attorneys have reported that "their client's access

to any medical services has been curtailed." *Id.* at p. 6.

Grobman's motion summarizes his health concerns with the following point: "There is no reason to risk Mr. Grobman's life for a sentence in a non-violent, first offense, fraud case, in which the loss amount is subject to serious dispute . . ." *Id.*

In addition to addressing his health concerns, Grobman alleges that his attorney's ability to review the Pre-Sentence Investigation Report "has been severely compromised." *Id.* As noted, Grobman's sentencing is now scheduled for June 17, 2020, and Grobman will undoubtedly need to have comprehensive discussions with counsel to prepare for the submission of a sentencing memorandum and for the sentencing hearing.

Grobman contends that he is not a flight risk. *Id.* This conclusion, he explains, is supported by the fact that travel both in and out of the country "is restricted and limited" and that "there is literally no place Grobman could flee to" because he lacks a passport and the country's borders have been closed. *Id.*

Not surprisingly, the United States sees things much differently than Grobman portrays them, and it opposes the motion.

II. Government's Position

The United States begins by pointing out that Judge Altman already rejected the Defendant's request for release before sentencing. [ECF No. 390, p. 1]. It describes the emergence of COVID-19 as the only new factor. *Id.* The United States argues that the existence of COVID-19 outside of FDC (where Grobman is confined) is not a basis for

release. *Id.* Significantly, the United States argues, this once-in-a-century virus does not amount to the clear and convincing evidence needed to overcome the presumption of detention. *Id.* In other words, the Government focuses on the applicable statute (28 U.S.C. § 3143) and argues that Grobman has not met its requirements for release.

III. Factual Background

The United States describes this case as one involving Grobman's extensive scheme to defraud multiple victim companies of more than one hundred million dollars. *Id.* On August 23, 2019, the Defendant was charged in a 31-count Superseding Indictment with various crimes, including wire fraud, money laundering, theft of pre-retail medical products, and smuggling. *See generally* Superseding Indictment [ECF No. 132]. Grobman and two co-conspirators proceeded to trial.

Grobman describes it differently. He denies that the case is about a scheme to steal more than $100 million. To the contrary, he explains that the case is about "gray market sales of diverted products." [ECF No. 393, p. 2]. He points to the fact that "every company listed as a victim was paid for their products and paid an amount in which they received a profit." *Id.* Therefore, Grobman argues, the issue at sentencing will be "whether any company suffered a loss under the guidelines or whether profits of the defendants can be characterized a loss." *Id.*

On January 21, 2020, a three-week jury trial began. The United States represents, in its response, that the jury took less than half-a-day of deliberations to convict the

defendants of all charges. [ECF No. 390, p. 2]. Immediately following the jury's verdict, Judge Altman remanded Grobman to the custody of the United States Marshals Service. *Id.* Defendants' sentencing is currently scheduled for June 17, 2020.

Just before remanding the Defendant, Judge Altman heard argument from Grobman's counsel, who argued that Grobman should be allowed to remain on bond, contending that his family circumstances and compliance with the previous conditions of bond provided clear and convincing evidence that Grobman did not pose a flight risk. *See* Feb. 6, 2020 Trial Tr. at 16:17-17:3.[1] Judge Altman ordered Grobman be remanded, noting, "[T]hings are different once you get convicted at trial. Because until that point, hope springs eternal in human beings. And now after that point, I think it's understandable that things may have changed." *Id.* at 17:8-11.

The Presentence Investigation Report ("PSI") was disclosed to the parties. [ECF No. 378]. The PSI established that Grobman's guideline imprisonment term is **life** imprisonment. [ECF No. 378, ¶ 109].[2]

But Grobman argues that this advisory recommendation is substantially and

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[1] The hearing transcript has not been posted on CM/ECF, so the Undersigned has not been able to review it. Therefore, I am quoting from the Government's opposition memorandum, as I have no reason to believe that the United States would purposefully miscite comments from a transcript. If Grobman has grounds to challenge the accuracy of the quotes provided by the United States in its opposition memorandum and used here, then he may file an appropriate motion.

[2] The United States mentioned the life term guideline in its publicly filed memorandum.

unfairly skewed, and he contends it is based on an over-representation of the actual harm in a gray market/diversion case. [ECF No. 393, p. 2].

To support this argument, Grobman relies on *United States v. Javat*, 18-cr-20668, a case which Grobman explains the United States has previously compared his case to during pre-trial conversations and hearings. *Id.* In *Javat*, United States District Judge Donald Middlebrooks held that the Advisory Sentencing Guidelines over-represented the actual harm and found a downward variance to 10 years, from a level 43 life sentence. *Id.* In doing so, Judge Middlebrooks explained the following at the sentencing hearing: "I think other guideline enhancements in this case operate together to produce an unreasonable sentence. And I also have some concerns . . . that the way the fraud guidelines have been ratcheted up by a number of events also lead, at least in this case, to an unreasonable sentence." *Id.* at pp. 2-3.

Before explaining my ruling, the Undersigned acknowledges the never-before-in-our-lifetime health crisis which the entire world is confronting with the COVID-19 pandemic.

So, let's be realistic about what's happening. The magnitude and speed of COVID-19's transmission is far greater than other flus or diseases which the world has battled in the last 75 years. As of now, there is no known treatment and a vaccine is, at a minimum, many months away. To say that the health risk is serious is to use an underwhelming adjective.

The Undersigned recognizes that Grobman (and likely many other FDC detainees) is concerned about his health. Anyone would be concerned. Similarly, there is no denying that COVID-19 has turned the world on its head.

Extraordinary times sometimes lead to atypical results. Factors which might be deemed comparatively insignificant in routine scenarios may now take on far-more importance. On the flip side, factors considered particularly relevant in a run-of-the-mill setting might generate only modest influence in an unprecedented time.

In our District, all trials, including criminal trials, have been stopped. All judges have been advised to conduct hearings by telephone or video conference, rather than to have in-person hearings. CDC-generated placards have been placed in many spots in our courthouses, admonishing all to wash their hands and practice social distancing.

The United States Attorney General issued a March 26, 2020 Memorandum, addressed to the Director of the Bureau of Prisons, giving guidance on how to grant home confinement to certain eligible inmates during the "present crisis" arising from "the pandemic currently sweeping across the globe." [ECF No. 395-1]. The Memorandum suggests that "there are some at-risk inmates who are non-violent and pose minimal likelihood of recidivism and who might be safer serving their sentences in home confinement **rather than in BOP facilities**." *Id.* (emphasis added).

Therefore, the Attorney General's Memorandum explained, he wants to "ensure that we utilize home confinement, where appropriate, to protect the health and safety of

BOP personnel and the people in our custody." *Id.*

In fact, several federal judges have focused on the health crisis when issuing orders releasing Defendants from custody, including those, like Grobman, who are facing sentencing.

For example, in *United States v. Stephens*, No. 15-cr-95, 2020 WL 1295155, at *2 (S.D.N.Y. Mar. 19, 2020), the Court discussed that "the unprecedented and extraordinarily dangerous nature of the COVID-19 pandemic has become apparent." The Court further focused on the reality that "although there is not yet a known outbreak among the jail and prison populations, inmates may be at a heightened risk of contracting COVID-19 should an outbreak develop." *Id.* The *Stephens* Court noted that "though the BOP has admirably put transmission mitigation measures in place," it then explained that "substantial medical and security challenges would almost certainly arise." *Id.*

Similarly, in *United States v. Harris*, No. 19-356, 2020 WL 1482342, at *1 (D.D.C. Mar. 26, 2020), the District Court judge granted an emergency motion for release filed by a defendant facing sentencing after he pled guilty to distribution of child pornography. In doing so, the judge highlighted the fact that "the risk of the spread of the virus in the jail is palpable, and the risk of overburdening the jail's healthcare resources, and the healthcare resources of the surrounding community is real." *Id.*

IV. Applicable Legal Standards and Analysis

It is presumed that a defendant will be remanded into custody following a

criminal conviction. Under Title 18, United States Code, Section 3143, a defendant who has been convicted "shall" be detained pending sentencing "unless the judicial officer finds by **clear and convincing evidence** that the person is not likely to flee or pose a danger to the safety of any other person or the community if released[.]" 18 U.S.C. § 3143(a) (emphasis added).

The United States has not advanced the argument that Grobman would be a danger to safety of another or to the community if released, so this Order will not discuss that factor.

The emergence of COVID-19, combined with Grobman's at-risk medical status, militates in favor of the Defendant's release.

In addition to Section 3143, there is another federal statute which comes into play here: 18 U.S.C. § 3145(c), which provides that "a person subject to detention pursuant to section 3143(a)(2) or (b)(2), and who meets the conditions of release set forth in section 3143(a)(1) or (b)(1), may be ordered released, under appropriate conditions, by the judicial officer, if it is clearly shown that there are **exceptional reasons** why such person's detention would not be appropriate." (emphasis added). The *Harris* Court recently relied on Section 3145(c) to enter an Order releasing a defendant pending sentencing. 2020 WL 1482342, at *1.

Courts have generally recognized that "it is a rare case in which health conditions present an 'exceptional reason'" to allow for release where otherwise detention would be

warranted. *United States v. Wages*, 271 F. App'x 726, 728 (10th Cir. 2008) (applying 18 U.S.C. § 3145(c); collecting cases). These cases recognize that reasonably necessary treatments are available in prison, and often times a prison setting will provide **superior** care than a defendant can obtain on the outside. *United States v. Rodriguez*, 50 F. Supp. 2d 717, 722 (N.D. Ohio 1999).

These cases, however, were not decided in the midst of a global pandemic which has killed thousands in two to three months and which appears to be spreading at an alarming and ever-increasing rate in the United States.

The Government notes that several courts have addressed similar motions for release based upon COVID-19 and still *denied* the defendant's release. [ECF No. 390, p. 7]; *see, e.g., United States v. Lewis*, Case No. 2:19-cr-00034-LMA-MBN, ECF No. 150 (E.D. La. Mar. 19, 2020); *United States v. Martin*, Case No. 1:19-cr-00140-PWG, ECF No. 209 (D. Md. Mar. 17, 2020); *see also United States v. Gileno*, Case No. 3:19-cr-00161-VAB, ECF No. 28 (D. Conn. Mar. 19, 2020) (denying wire fraud defendant's request in light of COVID-19 to serve remaining eight months of his sentence on home confinement); *cf. United States v. Stephens*, Case No. 15-cr-95-AJN, ECF No. 2798 (S.D.N.Y. Mar. 19, 2020) (granting bail in light of COVID-19 to defendant facing a hearing on supervised release violations, where defendant had not yet been convicted of violating supervised release and the hearing was scheduled for six days later).

The United States also relies on a decision from earlier this week in this district,

when United States District Judge James I. Cohn continued to detain pending sentencing a health care fraud defendant following his conviction at trial. [ECF No. 390, p. 7]; *United States v. Sebastian Ahmed*, Case No. 19-cr-60200-JIC (S.D. Fla. Mar. 24, 2020).

In *Lewis*, the Court was not convinced by the defendant's citation to articles discussing that jails are incubators for infectious diseases like COVID-19. *Lewis*, Case No. 2:19-cr-00034-LMA-MBN, ECF No. 150 (E.D. La. Mar. 19, 2020). The Court also noted that, if anything, the COVID-19 pandemic has *reduced* the availability of conditions to mitigate the risk of flight because probation officers will not be as efficient at monitoring. *Id.*

And in *Gileno*, the Court rejected the defendant's request, concluding that there is no showing that the FDC-implemented plan is inadequate to manage the pandemic at the facility in question. *Gileno*, Case No. 3:19-cr-00161-VAB, ECF No. 28 (D. Conn. Mar. 19, 2020). The judge could not assume that the BOP would be unable to manage the threat. Moreover, the Court reasoned, if the BOP is unable to manage the medical risk, then it would be duty-bound to release *all* prisoners who expressed vague concern about medical issues. *Id.*

There is no doubt that those cases undermine Grobman's position. But other, more-recent decisions, issued as the pandemic continues to worsen, support release under appropriate conditions. Grobman relies on the following cases:

1) *United States v. Avenatti*, No. 8:19-cr-61 (C.D. Cal. Mar. 25, 2020) (*sua sponte* inviting Avenatti to **reapply** for release after denying his motion for the release, stating,

"[i]n light of the evolving nature of the Covid-19 pandemic, particularly in the greater New York City area, the Court invites Avenatti to apply *ex parte* for reconsideration of the Court's order" denying release).

2) *United States v. Michaels*, 8:16-cr-76-JVS (C.D. Cal. Mar. 26, 2020) (finding that COVID-19 is a "compelling reason" for release and that "Michaels has demonstrated that the Covid-19 virus and its effects in California constitute 'another compelling reason'" justifying temporary release under § 3142(i)).

3) *United States v. Harris*, No. 19-cr-356 (D.D.C. Mar. 26, 2020) ("The Court is convinced that incarcerating Defendant while the current COVID-19 crisis continues to expand poses a far greater risk to community safety than the risk posed by Defendant's release to home confinement on . . . strict conditions.").

4) *Xochihua-James v. Barr*, No. 18-71460 (9th Cir. Mar. 23, 2020) (*sua sponte* releasing detainee from immigration detention because "in light of the rapidly escalating public health crisis, which public health authorities predict will especially impact immigration detention centers").

5) *United States v. Jaffee*, No. 19-cr-88 (D.D.C. Mar. 26, 2020) (releasing defendant with criminal history in gun and drug case, citing "palpable" risk of spread in jail and "real" risk of "overburdening the jail's healthcare resources"); ("[T]he Court is . . . convinced that incarcerating the defendant while the current COVID-19 crisis continues to expand poses a greater risk to community safety than posed by Defendant's

release to home confinement").

6) *United States v. Garlock*, No. 18-CR-00418-VC-1, 2020 WL 1439980 (N.D. Cal. Mar. 25, 2020) (citing "chaos" inside federal prisons in *sua sponte* order extending time to self-surrender because "[b]y now it almost goes without saying that we should not be adding to the prison population during the COVID-19 pandemic if it can be avoided").

7) *United States v. Perez*, No. 19 CR. 297 (PAE), 2020 WL 1329225, at *1 (S.D.N.Y. Mar. 19, 2020) (releasing defendant due to the "heightened risk of dangerous complications should he contract COVID-19").

8) *United States v. Stephens*, No. 15-cr-95 (AJN), 2020 WL 1295155, at *2 (S.D.N.Y. Mar. 19, 2020) (releasing defendant in light of "the unprecedented and extraordinarily dangerous nature of the COVID-19 pandemic").

9) *In re Manrique*, No. 19-mj-71055-MAG-1 (TSH), 2020 WL 1307109, at *1 (N.D. Cal. Mar. 19, 2020) (authorizing release of former Peruvian president who is fighting extradition back to Peru to face trial on corruption charges as "[t]he risk that this vulnerable person will contract COVID-19 while in jail is a special circumstance that warrants bail").[3]

Moving on from Grobman's medical concerns to the statutory requirement that he

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[3] In authorizing release, the magistrate judge noted that the United States' treaty obligation to Peru "is to deliver him to Peru **alive**." 2020 WL 1307109, at *1 (emphasis added).

establish by clear and convincing evidence that he is not a flight risk,[4] the Undersigned is persuaded by his presentation under the special and exceptional circumstances presented here.

As part of the flight risk analysis, I am persuaded by Magistrate Judge Hixson's observation in *Manrique* that the flight risk concerns have "to a certain extent been mitigated by the existing pandemic." 2020 WL 1307109, at *1.

Grobman argues that he does not pose a flight risk because "he lacks a passport and country borders have been closed." [ECF No. 387, p. 6]. As noted by Magistrate Judge Hixson, "international travel is hard now." *In re Manrique*, 2020 WL 1307109, at *1. For example, "travel bans are in place, and even if Toledo got into another country, he would most likely be quarantined in God-knows-what conditions, which can't be all that tempting." *Id.*

Moreover, to further quote Magistrate Judge Hixson, "international travel would itself pose a risk of infection by likely putting [the defendant who has family and contacts in Peru, where he used to be president] in contact with people in close quarters." *Id.*

The United States contends that Grobman has "vast wealth," which means he would have money to travel by private air or sea travel to escape. [ECF No. 390, p. 8].

But the Undersigned is not convinced by the argument. After all, maybe the risk

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[4] The Court must find by clear and convincing evidence that Grobman is not a flight risk under both Section 3143(a) and Section 3145(c).

of contracting COVID-19 is worth it to Grobman if he can escape and get away with it. But, to use a phrase from *Manrique*, "escape is riskier and more difficult now." *In re Manrique*, 2020 WL 1307109, at *1. As a 46-year-old man with Lupus and a pre-diabetic condition, Grobman might be giving himself a medical death sentence if he were to flee to Peru or another country with a less-sophisticated, less-modern and less-comprehensive health system than the United States and come into contact with a person carrying COVID-19.

The bond package proposed by Grobman, along with additional conditions I am imposing, will be sufficient to support the conclusion that there is clear and convincing evidence to demonstrate that he will not be a flight risk in the midst of a global COVID-19 pandemic.

The conditions of the release will be based on the following bonds and other restrictions, as outlined below:

1. A $1 million personal surety bond signed by Grobman and his wife, Noemi. Neither Grobman nor his wife will be able to sell, pledge, mortgage or do anything to affect the title to the marital home which will serve as the collateral for this bond.

2. A $1 million, 10% bond, signed by Abraham Vurnbrand. There will be a *Nebbia* requirement for the $100,000 which Mr. Vurnbrand will deposit with the Clerk.

3. A $500,000 personal surety bond signed by Edy Gross, who will not be able to sell, pledge, mortgage or do anything to affect any interest she has in any real estate,

including her home at 2040 N.E. 211 Street, North Miami.

4. Alan Grobman will sign an $850,000, 10% bond, with $85,000 to be deposited with the Clerk. There will be a *Nebbia* requirement. In addition, Alan Grobman will sign whatever papers are necessary to continue the $150,000 10% bond which he signed at the start of the case. The $15,000 he posted then will remain with the Clerk. Alan Grobman will not be able to sell, pledge, mortgage or do anything to affect the title to any real estate in which he has any interest, anywhere in the world.

5. Grobman, his wife and his children will need to surrender their passports and travel documents to Pretrial Services and may not seek any additional passports or travel documents.

6. Grobman will be on home confinement, supported by electronic monitoring, with the costs to be paid by him and/or his family. He may leave only to attend required court hearings, to visit a hospital emergency room for his own medical emergency, or to meet with his attorney for a scheduled appointment.

7. Grobman may not visit any commercial transportation establishments, including airports, marinas, train stations or bus stations.

8. Grobman must arrange for his racing boat (and all other boats) to be removed from his waterfront home before he arrives there, and he may not get within 500 yards of it.

9. Grobman will need to report to Pretrial Services, as directed.

10. He must undergo substance abuse testing and/or treatment, as may be Required by Pretrial Services.

11. Grobman may not possess any firearm, ammunition or dangerous devices.

12. As a precondition to release, Grobman will submit to screening for COVID-19 by the BOP and/or the United States Marshals Service. If he is found to be exhibiting symptoms consistent with COVID-19 or is confirmed to have it, then he shall **not** be released.

13. If Grobman does not have COVID-19 or symptoms consistent with it at the time of his release, then he shall submit to screening for COVID-19 as directed by Pretrial Services. If he then or thereafter exhibits symptoms consistent with COVID-19, then he shall remain in quarantine or isolation, as directed by Pretrial Services, in a form directed by Pretrial Services, including self-isolation or self-quarantine.

14. During this period of pre-sentencing supervision, Grobman shall comply with all national, state and local public health orders regarding COVID-19.

V. Conclusion

The Undersigned **grants** the updated and amended motion, subject to all the terms and conditions listed above. If the United States wishes to appeal this Order to Judge Altman and seek a stay, then it shall file a brief notice of its intent by **March 30, 2020**[5] and

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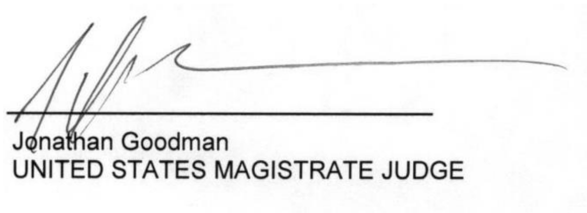
[5] The notice can be a simple one-notice submission, along the lines of "The United States is appealing the Order granting Grobman's post-trial bond motion and seeks a stay." At that point, the stay will be in effect. In other worlds, given the limited nature

then must file its motion/memorandum by **April 2, 2020**. At that point, Judge Altman can establish a briefing schedule if he deems it appropriate and can determine whether he will have a telephonic hearing or rule on the papers.

DONE AND ORDERED in Chambers, Miami, Florida, on March 29, 2020.



Jonathan Goodman
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
The Honorable Roy K. Altman
All counsel of record

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of the Court's daily operations, the Undersigned is giving an anticipatory ruling to grant a requested stay should the United States seek a stay in connection with an appeal.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
v.	)	**Case No. 18-cr-00222 (APM)**
GERALD MEEKINS,	)	
Defendant.	)	

RELEASE ORDER

Before the court is Defendant Gerald Meekins's Emergency Motion for Release Pending Sentencing, ECF No. 68. Having considered the parties' filings, the court finds that "exceptional reasons" exist to release Defendant from confinement pending sentencing. 18 U.S.C. § 1345(c). The "exceptional reason" is, of course, the COVID-19 pandemic and its arrival and potential spread within Department of Corrections' facilities. Critically, Defendant's medical condition of hypertension places him at increased risk for contracting the virus and its adverse health effects. *See* Lei Fang et al., Are patients with hypertension and diabetes mellitus at increased risk for COVID-19 infection?, The Lancet, March 11, 2020 (available at https://www.thelancet.com/journals/lanres/article/PIIS2213-2600(20)30116-8/fulltext) (last visited March 31, 2020).

Furthermore, although a close call, the court finds by clear and convincing evidence that Defendant is "not likely to flee or pose a danger to the safety of any other person or the community if released[.]" 18 U.S.C. § 1343(a)(1). Defendant in this case stands convicted of a non-violent offense: felon in possession of a weapon. Defendant's conduct was purely possessory in nature; he did not brandish or otherwise use the weapon. Moreover, Defendant's last adult conviction is a decade old, *see* PSR, ECF No. 57, ¶¶ 29–30, and although he has a prior conviction for

carjacking, his role in that offense involved no violence and was largely secondary in nature, *see id.* ¶ 30. The court is concerned about Defendant's potential for assaultive behavior, given the pendency of three assault charges, each incurred while on release in this case. But that concern is mitigated by the strict conditions of release under which the court intends to place Defendant, which are designed to minimize his exposure to others. In the end, the court has balanced the risk that Defendant poses to the community against the risk posed to his health by continued incarceration, and concludes that release is warranted under § 1345(c) under the following conditions:

1. Defendant shall be placed on electronic monitoring in the High Intensity Supervision Program and abide by all conditions of that Program.

2. Defendant shall be placed on home detention, meaning he may not leave his residence except for medical, mental health, and legal appointments.

3. Defendant shall reside with his father at [redacted]

4. Defendant shall report immediately upon release to 633 Indiana Ave., N.W., 9th floor for installation of the GPS device and, if released after 4 p.m., the following business day.

5. Defendant shall participate in outpatient treatment and counseling through MBI Health or other appropriate health care provider approved by the Pretrial Services Agency.

6. Defendant shall call the Pretrial Services Agency twice weekly.

Accordingly, for the foregoing reasons, Defendant's Emergency Motion for Release Pending Sentencing, ECF No. 68, is granted.

Dated: March 31, 2020

Amit P. Mehta
United States District Court Judge