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

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

Counsel for Plaintiff-Petitioners
Additional counsel listed on following page

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Jacinto Victor ALVAREZ, Joseph BRODERICK, Marlene CANO, Jose CRESPO-VENEGAS, Noe GONZALEZ-SOTO, Victor LARA-SOTO, Racquel RAMCHARAN, George RIDLEY, Michael Jamil SMITH, Leopoldo SZURGOT, Jane DOE, on behalf of themselves and those similarly situated.
Plaintiff-Petitioners,

v.

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

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

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

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

PLAINTIFF-PETITIONERS' FIRST RESPONSE TO DEFENDANT-RESPONDENTS' MOTION TO DENY PETITION FOR HABEAS CORPUS AND INJUNCTIVE AND DECLARATORY RELIEF

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

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

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

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

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INTRODUCTION

In the midst of the worst pandemic the world has seen since 1918, Petitioner-Plaintiffs ("Petitioners") remain detained at the Otay Mesa Detention Center ("Otay Mesa"), a facility that is currently experiencing a significant COVID-19 outbreak. Among them are many who have medical conditions that place them at high risk of severe illness or death should they become infected with the novel coronavirus. Since Petitioners filed this action, at least 70 additional detained people at Otay Mesa have tested positive for the virus—an increase of over 70% in a 7-day period.[1] As this Court has noted, "the current circumstances, and in particular, the circumstances at Otay Mesa, are anything but normal." *Alcantara v. Archambeault*, Case No. 3:20-cv-00756-DMS-AHG, Dkt. 41 at 16. Petitioners' lives and safety are at risk.

Against this backdrop, Respondents move to dismiss[2] the Petition on the grounds that the Prison Litigation Reform Act ("PLRA") requires exhaustion of

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[1] As of April 23, 2020, OMDC had 97 confirmed COVID-positive cases among detained persons (38 persons detained by USMS and 59 persons detained by Immigration and Customs Enforcement ("ICE")). Kate Morrissey (@bgirledukate), Twitter (Apr. 23, 2020, 10:50 PM), https://twitter.com/bgirledukate/status/1253471366621196288. As of April 30, 2020, OMDC had 167 positive cases in both USMS and ICE custody. Kate Morrissey, *Federal judge orders review for release of ICE detainees at Otay Mesa Detention Center due to pandemic*, San Diego Union Tribune, Apr. 30, 2020, https://www.sandiegouniontribune.com/news/immigration/story/2020-04-30/judge-orders-review-for-release-of-ice-detainees-at-otay-mesa-detention-center.

[2] Respondents style their motion as a "Motion to Deny" the petition, but because they move under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6), their motion is properly considered a motion to dismiss. Since tomorrow's emergency hearing relates only to the Medically Vulnerable Subclasses, Petitioners submit this first response to address these jurisdictional issues with respect to the Medically Vulnerable Subclasses. Petitioners are also concurrently filing an objection to Respondents' unilateral noticing of a hearing date on the full Motion to Dismiss for

administrative remedies and limits the relief Petitioners may seek from a single district judge; that habeas corpus is not available to Petitioners in this case; and that seeking relief through habeas "unduly duplicates judicial efforts." ECF No. 31 ("MTD") at 2. They propose instead that the hundreds of individuals in USMS custody each seek relief individually through separate applications to this Court or through extended processes that would take weeks if not months to fully resolve. *Id.* at 10–11, 14–15. But Respondents' arguments fundamentally misconstrue the nature of Petitioners' claims. Petitioners seek immediate release of the Medically Vulnerable Subclasses—relief that is "at the core" of habeas corpus. As dozens of courts across the country—including at least three courts within the Ninth Circuit—have found, Petitioners challenging the fact of their confinement on constitutional grounds do so appropriately through habeas petitions. *See infra* at 10 n.14 (citing cases).

The PLRA exhaustion requirements do not apply to habeas petitions. Nor is any prudential exhaustion required where, as here, Petitioners are likely to suffer irreparable injury or where any administrative remedy would be futile. The Bail Reform Act ("BRA") also does not provide an alternative avenue for relief that supplants the need for a habeas petition in this case.

Accordingly, this Court should deny Respondents' motion to dismiss as to the Medically Vulnerable Subclasses.

LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(1), a party may move to dismiss an action for "lack of subject matter jurisdiction." Such a motion may either be facial or factual. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2003). A facial challenge "asserts that the allegations contained in the complaint are insufficient on

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May 5, 2020, and will separately address the issues that do not pertain to the Medically Vulnerable Subclasses in due course.

their face to invoke federal jurisdiction." *Torres v. DHS*, 411 F. Supp. 3d 1036, 1046 (C.D. Cal. 2019); *see Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In other words, a facial attack challenges the legal sufficiency of a claim, rather than its factual basis. *Safe Air for Everyone* at 1039. "When evaluating a facial attack, the court must accept the factual allegations in the plaintiff's complaint as true." *Torres* at 1046 (citing *Comm. For Immigrant Rights of Sonoma Cty. v. Cty. of Sonoma*, 644 F. Supp. 2d 1177, 1189 (N.D. Cal. 2009)). Here, Respondents raise a facial challenge to subject-matter jurisdiction.[3] "Where jurisdiction is intertwined with the merits, [the Court] must 'assume the truth of the allegations in the complaint . . . unless controverted by undisputed facts in the record.'" *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003) (quoting *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987)).

Under Rule 12(b)(6), dismissal "is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). In order to meet this standard, a plaintiff must only set forth "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2007). The Rule must be read in conjunction with Fed. R. Civ. P. 8(a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to give the defendant "fair notice of what the claim is and the grounds upon which it rests." *Id.* at 555. In deciding a motion to dismiss under Rule 12(b)(6), the court must assume that all the allegations in the complaint are true and must construe the complaint in the light most favorable to the non-moving party. *See Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000).

[3] Respondents raise only a *facial* challenge to subject matter jurisdiction in this case, but incorrectly cite the legal standard for a factual challenge.

FACTS[4]

COVID-19 is a deadly and rapidly spreading global pandemic.[5] The consequences of contracting COVID-19 can be severe. Infected individuals who do not die from the disease may experience serious damage to the lungs, heart, liver, or other organs, resulting in prolonged recovery periods, including extensive rehabilitation from neurological damage, loss of respiratory capacity, and organ failure. Risk of serious illness or death from COVID-19 is even greater in older individuals or individuals of any age who suffer from certain underlying conditions.[6] Most people in higher-risk categories who develop serious illness will need advanced support, including highly specialized equipment like ventilators that are in limited supply and an entire team of care providers, including 1:1 or 1:2 nurse-to-patient ratios, respiratory therapists, and intensive care physicians.[7]

The only known effective measures to reduce the risk of COVID-19 are to prevent infection through social distancing and vigilant hygiene, including hand washing and disinfecting surfaces.[8] These measures are particularly challenging to

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[4] Petitioners refer the Court to their memorandum of points and authorities in support of their Motion for Emergency Temporary Restraining Order and for Preliminary Injunction (ECF No. 2-2) for a more complete recitation of the facts.

[5] *See* ECF No. 1, ¶¶ 31–52; ECF No. 2-2 at 4–9.

[6] Xianxian Zhao, et al., *Incidence, clinical characteristics and prognostic factor of patients with COVID- 19: a systematic review and meta-analysis* (Mar. 20, 2020), https://www.medrxiv.org/content/10.1101/2020.03.17.20037572v1.article-info.

[7] Kevin McCoy and Katie Wedell, *'On-the-job emergency training': Hospitals may run low on staff to run ventilators for coronavirus patients*, USA Today, Mar. 27, 2020, https://www.usatoday.com/story/news/nation/2020/03/27/coronavirus-hospitals-face-shortages-respiratory-therapists-run-ventilators/2914635001/.

[8] Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities, Centers for Disease Prevention and Control, Mar. 23, 2020, at 8, https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf.

implement in a congregate environment given the high concentration of people housed in close quarters and limited access to sinks, showers, toilets, water, personal hygiene supplies, and facility cleaning equipment. Cohen Decl. ¶ 10, attached as Exh. A to McPhee Decl. in Support of Reply to TRO; Goldenson Decl. ¶ 19 (ECF No. 1-2). Against this backdrop, Otay Mesa is the site of one of the largest detention facility COVID-19 outbreaks, and the situation at Otay Mesa has only deteriorated since this case was filed.[9]

It is currently impossible for individuals at Otay Mesa to comply with the CDC's recommendation to remain six feet apart at all times. Goldenson Decl. ¶ 27 (ECF No. 1-2). Despite the active outbreak within the facility, individuals remain housed together in pods, which consist of roughly 60 to 120 persons each. *Id.* ¶ 24. All detained individuals are held in close quarters, well under the distance of six feet apart that the CDC recommends. Amon Decl. ¶ 24 (ECF No. 1-3). Within each pod, most individuals share small cells with two or three persons per cell. *See, e.g.*, Lara-Soto Decl. ¶¶ 3, 4, 6 (ECF No. 1-9). When not in their cells, detained persons share common spaces and cannot consistently maintain a six-foot distance from others. Arreola Decl. ¶ 6, attached as Exh. B to McPhee Decl. in Support of Reply to TRO; Szurgot Decl. ¶ 11 (ECF No. 1-6); Lara-Soto Decl. ¶ 42 (ECF No. 1-9). Ridley Decl. ¶ 8 (ECF No. 1-4); Doe Decl. ¶ 5 (ECF No. 1-5). Chairs and tables in communal areas are bolted to the ground and chairs are less than three feet apart. Ridley Decl. ¶ 7 (ECF No. 1-4); Doe Decl. ¶ 4 (ECF No. 1-5); Jamil-Smith Decl. ¶ 6 (ECF No. 1-10). To watch television, individuals have to sit in close proximity to each other. Crespo-Venegas Decl. ¶ 6 (ECF No. 1-11); Gonzalez-Soto Decl. ¶ 9 (ECF No. 1-12); Lara-Soto Decl. ¶ 26 (ECF No. 1-9).

[9] *See* discussion at Section I.a of Petitioners' Reply in Support of Emergency Motion for Temporary Restraining Order.

In addition to the impossibility of social distancing within Otay Mesa, the hygienic situation in the facility is inadequate to abate the spread of COVID-19. Goldenson Decl. ¶ 30 (ECF No. 1-2), Amon Decl. ¶ 53 (ECF No. 1-3).[10] Yet Otay Mesa is not conducting widespread COVID-19 testing or even consistently testing those who report flu-like symptoms. Amon Decl. ¶ 24 (ECF No. 1-3); Szurgot Decl. ¶ 10 (ECF No. 1-6); Lara-Soto Decl. ¶ 46 (ECF No. 1-9). Sick individuals are given pills or told to drink water with salt. Lara-Soto Decl. ¶ 46 (ECF No. 1-9); Doe Decl. ¶ 14 (ECF No. 1-5); Broderick Decl. ¶ 24 (ECF No. 1-8). Numerous detained persons report remaining in a pod with dozens of asymptomatic individuals after reporting their symptoms. Amon Decl. ¶ 34 (ECF No. 1-3).

Because of the severity of the threat posed by COVID-19, and its potential to rapidly spread throughout a detention setting, public health experts recommend, first and foremost, the rapid release from custody of people with heightened vulnerability to COVID-19.[11] Release of medically vulnerable people from detention is especially important given the heightened risks to their health and safety and given the lack of a viable vaccine for prevention or effective treatment at this stage. Amon Decl. ¶ 50 (ECF No. 1-3). Release protects medically vulnerable people from transmission of the virus, and also allows for greater risk

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[10] *See also* Alvarez Decl. ¶¶ 6–7 (ECF No. 1-7); Gonzalez-Soto ¶ 15 (ECF No. 1-12); Cano Decl. ¶ 10 (ECF No. 1-15) (limited availability of soap); Ramcharan Decl. ¶ 6 (ECF No. 1-13); Alvarez Decl. ¶ 6 (ECF No. 1-7); Szurgot Decl. ¶ 5 (ECF No. 1-6) (limited availability of hand sanitizer); Cano Decl. ¶ 8 (ECF No. 1-15); Jamil-Smith Decl. ¶ 21 (ECF No. 1-10); Szurgot Decl. ¶ 4 (ECF No. 1-6); Amon Decl. ¶ 24 (ECF No. 1-3) (insufficient surface disinfection); Cano Decl. ¶ 9 (ECF No. 1-15); Doe Decl. ¶ 6 (ECF No. 1-5); Ramcharan Decl. ¶ 5 (ECF No. 1-13) (frequency of shower cleaning); Gonzalez-Soto Decl. ¶ 4 (ECF No. 1-12) (telephones closely spaced and not cleaned after each use).

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

mitigation for remaining detained individuals, detention center staff, and the surrounding community. Amon Decl. ¶ 52 (ECF No. 1-3). Release of medically vulnerable people from custody also reduces the burden on the region's health care infrastructure by reducing the likelihood that an overwhelming number of people will become seriously ill from COVID-19 at the same time. *Id.* In recognition of these and other reasons, a growing number of courts have ordered release from confinement and modifications of supervised release for individuals in the federal criminal system in response to COVID-19.[12]

ARGUMENT

I. This Court Has Subject-Matter Jurisdiction Over the Medically Vulnerable Subclasses' Habeas Petition.

A. Habeas Is The Appropriate Vehicle For The Relief Petitioners Seek.

Petitioners seek habeas relief. *See* ECF No. 1 ¶¶ 14–16, 79–81. Contrary to Respondents' assertions, MTD at 15–16, habeas is the appropriate vehicle for the relief Petitioners—and particularly the Medically Vulnerable Subclasses—seek. Habeas relief is available to persons who, like Petitioners, are "in custody in violation of the Constitution or laws or treaties of the United States . . . ." 28 U.S.C. § 2241(c)(3). The Medically Vulnerable Subclasses' claim—that their continued detention at Otay Mesa is unconstitutional, and that they are entitled to immediate

[12] *See, e.g.*, *United States v. Meekins*, Case No. 1:18-cr- 222-APM, Dkt. No. 75 (D.D.C. Mar. 31, 2020); *United States v. Davis*, No. 1:20-cr-9-ELH, Dkt. No. 21 (D. Md. Mar. 30, 2020); *United States v. Muniz*, Case No. 4:09-cr-199, Dkt. No. 578 (S.D. Tex. Mar. 30, 2020); *United States v. Hector*, Case No. 2:18-cr-3-002, Dkt. No. 748 (W.D. Va. Mar. 27, 2020); *United States v. Grobman*, No. 18-cr-20989, Dkt. No. 397 (S.D. Fla. Mar. 29, 2020); *United States v. Mclean*, No. 19-cr-380, Dkt. No. (D.D.C. Mar. 28, 2020); *United States v. Harris*, No. 19-cr-356 (D.D.C. Mar. 26, 2020); *In re Request to Commute or Suspend County Jail Sentences*, Docket No. 084230 (N.J. Mar. 22, 2020).

release—lies "within the core of habeas corpus." *Preiser v. Rodriguez*, 411 U.S. 475, 487 (1973).[13] And in fact, dozens of courts around the country have found that habeas jurisdiction is proper for actions challenging the fact of confinement in light of the COVID-19 pandemic.[14]

Even where the relief sought is not limited to release, moreover, the Ninth Circuit has not accepted Respondents' attempt to differentiate between challenges to the fact or duration of confinement and challenges to conditions of confinement. Although the Ninth Circuit has held that individuals in *state* prisons may not bring § 2245 habeas petitions to challenge their conditions of confinement, the Court expressly did not decide whether the same limits apply to individuals in federal custody. *Nettles v. Grounds*, 830 F.3d 922, 931 (9th Cir. 2016); *see also Ziglar v. Abbassi*, 137 S. Ct. 1843, 1862–63 (2017) (the Supreme Court has "left open the question whether [petitioners] might be able to challenge their confinement conditions via a petition for a writ of habeas corpus"). Numerous district courts

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[13] The Supreme Court has held repeatedly that "challenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus." *Muhammad v. Close*, 540 U.S. 749, 750 (2004); *see also Munaf v. Geren*, 553 U.S. 674, 693 (2008) ("Habeas is at its core a remedy for unlawful executive detention.").

[14] *See, e.g.*, *Bent v. Barr*, No. 19-cv-6123, 2020 WL 1812850, at *2 (N.D. Cal. Apr. 9, 2020); *Ortuño v. Jennings*, Case No. 20-cv-2064-MMC, 2020 WL 1701724, at *2 (N.D. Cal. Apr. 8, 2020); *Castillo v. Barr*, 2020 WL 1502864, at *3 (C.D. Cal. Mar. 27, 2020); *Vasquez-Berrera v. Wolf*, No. 20-cv-1241, 2020 WL 1904497, at *4 (S.D. Tex. Apr. 17, 2020) ("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."); *Malam v. Adducci*, No. 20-10829, 2020 WL 1672662, at *2–3 (E.D. Mich. Apr. 5, 2020); *Coreas v. Bounds*, No. 20-0780, 2020 WL 1663133, at *7 (D. Md. Apr. 3, 2020); *Mays v. Dart*, No. 20 C 2134, 2020 WL 1812381, at *6 (N.D. Ill. Apr. 9, 2020); *A.S.M. v. Donahue*, No. 20-CV-62, 2020 WL 1847158, at *1 (M.D. Ga. Apr. 10, 2020); *Wilson v. Williams*, No. 20 cv 794, 2020 WL 1940882, at *6 (N.D. Ohio, Apr. 22, 2020).

within the Ninth Circuit have declined to extend the holding in *Nettles* to habeas petitions brought by individuals in federal custody under § 2241.[15] Particularly where, as here, Petitioners seek release as the first remedy, a habeas petition is the appropriate vehicle for their claims.

B. PLRA Exhaustion Requirements Do Not Bar Petitioners' Claims Because Administrative Remedies Are "Unavailable"

Because the Medically Vulnerable Subclasses seek immediate release pursuant to a proper habeas petition, the PLRA plainly does not apply, 42 U.S.C. § 1997e, and there is no mandatory exhaustion requirement that would interfere with the Court's jurisdiction in this case. However, even if the PLRA did apply, exhaustion is not required where, as here, administrative remedies are not "available," either in fact or in practice. 42 U.S.C. § 1997e(a); *see Ross v. Blake*, 136 S. Ct. 1850 (2016).[16]

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[15] *See, e.g.*, *Spring v. Langford*, No. CV 16-04664-JLS (DTB), 2017 WL 3326973, at *3 (C.D. Cal. May 22, 2017) (declining to extend *Nettles* to a federal prisoner's habeas petition challenging BOP restitution payment plan even though the petition "challenges neither the validity nor duration of petitioner's confinement"); *Miller v. Fox*, No. CV 15-06888 DMG (AFM), 2017 WL 1591939, at *2 (C.D. Cal. Feb. 1, 2017) (declining to apply *Nettles* to a federal petitioner challenging his placement in administrative segregation); *McQuown v. Ives*, 2017 WL 359181, at *4 n.1 (D. Or. Jan. 24, 2017) (declining to extend *Nettles* to federal prisoners proceeding under 28 U.S.C. § 2241); *Shakur v. Milusnic*, No. 5:18-cv-00628-SVW-AS, 2019 WL 3207821, at *4–5 (C.D. Cal. Mar. 7, 2019) (holding that *Nettles* would not apply to a federal petitioner challenging a parole decision).

[16] In *Ross*, the Supreme Court clarified that the PLRA only requires exhaustion of remedies that "are capable of use to obtain relief." *Id.* at 1859. The Court provided three non-exhaustive examples where administrative remedies may be deemed unavailable: (1) where the remedial scheme "operates as a simple dead end" because prisons are "unable or consistently unwilling to provide any relief to aggrieved inmates"; (2) when the administrative scheme is "so opaque that it becomes, practically speaking, incapable of use"; and (3) when prison administrators "thwart inmates from taking advantage of a grievance process

Here, although Respondents describe a grievance process in their submission, *see* ECF 31-3, L. Mileto Decl., that process is effectively unavailable given, among other things, (1) the functional lack of any emergency review process that can provide timely relief in the face of imminent danger; and (2) the challenges detained persons must overcome to become aware of, let alone access, appropriate channels for relief. Based on Respondents' submission, Otay Mesa appears to have at least three different grievance processes, only one of which is described in the Detainee Admission and Orientation Handbook ("Detainee Handbook"), and all of which appear to take several weeks to fully exhaust. *Id.* Notably, the process described in the Detainee Handbook applies neither to medical care nor to "any matters relating to the USMS." *Id.*

Although the facility asserts that there is an emergency grievance process, the form provided does not include any way to mark the grievance as urgent. And even though Petitioner Broderick submitted a COVID-19 related grievance in which he stated *that he fears for his life*, Respondents failed to answer his grievance

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through machination, misrepresentation, or intimidation." *Id.* at 1859–60. The Ninth Circuit has also found that administrative remedies are effectively unavailable in numerous contexts, including situations characterized by administrative delays, improper grievance screening, or threats of retaliation. *See, e.g.*, *Andres v. Marshall*, 867 F.3d 1076, 1078 (9th Cir. 2017) (per curiam) (failure to process grievances); *McBride v. Lopez*, 807 F.3d 982, 987 (9th Cir. 2015) (threat of retaliation); *Sapp v. Kimbrell*, 623 F.3d 813, 823 (9th Cir. 2010); *Nunez v. Duncan*, 591 F.3d 1217, 1226 (9th Cir. 2010); *Brown v. Valoff*, 422 F.3d 926, 943 n.18 (9th Cir. 2005) ("Delay in responding to a grievance, particularly a time-sensitive one, may demonstrate that no administrative process is in fact available."); *see also Turner v. Cash*, No. CV 14-4758-JVS (AGR), 2019 WL 1949458, at *6 (C.D. Cal. Jan. 19, 2019), *report and recommendation adopted*, No. CV 14-4758-JVS (AGR), 2019 WL 1237142 (C.D. Cal. Mar. 18, 2019) (the fact that plaintiff previously filed successful grievances does not show that prison officials did not thwart his efforts to file a grievance regarding the specific incident at issue).

for a full nine days. *Id.*[17] On this timeline, the entire facility will be infected with COVID-19 before Petitioners can get past the first stage of the process, much less fully exhaust their administrative remedies.

Additionally, since individuals are now unable to leave their housing pods, they are unable to access the library or obtain any information pertinent to grieving "matters relating to USMS"—which presumably include requests for release or transfer because of the risk of COVID-19 exposure. It also remains wholly unclear how individuals detained at Otay Mesa can grieve concerns about medical care, which must be submitted separately to the Immigration Health Services Corps ("IHSC"), which provides medical care at Otay Mesa. Broderick Decl. ¶ 11 (ECF

[17] *See also* Broderick Decl. ¶ 6 (ECF No. 1-8) ("There are supposed to be slips in the pod that we fill out to file a grievance. I asked the counselor and a few staff workers for grievance slips while the slot was empty, and was told they would have to look into it. They did not offer me any other way to file a grievance. I was unable to file my grievance for 4-5 days."); Arreola Decl. ¶¶ 20–22, attached as Exh. B to McPhee Decl. in Support of Reply to TRO ("Around Monday, April 27, I filled out a complaint on a form titled 'Inmate or Resident Complaint' and put it in the mailbox. Officer Leyva took the complaint out of the mailbox and put it back in my hands. He said something to me, but I did not understand because he said it in English and I do not understand English. . . . Later that day or around that day, my counselor accepted the complaint. I have not received a response yet. . . . I still feel unsafe at CCA and I am afraid the staff will retaliate against me if I make complaints. I do not feel that staff are taking my concerns seriously."); Ridley Decl. ¶ 14 (ECF No. 1-4) ("The grievances are a cat and mouse game. Instead of fixing things, the guards tell you to file a grievance. Then time passes and nothing happens."); Doe Decl. ¶ 23 (ECF No. 1-5) ("Other women have filed grievances about medical treatment, but I do not think the jail has responded to them favorably."); Alvarez Decl. ¶ 14 (ECF No. 1-7) ("I have not filed a grievance because I have seen other people file grievances or try to talk to the warden and the jail ignores their concerns."); Gonzalez-Soto Decl. ¶ 18 (ECF No. 1-12) ("Several of us asked [the counselor] for help, and we weren't being given help by the counselor. There were two more who were also there who asked for help and didn't get it.").

No. 1-8). Under the current exigent circumstances, the grievance process Respondents describe "operates as a simple dead end" and is incapable of "provid[ing] any relief to aggrieved inmates." *Ross* at 1859.

Because the PLRA plainly does not apply to habeas petitions, this Court has jurisdiction regardless of whether Petitioners have satisfied the PLRA's exhaustion requirement. Even under the PLRA, however, in the current context, the administrative grievance process is "unavailable," and Petitioners are not required to exhaust. *Id.*; *see also Fuqua v. Ryan*, 890 F.3d 838 (9th Cir. 2018); *Andres v. Marshall*, 867 F.3d 1076, 1078 (9th Cir. 2017); *Nunez v. Duncan*, 591 F.3d 1217, 1226 (9th Cir. 2010).[18]

II. Petitioners Have Stated A Claim Upon Which Relief May Be Granted.

A. Prudential Exhaustion Under 28 U.S.C. § 2241 Is Not Required Where, As Here, Exhaustion Would Be Futile Or Irreparable Injury Would Result Without Immediate Judicial Review.

In addition to raising inapplicable mandatory exhaustion arguments under the PLRA, Respondents also argue that the Petition should be dismissed because administrative exhaustion is required for habeas petitions, and Petitioners have not exhausted their administrative remedies. MTD at 14–15. But in the present circumstances, exhaustion is not required. For habeas claims, "[t]he exhaustion

[18] It is also well-settled that failure to exhaust is an affirmative defense, and that Respondents have the burden of proving the availability of administrative remedies. *See Albino v. Baca*, 747 F.3d 1162, 1172 (9th Cir. 2014) (holding that "the ultimate burden of proof remains with the defendants" to "prove there was an available administrative remedy" under the PLRA; *Jones v. Bock*, 549 U.S. 199, 216 (2007) ("We conclude that failure to exhaust is an affirmative defense under the PLRA, and that inmates are not required to specially plead or demonstrate exhaustion in their complaints."). Respondents do not even come close to carrying their burden here, where all they have submitted is an excerpt of a manual, signature pages, and a single grievance that did not result in any meaningful response. *See* ECF No. 31-3, L. Mileto Decl.

requirement is prudential, rather than jurisdictional." *Hernandez v. Sessions*, 872 F.3d 976, 988 (9th Cir. 2017); *Brown v. Rison*, 895 F.2d 533, 535 (9th Cir. 1990). And "[u]nless statutorily mandated, application of the doctrine [of prudential exhaustion] is in the sound discretion of the courts." *Aleknagik Natives, Ltd. v. Andrus*, 648 F.2d 496, 500 (9th Cir. 1980). The requirement is not absolute, and courts have recognized a range of circumstances in which exhaustion should be waived, including: "if administrative remedies are inadequate or not efficacious; where pursuit of administrative remedies would be a futile gesture; [and] [w]here irreparable injury will result unless immediate judicial review is permitted." *Id.* at 499 (internal citations omitted); *see also Hernandez*, 872 F.3d at 988.

Here, any delay in judicial review would clearly result in irreparable injury. The Medically Vulnerable Subclasses are at high risk of serious illness or death should they contract COVID-19, and they do not have the luxury of time; they need immediate relief from this Court. The number of COVID-19 cases at Otay Mesa is rising exponentially. And as this Court recently found, the measures the facility has taken "do[] not appear to be working as planned," *Alcantara* at 5, and "it is clear those policies and procedures are insufficient to protect the medically vulnerable population." *Id.* at 17.

Moreover, there are no administrative remedies available to Petitioners that would result in the relief they seek. There is no agency mechanism through which Petitioners can seek release, or even systematic reforms short of release that could lead to an ability to socially distance and protect themselves against the virus. *See id.* at 5 (social distancing is not required and not possible to enforce at Otay Mesa). As discussed above, the grievance processes Respondents describe are fundamentally incapable of providing the quick and emergent relief Petitioners seek. *See supra* Section I.B. Any attempts at exhaustion would thus be futile. *See Ward v. Chavez*, 678 F.3d 1042, 1045 (9th Cir. 2012) (exhaustion may be waived

if administrative remedies would be futile). Accordingly, any prudential exhaustion requirements are inapplicable in this case.[19]

B. The Bail Reform Act Does Not Provide A Legal Remedy For The Constitutional Violations Petitioners Have Alleged.

Respondents insist that "individualized, case-specific determinations [pursuant to the BRA] are the only appropriate legal avenue through which Petitioners may seek release due to the threat to health and safety posed by COVID-19." MTD at 9; *see id.* at 13 & 17. Respondents appear to advance two distinct arguments: that Petitioners and class members must first pursue a remedy under the BRA as a form of prudential exhaustion, or, alternatively, that the BRA itself functions as the exclusive legal remedy for Petitioners' constitutional claims, such that no relief under habeas is available at all.[20] Both arguments misapprehend this Circuit's habeas jurisprudence and Petitioners' claims.

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[19] Respondents also argue that the PLRA precludes the relief Petitioners seek. Because this is a habeas petition, the PLRA does not apply. But even if it did, the PLRA does not preclude an order requiring transfer of Petitioners to a different form of custody. Thus, should this Court find that the PLRA applies to some or all of the Petitioners in this case, it may order the transfer of Petitioners to home detention, rather than outright release. *See Reaves v. Dep't of Corr.*, 404 F. Supp. 3d 520 (D. Mass. 2019) (ordering transfer and finding that a three-judge panel is not required for release orders that are not based solely on overcrowding). Here, the relief Petitioners seek may be effected through an order of release or enlargement of custody, or alternatively through an order requiring transfer to a different form or location of custody. The latter would be consistent with the PLRA.

[20] In places, Defendants imply that pursuit of release under the BRA is a form of administrative exhaustion required under the PLRA. *See* MTD at 12. This position finds no support in the law. The PLRA sets out a completely separate statutory scheme related to certain conditions of confinement. By contrast, the BRA governs when a particular federal defendant may be released or detained pretrial or presentencing. The two laws do not overlap or cross reference each other in any way.

First, the BRA is not a form of administrative exhaustion, and none of the traditional reasons for prudential exhaustion of administrative remedies apply here. *See*, *e.g.*, *Chua Han Mow v. United States*, 730 F.2d 1308, 1313 (9th Cir. 1984) (exhaustion of remedies allows "the appropriate development of a factual record in an expert forum; conserve the court's time because of the possibility that the relief applied for may be granted at the administrative level; and allow the administrative agency an opportunity to correct errors occurring in the course of administrative proceedings."). Moreover, as discussed in Section II.A above, any prudential exhaustion requirements are excused under the current circumstances in any event.

Respondents' alternative argument—that the BRA provides the exclusive legal remedy for Petitioners—is unavailing. The BRA addresses whether an individual is released or detained before trial or sentencing with two goals: preventing flight and danger to the community. 18 U.S.C. §§ 3142, 3143. By contrast, the common question presented for the entire class represented in the petition for habeas relief is whether their continued confinement at Otay Mesa violates their constitutional rights to due process or to be free from cruel and unusual punishment. No proceeding under the BRA permits an assessment of this question—much less provides for its resolution. Rather, the BRA directs judicial officers to consider various factors in determining whether an individual is likely to flee or pose a danger to the community if released pretrial, *see* 18 U.S.C. § 3142(g), or presentencing, *id.* § 3143. None of these factors require the presiding judicial officer to consider the presence of a deadly and highly contagious viral outbreak within the detention facility.[21] Accordingly, none of these factors include an assessment of the constitutionality of continued confinement.

[21] Respondents argue that the BRA "expressly allows district courts to consider an individual defendant's health when deciding whether to detain him or her pending trial." MTD at 9. Yet, although 18 U.S.C. § 3142(g)(3)(A) requires an assessment

Respondents also argue that individual defendants "may seek release under 18 U.S.C. § 3142(i)." MTD at 17. This, too, is not an "alternative" remedy available to Petitioners, much less an adequate alternative. First, § 3142(i) operates against the same backdrop as the overall BRA scheme—that is to say, the focus is on risk of flight or danger to community, not the constitutionality of continued detention amid an unprecedented public health crisis.[22] Indeed, when Petitioner Ridley filed a motion for review of his detention order on April 15, 2020 and raised arguments pursuant to § 3142(i), prosecutors responded by arguing that the § 3142(g) factors "do not support setting bond," and that, because Petitioner Ridley had "failed to present evidence suggesting that the detention facility would be unable to render appropriate medical treatment to him if he became ill," his continued detention was proper notwithstanding the COVID-19 pandemic. Ebadolahi Decl. ¶¶ 2–3 & Exs. A & B.[23]

Second, § 3142(i) is not even available to all members of the Medically Vulnerable Subclasses. Section 3142(i) does not apply to post-trial defendants detained under § 3143 at all. And § 3142(i) applies only to individuals ordered detained under § 3142(e). Not all Petitioners are subject to § 3142(e) detention orders. (For some, bond has been set pursuant to § 3142(c), but many may not be

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of an individual's "physical and mental condition," the BRA is clear that these factors are only relevant to "determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. 3142.

[22] Respondents state only that "[c]ertain *extreme* medical circumstances *may* present 'compelling reasons' that *could* warrant a *highly circumscribed* release." MTD at 17 (emphases added). Their language underscores the limits of § 3142(i) relief, and why the theoretical *possibility* of that relief for *some* Petitioners is insufficient to displace Petitioners' classwide habeas claims.

[23] Petitioner Ridley's motion remains pending before this Court.

able to post bond or, if they lack lawful status, would simply be transferred to ICE custody elsewhere in Otay Mesa if they were to post bond.)

Finally, even in those cases where § 3142(i) is theoretically available, the release contemplated under that provision is to "a United States marshal or another appropriate person," which underscores why BRA remedies are not sufficient to address the Petitioners' constitutional claims. The *possibility* of release to a "United States marshal or another appropriate person" for a limited subset of the individuals in harm's way falls far short of the relief Petitioners seek by way of their habeas claims.

Respondents place heavy weight on the Attorney General's April 6, 2020, memorandum regarding the Department of Justice's stance on detention issues during the ongoing pandemic. ECF No. 31-1. While the Attorney General's decision to recommend that DOJ attorneys consider the pandemic and COVID-19 vulnerability is laudable, people being held in unconstitutional conditions are not required to rely on the good will of government prosecutors to secure relief. Moreover, while the Attorney General has recommended that a "defendant's risk from COVID-19 should be a significant factor in [a prosecutor's] analysis," prosecutors in this district have taken a decidedly different tack, repeatedly arguing that "COVID-19 does not alter the statutory analysis" under the BRA. Ebadolahi Decl. ¶¶ 4–11 & Exs. C–J. When the Petitioners have attempted to obtain relief under the BRA, prosecutors have argued that neither the pandemic nor any individual Defendant's preexisting medical conditions control the BRA assessment. *See, e.g.*, Ebadolahi Decl. ¶ 7 & Ex. F.

The Medically Vulnerable Subclasses are entitled to have a court determine whether their confinement is unconstitutional—and, if so, they are entitled to relief.

Providing such relief is simply not what the BRA is designed to do. Thus, the BRA does not supply an alternative legal remedy for Petitioners' habeas claims.[24]

C. Respondents Plainly Have The Authority To Release Petitioners.

While Respondents concede that they are the "immediate custodian" of Petitioners, MTD at 16, they perplexingly argue that they are without authority to release Petitioners—even with a court order. This is incorrect. For individuals in criminal custody, it is well-established that the proper respondent in a federal habeas corpus action is the petitioner's immediate custodian, or the person who has day-to-day control over the petitioner. *Brittingham v. United States*, 982 F.2d 378, 379 (9th Cir. 1992). "The default rule is that the immediate custodian is the warden of the facility where the petitioner is being held." *Rumsfeld v. Padilla*, 542 U.S. 426, 435 (2004); *Stile v. Stafford Cnty. Dept. of Corr.*, Civil Action No. 13-cv-71-PB, 2013 WL 5728107 (D. N.H. Oct. 21, 2013) (naming the House of Corrections and the United States Marshal as the proper respondents in a habeas corpus action filed pursuant to 28 U.S.C. § 2241); *Reid v. U.S. Marshals Serv.*, Civil Action No. H-08-3196, 2008 WL 479464 (S.D. Tex. Oct. 30, 2008) (considering a § 2241 brought against the U.S. Marshals Service and noting that that, among its duties, the Marshals Service is responsible for maintaining custody of certain prisoners).[25]

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[24] Defendants' citation to *Money v. Pritzker*, 2020 WL 1820660 (N.D. Ill. Apr. 10, 2020) and *Plata v. Newsom*, 2020 WL 1908776 (N.D. Cal. Apr. 17, 2020) to support their assertion that "[i]ndividual motions for release under the BRA…are the proper legal vehicle for Petitioners to attempt to obtain release," MTD at 13, is puzzling. Both of those cases involved *state* prisoners to whom the BRA does not even apply and do not discuss the BRA at all.

[25] *See also* Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities, Centers for Disease Prevention and Control, Mar. 23, 2020, at 1, https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf (listing the U.S. Marshals Service as a law enforcement agency that has "custodial authority for detained populations"); *cf. Brittingham*, 982 F.2d at 380

Consequently, Respondents would clearly be able to effect the relief this Court orders should this Court order Petitioners' release.

CONCLUSION

For the foregoing reasons, this Court should deny Respondents' Motion to Dismiss the Petition with respect to the Medically Vulnerable Subclasses.

(finding that the warden, and not the U.S. Marshals Service, was the immediate custodian of the petitioner where the Marshals Service was responsible only for the transportation of the petitioner and did not have "day-to-day control"); *Dunn v. U.S. Parole Comm'n*, 818 F.2d 742, 744 (10th Cir. 1987) ("So long as the petitioner names as respondent a person or entity with power to release him, there is no reason to avoid reaching the merits of his petition.").

Respectfully submitted,

DATED: May 4, 2020

NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD

/s/ Sirine Shebaya

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

ACLU FOUNDATION OF SAN DIEGO & IMPERIAL COUNTIES

MITRA EBADOLAHI
(mebadolahi@aclusandiego.org)
BARDIS VAKILI
(bvakili@aclusandiego.org)
SARAH THOMPSON
(sthompson@aclusandiego.org)
DAVID LOY
(davidloy@aclusandiego.org)
P.O. Box 87131
San Diego, CA 92138-7131
Telephone: (619) 398-4187

ROPES & GRAY LLP

DATED: May 4, 2020

/s/ Joan McPhee

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

NICOLE HOROWITZ
(nicole.horowitz@ropesgray.com)
Three Embarcadero Center
San Francisco, CA 94111
TELEPHONE: (415) 315-6300

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

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

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

Counsel for Plaintiff-Petitioners

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Jacinto Victor ALVAREZ, Joseph BRODERICK, Marlene CANO, Jose CRESPO-VENEGAS, Noe GONZALEZ-SOTO, Victor LARA-SOTO, Racquel RAMCHARAN, George RIDLEY, Michael Jamil SMITH, Leopoldo SZURGOT, Jane DOE, on behalf of themselves and those similarly situated.
Plaintiff-Petitioners,

v.

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

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

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

CASE NO. 3:20-cv-00782-DMS-AHG

DECLARATION OF MITRA EBADOLAHI IN SUPPORT OF PLAINTIFF-PETITIONERS' FIRST RESPONSE TO DEFENDANT-RESPONDENTS' MOTION TO DENY PETITION FOR HABEAS CORPUS

DECLARATION OF MITRA EBADOLAHI

I, Mitra Ebadolahi, hereby declare as follows:

1. I am an attorney licensed to practice in California and before this Court. I am a Senior Staff Attorney with the ACLU of San Diego & Imperial Counties and counsel of record for Plaintiff-Petitioners ("Petitioners"). I have personal knowledge of the facts set forth below and if called to testify, I could and would do so competently.

2. Attached hereto as Exhibit A is an excerpt of a true and correct copy of Mr. George Martinez Ridley's "Motion for District Court Review of Detention Order," filed on April 15, 2020 in *United States v. Ridley*, No. 3:19-cr-4905 (DMS). By way of that motion, Mr. Ridley, who is also a petitioner in this action, has sought a redetermination of his detention order in light of the COVID-19 outbreak at the Otay Mesa Detention Center, or, in the alternative, temporary relase pursuant to 18 U.S.C. § 3142(i). I have highlighted the relevant language from the excerpt for the Court's convenience.

3. Attached hereto as Exhibit B is an excerpt of a true and correct copy of the "United States' Response in Opposition to Defendant's Motion for District Court Review of Detention Order, Together with Statement of Facts and Memorandum of Points and Authorities," filed by Assistant United States Attorney Katherine E. A. McGrath on April 17, 2020 in *United States v. Ridley*, No. 3:19-cr-4905 (DMS). I have highlighted the relevant language from the excerpt for the Court's convenience, and reproduce part of it here:

> Defendant's reliance on § 3142(i) fails as well. Section 3142(i) allows a judicial officer to "permit the temporary release of the person, in the custody of a United States marshal or another appropriate person, to the extent that the judicial officer determines such release to be necessary for preparation of the person's defense or for another compelling reason." Courts have used this provision "sparingly to permit a defendant's release where, for example, he is suffering from a terminal illness or serious injuries." *United States v. Boatwright*, 2020 WL 1639855, at *4 (D. Nev. April 2, 2020) (quoting *United States v.*

> *Hamilton*, 2020 WL 1323036, at *2 (E.D.N.Y. Mar. 20, 2020) (citation omitted)…. Defendant's motion should be denied on this ground as well.

United States v. Ridley, No. 3:19-cr-4905 (DMS), Dkt. No. 29, at 8–10 (S.D. Cal. Apr. 17, 2020).

4. Attached hereto as Exhibit C is an excerpt of a true and correct copy of the "Contested Joint Motion for Reconsideration of Release Order," filed by Lee Kennedy and Assistant United States Attorney Joseph Smith on April 3, 2020, in *United States v. Kennedy*, No. 3:19-cr-3374 (AJB). I have highlighted the relevant language from the excerpt ("Position of the United States") for the Court's convenience, and reproduce it here:

> In this case, none of the 3142(g) factors has changed in the months since this Court ordered Defendant released, subject to a $30,000 bond. Instead, Defendant focuses his motion solely on the health risks he faces from a potential COVID-19 outbreak. To be sure, the Bail Reform Act instructs the Court to consider a defendant's own "physical and mental health," 18 U.S.C. § 3142(g)(3)(A), but the general existence of a pandemic does not have significant bearing on that assessment. Currently, there are no known COVID-19 positive criminal inmates in any of the USMS facilities or MCC. [. . .] Defendant relies on the possibility that he will become infected by someone else at the facility. Even if this Court could weigh such a speculative risk (and properly discount it by risk of Defendant's becoming infected in the community), Defendant's concern is misplaced.

United States v. Kennedy, No. 3:19-cr-3374 (AJB), Dkt. No. 216, at 10 (S.D. Cal. Apr. 3, 2020).

5. Attached hereto as Exhibit D is an excerpt of a true and correct copy of the "United States' Response in Opposition to Defendant's Motion to Reconsider Detention," filed on April 21, 2020 by Assistant United States Attorney Andrew. J. Galvin in *United States v. Broderick*, No. 3:19-cr-4780 (GPC). I have highlighted the relevant language from the excerpt for the Court's convenience, and reproduce it here:

> Defendant urges this court to reconsider its detention order primarily based on the increased risks of COVID-19 infection in the facility where

> he is being housed. The United States is cognizant of these risks and, in appropriate cases, has joined in requests to reduce bond or reconsider detention. But "as concerning as the COVID-19 pandemic is," whether release or detention is appropriate must still rest on "an individualized assessment of the factors identified by the Bail Reform Act, 18 U.S.C. § 3142(g)." *United States v. Martin*, 2020 WL 1274857, at *3 (D. Md. Mar. 17, 2020). Here, the § 3142(g) factors simply do not support setting bond as Defendant proposes.
>
> [. . .]
>
> Nothing about the COVID-19 pandemic materially changes Defendant's incentives to flee. 18 U.S.C. § 3142(e). Defendant remains subject to significant penalties upon conviction. See generally USSG § 2B1.1. Indeed, his belief that incarceration increases his chances of infection—a belief evidenced by his bail motion—suggests that his incentives to avoid punishment have increased. Moreover, during a time when community and law- enforcement resources are devoted to fighting COVID-19, it may be easier for a motivated defendant to abscond. See *United States v. Barai*, No. 2:16-cr-00217-MCE, 2020 WL 1812161, at *2 (E.D. Cal. Apr. 9, 2020) (finding defendant to be "even more of a flight risk," because of the COVID-19 outbreak, given the increased burdens on law enforcement officers that "could very likely make it easier for defendants to escape, to cross a border, or to go into hiding.").

United States v. Broderick, No. 3:19-cr-4780 (GPC), Dkt. No. 43, at 2, 3–4 (S.D. Cal. Apr. 21, 2020).

6. Attached hereto as Exhibit E is an excerpt of a true and correct copy of the "United States' Response in Opposition to Defendant's Motion to Review Conditions of Relief Under 18 U.S.C. § 3145(b)," filed on April 8, 2020 by Assistant United States Attorney Stephen H. Wong in *United States v. Mayne Garcia*, No. 2:20-MJ-0780 (KSC) (GPC). I have highlighted the relevant language from the excerpt for the Court's convenience, and reproduce it here:

> Defendant's request for release from custody is based largely on the increased risks of COVID-19 infection in the facility where he is being housed. The United States is cognizant of these risks and, in appropriate cases, has joined in requests to reduce bond or reconsider detention. But "as concerning as the COVID-19 pandemic is," whether release or detention is appropriate must still rest on "an individualized assessment of the factors identified by the Bail Reform Act, 18 U.S.C. § 3142(g)."

> *United States v. Martin*, 2020 WL 1274857, at *3 (D. Md. Mar. 17, 2020). Here, the § 3142(g) factors do not support revoking the detention order and setting bond at the $10,000 amount Defendant's proposes.
>
> The United States recognizes that "the COVID-19 outbreak is unprecedented and poses a heightened risk to those in this nation's prisons and jails." *United States v. Carver*, 2020 WL 1604968, at *1 (E.D. Wash. Apr. 1, 2020). Nevertheless, given the steps taken by the Bureau of Prisons and other facilities to manage the risk of transmission, the mere threat of COVID-19 infection—standing alone—is not sufficient to revoke the Magistrate Judge's detention order.

United States v. Mayne Garcia, No. 2:20-MJ-0780 (KSC) (GPC), Dkt No. 21, at 5 (S.D. Cal. Apr. 8, 2020). The excerpt also includes the following:

> The United States recognizes that even with the efforts of BOP and other facilities, there is still a risk of COVID-19 transmission in custodial settings, and that risk will likely increase as the outbreak spreads. Nevertheless, this generalized risk cannot be permitted to overwhelm the careful balance of factors prescribed by Congress in determining whether he is properly subject to pretrial detention. "No matter the heightened risks intrinsic to prison populations as a matter of public health," courts should not order pretrial release "as a matter of law . . . just because of the current pandemic's generic risks." *United States v. Villegas*, 2020 WL 1649520, at *2 (C.D. Cal. Apr. 3, 2020). Instead, this Court must still evaluate the § 3142(g) factors to determine whether detention or bond is appropriate, based on the facts of each individual case. *See United States v. Penaloza*, 2020 WL 1555064, at *1 (D. Md. Apr. 1, 2020) ("[T]he mere presence of the [Covid-19] virus, even in the detention setting, does not automatically translate to the release of a person accused"); *United States v. Lee*, 2020 WL 1540207, at at *3 (E.D. Mich. Mar. 30, 2020) ("[T]he COVID-19 pandemic cannot be the sole basis for releasing a defendant from custody pending trial; the Court must still consider the Section 3142(g) factors.").

Id. at 8.

7. Attached hereto as Exhibit F is an excerpt of a true and correct copy of the "Contested Joint Motion for Release Prior to Sentencing," filed on April 6, 2020 by Salvador Moreno Hernandez, Jr. and Assistant United States Attorney Janet Cabral in *United States v. Moreno Hernandez, Jr.*, No. 3:19-cr-2298 (AJB). I have

highlighted the relevant language from the excerpt ("Position of the United States") for the Court's convenience, and reproduce it here:

> In this case, none of the § 3142(g) factors have changed in the 11 months since Magistrate Judge Schopler set bond in this case, or in the 9 months since this Court denied Defendant's appeal of his motion to modify that bond. Instead, Defendant focuses his motion solely on the health risks he faces from a potential COVID-19 outbreak. To be sure, the Bail Reform Act instructs the Court to consider a defendant's own "physical and mental health," 18 U.S.C. § 3142(g)(3)(A). The United States is mindful of Defendant's elevated risk of contracting COVID-19 due to his underlying health issues, and is further mindful of the serious risk this poses to Defendant's health. However, the general existence of a pandemic, and even Defendant's elevated risk associated with his underlying medical conditions, does not control the consideration of the appropriate bond. Defendant does not claim to be infected with the COVID-19. Instead, he relies on the possibility that he will become infected by someone else at the facility.

United States v. Moreno Hernandez, Jr., No. 3:19-cr-2298 (AJB), Dkt No. 40, at 11 (S.D. Cal. Apr. 6, 2020)

8. Attached hereto as Exhibit G is an excerpt of a true and correct copy of the "Contested Joint Motion for Modification of Release Conditions," filed on March 25, 2020 by Amaury Rocha and Assistant United States Attorney Lyndzie M. Carter in *United States v. Rocha*, No. 2:20-mj-9018 (RBM). I have highlighted the relevant language from the excerpt ("Position of the United States") for the Court's convenience, and reproduce it here:

> In this case, none of the 3142(g) factors has changed in the 5 days since the Court ordered Defendant released on a $25,000 bond. Instead, Defendant focuses his motion solely on the health risks he faces from a potential COVID-19 outbreak. To be sure, the Bail Reform Act instructs the Court to consider a defendant's own "physical and mental health," 18 U.S.C. § 3142(g)(3)(A), but the general existence of a pandemic does not have significant bearing on that assessment. Currently, there are no reported cases of COVID-19 at any of the local facilities operated by the Bureau of Prisons (BOP). And Defendant does not claim to be infected with the coronavirus such that he might cause an outbreak himself. Instead, Defendant relies on the possibility that he will become infected by someone else at the facility. Even if this Court could weigh such a

> speculative risk (and properly discount it by risk of Defendant's becoming infected in the community), Defendant's concern is misplaced.

United States v. Rocha, No. 2:20-mj-9018 (RBM), Dkt No. 11, at 10 (S.D. Cal. Mar. 25, 2020).

9. Attached hereto as Exhibit H is an excerpt of a true and correct copy of the "United States' Opposition to Defendant's Appeal of Detention Order," filed on April 15, 2020 by Assistant United States Attorney Brandon J. Kimura in *United States v. Rodriguez*, No. 2:20-mj-8756 (RBM) (GPC). I have highlighted the relevant language from the excerpt for the Court's convenience, and reproduce it here:

> The United States recognizes that even with the efforts of BOP and other facilities, there is still a risk of COVID-19 transmission in custodial settings, and that risk will likely increase as the outbreak spreads. Nevertheless, this generalized risk cannot be permitted to overwhelm the careful balance of factors prescribed by Congress in determining whether Defendant is properly subject to pretrial detention. "No matter the heightened risks intrinsic to prison populations as a matter of public health," courts should not order pretrial release "as a matter of law . . . just because of the current pandemic's generic risks." *United States v. Villegas*, 2020 WL 1649520, at *2 (C.D. Cal. Apr. 3, 2020). Instead, this Court must still evaluate the § 3142(g) factors to determine whether detention or bond is appropriate, based on the facts of each individual case. See *United States v. Penaloza*, 2020 WL 1555064, at *1 (D. Md. Apr. 1, 2020). ("[T]he mere presence of the [Covid-19] virus, even in the detention setting, does not automatically translate to the release of a person accused")….

United States v. Rodriguez, No. 2:20-mj-8756 (RBM) (GPC), Dkt No. 21, at 8 (S.D. Cal. Apr. 15, 2020).

10. Attached hereto as Exhibit I is an excerpt of a true and correct copy of the "Contested Joint Motion to Amend Conditions of Release," filed on March 31, 2020 by Luis Antonio Ruiz-Acosta and Assistant United States Attorney Adam Gordon in *United States v. Ruiz-Acosta*, No. 3:20-cr-961 (LAB). I have highlighted the relevant language from the excerpt ("Position of the United States") for the Court's convenience, and reproduce it here:

> In this case, none of the 3142(g) factors has changed in the seven weeks since this Court ordered Defendant's release only upon posting a $35,000 cash or corporate surety bond. Instead, Defendant focuses his motion solely on the health risks he faces from a potential COVID-19 outbreak. To be sure, the Bail Reform Act instructs the Court to consider a defendant's own "physical and mental health," 18 U.S.C. § 3142(g)(3)(A), but the general existence of a pandemic does not have significant bearing on that assessment. Currently, there are no reported cases of COVID-19 at any of the local facilities operated by the Bureau of Prisons (BOP). And Defendant does not claim to be infected with the coronavirus such that he might cause an outbreak himself. Instead, Defendant relies on the possibility that he will become infected by someone else at the facility. Even if this Court could weigh such a speculative risk (and properly discount it by risk of Defendant's becoming infected in the community), Defendant's concern is misplaced.

United States v. Ruiz-Acosta, No. 3:20-cr-961 (LAB), Dkt No. 18, at 16–17 (S.D. Cal. Mar. 31, 2020).

11. Attached hereto as Exhibit J is an excerpt of a true and correct copy of the "United States' Response in Opposition to Defendant's Motion for Bond Pending Sentencing," filed on April 23, 2020 by Assistant United States Attorney Brandon J. Kimura in *United States v. Smith*, No. 3:19-cr-1270 (W) (BGS). I have highlighted the relevant language from the excerpt for the Court's convenience, and reproduce it here:

> Nothing about the COVID-19 pandemic materially changes Defendant's incentives to flee. 18 U.S.C. § 3142(c). As to risk of flight, Defendant remains subject to near certain incarceration, after his sentencing hearing, with a maximum sentence of 10 years and a likely guideline range of 21-27. Indeed, his belief that incarceration increases his chances of infection—a belief evidenced by his bail motion—suggests that his incentives to avoid punishment have increased. Moreover, during a time when community and law- enforcement resources are devoted to fighting COVID-19, it may be easier for a motivated defendant to abscond. *See United States v. Barai*, No. 2:16-cr-00217-MCE, 2020 WL 1812161, at *2 (E.D. Cal. Apr. 9, 2020) (finding defendant to be "even more of a flight risk," because of the COVID-19 outbreak, given the increased burdens on law enforcement officers that "could very likely make it easier for Defendant to escape,

to cross a border, or to go into hiding").

United States v. Smith, No. 3:19-cr-1270 (W) (BGS), Dkt. No. 51, at 4 (Apr. 23, 2020).

I declare under penalty of perjury of the laws of the State of California and the United States of America that the foregoing statements are true and correct.

Executed this 4th day of May, 2020, in San Diego, California.

/s/ Mitra Ebadolahi
Mitra Ebadolahi

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LIST OF EXHIBITS

Exhibit A

ELIZABETH M. BARROS
California State Bar No. 227629
FEDERAL DEFENDERS OF SAN DIEGO, INC.
225 Broadway, Suite 900
San Diego, California 92101-5030
Telephone: (619) 234-8467
Facsimile: (619) 687-2666
Elizabeth_Barros@fd.org

Attorneys for Mr. Martinez Ridley

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. GEORGE MARTINEZ RIDLEY, Defendant.	Case No.: 19CR04905-DMS **Motion for District Court Review of Detention Order** Time to be set Date to be set

I. Introduction

George Martinez Ridley seeks review of the *Order Resolving Joint Contested Motion for Reconsideration of Detention Order* entered on April 8, 2020. ECF Doc. 27. The detention order violates Mr. Martinez Ridley's right to reasonable bail under the Eighth Amendment and the Bail Reform Act. He requests a personal appearance bond in the amount of $20,000 secured by one financially responsible adult and a $5,000 deposit to be posted by The Bail Project. He has no objection to GPS monitoring and home detention as a condition of release.

The primary reasons for setting bond in his case are: 1) Mr. Martinez Ridley is a 51 year-old man with a history of pneumothorax and is missing a portion of his right lung,[1] and so is at high risk of dying if the coronavirus spreads to his unit at

[1] This information was unknown to counsel at the time the joint contested motion was filed and the magistrate judge decided the motion without a hearing. Mr. Martinez Ridley's lung condition was not considered by the magistrate judge.

well be contagious.").

In short, this Court should find that the government has not "established by clear and convincing evidence that Mr. [Martinez Ridley] presents a current danger to the community that cannot be mitigated through appropriately strict conditions tailored to address those risks." *Conway*, 2011 WL 3421321, *5.

V. Alternatively, This Court Should Order Mr. Martinez Ridley's Temporary Release Pursuant to 18 U.S.C. § 3142(i).

"The text of Section 3142(i) provides that the Court may temporarily release a detained defendant to the custody of an 'appropriate person' where a 'compelling reason' necessitates such release." *Stephens*, 2020 WL 1295155, at *2. "[F]amily members may constitute 'appropriate persons' where the defendant is released to relatives and placed under house arrest." *Id.* at *2.

The COVID-19 pandemic and attendant difficulties it presents to the preparation of Mr. Martinez Ridley's defense and significant risks to his health are compelling reasons necessitating his release. *See id.* Numerous other courts around the country have found the COVID-19 pandemic to constitute a compelling reason for the temporary release of detained defendants. *See United States v. Tovar,* No. 1:19-cr-341-DCN, Dkt. No. 42 (D. Idaho Apr. 2, 2020) (releasing defendant previously detained in presumption case after finding COVID-19 a compelling basis for release under § 3142(i)); *United States v. Michaels*, 8:16-cr-76-JVS, Minute Order, Dkt. No. 1061 (C.D. Cal. Mar. 26, 2020) ("Michaels has demonstrated that the Covid-19 virus and its effects in California constitute 'another compelling reason' justifying temporary release under § 3142(i)."). Thus, even if this Court finds detention appropriate, the Court should order Mr. Martinez Ridley's temporary release pursuant to 18 U.S.C. §3142(i).

VI. Conclusion

For these reasons, the defense requests a personal appearance bond in the amount of $20,000 secured by the signature of Mr. Martinez Ridley's wife and a

Ex. A
3

Exhibit B

ROBERT S. BREWER, JR.
United States Attorney
KATHERINE E. A. MCGRATH
Assistant United States Attorney
California Bar No. 287692
U.S. Attorney's Office
880 Front Street, Room 6293
San Diego, CA 92101
Tel: (619) 546-9054
Email: katherine.mcgrath@usdoj.gov

Attorneys for the United States

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

GEORGE MARTINEZ RIDLEY,

Defendant.

Case No. 19-CR-4905-DMS

UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR DISTRICT COURT REVIEW OF DETENTION ORDER

TOGETHER WITH STATEMENT OF FACTS AND MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

Twice now, the Honorable Allison H. Goddard, United States Magistrate Judge, has order that Defendant be detained pending trial, finding both by clear and convincing evidence that the Defendant is a danger to the community and by a preponderance of the evidence that he is a serious flight risk. Doc. No. 12 (Order of Detention Pending Trial); Doc. No. 27 (Order Resolving Joint Contested Motion for Reconsideration of Detention Order). Defendant now moves this Court to review these Orders and release him from custody on a $20,000 personal appearance bond secured by one financially responsible adult, with a $5,000 deposit to be paid by The Bail Project. Defendant, for the first time, claims that he has a history of pneumothorax that makes him more

(holding that "community," within the meaning of 18 U.S.C. § 3142, is not necessarily confined to local geography). All California residents are currently required to shelter in place and "heed the current State public health directives" to avoid the spread of COVID-19. California Executive Order N-33-20 (March 19, 2020), available at https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf. Such rules, though enforceable by peace officers, rely largely on voluntary obedience. A person who ignores such admonitions and rules could increase infection rates, leading to severe illness and death. Defendant's history reflects an unwillingness to follow rules and a disregard for the welfare of others--characteristics that now have potentially fatal consequences.

Finally, as previously briefed before the Magistrate, the Bureau of Prisons has taken aggressive steps to manage the risk of COVID-19 transmission in prison. *See United States v. Hamilton*, 2020 WL 1323036, at *2 (E.D.N.Y. Mar. 20, 2020) (denying motion for release based in part on the fact that "the Bureau of Prisons is taking system-wide precautions to mitigate the possibility of infection within its facilities"); *United States v. Blegen*, 2020 WL 1619282, at *5 (D. Minn. Apr. 2, 2020) (same). The United States recognizes that even with the efforts of BOP and other facilities, there is still a risk of COVID-19 transmission in custodial settings, and that risk will likely increase as the outbreak spreads. Nevertheless, this generalized risk cannot be permitted to overwhelm the careful balance of factors prescribed by Congress in determining whether a particular defendant is properly subject to pretrial detention. Here, even with the risk of COVID-19, the § 3142(g) factors continue to support the detention.

C. The Risk of COVID-19 Without More Does Not Present a Compelling Reason for Temporary Release under section 3142(i)

Defendant's reliance on § 3142(i) fails as well. Section 3142(i) allows a judicial officer to "permit the temporary release of the person, in the custody of a United States marshal or another appropriate person, to the extent that the judicial officer determines

such release to be necessary for preparation of the person's defense or for another compelling reason." Courts have used this provision "sparingly to permit a defendant's release where, for example, he is suffering from a terminal illness or serious injuries." *United States v. Boatwright*, 2020 WL 1639855, at *4 (D. Nev. April 2, 2020) (quoting *United States v. Hamilton*, 2020 WL 1323036, at *2 (E.D.N.Y. Mar. 20, 2020) (citation omitted). A defendant bears the burden of establishing circumstances warranting temporary release under § 3142(i). *Boatwright*, 2020 WL 1639855, at *4; *United States v. Clark*, 2020 WL 1446895, at *2 (D. Kan. Mar. 25, 2020); *United States v. Buswell*, 2013 WL 210899, at *5 (W.D. La. Jan. 18, 2013)(collecting cases).

The court in *Boatwright* considered a similar request as Defendant makes here – "namely that the health risk to Defendant is a compelling reason to grant release." 2020 WL 1639855, at *2. In ultimately denying the defendant's request, the court considered the following factors: "(1) the original grounds for Defendant's pretrial detention; (2) the specificity of Defendant's stated COVID-19 concerns; (3) the extent to which the proposed release plan is tailored to mitigate or exacerbate other COVID-19 risks to Defendant; and (4) the likelihood that Defendant's proposed release would increase COVID-19 risks to others." *Id*. at *5 (citing *Clark*, 2020 WL 1446895, at *3). It noted that the defendant failed to demonstrate that his release would mitigate his overall COVID-19 risks. *Id.* at *7. Like Defendant here, Boatwright failed to present evidence suggesting that the detention facility would be unable to render appropriate medical treatment to him if he became ill or that his travel to another district to live with his proposed surety would not increase his risk of exposure. *Id.* at *7-*8. Finally, the court found that the risk that Boatwright would "increase COVID-19 risks to others, particularly if the defendant is likely to violate conditions of release, as [Boatwright] has in the past" did not support release. *Id.* at *8 (citing *Clark*, 2020 WL at 1446895, at *7). "A defendant who is unable to comply with conditions of release poses potential risks to law enforcement officers who are already tasked with enforcing shelter-in-place

orders in many cities and counties, Pretrial Services officers who come into contact with Defendant for supervision, and others if Defendant is taken back into custody." *Id.* Defendant's criminal history similarly demonstrates a likelihood to violate the conditions of release. All of those same concerns are present here. Defendant's motion should be denied on this ground as well.

IV. CONCLUSION

The Magistrate Judge complied with § 3142 in holding a detention hearing, considering the factors enumerated subsection (g), and issuing a written Order after analyzing those factors. The Magistrate Judge evaluated these factors yet again following Defendant's motion for reconsideration. Because the factors support the detention order, and Defendant has failed to justify release under § 3142(i), the United States respectfully requests that this Court deny the motion to revoke the order.

DATED: April 17, 2020

Respectfully submitted,

ROBERT S. BREWER, JR.
United States Attorney

/s/Katherine E. A. McGrath
KATHERINE E. A. MCGRATH
Assistant United States Attorney

Exhibit C

HOLLY SULLIVAN
California State Bar No. 216376
FEDERAL DEFENDERS OF SAN DIEGO, INC.
225 Broadway, Suite 900
San Diego, California 92101-5030
Telephone: (619) 234-8467
Facsimile: (619) 687-2666
Holly_Sullivan@fd.org
Attorneys for KENNEDY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. LEE KENNEDY, Defendant.	CASE NO.: 19CR3374-AJB **CONTESTED JOINT MOTION FOR RECONSIDERATION OF RELEASE ORDER**

The United States and Mr. Kennedy hereby respectfully request this Court hear their dispute with respect to bail in a prompt bail review hearing. Defense counsel will waive Mr. Kennedy's presence, if necessary, for a hearing. He is currently housed at MCC which also has video conference capabilities.

The parties' respective positions are set forth in separate sections below.

Mr. Kennedy's Position

Mr. Kennedy hereby respectfully requests that the Court amend the current bond order in this case, currently set at a $25,000 personal appearance bond secured by the signature of one financially responsible adult, his son, plus a $3000 cash deposit and entry into CRASH, in light of the unprecedented public health crisis facing San Diego jails and hospitals.

Specifically, he requests that this court set a $5,000 cash or corporate surety bond, along with location monitoring and outpatient drug therapy at the discretion of

In this case, none of the 3142(g) factors has changed in the months since this Court ordered Defendant released, subject to a $30,000 bond. Instead, Defendant focuses his motion solely on the health risks he faces from a potential COVID-19 outbreak. To be sure, the Bail Reform Act instructs the Court to consider a defendant's own "physical and mental health," 18 U.S.C. § 3142(g)(3)(A), but the general existence of a pandemic does not have significant bearing on that assessment. Currently, there are no known COVID-19 positive criminal inmates in any of the USMS facilities or MCC. And Defendant does not claim to be infected with the coronavirus such that he might cause an outbreak himself. Instead, Defendant relies on the possibility that he will become infected by someone else at the facility. Even if this Court could weigh such a speculative risk (and properly discount it by risk of Defendant's becoming infected in the community), Defendant's concern is misplaced.

The BOP has been planning for potential coronavirus transmissions since January. On March 13, 2020, the agency implemented Phase II of their Action Plan, and issued directives suspending social and legal visits, curtailing movement, cancelling staff travel and training, limiting access for contractors and volunteers, and established enhanced screening for staff and inmates for locations with sustained community transmission and at all medical centers. All facilities were placed on modified operations to maximize social distancing in our facilities, as much as practicable. This modification includes staggered meal times and staggered recreation times, for example, in order to limit congregate gatherings Additionally, the Bureau established quarantine and isolation procedures to mitigate the spread of COVID-19. Bureau of Prisons Update on COVID-19 dated March 24, 2020. https://www.bop.gov/resources/news/pdfs/20200324_bop_press_release_covid19_update.pdf

On March 18, 2020, the Bureau implemented Phase 3, an action plan for Bureau locations that perform administrative services, which followed DOJ, OMB and OPM guidance for maximizing telework. Additionally, as part of the Pandemic Influenza

Exhibit D

ROBERT S. BREWER, JR.
United States Attorney
ANDREW J. GALVIN
Assistant U.S. Attorney
California Bar No. 261925
880 Front Street, Room 6293
San Diego, CA 92101
Telephone: (619) 546-9721
andrew.galvin@usdoj.gov

Attorneys for Plaintiff
United States of America

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. JOSEPH BRODERICK (2), Defendant.	Case No.: 19-CR-4780-GPC **UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO RECONSIDER DETENTION**

The United States of America, by and through its counsel, Robert S. Brewer, Jr., United States Attorney for the Southern District of California, and Andrew J. Galvin, Assistant United States Attorney, hereby files its response in opposition to Defendant's Motion to Reconsider Detention.

INTRODUCTION

Defendant was arrested on December 23, 2019 in the Central District of California and later transferred to the Southern District of California. Broderick is charged with participating in a scheme with several other individuals to obtain loans against property they did not own. First, they would find vacant residential lots owned by an entity. Next, they would pretend to own the entity by either incorporating the same entity in another state or creating fake articles of organization. Finally, using the corporate documents, they would fraudulently obtain construction loans from private money lenders, which they never paid back. Using this scheme, Broderick and his co-schemers obtained a $165,000 loan from a Los Angeles lender and tried to obtain a $1.8 million loan from a San Diego lender.

Defendant appeared before this Court for his initial appearance on January 13, 2020 and for a detention hearing on January 21, 2020. After hearing argument from both sides, and weighing the § 3142(g) factors, the Court ordered Defendant detained based on a finding that no condition or combination of conditions would reasonably assure defendant's appearance in court.

On April 20, 2020, Defendant filed a motion for reconsideration and requested he be released on a $10,000 personal appearance bond secured by the signature of one financially responsible adult. The parties met and conferred, but were not able to reach an agreement.

ARGUMENT

A. The § 3142(g) Factors Continue to Support Detention

This Court should not reconsider its previously imposed order of detention. Title 18, United States Code, Section 3142(g) sets forth the factors courts shall consider when determining whether "there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community." These factors include, among others, (1) the "nature and circumstances of the offense charged," (2) the "weight of the evidence against" the defendant, (3) the "history and characteristics" of the defendant, and (4) "the nature and seriousness of the danger to any person or to the community that would be posed by the defendant's release." 18 U.S.C. § 3142(g). None of those factors have changed in the weeks since this Court first ordered Defendant detained.

Nevertheless, Defendant urges this court to reconsider its detention order primarily based on the increased risks of COVID-19 infection in the facility where he is being housed. The United States is cognizant of these risks and, in appropriate cases, has joined in requests to reduce bond or reconsider detention. But "as concerning as the COVID-19 pandemic is," whether release or detention is appropriate must still rest on "an individualized assessment of the factors identified by the Bail Reform Act, 18 U.S.C. § 3142(g)." *United States v. Martin*, 2020 WL 1274857, at *3 (D. Md. Mar. 17, 2020). Here, the § 3142(g) factors simply do not support setting bond as Defendant proposes.

1. The *Nature and Circumstances of the Offense Have Not Changed*

Defendant was charged with wire fraud, in violation of 18 U.S.C. 1343, and conspiracy to commit wire fraud, in violation of 18 U.S.C. 1349, each of which carries a maximum term of imprisonment of twenty years.

2. *The Weight of the Evidence Remains Substantial*

The evidence against Defendant is substantial and includes hundreds of emails, eyewitness testimony from the lenders that Broderick applied for multiple loans, notarized signatures, dozens of fraudulent documents, and testimony from the property owners that they did not authorize Broderick or his co-schemers to use the properties as loan collateral.

3. *Defendant's History and Characteristics Have Not Changed*

In analyzing "the history and characteristics" of a defendant under § 3142(g)(3), courts are to consider, among other things, "past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings." As Defendant's motion notes, he is likely in a Criminal History Category VI. Defendant's criminal history stretches back to 2003 and includes felony convictions for grand theft, receiving stolen property, burglary, drug transportation, and drug possession. This serious criminal history militates in favor of continued detention.

B. COVID-19 Does Not Alter the Statutory Analysis

Nothing about the COVID-19 pandemic materially changes Defendant's incentives to flee. 18 U.S.C. § 3142(e). Defendant remains subject to significant penalties upon conviction. See generally USSG § 2B1.1. Indeed, his belief that incarceration increases his chances of infection—a belief evidenced by his bail motion—suggests that his incentives to avoid punishment have increased. Moreover, during a time when community and law-enforcement resources are devoted to fighting COVID-19, it may be easier for a motivated defendant to abscond. See *United States v. Barai*, No. 2:16-cr-00217-MCE, 2020 WL 1812161, at *2 (E.D. Cal. Apr. 9, 2020) (finding defendant to be "even more of a flight risk," because of the COVID-19 outbreak, given the increased burdens on law enforcement

officers that "could very likely make it easier for Defendant to escape, to cross a border, or to go into hiding").

Finally, as outlined in appendix A, the Bureau of Prisons has taken aggressive steps to manage the risk of COVID-19 transmission in prison. See *United States v. Hamilton*, 2020 WL 1323036, at *2 (E.D.N.Y. Mar. 20, 2020) (denying motion for release based in part on the fact that "the Bureau of Prisons is taking system-wide precautions to mitigate the possibility of infection within its facilities"); *United States v. Blegen*, 2020 WL 1619282, at *5 (D. Minn. Apr. 2, 2020) (same). The United States recognizes that even with the efforts of BOP and other facilities, there is still a risk of COVID-19 transmission in custodial settings, and that risk will likely increase as the outbreak spreads. Nevertheless, this generalized risk cannot be permitted to overwhelm the careful balance of factors prescribed by Congress in determining whether a particular defendant is properly subject to pretrial detention. Here, even with the risk of COVID-19, the § 3142(g) factors continue to support the detention.

CONCLUSION

The United States respectfully requests that Defendant's Motion to Detention be denied.

DATED: April 21, 2020

Respectfully submitted,

ROBERT S. BREWER, JR.
United States Attorney

s/ Andrew J. Galvin
ANDREW J. GALVIN
Assistant U.S. Attorney

Exhibit E

ROBERT S. BREWER, JR.
United States Attorney
STEPHEN H. WONG
Assistant U.S. Attorney
California Bar No. 212485
Office of the U.S. Attorney
880 Front Street, Room 6293
San Diego, CA 92101
Tel: (619) 546-9464
Email: stephen.wong@usdoj.gov

Attorneys for the United States

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. MIGUEL JOSE MAYNE GARCIA, Defendant.	Case No. 2:20-MJ-0780-KSC-GPC **UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO REVIEW CONDITIONS OF RELIEF UNDER 18 U.S.C. § 3145(b)** **The Honorable Gonzalo P. Curiel**

The UNITED STATES OF AMERICA, by and through its counsel, Robert S. Brewer, Jr., United States Attorney, and Stephen H. Wong, Assistant U.S. Attorney, hereby responds in opposition to Defendant Miguel Jose Mayne Garcia's "Motion to Review Conditions of Release under 18 U.S.C. § 3145(b)." (ECF No. 18).

I

INTRODUCTION

On February 19, 2020, Defendant drove a vehicle containing approximately 38 kilograms of methamphetamine into the United States from Mexico. Dk. 1. He was arrested and charged with the knowing importation of more than 500 grams of methamphetamine, a felony offense that carries a 10-year mandatory-minimum sentence and a presumption of pre-trial detention. At Defendant's initial appearance, Magistrate Judge Karen S. Crawford

Defendant is 64 years old with no known criminal history. This factor weighs in favor of setting conditions of release.

2. *COVID-19 Does Not Alter the Statutory Analysis*[2]

Defendant's request for release from custody is based largely on the increased risks of COVID-19 infection in the facility where he is being housed. The United States is cognizant of these risks and, in appropriate cases, has joined in requests to reduce bond or reconsider detention. But "as concerning as the COVID-19 pandemic is," whether release or detention is appropriate must still rest on "an individualized assessment of the factors identified by the Bail Reform Act, 18 U.S.C. § 3142(g)." *United States v. Martin*, 2020 WL 1274857, at *3 (D. Md. Mar. 17, 2020). Here, the § 3142(g) factors do not support revoking the detention order and setting bond at the $10,000 amount Defendant's proposes.

The United States recognizes that "the COVID-19 outbreak is unprecedented and poses a heightened risk to those in this nation's prisons and jails." *United States v. Carver*, 2020 WL 1604968, at *1 (E.D. Wash. Apr. 1, 2020). Nevertheless, given the steps taken by the Bureau of Prisons and other facilities to manage the risk of transmission, the mere threat of COVID-19 infection—standing alone—is not sufficient to revoke the Magistrate Judge's detention order.

a. *The Bureau of Prisons Has Taken Steps to Protect Inmates' Health and Minimize the Spread of COVID-19 in its Facilities*

The BOP has been planning for potential coronavirus transmissions since January. On March 13, 2020, BOP announced that it was implementing the Coronavirus Phase Two Action Plan in order to minimize the risk of COVID-19 transmission into and inside its facilities.[3] The Action Plan comprises several preventive and mitigation measures,

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[2] Because Defendant hitches his COVID-19 arguments to the § 3142(g)(3) factor concerning physical and mental health (ECF No. 11 at 5), the arguments are addressed in this subsection of the United States' Response in Opposition.

[3] Available at <www.bop.gov/resources/news/20200313_covid-19.jsp> (last access April 6, 2020).

course, "as warned by the Surgeon General of the United States, [the BOP] expect[s] to have more cases as the virus continues to spread in the general community," but they "will continue to diligently support all persons system-wide while doing everything [they] can to do [their] part in mitigating the spread of the virus." Statement from BOP Director (Mar. 26, 2020).[10] Taken together, these protective measures are designed to mitigate the risks of COVID-19 transmission.

b. *The Risk of COVID-19 Transmission Cannot Control the Bail Reform Analysis*

The United States recognizes that even with the efforts of BOP and other facilities, there is still a risk of COVID-19 transmission in custodial settings, and that risk will likely increase as the outbreak spreads. Nevertheless, this generalized risk cannot be permitted to overwhelm the careful balance of factors prescribed by Congress in determining whether he is properly subject to pretrial detention. "No matter the heightened risks intrinsic to prison populations as a matter of public health," courts should not order pretrial release "as a matter of law . . . just because of the current pandemic's generic risks." *United States v. Villegas*, 2020 WL 1649520, at *2 (C.D. Cal. Apr. 3, 2020). Instead, this Court must still evaluate the § 3142(g) factors to determine whether detention or bond is appropriate, based on the facts of each individual case. *See United States v. Penaloza*, 2020 WL 1555064, at *1 (D. Md. Apr. 1, 2020) ("[T]he mere presence of the [Covid-19] virus, even in the detention setting, does not automatically translate to the release of a person accused"); *United States v. Lee*, 2020 WL 1540207, at at *3 (E.D. Mich. Mar. 30, 2020) ("[T]he COVID-19 pandemic cannot be the sole basis for releasing a defendant from custody pending trial; the Court must still consider the Section 3142(g) factors.").

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[10] Available at <www.bop.gov/resources/news/20200326_statement_from_director.jsp> (last accessed April 6, 2020).

Exhibit F

HOLLY A. SULLIVAN
California State Bar No. 216376
FEDERAL DEFENDERS OF SAN DIEGO, INC.
225 Broadway, Suite 900
San Diego, California 92101-5030
Telephone: (619) 234-8467
Facsimile: (619) 687-2666
Holly_Sullivan @fd.org
Attorneys for Mr. Hernandez

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. SALVADOR MORENO HERNANDEZ, JR., Defendant.	CASE NO.: 19-CR-2298-AJB Hon. Anthony J. Battaglia **CONTESTED JOINT MOTION FOR RELEASE PRIOR TO SENTENCING**

The United States and Salvador Moreno Hernandez, Jr., hereby respectfully request this Court hear their dispute with respect to bail in a prompt bail review hearing. Defense counsel is available by any means necessary. Hernandez waives his right to be present.

The parties' respective positions are set forth in separate sections below.

Mr. Hernandez's Position

Mr. Hernandez hereby respectfully requests that the Court order him released pending sentencing on a $20,000 personal appearance bond secured by his sister's signature, GPS monitoring conditions, and Adam Walsh Act and other standard conditions. He requests that he be allowed to reside at a residence or contract facility approved by Pretrial Services that will reduce his exposure to COVID-19. Because of his health concerns, if Mr. Hernandez catches COVID-19, there is a high likelihood

to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings." 18 U.S.C. § 3142(g). Categorical grants or denials of bail, untethered from an individualized determination, are impermissible. *United States v. Diaz-Hernandez*, 943 F.3d 1196, 1199 (9th Cir. 2019). That is because "the Bail Reform Act mandates an individualized evaluation guided by the factors articulated in § 3142(g)." *Id.* As Defendant acknowledges, because defendant has entered a guilty plea in this case and is pending sentencing, the Court must find by clear and convincing evidence that defendant does not pose a danger to the community or a flight risk. 18 U.S.C. § 3143(a)(1).

Argument

In this case, none of the § 3142(g) factors have changed in the 11 months since Magistrate Judge Schopler set bond in this case, or in the 9 months since this Court denied Defendant's appeal of his motion to modify that bond. Instead, Defendant focuses his motion solely on the health risks he faces from a potential COVID-19 outbreak. To be sure, the Bail Reform Act instructs the Court to consider a defendant's own "physical and mental health," 18 U.S.C. § 3142(g)(3)(A). The United States is mindful of Defendant's elevated risk of contracting COVID-19 due to his underlying health issues, and is further mindful of the serious risk this poses to Defendant's health. However, the general existence of a pandemic, and even Defendant's elevated risk associated with his underlying medical conditions, does not control the consideration of the appropriate bond. Defendant does not claim to be infected with the COVID-19. Instead, he relies on the possibility that he will become infected by someone else at the facility. The United States notes that Defendant relies upon generalized statistics in the BOP, and information relayed by other clients of Federal Defenders of San Diego, Inc., who are housed at GEO. The United States notes that as an individual pending sentencing for a sex offense, Defendant is not likely in the general population at GEO such that it is unclear whether any of the proffered information is pertinent to his conditions. Even if this Court could weigh Defendant's

Exhibit G

CHELSEA A. ESTES
California State Bar No. 297641
FEDERAL DEFENDERS OF SAN DIEGO, INC.
225 Broadway, Suite 900
San Diego, California 92101-5030
Telephone: (619) 234-8467
Facsimile: (619) 687-2666
Chelsea_Estes@fd.org

Attorneys for Defendant
AMAURY ROCHA

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. AMAURY ROCHA, Defendant.	CASE NO.: 20-MJ-9018-RBM Hon. Ruth Bermudez Montenegro **CONTESTED JOINT MOTION FOR MODIFICATION OF RELEASE CONDITIONS**

The United States and Mr. Rocha hereby respectfully request this Court hear their dispute with respect to bail in a prompt bail review hearing. Mr. Rocha is willing to waive his appearance for the hearing. The parties are available for a hearing on Thursday, March 26, or Tuesday, March 31.

On March 19, 2020, this Court denied the government's motion for detention and set bond: $25,000 to be secured by the signatures of two financially responsible related adults and a 10% deposit.

The parties' respective positions are set forth in separate sections below.

Mr. Rocha's Position

Mr. Rocha requests that this Court modify the financial condition of his bond to allow Mr. Rocha to be released on his own recognizance or a maximum $5,000

now exists that was not known to the movant at the time of the detention hearing, and (2) that the new information has a material bearing on release conditions regarding flight risk or dangerousness. *United States v. Dillon*, 938 F.2d 1412 (1st Cir. 1991). In other words, the unknown information is material if it increases the chances the defendant appears for his criminal hearing or decreases the danger the defendant poses to an individual or the community as a whole. The rationale behind this provision is that "a rule that would not discourage a party for failing to acquire readily available evidence for presentation the first time is a rule that encourages piecemeal presentations. Judicial efficiency is not served by such a practice." *United States v. Tommie*, 2011 WL 2457521 at *2 (D. Ariz. June 20, 2011) (citing *United States v. Bowens*, 2007 WL 2220501 at *1 (D. Ariz. July 31, 2007) (emphasis in original)).

In this case, none of the 3142(g) factors has changed in the 5 days since the Court ordered Defendant released on a $25,000 bond. Instead, Defendant focuses his motion solely on the health risks he faces from a potential COVID-19 outbreak. To be sure, the Bail Reform Act instructs the Court to consider a defendant's own "physical and mental health," 18 U.S.C. § 3142(g)(3)(A), but the general existence of a pandemic does not have significant bearing on that assessment. Currently, there are no reported cases of COVID-19 at any of the local facilities operated by the Bureau of Prisons (BOP). And Defendant does not claim to be infected with the coronavirus such that he might cause an outbreak himself. Instead, Defendant relies on the possibility that he will become infected by someone else at the facility. Even if this Court could weigh such a speculative risk (and properly discount it by risk of Defendant's becoming infected in the community), Defendant's concern is misplaced.

The BOP has been planning for potential coronavirus transmissions since January. On March 13, 2020, BOP announced that it was implementing the Coronavirus Phase Two Action Plan in order to minimize the risk of COVID-19

Exhibit H

ROBERT S. BREWER, JR.
United States Attorney
BRANDON J. KIMURA
Assistant U.S. Attorney
California Bar No. 295513
Office of the U.S. Attorney
880 Front Street, Room 6293
San Diego, CA 92101
Tel: (619) 546-9614
Email: brandon.kimura@usdoj.gov

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. JOHN ANGEL RODRIGUEZ, Defendant	Case No.: 20MJ8756-RBM-GPC **UNITED STATES' OPPOSITION TO DEFENDANT'S APPEAL OF DETENTION ORDER**

Position of the United States

The United States opposes Defendant's appeal of his pretrial detention order. Defendant is charged with Possession of Methamphetamine with Intent to Distribute, which carries a presumption of detention, under 18 U.S.C. §§3142(e)(3). On March 4, 2020, the court ordered Defendant detained pursuant to 18 U.S.C. § 3142(e), based on a finding that no condition or combination of conditions would reasonably assure defendant's appearance in court. On April 2, 2020, Defendant filed a motion for reconsideration of the detention order, which was denied. Defendant does not challenge the court's factual findings underlying this order, allege any procedural defect in the proceedings, nor does he point to any change in his personal circumstances that would warrant reconsideration of detention. Instead, Defendant's request for release from custody

Facility, has implemented an emergency plan for managing the virus, which includes deploying "special sanitation teams to sterilize high-contact areas, adding additional screening measures during the intake process, restricting visitation, and implementing "quarantines and testing policies" in each facility. See Geo Coronavirus Statement.[7] Of course, "as warned by the Surgeon General of the United States, [the BOP] expect[s] to have more cases as the virus continues to spread in the general community," but they "will continue to diligently support all persons system-wide while doing everything [they] can to do [their] part in mitigating the spread of the virus." Statement from BOP Director (Mar. 26, 2020).[8] Taken together, these protective measures are designed to mitigate the risks of COVID-19 transmission.

B. The Risk of COVID-19 Transmission Cannot Control the Bail Reform Analysis

The United States recognizes that even with the efforts of BOP and other facilities, there is still a risk of COVID-19 transmission in custodial settings, and that risk will likely increase as the outbreak spreads. Nevertheless, this generalized risk cannot be permitted to overwhelm the careful balance of factors prescribed by Congress in determining whether Defendant is properly subject to pretrial detention. "No matter the heightened risks intrinsic to prison populations as a matter of public health," courts should not order pretrial release "as a matter of law . . . just because of the current pandemic's generic risks." *United States v. Villegas*, 2020 WL 1649520, at *2 (C.D. Cal. Apr. 3, 2020). Instead, this Court must still evaluate the § 3142(g) factors to determine whether detention or bond is appropriate, based on the facts of each individual case. See *United States v. Penaloza*, 2020 WL 1555064, at *1 (D. Md. Apr. 1, 2020) ("[T]he mere presence of the [Covid-19] virus, even in the detention setting, does not automatically translate to the release of a person accused"); *United States v. Lee*, 2020 WL 1540207, at *3 (E.D. Mich. Mar. 30, 2020)

[7] Available at www.geogroup.com/Portals/0/GEO_Coronavirus_Statement.pdf
[8] Available at www.bop.gov/resources/news/20200326_statement_from_director.jsp

Exhibit I

Max A. Schoening
FEDERAL DEFENDERS OF SAN DIEGO, INC.
225 Broadway, Suite 900
San Diego, California 92101-5030
Telephone: (619) 234-8467
Facsimile: (619) 687-2666

Attorneys for
LUIS ANTONIO RUIZ-ACOSTA

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. LUIS ANTONIO RUIZ-ACOSTA Defendant.	CASE NO.: 20-cr-00961-LAB Hon. Jill L. Burkhardt **CONTESTED JOINT MOTION TO AMEND CONDITIONS OF RELEASE**

The United States and Luis Antonio Ruiz-Acosta hereby respectfully request this Court hear their dispute with respect to bail in a prompt hearing. Mr. Ruiz is willing to waive his appearance for the hearing. The parties are available at the earliest possible date and time for this hearing.

The Court set a $35,000 cash or corporate surety bond. He moves modify the bond to a $6,500 cash or corporate surety bond, while the government opposes. The parties' respective positions are set forth in separate sections below.

Mr. Ruiz's position

"[A]n outbreak of COVID-19 among the U.S. jail and prison population is likely. Releasing as many inmates as possible is important to protect the health of inmates, the health of correctional facility staff, the health of health care workers at jails and other detention facilities, and the health of the community as a whole." – *Declaration of Chris Beyrer, Professor of Epidemiology at Johns Hopkins Bloomberg School of Public Health, Exhibit C.*

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conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings." 18 U.S.C. § 3142(g). Categorical grants or denials of bail, untethered from an individualized determination, are impermissible. *United States v. Diaz-Hernandez*, 943 F.3d 1196, 1199 (9th Cir. 2019). That is because "the Bail Reform Act mandates an individualized evaluation guided by the factors articulated in § 3142(g)." *Id*.

Section 3142(f) provides that a detention hearing may be reopened if: (1) the movant, whether prosecutor or defendant, first establishes that new information now exists that was not known to the movant at the time of the detention hearing, and (2) that the new information has a material bearing on release conditions regarding flight risk or dangerousness. *United States v. Dillon*, 938 F.2d 1412 (1st Cir. 1991). In other words, the unknown information is material if it increases the chances the defendant appears for his criminal hearing or decreases the danger the defendant poses to an individual or the community as a whole. The rationale behind this provision is that "a rule that would not discourage a party for failing to acquire readily available evidence for presentation the first time is a rule that encourages piecemeal presentations. Judicial efficiency is not served by such a practice." *United States v. Tommie*, 2011 WL 2457521 at *2 (D. Ariz. June 20, 2011) (citing *United States v. Bowens*, 2007 WL 2220501 at *1 (D. Ariz. July 31, 2007) (emphasis in original)).

In this case, none of the 3142(g) factors has changed in the seven weeks since this Court ordered Defendant's release only upon posting a $35,000 cash or corporate surety bond. Instead, Defendant focuses his motion solely on the health risks he faces from a potential COVID-19 outbreak. To be sure, the Bail Reform Act instructs the Court to consider a defendant's own "physical and mental health," 18 U.S.C. § 3142(g)(3)(A), but the general existence of a pandemic does not have significant bearing on that assessment. Currently, there are no reported cases of COVID-19 at any of the local facilities operated by the Bureau of Prisons (BOP).

And Defendant does not claim to be infected with the coronavirus such that he might cause an outbreak himself. Instead, Defendant relies on the possibility that he will become infected by someone else at the facility. Even if this Court could weigh such a speculative risk (and properly discount it by risk of Defendant's becoming infected in the community), Defendant's concern is misplaced.

The BOP has been planning for potential coronavirus transmissions since January. On March 13, 2020, BOP announced that it was implementing the Coronavirus Phase Two Action Plan in order to minimize the risk of COVID-19 transmission into and inside its facilities.[19] The Action Plan comprises several preventive and mitigation measures, including the following:

Screening of Inmates and Staff: All new BOP inmates are screened for COVID-19 symptoms and risk of exposure. Asymptomatic inmates with a documented risk of exposure will be quarantined; symptomatic inmates with documented risk of exposure will be isolated and tested pursuant to local health authority protocols. In areas with sustained community transmission, all facility staff will be screened for self-reported risk factors and elevated temperatures. (Staff registering a temperature of 100.4 degrees F or higher will be barred from the facility on that basis alone.)

Quarantine Logistics: The Action Plan directs all BOP institutions to assess their stockpiles of food, medicines, and sanitation supplies and to establish quarantine areas within their facilities to house any detainees who are found to be infected with or at heightened risk of being infected with coronavirus pursuant to the above-described screening protocol. Here in San Diego, the MCC has implemented protocols to quarantine any inmate with flu-like symptoms since late January, 2020.

[19] *See* Action Plan, available at https://www.bop.gov/resources/news/20200313_covid-19.jsp (last visited March 18, 2020 at 11:00 a.m. PST).

Exhibit J

ROBERT S. BREWER, JR.
United States Attorney
BRANDON J. KIMURA
Assistant U.S. Attorney
California Bar No.: 241220
Office of the U.S. Attorney
880 Front Street, Room 6293
San Diego, CA 92101
Tel: (619) 546-9614

Attorneys for Plaintiff
United States of America

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. MICHAEL JAMIL SMITH, Defendant.	Case No.: 19CR1270-W-BGS **UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR BOND PENDING SENTENCING**

The United States of America, by and through its counsel, Robert S. Brewer, Jr., United States Attorney for the Southern District of California, and Brandon J. Kimura, Assistant United States Attorney, hereby files its response in opposition to Defendant's Motion to Reconsider Bond, Dkt. 50 ("Motion").

INTRODUCTION

Defendant Michael Jamil Smith ("Defendant") and co-defendant Andre Leon Scribner were arrested on August 22, 2019. A confidential informant working for the Bureau of Alcohol, Tobacco, and Firearms ("ATF") purchased two shotguns from Defendant and Mr. Scribner and a total of 85.67 grams of methamphetamine from Defendant during controlled purchases between August 29, 2018, to October 31, 2018. Defendant's rap sheet indicates the following criminal history:

B. COVID-19 Does Not Alter the Statutory Analysis

Nothing about the COVID-19 pandemic materially changes Defendant's incentives to flee. 18 U.S.C. § 3142(c). As to risk of flight, Defendant remains subject to near certain incarceration, after his sentencing hearing, with a maximum sentence of 10 years and a likely guideline range of 21-27. Indeed, his belief that incarceration increases his chances of infection—a belief evidenced by his bail motion—suggests that his incentives to avoid punishment have increased. Moreover, during a time when community and law-enforcement resources are devoted to fighting COVID-19, it may be easier for a motivated defendant to abscond. *See United States v. Barai*, No. 2:16-cr-00217-MCE, 2020 WL 1812161, at *2 (E.D. Cal. Apr. 9, 2020) (finding defendant to be "even more of a flight risk," because of the COVID-19 outbreak, given the increased burdens on law enforcement officers that "could very likely make it easier for Defendant to escape, to cross a border, or to go into hiding").

Finally, as outlined in appendix A, the Bureau of Prisons has taken aggressive steps to manage the risk of COVID-19 transmission in prison. *See United States v. Hamilton*, 2020 WL 1323036, at *2 (E.D.N.Y. Mar. 20, 2020) (denying motion for release based in part on the fact that "the Bureau of Prisons is taking system-wide precautions to mitigate the possibility of infection within its facilities"); *United States v. Blegen*, 2020 WL 1619282, at *5 (D. Minn. Apr. 2, 2020) (same). The United States recognizes that even with the efforts of BOP and other facilities, there is still a risk of COVID-19 transmission in custodial settings, and that risk will likely increase as the outbreak spreads. Nevertheless, this generalized risk cannot be permitted to overwhelm the careful balance of factors prescribed by Congress in determining whether a particular defendant is properly subject to pretrial detention. *See United States v. Martin*, 2020 WL 1274857, at *3 (D. Md. Mar. 17, 2020) ("as concerning as the COVID-19 pandemic is," whether release or detention is appropriate must still rest on "an individualized assessment of the factors identified by the Bail Reform Act, 18 U.S.C. § 3142(g)"). Here, even with the risk of COVID-19, the §