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,

Plaintiffs-Petitioners,

v.

CHRISTOPHER J. LAROSE, Senior Warden, Otay Mesa Detention Center, et al.,

Defendants-Respondents.

Case No.: 20-cv-00782-DMS (AHG)

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

On April 25, 2020, Plaintiffs filed a motion for temporary restraining order ("TRO"), seeking the release of medically vulnerable pretrial and post-conviction criminal detainees housed in Otay Mesa Detention Center ("Otay Mesa" or "OMDC"). (ECF No. 2). On May 9, 2020, the Court denied Plaintiffs' motion, finding the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626, applied to Plaintiffs' claims and divested the Court of authority to grant the requested relief. (ECF No. 46). Since then, Otay Mesa has lowered

its operating capacity to 37%, and the number of detainees testing positive on a daily basis has significantly declined. (ECF No. 76-1 at 2, 4). The COVID-19 outbreak at Otay Mesa, however, remains one of the worst outbreaks among detention facilities in the nation.

On May 15, 2020, Plaintiffs filed the present motion for preliminary injunction, seeking the release, enlargement, and/or transfer to home confinement for all people detained pretrial or post-conviction by the United States Marshal Service ("USMS") at Otay Mesa who are aged 45 or older or who have medical conditions that place them at heightened risk of severe illness or death from COVID-19. (ECF No. 61-1 at 11). Plaintiffs assert the current situation at the detention facility violates their rights under the Fifth and Eighth Amendments to the United States Constitution. Defendants oppose Plaintiffs' motion. Defendants contend Plaintiffs' claim challenges the conditions of confinement at OMDC, and as such, the PLRA precludes the Court from granting the relief they seek. After reviewing the parties' briefs and hearing oral argument from counsel, the Court reaffirms its conclusion that the PLRA applies to Plaintiffs' claim and restricts the Court's ability to order the relief Plaintiffs seek. Accordingly, Plaintiffs' motion for preliminary injunction is denied.

I.

BACKGROUND

As set out in the Court's May 9, 2020 Order, Otay Mesa separately houses both Immigration and Customs Enforcement ("ICE") civil detainees and USMS criminal detainees. Plaintiffs in this case fall into the latter category. Individuals in the former category brought a similar suit in *Alcantara, vs. Archambeault.*, ---F. Supp. 3d ---, 2020 WL 2315777, at *1 (S.D. Cal. May 1, 2020). In that case, the Court provisionally certified a subclass of medically vulnerable civil immigration detainees at OMDC and issued a temporary restraining order, directing the defendants to immediately review for release those subclass members. The defendants released 92 of the 134 subclass members. Thereafter, the Court denied the plaintiffs' motion for preliminary injunction, finding the remaining subclass members' continued confinement in light of the improved conditions

of confinement at Otay Mesa did not amount to punishment under the Fifth Amendment. *Alcantara v. Archambeault*, 2020 WL 2773765, at *2–3 (S.D. Cal. May 26, 2020) (citing *Bell v. Wolfish*, 441 U.S. 520, 535 (1979)).

Plaintiffs in this case are USMS criminal detainees—not immigration detainees—who are pretrial or post-conviction and awaiting sentencing. As of May 27, 2020, there are 261 USMS detainees housed at Otay Mesa. (ECF No. 76-1 at 3). Seventy-one of these detainees have tested positive for COVID-19 at OMDC and 56 have tested negative. (*Id.* at 4). Forty-six of the USMS detainees who tested positive have now recovered, and 10 have been released. (*Id.*). One USMS detainee is hospitalized due to a COVID-19 related illness. (*Id.* at 3). No USMS detainee has died from COVID-19, but one ICE civil detainee died as a result of COVID-19. (*Id.* at 3; ECF No. 61-1 at 25).

Plaintiffs allege OMDC is noncompliant with Center of Disease Control ("CDC") guidelines for detention facilities and is failing to adequately identify and protect medically vulnerable detainees. More specifically, Plaintiffs allege that given the current condition at Otay Mesa, they are unable to take basic measures to protect themselves from contracting COVID-19, like practicing social distancing, wearing fresh face masks and protective equipment, or washing their hands regularly. (ECF No. 77 at 8). Upon showing symptoms of the novel coronavirus, Plaintiffs allege they are not removed from their pods—instead, they are left with their cellmates until test results are returned positive. (*Id.* (citing Roe Decl. ¶ 8; Taberes Decl. ¶ 8)). Plaintiffs further note that OMDC staff frequently fail to use masks, gloves, or protective wear when moving throughout the facility and when they do wear gloves, they often fail to change them after touching items in the living areas of sick detainees. (*Id*. at 9 (citing Martino Decl. ¶ 11; Taberes Decl. ¶ 8)). Plaintiffs allege that given these conditions, subclass members' lives are in serious danger.

Based on these alleged facts, Plaintiffs filed the present motion for preliminary injunction, seek the release, enlargement, and/or transfer to home confinement of the medically vulnerable pretrial and post-conviction detainees at Otay Mesa. Plaintiffs define medically vulnerable as individuals who are aged 45 years or older or who have medical

conditions that place them at higher risk of severe illness or death from COVID-19. Plaintiffs' allege (1) their confinement amounts to unconstitutional punishment in violation of the Fifth Amendment, and (2) Defendants have acted with deliberate indifference to a substantial risk of serious harm to Plaintiffs in violation of the Eighth Amendment.

In Defendants' initial response to Plaintiffs' motion for preliminary injunction, Defendants did not address the conditions at Otay Mesa. Instead, Defendants argued that Plaintiffs' motion for preliminary injunction should be dismissed for the same reason their motion for TRO was dismissed: the PLRA precludes the Court from granting the relief Plaintiffs seek. Defendants later briefed the merits of Plaintiffs' motion, detailing the protective measures OMDC has undertaken to mitigate the spread and harm of COVID-19. (ECF No. 71 at 4). These protective measures include, but are not limited to: suspending admission of all new USMS detainees, establishing protective cohorts, educating detainees on COVID-19, performing COVID-19 tests on detainees, quarantining detainees suspected of having COVID-19, requiring staff to wear Personal Protective Equipment ("PPE"), using negative air pressure cells and observation cells, suspending visitation, implementing social distancing policies, and enhancing sanitation practices. (*Id.* at 4–5). Defendants allege Otay Mesa is compliant with CDC guidelines regarding COVID-19. (*Id.* at 9).

II.

DISCUSSION

As set out in the Court's May 9, 2020 Order, the standard for issuing a preliminary injunction is the same as for issuing a temporary restraining order. *Lockheed Missile & Space Co., Inc. v. Hughes Aircraft Co.*, 887 F. Supp. 1320, 1323 (N.D. Cal. 1995). To meet that standard, Plaintiffs must demonstrate "'[they are] likely to succeed on the merits, that [they are] likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is in the public interest.'" *Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

A. Likelihood of Success

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

In its May 9, 2020 order, the Court found Plaintiffs were unlikely to be successful on the merits because Plaintiffs' claims rested entirely on the conditions of the Otay Mesa facility, which meant their claims triggered the PLRA's restrictions on prisoner release orders. *See* 18 U.S.C. § 3626(a)(3)(A) (placing restrictions on a court's authority to "enter a prisoner release order" in "any civil action with respect to prison conditions"). As such, the Court concluded the PLRA precluded the remedy Plaintiffs sought. *Id.*

Plaintiffs present argument remains that they are not challenging the conditions of confinement at Otay Mesa but the fact or duration of their confinement. Because their claim is a habeas petition challenging fact or duration, Plaintiffs argue, the PLRA's restrictions do not apply. *Id.* § 3626(g)(2) (excluding "habeas corpus proceedings challenging the fact or duration of confinement in prison" from the PLRA's reach). Plaintiffs contend that the PLRA does not apply to their claim because (1) habeas is the appropriate vehicle when the relief sought is release, and (2) "the very fact of confinement" for the detainees is unconstitutional due to Defendants' inaction. The Court addresses these arguments in turn.

Plaintiffs' first argument misses the mark—the question at hand is not whether habeas is the proper vehicle for their claim but whether the PLRA's restrictions apply. The PLRA's language is notably broad, covering "[a]ny civil action with respect to prison conditions." *Id.* § 3626(a)(3)(A). The phrase "civil action with respect to prison conditions" is defined as "any civil proceeding arising under Federal law with respect to conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison." *Id.* § 3626(g)(2). It excludes "habeas corpus proceedings

challenging the fact or duration of confinement in prison." *Id.* In its categorization, the PLRA plainly does not differentiate habeas petitions and non-habeas petitions, which would presumably be civil rights claims brought under 28 U.S.C. §1983 or *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). The PLRA differentiates claims challenging conditions of confinement and claims challenging fact or duration of confinement. *See Mays v. Dart*, --- F. Supp. 3d ----, 2020 WL 1987007, at *20 (N.D. Ill. Apr. 27, 2020) (holding the PLRA applied to the plaintiffs' habeas petitions challenging conditions of confinement and noting the PLRA would not apply to habeas petitions challenging fact or duration of confinement); *Money v. Pritzker*, --- F. Supp. 3d ----, 2020 WL 1820660, at *10 (N.D. Ill. Apr. 10, 2020) (noting that the PLRA "broadly" defines "civil actions with respect to prison conditions" but explicitly excludes proceedings "challenging the fact or duration of confinement"); *see also Jones v. Smith*, 720 F.3d 142, 145, 145 n.3 (2d Cir. 2013) (assuming the PLRA would apply to 28 U.S.C. §2241 habeas corpus petitions challenging conditions of confinement); *Blair-Bey v. Quick*, 151 F.3d 1036, (D.C. Cir. 1998) (noting that habeas corpus claims challenging prison conditions "would have to be subject" to the PLRA "as they are precisely the sort of actions that the PLRA sought to address"). The PLRA's application, therefore, does not turn on whether Plaintiffs' claim is cognizable in habeas.[1] It turns on whether Plaintiffs are challenging the conditions of their confinement or the fact or duration of their confinement.

Plaintiffs' second argument—that their claim challenges the very fact of their confinement—is not persuasive. Plaintiffs' allegations in their motion for preliminary injunction are nearly identical to their allegations in their motion for TRO: Otay Mesa lacks

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[1] As the Court noted in its May 9, 2020 order, Plaintiffs may bring either kind of challenge—"fact or duration of confinement" or conditions of confinement—in a habeas proceeding. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862-63 (2017) (leaving open the question whether detainees "might be able to challenge their confinement conditions via a petition for writ of habeas corpus"); *Nettles v. Grounds*, 830 F.3d 922, 931 (9th Cir. 2016) (same as to federal detainees).

necessary medical care and has failed to implement crucial hygiene measures and Otay Mesa detainees are unable to practice social distancing. (ECF No. 61-1 at 11–15; ECF No. 77 at 8–9). These allegations clearly concern the conditions at Otay Mesa—they involve the "action[s] of prison officials" which have resulted in "allegedly unconstitutional treatment" of detainees. *Preiser v. Rodriguez*, 411 U.S. 475, 521 (1973); *see also* 18 U.S.C. § 3626(g)(2) (defining "civil action with respect to prison conditions" as "any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison"). Furthermore, Plaintiffs' Complaint does not challenge the fact or duration of their confinement. Plaintiffs do not challenge their "underlying conviction or sentence," "the invalidity of the confinement's legality," or "the restoration of good-time credits." *Terrell v. United States*, 564 F.3d 442, 446 (6th Cir. 2009); *see also Wilkinson v. Dotson*, 554 U.S. 74, 82 (2006) (holding challenges to fact or duration of confinement, if successful, "necessarily demonstrate the invalidity of their convictions or sentences"). Plaintiffs' claims do not attack the legality of their convictions or sentences.[2] As the Court held in its May 9, 2020 order, Plaintiffs' claims would not exist *but for* the current conditions of confinement at Otay Mesa. Accordingly, the Court reaffirms its conclusion that Plaintiffs' allegations concern the conditions at Otay Mesa given the COVID-19 pandemic.

The Court, therefore, reaffirms its finding that Plaintiffs' claim challenges the conditions of Plaintiffs' confinement at OMDC. As such, the PLRA applies. *See* 18 U.S.C. § 3626(a)(3)(A) (stating PLRA applies to "any civil action in federal court with respect to

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[2] The fact Plaintiffs seek release from confinement does not convert their claim from a conditions of confinement challenge to a fact or duration challenge. Plaintiffs are correct that habeas is the appropriate vehicle when the relief sought is release and the challenge concerns "validity of any confinement or [] particulars affecting its duration." *Muhammad v. Close*, 540 U.S. 749, 750 (2004). This, however, does not mean that if a plaintiff seeks release, then their claim challenges the fact or duration of confinement. Such reasoning is illogical, for it confuses the relief sought with the substance of the claim plaintiff brought.

prison conditions"); *Nettles v. Grounds*, 830 F.3d 922, 934 (9th Cir. 2016) (stating prisoners must comply with the PLRA if their claim challenges any "aspect of prison life" other than "fact or duration of the conviction or sentence").

Plaintiffs contend even if the PLRA applies, the Court may order the relief they seek. Plaintiffs cite two cases in support of this argument. The first, *Reaves v. Department of Corrections*, 404 F. Supp. 3d 520 (D. Mass. 2019), concerns the transfer of a single prisoner from a correctional facility to a medical facility because of the prisoner's medical needs. There, the court found the relief sought—the transfer of one prisoner—did not constitute a prisoner release order under the PLRA. *Reaves*, 404 F. Supp. 3d at 523; *cf. Gillette v. Prosper*, No. 2014-00110, 2016 WL 912195, at *1 (D.V.I. Mar. 4, 2016) (assuming without deciding that the release or transfer of a single prisoner constitutes a prisoner release order under the PLRA). The second, *Plata v. Brown*, 427 F. Supp. 3d 1211, 1222 (N.D. Cal. 2013), concerns the transfer of a large number of prisoners from one state facility to another state facility because of an outbreak of Valley Fever at the original facility. The court found this remedy did not constitute a prisoner release order because the transfer was meant "to correct the violation of a constitutional right caused by something other than crowding." *Plata*, 427 F. Supp. 3d at 1222. The court reasoned that a transfer of prisoners that is, for example, "necessary for the inmate[s] to obtain appropriate medical care" is not a prisoner release order because it has nothing to do with overcrowding, which is the main concern of the PLRA. *Id.*; *see also Cameron v. Bouchard*, --- F. Supp. 3d ---, 2020 WL 2569868, *27 (E.D. Mich. May 21, 2020) (construing § 3626(a)(3) to apply only to orders correcting violations of a federal right where overcrowding is the primary cause of the violation).

The Court does not find either of these cases persuasive for two reasons. First, Plaintiffs are not asking for the transfer of a single prisoner. Plaintiffs are asking for the *release* of a *large number* of prisoners. (*See* ECF No. 61-1 at 15 ("[T]he only remedy [the medically vulnerable subclasses] seek is, and always has been, release from detention at Otay Mesa."); ECF No. 1 at ¶ 12 ("Plaintiffs further request . . . the staggered release of

remaining Plaintiffs and other class members until necessary social distancing and hygiene measures can be sustained."). The remedy Plaintiffs seek falls squarely within the PLRA's definition of a prisoner release order—it is an order "that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison[.]" *Id.* § 3626(g)(4). To the extent that Plaintiffs seek enlargement or the transfer of prisoners, the PLRA's language still applies. Plaintiffs suggest that the Court could order the detainees' "transfer to home confinement or other forms of modified custody." (ECF No. 70 at 9). The Court disagrees. A mass transfer of prisoners to home confinement or to other facilities clearly constitutes a prisoner release order because it has "the purpose or effect of reducing or limiting the prison population." *Id.* § 3626(g)(4); *see also Mays*, 2020 WL 1987007, at *30 (finding the transfers sought by the plaintiffs constitute prisoner release orders under the PLRA's definition); *Plata v. Newsom*, ---F. Supp. 3d ----, 2020 WL 1908776, at *10 (Apr. 17, 2020) (same); *Money*, 2020 WL 1820660, at *12 (same).

Second, Plaintiffs' argument is not convincing because overcrowding is the cause of the alleged constitutional violation here. One of the central allegations in Plaintiffs' Complaint is that detainees are at risk of irreparable harm because of their inability to practice social distancing. (ECF No. 1 at ¶ 10 ("Detained persons at OMDC cannot maintain a six foot distance from other individuals: they sleep, eat, bathe, and engage in other activities in close proximity with each other"); *id.* at ¶ 57 ("It is virtually impossible for individuals at OMDC to comply with the CDC's recommendation to remain six feet apart at all times."); *id.* at ¶ 58 ("The pods house individuals in close quarters well under the distance of six feet apart that the CDC recommends"); *id.* at ¶ 59 ("When not in their cells, detained persons use common spaces together, sharing tables, telephones and showers. They cannot reliably maintain a six-foot distance in communal areas.")). Other courts agree: "the ultimate aim of these lawsuits . . . [is] to reduce the prison population. Reducing the prison population is not just a side effect of the case—it is the whole point." *Money*, 2020 WL 1820660 at *13.

The substance of Plaintiffs' claim and the relief they seek, therefore, falls squarely within the PLRA's reach. Plaintiffs are challenging the conditions of their confinement and they seek an order that has the effect of reducing or limiting the prison population. As such, the Court reaffirms its conclusion that the it does not have authority to grant the relief Plaintiffs' seek. By its terms, the PLRA "restricts the circumstances in which a court may enter an order 'that has the purpose or effect of reducing or limiting the prison population.'" *Brown v. Plata,* 563 U.S. 493, 511 (2011). The PLRA provides that "no court shall enter a prisoner release order unless . . . (i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied. . . ; and (ii) the defendant has had a reasonable amount of time to comply with the previous court orders." 18 U.S.C. § 3626(a)(3)(A)(i)-(ii). It precludes prisoner release orders unless "entered [] by a three-judge court." *Id.* § 3626(a)(3)(B). In addition, before entering such an order, the three-judge panel must first find, by clear and convincing evidence, "(i) crowding is the primary cause of the violation of a Federal right; and (ii) no other relief will remedy the violation of the Federal right." *Id.* § 3626(a)(3)(E). These limitations "ensure that the 'last resort remedy' of a population limit is not imposed 'as a first step.'" *Plata*, 563 U.S. at 514 (quoting *Inmates of Occoquan v. Barry*, 844 F.2d 828, 843 (D.C. Cir. 1988)).

Here, Plaintiffs are requesting the Court do just that—impose a reduction of the prison population at OMDC as the first step in addressing the facility's COVID-19 outbreak. The Court, however, cannot order such relief without first following the PLRA's requirements. Plaintiffs, therefore, have failed to establish a likelihood of success on the merits of their claim.[3]

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[3] In light of this finding, the Court declines to address the balance of Defendants' arguments.

B. Remaining Injunctive Relief Factors

The next three factors require Plaintiffs to demonstrate they are "likely to suffer irreparable harm in the absence of preliminary relief," the "balance of equities tips in [their] favor" and the "public interest favors granting an injunction." *Hernandez v. Sessions*, 872 F.3d 976, 995, 996 (9th Cir. 2017) (internal quotations omitted). Considering the Court's finding that Plaintiffs have failed to show at "an irreducible minimum that there is a fair chance of success on the merits," the Court cannot enter injunctive relief based on the remaining three factors. *Martin v. Int'l Olympic Comm.*, 740 F.2d 670, 675 (9th Cir. 1984). Nevertheless, the Court briefly addresses these factors below.

First, Plaintiffs have a strong showing of likelihood of irreparable injury. As of May 27, 2020, there are 261 USMS detainees housed at Otay Mesa and 71 of these detainees have tested positive for COVID-19. (ECF No. 76-1 at 3, 4). The novel coronavirus is highly contagious, and individuals who are medically vulnerable face a heightened risk of serious injury or death upon contracting it. Moreover, although Plaintiffs may individually seek release under the Bail Reform Act ("BRA"), this legal avenue is meant to assess whether the individual, if released, is likely to flee or pose a danger to the community. *See* 18 U.S.C. §§ 3142(g) & 3143(a)(1). By contrast, their class action here alleges a violation of their constitutional rights to due process and to be free from cruel and unusual punishment. Plaintiffs are alleging a common injury that could not be properly addressed under the BRA. As noted in its May 9, 2020 order, however, the Court cannot grant relief based solely on a strong showing of likelihood of irreparable injury, without "serious questions" as to the likelihood of success on the merits. *All for the Wild Rockies v. Pena*, 865 F.3d 1211, 1217 (9th Cir. 2017).

Plaintiffs also do not satisfy the remaining two factors of injunctive relief. The Supreme Court has held that where the government is the party opposing an injunction, the balance of the equities and public interest injunctive relief factors tend to merge. *See Nken v. Holder*, 556 U.S. 418, 435 (2009); *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). Here, the Court cannot issue injunctive relief without raising

significant separation of powers concerns. *See Turner v. Safley*, 482 U.S. 78, 84–85 (1987) ("Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government."). Congress enacted the PLRA "to revive the hands-off doctrine[,]" which is "a rule of judicial quiescence derived from federalism and separation of powers concerns." *Gilmore v. California*, 220 F.3d 987, 991 (9th Cir. 2000). As the Supreme Court notes, the hands-off doctrine "springs from complementary perceptions about the nature of the problems [at prisons] and the efficacy of judicial intervention." *Id.* (citing *Procunier v. Martinez*, 416 U.S. 396 404-05 (1974)). The Court cannot order relief here without violating the congressional mandate to follow the hands-off approach. Such relief would intrude upon the legislative and executive branches of government. *See Gilmore*, 220 F.3d at 991.

It does not logically follow from the Court's conclusion, however, that all is well. Plaintiffs' allegations and declarations raise important concerns that must be continually addressed by Defendants. As Justice Sonia Sotomayor noted recently:

> It has long been said that a society's worth can be judged by taking stock of its prisons. That is all the truer in this pandemic, where inmates everywhere have been rendered vulnerable and often powerless to protect themselves from harm. May we hope that our country's facilities serve as models rather than cautionary tales.

Valentine v. Collier, 140 S. Ct. 1598, 1601 (2020) (mem.) (joined by Ginsburg, J.)

CONCLUSION AND ORDER

For these reasons, Plaintiffs' motion for preliminary injunction is respectfully denied, and Plaintiffs' motion for class certification (ECF No. 3) is denied as moot.

IT IS SO ORDERED.

Dated: June 7, 2020

Hon. Dana M. Sabraw
United States District Judge