UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

JOSE CASTAÑEDA JUAREZ, et al.,

Petitioners-Plaintiffs,

v.

NATHALIE ASHER, et al.,

Respondents-Defendants.

Case No. 2:20-cv-700-MJP-MLP

**MOTION FOR A TEMPORARY RESTRAINING ORDER**

NOTE ON MOTION CALENDAR: MAY 11, 2020

**ORAL ARGUMENT REQUESTED**



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Tel: 206-957-8611

## INTRODUCTION

Petitioners-Plaintiffs Josue Castañeda Juarez, J.A.M., Wilfredo Favela Avendaño, and Naeem Sohail Khan ("Plaintiffs") are immigration detainees at the Northwest Detention Center ("NWDC") who are vulnerable to serious illness and death from the global COVID-19 pandemic. As this Court knows, COVID-19 is a contagious disease with no vaccine or cure that has spread like wildfire throughout the United States and the world. It has killed hundreds of thousands and infected millions. COVID-19 has sickened scores of immigration detainees and, as of this date, has reached 47 detention centers across the country.[1] Indeed, on May 6, 2020, a medically vulnerable detainee with diabetes at the Otay Mesa Detention Center in San Diego, California died from COVID-19. Dkt. 2-1. Experts predict that *72 to 99%* of detainees will contract the coronavirus in the next few months, with fatal consequences. Dkt. 2-6 at 2.

It is inevitable that COVID-19 will reach NWDC, if it has not already. Defendants-Respondents ("Defendants") recently notified the Court that an individual whom they transferred from NWDC to the Florence Service Processing Center ("FSPC") in Florence, Arizona last month, tested positive for COVID-19 only days after his transfer. *See Dawson v. Asher*, No. 2:20-cv-409, Dkt. 93 (W.D. Wash.). Moreover, Defendants have since transferred the same detainee who tested positive for COVID-19, as well as three other detainees, back to NWDC from FSPC, despite a known COVID-19 outbreak at FSPC. *See* No. 2:20-cv-409, Dkt. 100.[2]

Federal courts throughout the United States—including a judge of this Court and the Ninth Circuit Court of Appeals—have ordered the release of immigration detainees, recognizing the "substantial risk of serious and potentially irreparable harm" that detention poses to their

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[1] Decl. of My Khanh Ngo ("Ngo Decl."), Ex. A, Immigration and Customs Enforcement ("ICE"), *ICE Guidance on COVID-19: Confirmed Cases* (last updated May 11, 2020) (hereinafter "ICE Confirmed Cases") (reporting 869 confirmed cases among ICE detainees who have been tested).

[2] As of May 11, 2020, ICE reported 11 confirmed cases of COVID-19 at FSPC, including 10 detainees and one ICE employee. This number continues to grow. *Id.*



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health and safety in light of COVID-19. *See Pimentel-Estrada v. Barr*, No. C20-495 RSM-BAT, --- F. Supp. 3d ----, 2020 WL 2092430, at *17 (W.D. Wash. Apr. 28, 2020); *Xochihua-Jaimes v. Barr*, No. 18-71460, 2020 WL 1429877, at *1 (9th Cir. Mar. 24, 2020); *see also, e.g.*, *Bravo Castillo v. Barr*, No. 20-605-TJH (AFMx), --- F. Supp. 3d ----, 2020 WL 1502864 (C.D. Cal. Mar. 27, 2020); *Coronel v. Decker*, No. 20-cv-2472 (AJN), --- F. Supp. 3d ----, 2020 WL 1487274 (S.D.N.Y. Mar. 27, 2020); *Basank v. Decker*, No. 20-cv-2518 (AT), --- F. Supp. 3d ----, 2020 WL 1481503 (S.D.N.Y. Mar. 26, 2020); *Vazquez Barrera v. Wolf*, No. 4:20-cv-1241, --- F. Supp. 3d ----, 2020 WL 1904497 (S.D. Tex. Apr. 17, 2020); *Fofana v. Albence*, No. 20-10869, --- F. Supp. 3d ----, 2020 WL 1873307 (E.D. Mich. Apr. 15, 2020); *Malam v. Adducci*, No. 20-10829, --- F. Supp. 3d ----, 2020 WL 1672662 (E.D. Mich. Apr. 5, 2020), *as amended* (Apr. 6, 2020); *Essien v. Barr*, No. 20-cv-1034-WJM, --- F. Supp. 3d ----, 2020 WL 1974761 (D. Colo. Apr. 24, 2020); *Doe v. Barr*, No. 20-cv-2141-LB, 2020 WL 1820667 (N.D. Cal. Apr. 12, 2020); *Bent v. Barr*, No. 19-cv-6123-DMR, 2020 WL 1812850 (N.D. Cal. Apr. 9, 2020); *Bahena Ortuño v. Jennings*, No. 20-cv-2064-MMC, 2020 WL 1701724 (N.D. Cal. Apr. 8, 2020); *Christian A.R. v. Decker*, No. 20-3600, 2020 WL 2092616 (D.N.J. Apr. 12, 2020); *Coreas v. Bounds*, No. TDC-20-780, 2020 WL 2292747 (D. Md. May 7, 2020); *Perez-Perez v. Adducci*, No. 20-10833, 2020 WL 2305276 (E.D. Mich. May 9, 2020); *Prieto Refunjol v. Adducci*, No. 2:20-cv-02099-SDM-CMV, 2020 WL 1983077 (S.D. Oh. Apr. 27, 2020); *Favi v. Kolitwenzew*, No. 20-cv-2087, 2020 WL 2114566 (C.D. Ill. May 4, 2020); *Hernandez v. Kolitwenzew*, No. 2:20-cv-2088-SLD, Dkt. 12, slip op. (C.D. Ill. Apr. 23, 2020) (Att. A). Plaintiffs ask that this Court do the same here.

Plaintiffs have filed a class action complaint and petition for writ of habeas corpus on behalf of themselves and similarly situated civil immigration detainees. The proposed class includes individuals, like Plaintiffs, who are at heightened risk of serious illness or death from COVID-19; are or will be detained at NWDC; and seek release from custody consistent with



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public health guidelines. Like the petitioner in *Pimentel-Estrada*, Plaintiffs and class members are kept in "settings where they cannot engage in meaningful social distancing[,]" where Defendants "have failed to implement and enforce cleaning and hygiene measures to prevent the spread of COVID-19. . . ." *Pimentel-Estrada*, 2020 WL 2092430, at *11. And like the petitioner in *Pimentel-Estrada*, Plaintiffs and class members are "at a higher risk of complications from COVID-19 due to [their] age and[/or] medical history[,]" while Defendants have failed to take "any added precautions to abate the elevated harm" they face. *Id.* at *11, *15.

Plaintiffs bring this emergency request for a temporary restraining order seeking the expedited release of Plaintiffs and all putative class members. The threat to Plaintiffs' health and very lives is "so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk." *Helling v. McKinney,* 509 U.S. 25, 36 (1993) (emphasis omitted). In light of the "unsafe, life-threatening condition" that detention presents to medically vulnerable people in this pandemic, *id*. at 33, immediate release is necessary to ensure "compliance with a constitutional mandate. . . ." *Brown v. Plata*, 563 U.S. 493, 511 (2011). The TRO should therefore be granted.

## FACTUAL BACKGROUND

### I. COVID-19 Poses Grave Risk of Harm, Including Serious Illness or Death, to Older Adults and Those with Certain Medical Conditions.

COVID-19 is a disease caused by a coronavirus that has reached pandemic status, with the United States at its epicenter. As of May 11, 2020, it has claimed 79,699 lives in the United States and has infected 1,334,951 people.[3] Although these figures grow every day, they are likely an underestimate due to the lack of available testing. Dkt. 3 (Decl. of Joseph Amon) ¶¶ 5-6. COVID-19 is a novel, serious disease, whose effects range from no symptoms to respiratory failure and death. *Id.* ¶ 8. It is highly infectious, passing primarily through respiratory droplets

[3] Ngo Decl., Ex. B, Johns Hopkins Univ., *Confirmed Cases, Coronavirus Resource Center* (updated May 11, 2020 9:32AM).



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when an infected individual coughs or sneezes. *Id.* ¶ 13. There is no vaccine or cure. *Id.* ¶ 8. The Centers for Disease Control and Prevention ("CDC") projects that 200 million people in the United States could be infected if effective public health measures are not properly implemented. Dkt. 5 (Decl. of Jonathan Golob) ¶ 11.

As Defendants recognize, people over the age of 60 and those with certain medical conditions are more likely to experience serious illness or death from COVID-19. Dkt. 3-4 (ICE Apr. 4, 2020 guidance); *see also Alcantara v. Archambeault*, No. 20-cv-756 DMS (AHG), Dkt. 41, slip op. at *13 (S.D. Cal. May 1, 2020) (Att. B) (noting that "ICE considers detainees at higher risk if they are age 60 or older"). As the CDC has advised, certain underlying medical conditions increase the risk of severe COVID-19 illness for people of any age, including blood disorders, heart and lung disease including asthma, chronic kidney or liver disease, compromised immune system, endocrine disorders, diabetes, and metabolic disorders.[4] Dkt. 5 ¶ 3; Dkt. 3 ¶ 11. The potential consequences to medically vulnerable people are severe: in the high-risk populations, the fatality rate is 15%—meaning about one in seven will die. Dkt. 5 ¶ 4. Those who do not die likely face a prolonged recovery, including extensive rehabilitation, loss of digits, neurologic damage, and sometimes permanent loss of respiratory capacity. *Id.* The only known effective measures to reduce the risk of death or injury for high risk individuals are avoiding contagion through social distancing and rigorous hygiene. *Id.* ¶ 10.

Concentrated outbreaks of COVID-19 could overwhelm a locality's medical resources. Dkt. 3 ¶¶ 49-50. Treating patients who have COVID-19 requires intensive care—including supplemental oxygen, positive pressure ventilation, and sometimes extracorporeal mechanical oxygenation. *Id.* ¶ 9; Dkt. 5 ¶ 5. People in high risk categories require even more intensive care

[4] Ngo Decl. Ex. C, CDC, *Implementation of Mitigation Strategies for Communities with Local COVID-19 Transmission* (Mar. 12, 2020); *id.*, Ex. D, CDC, *Coronavirus Disease 2019 – People Who Are at Higher Risk for Severe Illness* (last updated Apr. 17, 2020).



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than people in lower risk categories. Dkt. 5 ¶ 8. This could require 1:1 or 1:2 nurse to patient ratios, respiratory therapists, and intensive care physicians. *Id.*

The strategy of social distancing has dramatically transformed daily life in Washington since February 29, 2020, when Governor Jay Inslee declared a State of Emergency due to the COVID-19 outbreak. Dkt. 3 ¶ 16. On March 23, Governor Inslee issued an order requiring residents statewide to stay at home, with exceptions for only "essential" activities.[5] The Governor has extended that order until at least May 31. Dkt. 3 ¶ 16. Despite these measures, new cases continue to be reported, including in Pierce County, where NWDC is located, and where "there has been no indication of a slowing epidemic[.]" *Id.* ¶ 7. Recently, the Institute for Health Metrics and Evaluation at the University of Washington, whose model has been relied on by the White House, updated their predictions for the number of deaths that may occur in the United States from 72,433 to 134,000 by early August—nearly double its previous prediction. *Id.* ¶ 21.

## II. Detained Individuals Face an Imminent and Substantial Risk of Contracting COVID-19.

People held in jails, prisons, and detention centers are highly vulnerable to the rapid spread of COVID-19 because conditions in those facilities make it impossible to practice social distancing or other protective measures. Dkt. 3 ¶ 22. These facilities are enclosed, congregate environments—places where people live, eat, and sleep in close proximity. *Id.* ¶ 23; Dkt. 5 ¶ 13. For these reasons, jails and prisons have become the nation's largest hotspots of COVID-19 infection. Dkt. 2-8 at 14 (four of top five COVID-19 outbreaks in the U.S. are in prisons or jails); Dkt. 2-9 at 6 (reporting that over 21,000 incarcerated people and 8,000 correctional staff have confirmed cases of COVID-19 nationwide; 295 prisoners and 34 correctional staff have died); Dkt. 3 ¶ 26 (describing facilities with over 50% infection rates, reaching as high as 80% of people incarcerated in an Ohio state prison), ¶¶ 43-45 (describing how quickly infection rates

[5] Ngo Decl., Ex. E, State of Wash., Off. of the Governor, Proclamation 20-25 (Mar. 23, 2020).



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grew at Cook County Jail in Chicago and Rikers Island Jail in New York City). The fate of these facilities "illustrate[s] the risk of infection at communal detention facilities." *Malam v. Adducci*, No. 20-10829, 2020 WL 1899570, at *5 (E.D. Mich. Apr. 17, 2020).

As described in detail below, living conditions at NWDC render it impossible to practice social distancing, as people are required to live in close quarters and share various surfaces and objects, including toilets, sinks, showers, tables, and phones. Dkt. 3 ¶¶ 23, 40(b). The inability to practice social distancing is especially problematic given the contagious nature of the coronavirus and its ability to spread through asymptomatic and pre-symptomatic carriers. *Id*. ¶ 15. Under these circumstances, Dr. Joseph Amon, an infectious disease epidemiologist and correctional health expert, concludes that ICE will not be able to mitigate the rapid transmission of COVID-19 once it enters NWDC, if it has not already. *Id*. ¶¶ 1-4, 29. Dr. Jonathan Golob, a specialist in infectious diseases and internal medicine, expects that COVID-19 will readily spread in detention centers, particularly if detainees cannot engage in proper hygiene and isolation. Dkt. 5 ¶¶ 1, 13.

## III. Conditions at NWDC Demonstrate ICE's Ongoing Failure to Protect Medically Vulnerable Individuals in light of COVID-19.

ICE's own experts recognize that immigration detention centers like NWDC are a "tinderbox scenario" for rapid spread of COVID-19. Dkt. 2-3 at 4. Plaintiffs' experiences at NWDC demonstrate why congregate living poses such a danger to their health and safety. Although ICE has issued protocols regarding COVID-19—the most *recent* dated April 10, over a month ago, Dkt. 3-5—those protocols have failed to ensure the safety of detainees at NWDC.

*First*, even though social distancing is the only effective way to prevent transmission, ICE's guidance acknowledges that "strict social distancing *may not be possible*" given crowding and the physical infrastructure of detention facilities. Dkt. 3 ¶ 30 (emphasis added); *see also id*. (ICE's social distancing guidelines are "merely aspirational and therefore insufficient."). As this



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Court concluded in *Pimentel-Estrada*, "the undisputed evidence establishes that maintaining social distance at the [NWDC] is impossible." *Pimentel-Estrada*, 2020 WL 2092430 at * 7. Plaintiffs and the other people detained at NWDC are housed in group dorms or "pods" where dozens of people are kept together in an enclosed space throughout the day. Dkt. 8 (Decl. of Jose Castañeda Juarez) ¶ 2; Dkt. 7 (Decl. of Wilfredo Favela Avendaño) ¶ 5; Dkt. 11 (Decl. of J.A.M.) ¶ 8; Dkt. 9 (Decl. of Naeem Sohail Khan) ¶ 5; Dkt. 14 (Decl. of Maksym Bonarov) ¶ 3; Dkt. 10 (Decl. of Elsa Diaz Reyes) ¶ 6; Dkt. 12 (Decl. of Flavio Lopez Gonzalez) ¶¶ 7-8; Dkt. 13 (Decl. of Norma Lopez Nuñez) ¶ 6. Toilets, sinks, showers, phones, exercise equipment, tables, microwaves, and other items are shared without disinfection between each use. Dkt. 8 ¶¶ 5-9; Dkt. 7 ¶¶ 9, 11, 14-16; Dkt. 9 ¶ 10; Dkt. 14 ¶¶ 5-7; Dkt. 10 ¶ 11; Dkt. 12 ¶ 12; Dkt. 13 ¶¶ 7-10. Detained people sit in close proximity to one another during meals, when attending court hearings, and when visiting the medical clinic. They stand next to each other in lines to use bathrooms and get food and medicine and when they are moved through the facility. Dkt. 8 ¶¶ 5-10; Dkt. 7 ¶¶ 13-14; Dkt. 14 ¶¶ 5-6, 9; Dkt. 10 ¶ 13; Dkt. 12 ¶¶ 4-6, 12; Dkt. 13 ¶¶ 7-9. At night and during "count" each day, detainees sleep and sit on their bunkbeds in their cells with other detainees or in pods with dozens of others where the beds are mere feet apart. Dkt. 8 ¶ 3; Dkt. 7 ¶¶ 5, 12; Dkt. 11 ¶ 10; Dkt. 9 ¶ 7; Dkt. 14 ¶ 4; Dkt. 10 ¶ 6; Dkt. 12 ¶¶ 4, 7-8; Dkt. 13 ¶ 6. As one detainee puts it, while "[w]e were never told that we should try to maintain a [six] foot distance between each other; even if we had been told that, it would be impossible in the pod because we have to sleep and sit so close to each other." Dkt. 14 ¶ 9; *see also* Dkt. 10 ¶ 20 (noting that it is "impossible to keep six feet away from everybody with so many of us in such a small pod"); Dkt. 11 ¶ 13 (similar). These conditions make it impossible to socially distance. *See* Dkt. 3 ¶¶ 40(a), (b), 42(g).

*Second*, COVID-19 can easily enter NWDC. NWDC staff, which include both employees of ICE and the GEO Group, Inc. ("GEO"), which owns and operates the facility, continue to



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arrive and leave on a shift basis, and Defendants do not test staff for new, asymptomatic infection. *Id*. ¶¶ 32, 53; Dkt. 8 ¶ 13 (estimating that ten guards enter and leave the pod every day). Thus, it is impossible to determine if staff are COVID-19 positive and contagious, but asymptomatic. Defendants have failed to test for asymptomatic infection even though large percentages of COVID-19 cases may be entirely asymptomatic. Dkt. 3 ¶¶ 14, 43. While ICE has eliminated social visits and quarantined some individuals, this will do little to stop the virus since there are many other vectors through which it can spread. *Id*. ¶ 32. For example, some attorneys still arrive to attend immigration court, where they interact with staff and detainees directly. Dkt. 16 (Decl. of Andrew Augustine) ¶ 2; Dkt. 15 (Decl. of Mark Nerheim) ¶¶ 10, 13, 14.

*Third*, once in the facility, guards are often in close proximity to detained persons. *See, e.g.*, Dkt. 12 ¶ 6; Dkt. 13 ¶ 4. Guards often do not wear masks or gloves in the facility, nor are they required to do so. Dkt. 16 ¶¶ 3-15; Dkt. 15 ¶ 5; Dkt. 8 ¶ 13; Dkt. 7 ¶ 16; Dkt. 11 ¶ 14; Dkt. 9 ¶ 13; Dkt. 14 ¶ 10; Dkt. 10 ¶ 21 Dkt. 12 ¶ 13; Dkt. 13 ¶ 13; *Pimentel-Estrada*, 2020 WL 2092430 at *11 ("Respondents . . . do not even require all employees to wear PPE when interacting with detainees); *Dawson*, No. 2:20-cv-409, Dkt. 96 (Decl. of Drew Bostock) ¶ 39 (masks are not required for GEO staff except in ICE medical clinic). To the contrary, many guards display a "cavalier attitude" about such basic safety protocols, Dkt. 15 ¶ 5; *see also* Dkt. 9 ¶ 13, and refuse to wear masks even when detainees ask them to do so, Dkt. 8 ¶ 14.

*Fourth*, while Defendants assert they have reduced the number of transfers to NWDC, *Dawson*, No. 2:20-cv-409, Dkt. 96 ¶ 11, they continue to transfer detainees to the NWDC. *See* Decl. of Danielle Surkatty ("Surkatty Decl.") ¶¶ 11-22. Also, Defendants do not deny that they continue to arrest members of the community and detain them at NWDC. *Dawson*, No. 2:20-cv-409, Dkt. 96 ¶ 11.

*Fifth,* many hygiene practices at NWDC have not improved despite the pandemic. While ICE and GEO have insisted that they have provided sufficient soap and sanitizer to detainees, *see*



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*Dawson*, No. 2:20-cv-409, Dkt. 96 ¶ 21, Plaintiffs and others have repeatedly run out of these supplies. *See* Dkt. 8 ¶ 6; Dkt. 11 ¶ 13; Dkt. 10 ¶ 12. Moreover, Defendants have never produced any "evidence that professional cleaning occurs within the housing units." *Pimentel-Estrada*, 2020 WL 2092430, at *8. Instead, "GEO generally passes on the responsibility for maintaining the cleanliness of its facilities to detainees, and GEO does not always assure that adequate cleaning is performed." *Id. See also, e.g.*, Dkt. 8 ¶¶ 5,8; Dkt. 7 ¶ 16; Dkt. 11 ¶ 11; Dkt. 9 ¶¶ 8-9; Dkt. 14 ¶ 7. Alarmingly, there is a suspected outbreak of scabies at NWDC, casting further doubt on the alleged cleaning and other protective measures at the facility. Dkt. 18 (Decl. of Gustavo Garcia Cruz) ¶¶ 2-4.[6]

*Sixth*, the risk to Plaintiffs is further heightened by ICE's flawed testing protocols and Defendants' inability to guarantee a comprehensive testing system necessary to detect asymptomatic and pre-asymptomatic carriers. As Dr. Amon explained, ICE does not provide clear guidance or sufficient resources to test for COVID-19. Dkt. 3 ¶ 33. The availability of testing is very limited at NWDC and Washington at large.[7] *See* Dkt. 2-3 at 5 (DHS medical experts noting their concern about the "widespread reporting about the lack of available tests for COVID-19"). In a previous case, Defendants admitted that, as of April 3, 2020, only three individuals at NWDC had been tested. *See* No. 2:20-cv- 409, Dkt. 75 ¶ 7. Last week, Defendants represented that in response to complaints they subsequently tested one individual from each pod, and later tested one more individual. *Dawson*, No. 2:20-cv-409, Dkt. 97 ¶ 26. In short, Defendants have tested only *eight* of hundreds detained at NWDC over the course of the pandemic. *See* Dkt. 3 ¶ 42(f) (noting ICE's "highly restrictive policy on testing"); *see also* Dkt. 17 ¶¶ 7-9 (detainee with at-risk factors at NWDC describing denial of COVID-19 testing despite

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[6] *See also* Ngo Decl., Ex. F, Ctr. for Human Rights, Univ. of Wash., *Conditions at the NWDC: Background, Methodology, & Human Rights Standards*, Mar. 27, 2020, at 15-21, 25-40 (describing shortfalls in NWDC's sanitation and medical care).

[7] Ngo Decl., Ex. G, Wash. State Dep't of Health, *2019 Novel Coronavirus Outbreak (COVID-19)* (updated as of May 10, 2020).



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displaying symptoms including chills, headaches, vomiting, fever, and shortness of breath); Dkt. 8 ¶ 12 (similar); Dkt. 4-2 (form denying Mr. Castañeda Juarez's request for COVID-19 test).

*Finally*, ICE's protocols fail to identify *any* steps to protect medically vulnerable individuals who remain detained from contracting COVID-19. Dkt. 3 ¶ 31; *see also Pimentel-Estrada*, 2020 WL 2092430 at *15 ("Respondents do not present any evidence they are taking any added precautions to abate the elevated harm faced by Petitioner."). ICE's guidance merely notes that the agency must identify vulnerable individuals, but neither mandates their release nor requires any other protective measures. Dkt. 3 ¶ 31. Moreover, ICE's reliance on "cohorting," whereby units or fixed groups of people are quarantined together, including individuals who have been exposed to the virus, *facilitates* rather than prevents the spread of COVID-19. *Id*. ¶ 36. As Dr. Amon explains, ICE's method of cohorting can result in asymptomatic carriers mixing in even closer, less-monitored quarters with those not yet sick. *Id*.

ICE purportedly has implemented its procedures at all immigration detention facilities. Yet the growing number of confirmed COVID-19 cases among detainees, guards, and staff across the country makes clear that ICE's policies are inadequate. *See, e.g.*, *Favi*, 2020 WL 2114566, at *3-*4 (concluding that screening, increased sanitation, twice-daily temperature checks, end to social and attorney visits, and some depopulation "are insufficient to minimize" a medically vulnerable detainee's risk of harm"). ICE confirmed its first case of a detained immigrant with COVID-19 only in late March, a month and a half ago.[8] Since, then, in a matter of weeks, infections in ICE facilities nationwide have ballooned to 869 confirmed cases, despite the extremely limited testing in ICE facilities,[9] and at least one detainee has died as a result of COVID-19, Dkt. 2-1. In the next few months, experts predict that *72% to 99%* of ICE detainees

[8] Ngo Decl., Ex. H, ICE, *ICE Detainee Tests Positive For COVID-19 at Bergen County Jail* (Mar. 24, 2020).

[9] Ngo Decl. Ex. A, ICE Confirmed Cases.



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will contract the virus. *See* Dkt. 2-6 at 2. Such concerns are well-grounded given ICE's history of mishandling outbreaks and detainee medical care, including at NWDC.[10]

## IV. Releasing Class Members Who Are Vulnerable to Serious Illness or Death from COVID-19 Will Save Lives and Protect Public Health.

Because there is no vaccine or cure for COVID-19, the most critical strategy to protect medically vulnerable people from severe illness or death is to ensure they do not contract COVID-19 in the first place. Given the realities of detention and conditions at NWDC, release is the only option to protect Plaintiffs and class members. As Dr. Amon explains:

> Even with the best-laid plans to address the spread of COVID-19 in detention facilities, the release of individuals who can be considered at high-risk of severe disease if infected with COVID-19 is a key part of a risk mitigation strategy. In my opinion, the public health recommendation is to release high-risk people from detention, given the heightened risk to their health and safety, especially given the lack of a viable vaccine for prevention or effective treatment at this stage.

Dkt. 3 ¶ 55; *see also* Dkt. 5 ¶¶ 13-14; Dkt. 2-3 at 5-6; *Pimentel-Estrada*, 2020 WL 2092430, at *19 (concluding that "the only adequate remedy at this time is to order Petitioner released from detention on appropriate conditions of supervision to be set by ICE") (citing *Malam*, 2020 WL 1672662, at *13).

Here, Plaintiffs are all at high risk of serious illness and death should they contract COVID-19 at NWDC. Dkt. 4 (Decl. of Katherine McKenzie) ¶ 31.

- **Josue Castañeda Juarez** is a 36-year-old man with a lengthy history of asthma. Dkt. 8 ¶¶ 1, 15. His asthma is not well-controlled. He must use two inhalers and was hospitalized for his asthma as recently as December 2019. *Id.* ¶ 15. He also has been diagnosed with a heart condition called aortic stenosis, which means that his aorta is calcifying and could stop correctly circulating blood at any time. *Id.* ¶ 16. He has not received proper follow-up care for this condition while detained. *Id.* ¶ 19.

[10] *See, e.g.*, Ngo Decl., Ex. I, Emma Ockerman, *Migrant Detention Centers Are Getting Slammed with Mumps and Chickenpox*, Vice News, Jan. 14, 2019 (reporting on outbreaks of mumps and chicken pox at ICE facilities as recently as last year); *id*., Ex. J, Melissa Hellman, *Incarcerated and Infirmed: How Northwest Detention Center Is Failing Sick Inmates*, Seattle Weekly, Oct. 10, 2018 (recounting history of detainee complaints regarding inadequate medical care at NWDC).



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- **Wilfredo Favela Avendaño** is a 46-year-old man who has had asthma for over twenty years. Dkt. 7 ¶¶ 1, 4. His asthma is not well-controlled. He has to use two inhalers a total of four times in an average day. *Id.* ¶ 4.

- **Naeem Sohail Khan** is a 47-year-old man with diabetes that has not been properly controlled since arriving at NWDC. Dkt. 9 ¶¶ 1, 3. He experiences bleeding in his teeth, a sign of improperly managed diabetes. *Id.* ¶ 4.

- **J.A.M.** is a 57-year-old asylum seeker who had part of his right lung removed after being shot. Dkt. 11 ¶¶ 1, 2, 4. Only one of his lungs properly functions. *Id.* ¶ 4. Additionally, he has type II diabetes. *Id.* ¶ 5.

The release of Plaintiffs and individuals like them will not only protect their lives, but also decrease the burden upon local health care facilities and hospitals. As ICE's medical experts point out, as "local hospital systems become overwhelmed by the patient flow from detention center outbreaks, precious health resources will be less available to people in the community," leading to a scenario in which "many people from the detention center *and the community* die unnecessarily for want of" medical resources, like ventilators. Dkt. 2-3 at 4. For this reason, multiple jurisdictions, including the state of Washington, have released thousands of people from criminal jails and prisons, acknowledging the grave threat that an outbreak in jails and prisons pose. Dkt. 6 (Decl. of Dora Schriro) ¶¶ 67-70.[11]

## LEGAL STANDARD

On a motion for a TRO, the movant "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001) (noting that preliminary injunction and TRO standards are "substantially identical"). A TRO may issue where "serious questions going to the

[11] *See also* Ngo Decl., Ex. K, Dep't of Justice, *Memorandum from the Attorney General to the Director of Bureau of Prisons* (March 26, 2020) (advising the Bureau of Prisons to reduce populations by transferring non-violent, vulnerable and elderly prisoners to home confinement).



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merits [are] raised and the balance of hardships tips sharply in [plaintiff's] favor." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (alteration in original) (citation omitted). To succeed under the "serious question" test, Petitioner must show that he is likely to suffer irreparable injury and that an injunction is in the public's interest. *Id*. at 1132.

## ARGUMENT

### I. Class Members Are Likely to Succeed on the Merits.

Plaintiffs and the putative class of medically vulnerable people at NWDC are likely to establish that Defendants violate their constitutional rights by detaining them in conditions where it is impossible to practice the social distancing and scrupulous hygiene necessary to avoid COVID-19. Plaintiffs seek relief under both 28 U.S.C. § 2241, as a habeas petition, and 28 U.S.C. § 1331, as an independent cause of action for injunction relief under the Due Process Clause. There is no dispute in the Ninth Circuit that both are appropriate vehicles. *See Lopez-Marroquin v. Barr*, 955 F.3d 759, 759-60 (9th Cir. 2020); *Hernandez Roman v. Wolf*, No. 20-00768 TJH (PVCx), 2020 WL 1952656, at *9 (C.D. Cal. Apr. 23, 2020), *stayed in part on other grounds*, No. 20-55436, 2020 WL 2188048, at *1 (9th Cir. May 5, 2020).

So long as class members remain detained, Defendants *cannot* remedy grave risk of harm they face from COVID-19. Accordingly, their continued detention at NWDC violates their Fifth Amendment rights, and they must be released.

#### *a. Subjecting Detainees to an Unreasonable Risk of Serious Infection or Death Violates Their Fifth Amendment Right to Reasonable Safety in Custody.*

Whenever the government detains or incarcerates someone, it has an affirmative duty to provide conditions of reasonable health and safety. As the Supreme Court has explained, "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989).



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As a result, the government must provide those in its custody with "food, clothing, shelter, medical care, and reasonable safety . . . ." *Id.* at 200; *accord Pimentel-Estrada*, 2020 WL 2092430, at *11.

Conditions that pose an unreasonable risk of future harm violate the Eighth Amendment's prohibition against cruel and unusual punishment, even if that harm has not yet come to pass. "It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them." *Helling*, 509 U.S. at 33. For that reason, the government cannot "ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year." *Id.*

The same principle applies to immigration detainees. Immigration detainees are civil detainees protected by the Due Process Clause of the Fifth Amendment. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). In contrast to convicted prisoners, who derive protection from the Eighth Amendment, civil detainees are entitled to greater constitutional protection. *Jones v. Blanas*, 393 F.3d 918, 931-32 (9th Cir. 2004), *cert denied*, 546 U.S. 820 (2005); *King v. Cty. of Los Angeles*, 885 F.3d 548, 556-57 (9th Cir. 2018); *see also Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982). Civil detention cannot "amount to punishment of the detainee." *Bell v. Wolfish*, 441 U.S. 520, 535 (1979); *see also Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473-74 (2015). Detention is punitive where it is not "reasonably related to a legitimate governmental objective." *Doe v. Kelly*, 878 F.3d 710, 720 (9th Cir. 2017) (quoting *Bell*, 441 U.S. at 539). Detention that "is arbitrary or purposeless" violates the detainee's due process rights. *Id*. (quoting *Bell*, 441 U.S. at 539).

Moreover, because civil detention is governed by the Fifth Amendment rather than the Eighth Amendment, the "deliberate indifference" standard required to establish a constitutional violation under the Eighth Amendment does not apply to civil detainees like Plaintiffs. *Jones*, 393 F.3d at 933-34. For example, in the pretrial criminal context, detainees need only show "an



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intentional decision" regarding conditions that puts detainees at "substantial risk of suffering serious harm" and a failure to "take reasonable available measures to abate that risk." *Gordon v. Cty. of Orange*, 888 F.3d 1118, 1125 (9th Cir. 2018) (applying the "objective deliberate indifference" standard for pretrial detainees outlined in *Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1070-1071 (9th Cir. 2016) (en banc)); *Kingsley*, 135 S. Ct. at 2473-74; *see also Pimentel-Estrada*, 2020 WL 2092430, at *11, *17. Moreover, civil detainees like Plaintiffs are entitled to even stronger protections than pretrial defendants: conditions of confinement for civil detainees are presumptively punitive if they are "identical to, similar to, or more restrictive" than those of criminal pretrial detainees. *Jones*, 393 F.3d at 932; *King*, 885 F.3d at 557.

As this Court has explained, applying the objective standard outlined in *Castro,* the "several glaring deficiencies" in Defendants' failure to abate the "substantial risk of serious harm" to vulnerable detainees at NWDC from COVID-19 violates Plaintiffs' due process rights. *Pimentel-Estrada*, 2020 WL 2092430, at *11–*16.

*First*, Defendants' intentional actions have placed Plaintiffs at substantial risk of serious harm. Medically vulnerable Plaintiffs face a one in seven chance of death if infected with COVID-19, and those who survive illness will likely face a prolonged recovery and long-term disability. Dkt. 5 ¶ 4. Defendants, however, continue to detain Plaintiffs in conditions that create a substantial risk of contracting COVID-19. Defendants have recklessly transferred detainees to and from facilities with confirmed COVID-19 outbreaks, further increasing the risk of viral spread at NWDC. *See Dawson*, No. 2:20-cv-409, Dkt. 100; *see also* Dkt. 3 ¶ 35(b). Defendants have failed to screen for asymptomatic infection even though large percentages of COVID-19 cases may present without symptoms. Dkt. 3 ¶¶ 14, 43. Indeed, thus far, Defendants have tested only *eight* of hundreds of detainees at NWDC, and refused testing even to symptomatic detainees. *See* Dkt. 3 ¶ 42(f); Dkt. 17 ¶¶ 7-9; Dkt. 8 ¶ 12; Dkt. 4-2. Defendants have detained Plaintiffs conditions in which they cannot practice social distancing and proper hygiene:



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detainees at NWDC cannot engage in adequate social distancing in their living quarters or common areas; they share surfaces and objects that are rarely sanitized between use, usually, by untrained and unsupervised detainees; and they do not have consistent access to hygiene supplies or PPE. *See supra*, Section III; *see also Zepeda Rivas v. Jennings*, No. 3:20-cv-2731-VC, --- F. Supp. 3d ----, 2020 WL 2059848, at *2 (N.D. Cal. Apr. 29, 2020) ("Although ICE has recently begun taking modest measures, it is undisputed that the agency has not come close to achieving social distancing for most detainees—for example, people are still sleeping in barracks-style dorms within arms-reach of one another."); *Bahena Ortuño v. Jennings*, No. 20-cv-2064-MMC, 2020 WL 2218965, at *2-*3 (N.D. Cal. May 7, 2020) (converting TRO to preliminary injunction for medically vulnerable detainees because "individuals presently detained . . . continue to lack the ability to engage in social distancing."). Defendants do not require employees to wear PPE when interacting with detainees, *see Dawson*, No. 2:20-cv-409, Dkt. 96 ¶ 39, and guards display a "cavalier attitude" about such basic safety protocols, refusing to wear masks even when detainees ask them to do so. Dkt. 15 ¶ 5; Dkt. 9 ¶ 13; Dkt. 8 ¶ 14.

*Second*, Defendants' failure to take reasonable measures to abate the substantial risk faced by Plaintiffs is objectively unreasonable. *Castro*, 833 F.3d at 1071. As a judge of this Court found in *Pimentel-Estrada*, there are "several glaring deficiencies" in Defendants' response to COVID-19. 2020 WL 2092430, at *14. *See also supra*, Section III. Defendants have been on notice about the risk to medically vulnerable detainees in NWDC since at least early March 2020 when the first COVID-19 litigation was filed. *Dawson*, No. 2:20-cv-409, Dkt. 1 (complaint filed March 16, 2020). Nonetheless, Defendants have failed to substantially reduce the number of detainees at NWDC such that meaningful social distancing is possible. They have failed to end to transfers of detainees from facilities with confirmed COVID-19 outbreaks; implement social distancing and hygiene measures; require that employees to wear PPE when working with detainees. Nor have Defendants implemented testing protocols to guarantee a



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system necessary to detect asymptomatic and pre-symptomatic carriers. And Defendants have taken *no* additional precautions to protect medically vulnerable individuals from contracting COVID-19. Dkt. 3 ¶ 31(c); *Pimentel-Estrada*, 2020 WL 2092430, at *15 ("Respondents do not present any evidence they are taking any added precautions to abate the elevated harm faced by Petitioner."). For these reasons, Defendants' actions violate the Due Process Clause.

***b. The Harm to Class Members from the Threat of COVID-19 Is Excessive in Relation to the Government's Interest, in Violation of Substantive Due Process.***

Plaintiffs' detention at NWDC additionally violates due process because "it imposes some harm to the detainee that significantly exceeds or is independent of the inherent discomforts of confinement and is not reasonably related to a legitimate governmental objective or is excessive in relation to the governmental objective." *Unknown Parties v. Johnson*, No. CV-15-250-TUC-DCB, 2016 WL 8188563, at *5 (D. Ariz. Nov. 18, 2016) (citing *Kingsley*, 135 S. Ct. at 2473-74), *aff'd sub nom., Doe v. Kelly*, 878 F.3d 710 (9th Cir. 2017).

As older adults and people who have serious underlying medical conditions, class members are at higher risk of severe disease or death if they contract COVID-19, which is highly likely to occur in immigration detention. Dkt. 3 ¶¶ 10-12, 22-23, 26, 39-50, 55. The imminent danger faced by Plaintiffs vastly outweighs the government's interest in their continued detention. Civil immigration detention is justified only when necessary to ensure the individual's appearance for removal proceedings or deportation, or to protect the community from harm. *Zadvydas*, 533 U.S. at 690. The Supreme Court held in *Zadvydas* that "[t]here is no sufficiently strong special justification . . . for indefinite civil detention." *Id.* If the government's interest in effectuating removal and protecting the community cannot justify indefinite detention, it cannot justify continuing to expose medically vulnerable people to "potentially permanent" harm and death. *See id*. 690-91; *Pimentel-Estrada*, 2020 WL 2092430, at *17; *Alcantara*, slip op. at *15-*16 (citing cases and noting that "a majority of district courts [in the Ninth Circuit] that have



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considered the issue have concluded there is a likelihood plaintiffs will prevail on those [Fifth Amendment] claims"); *cf. D'Alessandro v. Mukasey*, 628 F. Supp. 2d 368, 399 (W.D.N.Y. 2009) (considering immigrant's age and "constellation of serious, debilitating, and progressive health problems" to weigh against any interest in continued detention).

Even worse, ICE has decided to keep medically vulnerable people detained during this deadly pandemic even though alternatives to detention are readily available. As the Ninth Circuit has recognized, ICE has highly effective tools at its disposal to supervise individuals in the community and ensure that they report for court hearings and other appointments. *See Hernandez v. Sessions*, 872 F.3d 976, 991 (9th Cir. 2017); *see also* Dkt. 6 ¶¶ 61-65.[12] And Plaintiffs and class members have homes or other locations available to them upon release where they can remain and adhere to guidelines for self-quarantine, further undercutting any interest in confinement.

Plaintiffs' continued detention in light of the risks posed by COVID-19 is thus excessive in relation to any legitimate governmental interest. *Pimentel-Estrada*, 2020 WL 2092430, at *17; *see also Alcantara*, slip op. at *17; *Rafael L.O. v. Tsoukaris*, No. 20-3481 (JMV), 2020 WL 1808843, at *7 (D.N.J. Apr. 9, 2020).

[12] For example, ICE's Intensive Supervision Appearance Program ("ISAP"), relies on biometric voice recognition software, home visits, individualized coaching, in-person or phone reporting, and electronic ankle monitors to supervise program participants. Dkt. 6 ¶¶ 63-64. A government-contracted evaluation of ISAP reported a 99% attendance rate at all immigration court hearings and a 95% attendance rate at final hearings. *Id.* ¶ 62. Another supervision program studied in 2011 saw fewer than 1% of participants removed from the program due to arrest by another law enforcement agency. *See Jennings v. Rodriguez*, No. 15-1204, 2016 WL 6276890, at *36–37 (U.S. 2016) (Br. of 43 Social Science Researchers and Professors as Amici Curiae in Support of Respondents).



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***c. As Multiple Courts Have Recognized, This Court Has Authority to Order Class Members' Release as the Sole Effective Remedy for the Violation of their Constitutional Rights.***

This Court has clear authority to remedy unconstitutional detention by directing the release of medically vulnerable individuals. *Pimentel-Estrada*, 2020 WL 2092430, at *18. "Federal courts possess whatever powers are necessary to remedy constitutional violations because they are charged with protecting these rights." *Stone v. City & Cty. of San Francisco*, 968 F.2d 850, 861 (9th Cir. 1992). Moreover, it is well-established that a federal court may release individuals to remedy unconstitutional conditions of confinement. *See Plata*, 563 U.S. at 511 ("When necessary to ensure compliance with a constitutional mandate, courts may enter orders placing limits on a prison's population."); *Duran v. Elrod*, 713 F.2d 292, 297-98 (7th Cir. 1983) (concluding that court did not exceed its authority in directing release of low-bond pretrial detainees as necessary to reach a population cap).

Accordingly, in recent weeks, federal courts across the country have ordered the immediate release of immigration detainees, including on a class-wide basis, in light of the dangers posed by COVID-19. *See, e.g.*, *Xochihua-Jaimes*, 2020 WL 1429877, at *1 (ordering release "[i]n light of the rapidly escalating public health crisis, which public health authorities predict will especially impact immigration detention centers[.]"); *Zepeda Rivas*, 2020 WL 2059848, at *3 (ordering expedited bail hearings of detainee class members); *Fraihat v. U.S. Immigration & Customs Enf't*, No. 5:19-cv-01546-JGB-SHK, --- F. Supp. 3d ----, 2020 WL 1932570, at *29 (C.D. Cal. Apr. 20, 2020) (certifying subclasses of medically vulnerable and disabled detainees in light of COVID-19); *Bravo Castillo*, 2020 WL 1502864, at *6 (granting temporary restraining order and ordering the government to "forthwith and without delay, release Petitioners"); *Alcantara v. Archambeault*, No. 20-cv-0756-DMS (AHG), Dkt. 38, slip op. at *3 (S.D. Cal. Apr. 30, 2020) (Att. C) (ordered release of medically vulnerable subclass members to begin "immediately"); *see also Gomes v. Acting Secretary, U.S. Dep't of Homeland Sec.*, No.



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1:20-cv-453-LM, 2020 WL 2113642, at *1 (D.N.H. May 4, 2020) (order granting expedited bail hearings for provisionally certified subclass of medically vulnerable individuals at Stafford County House of Corrections in New Hampshire); *supra* at 2 (collecting cases).

Importantly, courts—including a judge of this Court—have ordered release where there were *no* confirmed cases of COVID-19 in the facility at issue. *See e.g.*, *Pimentel-Estrada*, 2020 WL 2092430, at *19; *Bravo Castillo v. Barr*, 2020 WL 1502864, at *5-*6; *Vazquez Barrera*, 2020 WL 1904497, at *8; *Fofana*, 2020 WL 1873307, at *1; *Malam*, 2020 WL 1672662, at *2; *Doe*, 2020 WL 1820667, at *1; *Bent*, 2020 WL 1812850, at *1; *Bahena Ortuño*, 2020 WL 1701724, at *5; *Coreas*, 2020 WL 2292747, at *1; *Favi*, 2020 WL 2114566, at *1; *Hernandez*, Dkt. 12, slip op. at *1.

Courts likewise have ordered release and modifications of supervised release of prisoners and pre-trial criminal detainees because of the dangers posed COVID-19. *See, e.g.*, *Wilson v. Williams*, No. 20-3447, Order, slip op. at *6 (6th Cir. May 4, 2020) (Att. D) (denying stay of district court preliminary injunction ordering release of subclass of medically vulnerable inmates at an Ohio prison); *United States v. Hargrove*, No. 13-cr-274, 2020 WL 1865462, at *4 (N.D. Cal. Apr. 13, 2020) (granting defendant's motion for temporary release due to "the unprecedented, extremely serious health risk posed by continued detention, exacerbated by [the defendant]'s health conditions"); *United States v. Daniels*, No. 19-CR-00709-LHK (NC), 2020 WL 1815342, at *4 (N.D. Cal. Apr. 9, 2020) (same); *Matter of Extradition of Toledo Manrique*, No. 19-mj-71055-MAG-1 (TSH), 2020 WL 1307109, at *1 (N.D. Cal. Mar. 19, 2020) (ordering release of vulnerable 74-year-old on bail due to "risk of serious illness or death if he remains in custody"); *United States v. Barkman*, No. 3:19-cr-0052-RCJ-WGC, --- F. Supp. 3d ----, 2020 WL 1811343, at *1, 3 (D. Nev. Mar. 17, 2020) (modifying probation conditions to suspend requirement of intermittent confinement where jail "simply lacks the resources necessary to



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engage in aggressive screening and testing of inmates [and staff]" and concluding that "we must take every necessary action to protect vulnerable populations and the community at large").

Although judges in this District have declined to order release from NWDC, the reasoning of *Pimentel-Estrada* controls here. In contrast to those decisions, the class members' medical vulnerabilities recognized by the CDC, the magnitude of the pandemic's rapid spread in ICE facilities in recent weeks, and more recent conditions at NWDC illustrate the inability of ICE to prevent or control the transmission of COVID-19. *Compare Pimentel-Estrada*, 2020 WL 2092430, at *10 n.10 *with Almeida v. Barr*, No. C20-490 RSM-MLP, --- F. Supp. 3d ----, 2020 WL 2121289 (W.D. Wash. Apr. 6, 2020); *Moturi v. Asher*, No. 2:19-cv-2023-RSM-BAT, 2020 WL 2084915 (W.D. Wash. Apr. 30, 2020); *Dawson v. Asher*, No. C20-409-JLR-MAT, 2020 WL 1704324 (W.D. Wash. Apr. 8, 2020).

In sum, because Plaintiffs have shown that their continued detention would cause an unacceptably high risk of grave injury, they are likely to succeed on the merits of their claim that their continued detention violates the Fifth Amendment, and that release from custody is the only effective way to ensure their safety.

## II. The Remaining Factors Weigh Heavily in Plaintiffs' Favor.

### *a. Exposure to a Lethal Virus Which Lacks Any Vaccine, Treatment, or Cure Constitutes Irreparable Harm.*

It is well established that the deprivation of constitutional rights constitutes irreparable injury and is sufficient to warrant an injunction. *Hernandez*, 872 F.3d at 994; *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012); *Warsoldier v. Woodford*, 418 F.3d 989, 1001-02 (9th Cir. 2005). In addition, the Ninth Circuit has recognized that conditions of detention dangerous to human health constitute irreparable harm. *Padilla v. U.S. Immigration & Customs Enf't*, 953 F.3d 1134, 1147 (9th Cir. 2020); *see also Hernandez*, 872 F.3d at 995 (recognizing "substandard physical conditions, [and] low standards of medical care" in detention as



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irreparable harms). Irreparable harm also occurs where the government's actions threaten an individual's health. *M.R. v. Dreyfus*, 663 F.3d 1100, 1111 (9th Cir. 2011), *as amended by*, 697 F.3d 706 (9th Cir. 2012); *Indep. Living Cent. of S. California, Inc. v. Shewry*, 543 F.3d 1047, 1049-50 (9th Cir. 2008).

Here Plaintiffs' detention threatens their lives. As noted above, medically vulnerable people like Plaintiffs face a one in seven chance of death if infected with COVID-19. Dkt. 5 ¶ 4. Those who survive COVID-19 face a prolonged recovery and permanent disability. *Id.* Thus, Plaintiffs have clearly established irreparable harm.

***b. The Public Interest and Balance of Equities Weigh Heavily in Plaintiffs' Favor.***

Finally, given the "preventable human suffering" at issue, the "balance of hardships tips decidedly in plaintiffs' favor." *Hernandez*, 872 F.3d at 996 (quotation omitted). The government "cannot reasonably assert that it is harmed in any legally cognizable sense" by being compelled to follow the law. *Zepeda v. I.N.S.*, 753 F.2d 719, 727 (9th Cir. 1983). Indeed, it is always in the public interest to prevent violations of fundamental rights. *Melendres*, 695 F.3d at 1002. Moreover, as explained above, class members can be released on reasonable conditions of supervision as needed to address the government's interests. *See, e.g.*, *Alcantara*, slip op. at *18 (finding that the balance of equities weighs in favor of issuing a TRO, in part, because the government's concerns about flight risk may be addressed through alternatives to detention); *supra* n. 11 (describing effectiveness of alternatives to detention).

Furthermore, it is in both in the Defendants' and the broader public interest to release Plaintiffs and class members. In fact, ICE has a historical practice of releasing medically vulnerable detainees, like Plaintiffs and class members, who have physical or mental conditions that make them more susceptible to medical harm while in custody. Dkt. 6 ¶¶ 29, 61, 65. Here, release of Plaintiffs and class members will reduce the risk of their death, the health risk for remaining detainees and facility staff at NWDC, and the risk to the surrounding greater local



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community. Dkt. 3 ¶¶ 50, 58. This is especially true as the Court may tailor its order to ensure compliance with local public health protocols for self-quarantine and social distancing by class members upon release. Many class members have safe locations to go upon release where they can self-quarantine and practice social distancing, and local shelters have expressed willingness and capacity to assist with the effort. Dkt. 8 ¶¶ 20-21; Dkt. 7 ¶ 20; Dkt. 11 ¶ 7; Dkt. 9 ¶ 17

The public also has an interest in mitigating spread of COVID-19 among detainees and detention center staff so as to avoid overwhelming the local healthcare infrastructure that supports NWDC. *Cf. Pimentel-Estrada*, 2020 WL 2092430, at *18. As discussed, as the burden of caring for detainees struck ill from COVID-19 shifts to local hospitals, it will "strain the limited medical infrastructure in [those] communities[.]" Dkt. 3 ¶ 50. Indeed, a recent study predicts that the spread of COVID-19 in ICE detention centers in the next few months likely will overwhelm hospital and intensive care capacity *within a 10- and 50-mile radius* of each facility. Dkt. 3 ¶¶ 26, 50. Thus, as another district court in the Ninth Circuit observed, "[t]he public has a critical interest in preventing the further spread of the coronavirus. An outbreak at [the detention center] would, further, endanger all of us – detainees, [detention center] employees, [county] residents . . . , residents of the State . . . , and our nation as a whole." *Bravo Castillo*, 2020 WL 1502864, at *6; *accord Zepeda Rivas*, 2020 WL 2059848, at *3 ("The conditions of confinement do not merely threaten detainees; they also threaten facility staff, not to mention the greater community whose health is put at risk by the congregation of large groups in cramped spaces.").

## CONCLUSION

For the foregoing reasons, the Court should provisionally certify the proposed class and issue a temporary restraining order, directing Defendants to immediately identify and release class members from NWDC.



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Seattle, WA 98144
Tel: 206-957-8611

Respectfully submitted on this 11th of May, 2020

s/ Matt Adams
Matt Adams, WSBA No. 28287
matt@nwirp.org

s/ Aaron Korthuis
Aaron Korthuis, WSBA No. 53974
aaron@nwirp.org

Northwest Immigrant Rights Project
615 Second Ave., Suite 400
Seattle, WA 98104
Tel: (206) 957-8611

s/ Tim Henry Warden-Hertz
Tim Henry Warden-Hertz,
WSBA No. 53042
tim@nwirp.org

Northwest Immigrant Rights Project
1119 Pacific Ave., Suite 1400
Tacoma, WA 98402
Tel: (206) 957-8652

s/ Enoka Herat
Enoka Herat, WSBA No. 43347
eherat@aclu-wa.org

s/ John Midgley
John Midgley, WSBA No. 6511
jmidgley@aclu-wa.org

American Civil Liberties Union
Foundation of Washington
P.O. Box 2728

s/ David C. Fathi
David C. Fathi, WSBA No. 24893**
dfathi@aclu.org

s/ Eunice H. Cho
Eunice H. Cho, WSBA No. 53711**
echo@aclu.org

Lauren Kuhlik*
Joseph Longley**
American Civil Liberties Union Foundation
National Prison Project
915 15th Street N.W., 7th Floor
Washington, DC 20005
Tel: (202) 548-6616

Omar C. Jadwat*
ojadwat@aclu.org
Michael Tan*
mtan@aclu.org
American Civil Liberties Union Foundation
Immigrants' Rights Project
125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 549-2600

My Khanh Ngo*
mngo@aclu.org
American Civil Liberties Union Foundation
Immigrants' Rights Project
39 Drumm Street
San Francisco, CA 94111
Tel: (415) 343-0774

*Pro hac vice application forthcoming
**Not admitted in DC; practice limited to federal courts
†Pro hac vice application forthcoming; not admitted in DC; practice limited to federal courts

*Attorneys for Plaintiffs*

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

JOSUE CASTAÑEDA JUAREZ, et al.,

Petitioners-Plaintiffs,

v.

NATHALIE ASHER, et al.,

Respondents-Defendants.

Case No. 20-cv-700-MJP-MLP

**[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER**

Upon review of Plaintiffs' Motion for Temporary Restraining Order, the Petition for Habeas Corpus and Complaint for Declaratory and Injunctive Relief, all supporting exhibits, and any response filed by Defendants, Plaintiffs' Motion for Temporary Restraining Order is GRANTED.

Plaintiffs have satisfied the requirements for temporary injunctive relief by demonstrating that they are likely to succeed on the merits, that they are likely to suffer irreparable harm in the absence of injunctive relief, that the balance of equities tips in their favor, and that an injunction is in the public interest. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 21 (2008). Pursuant to Rule 65(b) of the Federal Rules of Civil Procedure, and Local Rule 65(b), the Court orders that:



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1. The proposed class at the Northwest Detention Center ("NWDC") is provisionally certified and defined as follows:

> All individuals detained at the Northwest Detention Center who are age 60 years or older or have medical conditions that place them at heightened risk of severe illness or death from COVID-19 as determined by Centers for Disease Control and Prevention guidelines.
>
> These medical conditions include:
>
> 1. Chronic kidney disease (e.g., receiving dialysis);
> 2. Chronic liver disease (e.g., cirrhosis and chronic hepatitis);
> 3. Endocrine disorders (e.g., diabetes mellitus);
> 4. Compromised immune system (immunosuppression) (e.g., receiving treatment such as chemotherapy or radiation, received an organ or bone marrow transplant and is taking immunosuppressant medications, taking high doses of corticosteroids or other immunosuppressant medications, HIV or AIDS);
> 5. Metabolic disorders (e.g., inherited metabolic disorders and mitochondrial disorders);
> 6. Heart disease (e.g., congenital heart disease, congestive heart failure, and coronary artery disease);
> 7. Lung disease (e.g., asthma, chronic obstructive pulmonary disease (chronic bronchitis or emphysema), or other chronic conditions associated with impaired lung function or that require home oxygen);
> 8. Neurological and neurologic and neurodevelopment conditions (including disorders of the brain, spinal cord, peripheral nerve, and muscle such as cerebral palsy, epilepsy (seizure disorders), stroke, intellectual disability, moderate to severe developmental delay, muscular dystrophy, or spinal cord injury);
> 9. Current or recent pregnancy (in the last two weeks);
> 10. Body mass index (BMI) greater than 40; and
> 11. Hypertension.

2. Defendants shall immediately identify and review class members for release, and release all class members with any reasonable release conditions that are necessary to protect the public, and the health and safety of each class member.

3. Within 72 hours (3 days) of this order, Defendants shall provide and disclose to the Court and class counsel a list of all class members in a spreadsheet or comparable searchable format including every class member's name, Alien number, age, underlying medical condition(s), immigration lawyer or representative (if any), primary language, current



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housing unit (if still detained), prior custody determinations made by Defendants, and the name(s), relationship(s), and contact information for any points of contact in the United States that class members have provided Defendants.

4. Immediately upon identifying class members, Defendants shall release them in accordance with Paragraph 2, and in a manner that comports with public health guidelines.

5. Defendants may not condition class members' release on paying a bond or providing proof of a sponsor's legal status and/or a sponsor's financial documents where class members' release plans otherwise comport with public health guidelines related to COVID-19.

6. Within 72 hours (3 days) of this Order, Defendants shall meet and confer with class counsel regarding any class members for whom Defendants cannot determine adequate release plans or whom Defendants decline to release so that class counsel can assess whether to seek further relief from this Court.

7. Upon request, Defendants must provide class counsel with information in their possession regarding each class members' medical, immigration, and criminal history.

8. Defendants must screen each new individual booked into NWDC for membership in the class upon booking. Upon identification of any new or previously unidentified class members following this Order, Defendants shall promptly notify class counsel and release any such class members consistent with the requirements of this Order.

9. Within 24 hours (one day) of this Order, Defendants shall distribute notice of this Order, to be furnished by class counsel, throughout NWDC, advising all detainees at NWDC of a phone number and email address at which they can reach class counsel regarding their



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615 2nd Ave Ste. 400
Seattle, WA 98144
Tel: 206-957-8611

potential membership in the class. Defendants shall post the notice prominently in all dorms or other housing units, as well as all rooms where telephones and/or computers are available for class members' use, and ensure timely, free, and confidential telephone calls between potential class members and class counsel.

10. Defendants shall ensure that the class notice is translated into Spanish and other languages spoken by detainees at NWDC within 24 hours of this Order so that class members receive the information in a language they understand. Upon class counsel's notification of a class member who is not included in Defendants' list of class members, Defendants must provide class counsel with information in their possession regarding that individual's medical, immigration, and criminal history, and meet and confer with class counsel regarding the individual's class member status.

11. Defendants shall provide a weekly report to class counsel and the Court regarding the COVID-19 response in NWDC. That report will address the size of the current population at NWDC; the number of new detainees booked into to NWDC; the number of releases from NWDC and reasons for those releases, including removals and transfers to another government facility; and number of COVID-19 tests conducted and the results of those tests, including those of detainees, ICE employees, EOIR employees, GEO employees, and other third-party contractors present at NWDC.

Dated this _____ day of _____, 2020.

_____
District Judge Marsha J. Pechman



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615 2nd Ave Ste. 400
Seattle, WA 98144
Tel: 206-957-8611

Respectfully submitted on this 11th day of May, 2020.

s/ Matt Adams
Matt Adams, WSBA No. 28287
matt@nwirp.org

s/ Aaron Korthuis
Aaron Korthuis, WSBA No. 53974
aaron@nwirp.org

Northwest Immigrant Rights Project
615 Second Ave., Suite 400
Seattle, WA 98104
Tel: (206) 957-8611

s/ Tim Henry Warden-Hertz
Tim Henry Warden-Hertz,
WSBA No. 53042
tim@nwirp.org

Northwest Immigrant Rights Project
1119 Pacific Ave., Suite 1400
Tacoma, WA 98402
Tel: (206) 957-8652

s/ Enoka Herat
Enoka Herat, WSBA No. 43347
eherat@aclu-wa.org

s/ John Midgley
John Midgley, WSBA No. 6511
jmidgley@aclu-wa.org

American Civil Liberties Union
Foundation of Washington
P.O. Box 2728

s/ David C. Fathi
David C. Fathi, WSBA No. 24893**
dfathi@aclu.org

s/ Eunice H. Cho
Eunice H. Cho, WSBA No. 53711**
echo@aclu.org

Lauren Kuhlik*
Joseph Longley†
American Civil Liberties Union Foundation
National Prison Project
915 15th Street N.W., 7th Floor
Washington, DC 20005
Tel: (202) 548-6616

Omar C. Jadwat*
ojadwat@aclu.org
Michael Tan*
mtan@aclu.org
American Civil Liberties Union Foundation
Immigrants' Rights Project
125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 549-2600

My Khanh Ngo*
mngo@aclu.org
American Civil Liberties Union Foundation
Immigrants' Rights Project
39 Drumm Street
San Francisco, CA 94111
Tel: (415) 343-0774

*Pro hac vice application forthcoming
**Not admitted in DC; practice limited to federal courts
†Pro hac vice application forthcoming; not admitted in DC; practice limited to federal courts

*Attorneys for Plaintiff*

# Attachment A

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF ILLINOIS**
**URBANA DIVISION**

| | | |
|---|---|---|
| JUAN MANUEL HERNANDEZ,<br><br>Petitioner,<br><br>v.<br><br>CHAD KOLITWENZEW,<br><br>Respondent.<br><br><br>UNITED STATES OF AMERICA,<br><br>Interested Party. | ) | Case No. 20-cv-2088-SLD |

**ORDER**

Now before the Court is Petitioner Juan Manuel Hernandez's Emergency Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 and Complaint for Injunctive Relief (Doc. 1). Petitioner alleges his detention violates his Fifth Amendment substantive due process rights in light of the COVID-19 pandemic and that his $2000 bond order violates his procedural due process rights in light of his inability to pay. On April 9, 2020, pursuant to the Court's inherent power in habeas corpus petitions and/or pursuant to Fed. R. Civ. P. 65(b), this Court granted Petitioner's immediate release pursuant to the conditions of his bond as entered by the immigration judge aside from the financial condition that he pay a bond. For the reasons below, the Court now GRANTS Petitioner's Petition for Writ of Habeas Corpus (Doc. 1) and orders his continued release from custody. However, this Order does not restrict the Government from seeking reasonable non-monetary conditions of release from the immigration judge in the future. As the Court has granted Petitioner's Petition, the Court finds no further order is needed

regarding the Temporary Restraining Order issued on April 9, 2020 pursuant to Fed. R. Civ. P. 65(b), which is now moot.

## I. BACKGROUND

### A. Procedural History

Petitioner filed this Emergency Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 (Doc. 1) on April 8, 2020. At the time of filing the Petition, he was detained as a civil immigration detainee by Immigration and Customs Enforcement (ICE) at the Jerome Combs Detention Center (JCDC) in Kankakee, Illinois. He alleges his detention violates his Fifth Amendment right to substantive due process due to conditions of confinement he faced, as well as the Government's failure to provide adequate medical care. His claims relate to the COVID-19 pandemic and his particular risk of serious illness or death should he be infected. Additionally, Petitioner asserted that his detention and the bond order of the immigration judge violated his Fifth Amendment right to procedural due process because the monetary bond amount was set without consideration of his financial circumstances and he is unable to post the bond.

Given the emergency nature of the petition and the rapidly spreading COVID-19 virus, the Court found that the Petitioner was implicitly seeking temporary injunctive relief in the form of immediate release from detention. The Court held a hearing on April 9, 2020. After considering the arguments of both parties, the Court found it had authority to grant Petitioner's release pending the decision in his habeas case, *see Cherek v. United States*, 767 F.2d 335, 337 (7th Cir. 1985), as well as authority to grant temporary injunctive relief in the form of immediate release pursuant to Fed. R. Civ. P. 65(b). Further, the Court found that Petitioner had shown that he would suffer irreparable harm if he was not immediately released, that he was likely to

succeed on his claims, and that his release was in the public interest. Accordingly, the Court ordered Petitioner's immediate release. The parties have now submitted further briefing on the merits. *See* Gov't Resp. (Doc. 10); Pet. Reply (Doc. 11).

**B. The COVID-19 Pandemic and Jerome Combs Detention Center's Response**

The COVID-19 pandemic is well-known to the parties and likely all Americans and its rapid and deadly development has been well-documented in court filings and other sources. *See, e.g., Basank v. Decker***,** No. 20 CIV. 2518 (AT), 2020 WL 1481503 (S.D.N.Y. Mar. 26, 2020); *Castillo, et. al, v. Barr, et al.,* No. CV2000605TJHAFMX, 2020 WL 1502864 (C.D. Cal. Mar. 27, 2020). On March 9, 2020, the Illinois Governor issued a disaster proclamation regarding COVID-19. On March 13, 2020, the President of the United States declared a national state of emergency in response to the COVID-19 outbreak. While the first cases of COVID-19 in the United States were only confirmed in February, the World Health Organization, reports there are now over 800,000 confirmed cases of COVID-19 in the United States and over 40,000 deaths. *Coronavirus (COVID-19)*, WHO, https://covid19.who.int/region/amro/country/us (last visited Apr. 23, 2020). In Illinois, there have been over 35,000 confirmed positive cases and 1,565 deaths. *Coronavirus Disease 2019 (COVID-19) in Illinois Test Results*, Ill. Dep't of Pub. Health, https://www.dph.illinois.gov/covid19 (last visited Apr. 22, 2020). And, in Kankakee County, since Petitioner's Petition was filed on April 8, 2020, the positive cases have grown from 107 to 285 and there are now 14 deaths. *Id.*

The U.S. Center for Disease Control (CDC) reports that COVID-19 appears to spread from person-to-person, mainly through respiratory droplets produced when an infected person coughs, sneezes, or talks. *Coronavirus Disease 2019 Basics* (Apr. 14, 2020) https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Coronavirus-Disease-2019-Basics (last

visited Apr. 22, 2020). The virus spreads very easily through what is called "community spread." *Id.* While infected individuals are thought to be most contagious when they are showing symptoms, the virus also appears to be spread by asymptomatic individuals. *Id.*; *see also Transmission*, CDC (Apr. 15, 2020), https://www.cdc.gov/coronavirus/2019-ncov/hcp/faq.html#Transmission (last visited Apr. 23, 2020) ("The onset and duration of viral shedding and the period of infectiousness for COVID-19 are not yet known.")

The symptoms of COVID-19 vary greatly from person-to-person. In many people, COVID-19 causes some combination of fever, cough, shortness of breath, chills, muscle pain, headache, sore throat, and a new loss of taste or smell. *Coronavirus Symptoms* (March 20, 2020), https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html (last visited Apr. 22, 2020). In others, however, it can result in serious illness or death. *Id.* While people of all ages face the possibility of serious illness or death should they contract the virus, older adults and those with certain medical conditions face a much higher risk. *See, e.g., Groups at a Higher Risk for Severe Illness,* CDC, (Apr. 17, 2020) https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html (last visited Apr. 23, 2020). Notably for this Petitioner, the mortality rate for individuals with underlying health conditions is much higher. Preliminary mortality rate analyses from a February 29, 2020 WHO-China Joint Mission Report indicated a mortality rate for individuals with cardiovascular disease at 13.2%, 9.2% for diabetes, 8.4% for hypertension, and 8.0% for chronic respiratory disease. *Age, Sex, Existing Conditions of COVID-19 Cases and Deaths* (Feb. 29, 2020), https://www.worldometers.info/coronavirus/coronavirus-age-sex-demographics/ (data analysis based on WHO- China Joint Mission Report) (last visited Apr. 23, 2020).

There is currently no cure or vaccine for COVID-19 and the only way to control the virus is to prevent its spread. In addition to frequent handwashing, the CDC recommends "social distancing" or "physical distancing" from others by maintaining at least 6 feet away from other people, avoiding gathering in groups, and staying out of crowded places. *Prevent Getting Sick*, CDC (April 8, 2020), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html (last visited Apr. 22, 2020). Additionally, the CDC recommends face masks be worn at all times in settings where social distancing is not possible. *Id.* The majority of states, including Illinois, have initiated lockdown and stay at home measures to stop the spread of the virus. In Illinois, the stay at home order is currently in place until April 30, 2020. Many other states have already extended their stay-at-home orders until mid-May.

Detention facilities, and other congregate settings, present an increased danger for the spread of COVID-19 if it is introduced into the facility as infectious diseases communicated by air or touch are more likely to spread in these environments. *See also, Castillo v. Barr*, No. CV2000605TJHAFMX, 2020 WL 1502864, at *5 (C.D. Cal. Mar. 27, 2020) ("[T]he Government cannot deny the fact that the risk of infection in immigration detention facilities – and jails – is particularly high if an asymptomatic guard, or other employee, enters a facility."); *Coreas v. Bounds*, No. CV TDC-20-0780, 2020 WL 1663133, at *6 (D. Md. Apr. 3, 2020) (relying on expert opinions to conclude that it was implausible to claim "someone will be safer from a contagious disease while confined in close quarters with dozens of other detainees and staff than while at liberty"). Maintaining social distancing is often not possible. In neighboring Cook County, Illinois, the danger has already manifested in a jail setting, with 398 Cook County jail detainees testing positive for COVID-19 and six detainee deaths, as well as at least 185 corrections officers testing positive and two corrections officer deaths. *See*

*Correctional Officer, 2 Inmates at Cook County Jail die from COVID-19,* WGNTV, https://wgntv.com/news/coronavirus/sheriffs-officer-correctional-officer-both-die-from-covid-19/ (last visited Apr. 22, 2020); *see also, Mays v. Dart,* No. 20 C 2134, 2020 WL 1812381, at *2 (N.D. Ill. Apr. 9, 2020) (addressing the conditions at the Cook County Jail and the particular challenges of reducing the spread of the virus in jails and prisons). Many other jails and detention centers have already seen dangerous outbreaks of COVID-19 and the difficulty in containing its spread within a facility. *See, e.g., United States v. Scparta*, No. 18-CR-578 (AJN), 2020 WL 1910481, at *1 (S.D.N.Y. Apr. 20, 2020) (discussing outbreak of COVID-19 at FCI Butler).

Petitioner, at the time of filing his Petition, was housed at the Jerome Combs Detention Center (JCDC), which has a contract with ICE to house ICE detainees. At the time of filing his Petition, he reported that the facility has not informed him or, to his knowledge, other detainees about the COVID-19 pandemic or given any information about what it is or how it spreads. Pet. Ex. A. Declaration of Juan Manuel Hernandez ¶ 6 (Doc. 1-1). As recently as April 2, 2020, Petitioner observed approximately 20 new detainees arrive into the facility. *Id.* ¶ 7. And, while these new detainees were provided facemasks, they have not been instructed to or required to wear them, so the detainees have removed the masks. Staff have not given gloves, masks, or hand sanitizer to any of the detainees who arrived prior to the start of pandemic. *Id.* ¶ 8-9. Petitioner reports a lack of social distancing, as detainees are still required to line up for meals, usually back-to-front, and most detainees eat at tables where everyone is close together. *Id.* ¶ 14. Further, detainees continue to play basketball together, play cards, and engage in other communal activities, as there has been no mandatory restrictions on these activities. *Id.* ¶ 16-17. While Petitioner himself stated he was eating his meals alone in his cell and taking the measures

he could to socially distance, he could not avoid frequently being near other detainees. Notably, his cellmate sleeps in a bunk only two feet above him. *Id.* ¶ 18.

Petitioner also reported that medical staff checked all detainee's temperatures on April 1, 2020, but he has not observed any other measures being put in place. He has observed that approximately half the detainees in his unit (22 out of 48) were showing symptoms of COVID-19, including either a cough or a fever, but had not been isolated. *Id.* ¶ 22.

The Government disputes some of Petitioner's allegations and reports that JCDC has initiated the following measures in response to the COVID-19 pandemic:

> *Detainees Entering the Facility*. The Jerome Combs Detention Center houses both state and federal detainees but over the past several weeks, fewer detainees have been entering the facility. Jerome Combs Detention Center has suspended accepting inmates sentenced to weekends, work release, or any intermittent sentence.
>
> *Screening Procedures*. In the few instances in which a new detainee enters Jerome Combs Detention Center, he or she is screened for symptoms and must complete the risk assessment questionnaire. The screening process includes taking the detainee's temperature. All new inmates remain in a separate pod from 5-14 days until cleared by medical.
>
> *Sanitation and Hygiene*. Detainees are provided with soap to wash their hands at any time throughout the day. Bottles of disinfectant are also stocked in all housing units. In addition, the Jerome Combs Detention Center conducts a daily disinfection routine three times a day, which includes door handles, toilets, showers and tables. Hand sanitizer is stocked in every housing unit. Detainee restraints are disinfected after each use. Hot water, soap and towels are stocked by every sink in both cells and common areas.
>
> *Quarantine*. The Jerome Combs Detention Center follows the CDC guidelines regarding testing for COVID-19 and isolation of individuals with symptoms and/or risk exposure factors. Should a detainee exhibit flu-like symptoms, that detainee will be isolated. If a detainee exhibits COVID-19 symptoms, he will be isolated in a negative pressure room (air is not circulated to the other parts of the facility) for further observation and treatment by the facility's medical staff. Asymptomatic inmates with exposure risk factors are quarantined.
>
> *Correctional Officers*. Although correctional officers will need to enter and re-enter the facility, they have been ordered to stay home if they have any symptoms

of the disease. Enhanced health screening of staff has been implemented in areas with "sustained community transmission," as determined by the CDC. Beginning March 13, 2020, screening of all staff and officers entering the facility has included self-reporting and temperature checks. Correctional officers and health care workers wear masks and detainees are issued masks when they go to court and to medical.

*Medical Services.* This facility has one doctor who comes three days a week, a physician's assistant and a nurse practitioner who both come five days a week and all three are on call seven days a week. Should a detainee wish to see a medical specialist for any reason including fear of COVID-19, a detainee can request to do so and he will be put on the list of detainees to see a medical specialist. In addition, a nurse comes to detainees twice a day to dispense medicine and the nurse can triage any medical question including questions regarding COVID-19.

*ICE Detainee Unit*. Health care workers wearing masks visit the ICE detainee unit twice a day to check detainees for Covid-19 symptoms. Correctional officers visit the ICE detainee unit every 25 minutes and check for any possible Covid-19 symptoms such as sneezing or coughing. To date, they have not noted any detainee exhibiting such symptoms. While it is true that detainees share a cell, the two detainees in each cell are assigned to the cell only after being cleared by medical personnel. When trays come into the housing unit, detainees line up. They are reminded to remain six feet from the detainee in front. Trays are dispensed by a detainee wearing gloves, a hair net and face mask. Detainees can eat in their cells or sit at tables. Whiles detainees can choose to eat at tables there are posted reminders to remain six feet from others when eating at a table.

*COVID-19 Information Provided to Detainees.* Staff began informing detainees nearly four weeks ago by means by posting CDC guidelines that discuss sanitary guidelines such as social distancing and washing hands regularly. This facility has posted the CDC health guidelines in both Spanish and English. Reminders for clean hands and social distancing also appear by means of demonstrative pictures which show the best and most protective practices. The facility provides plenty of soap and hand sanitizer; it is at every sink both in cells and common areas; also there is hot water and towels by every sink in both cells and common areas.

Gov't Resp. at 16-18 (Doc. 10), Ex. 1 at ¶5 (Doc. 10-1). The Government also reports that as of April 15, 2020, no staff or inmates at JCDC had tested positive for COVID-19.

**C. Petitioner and His Confinement History.**

Petitioner is a 46-year-old undocumented individual who has resided in the United States since 1988. He is married to a U.S. citizen who currently resides in a nursing home in Burbank,

Illinois, due to her medical condition and need for care. He is currently in removal proceedings. The Government reports that his next immigration hearing was scheduled for April 13, 2020, but did not occur due to his release from detention, as immigration hearings are only proceeding for detained individuals. According to the Government, Petitioner is seeking relief from removal through cancellation of removal for certain non-permanent residents, pursuant to 8 U.S.C. § 1229(b)(2). Gov't Resp. at 21 (Doc. 10). The Government also alleges that Petitioner has a felony conviction for possession of controlled substances and at least twenty arrests dating back to 1992. The Government also speculates in its brief that if one of his arrests—that for obstruction of justice—was actually a conviction, he may be found ineligible for cancellation of removal. Gov't Resp. at 22 (Doc. 10). However, Petitioner has not had an opportunity to present his case to the immigration judge and the immigration judge has made no such findings.

Petitioner suffers from chronic health conditions that make him particularly susceptible to serious illness or death if he contracts COVID-19, including diabetes, high blood pressure, and high cholesterol. Pet. at ¶ 10, 14 (Doc. 1), Pet. Ex. A. Declaration of Juan Manuel Hernandez, ¶ 23-24. Additionally, Petitioner has previously had a heart attack and suffers from breathing issues due to smoke inhalation from a fire in his home. *Id.; Groups at Higher Risk for Severe Illness*, CDC (Apr. 17, 2020) https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html (last visited Apr. 22, 2020).

Petitioner was originally detained by ICE in May 2019. On August 14, 2019, an immigration judge granted Petitioner's request for release from custody under a $5000 bond, pursuant to 8 C.F.R. § 236.1(c). *See* Pet. Ex. E. (Doc. 1-5). On August 30, 2019, the immigration judge reduced the bond amount to $2000. *Id.* Petitioner states that he does not have the financial means to post the bond.

The Government contends, however, that this bond order no longer applies due to an intervening criminal matter in Kankakee County Circuit Court. The Court takes judicial notice of Petitioner's state court criminal records in Case No. 2017 CF 000070 in Kankakee County Circuit Court, Illinois. *See Ennenga v. Starns*, 677 F.3d 766, 774 (7th Cir. 2012). The record indicates that a Petition for Revocation of Probation was filed in his criminal case on July 11, 2019 and that a Bench Warrant was served on October 2, 2019. The criminal docket indicates that a $10,000 bond at 10% was posted on December 10, 2019. However, the criminal docket also shows that a "Mittimus for Failure to Give Bail" was filed on December 12, 2019. On December 30, 2019, Petitioner admitted to the allegations in the Petition to Revoke and was "given credit for time served from 6-13-2019 thru present." The Government alleges, supported only by the Declaration of Deportation Officer Eliu Fontanez, that from roughly October 2, 2019 to December 10, 2019, Petitioner was in the custody of Kankakee County. Accordingly, the Government argues that the bond order of the immigration judge was no longer valid as of the time of his reentry into ICE custody on December 10, 2019.

In reply, Petitioner has submitted a declaration from Petitioner's immigration attorney asserting that both the immigration judge and the ICE Trial Attorney believed the bond order to still be in effect at his removal hearing on February 20, 2020. Pet. Reply, Ex. A, Fernandez Decl. ¶¶ 4-6 (Doc. 11). Further, it is undisputed that Petitioner has remained in custody at the Jerome Combs Detention Center either under the primary authority or ICE or Kankakee County since May 2019.

On March 25, 2020, Petitioner submitted a request to ICE for parole or release on recognizance pursuant to INA § 212(d)(5)(A) (8 U.S.C. § 1182(d)(5)(A)) and INA § 236(a) (8 U.S.C. § 1226(a)). His request was denied on April 3, 2020. Shortly after this denial, on April

8, 2020, Petitioner filed the instant habeas petition, which, for the reasons below, the Court now grants.

## II. DISCUSSION

Petitioner argues his civil detention by ICE is unconstitutional because his conditions of confinement and the Government's related failure to provide adequate medical care violate his substantive due process rights under the Fifth Amendment in light of COVID-19, his underlying health conditions, and the response of JCDC. He also claims that the $2000 bond amount by the immigration judge violates his Fifth Amendment right to procedural due process because he cannot afford the bond and he is being held solely based on his indigence.[1] The Government argues that Petitioner's claims are not properly brought in a habeas petition, have not been administratively exhausted, and, with regards to his substantive due process claim, fails on the merits. As explained below, the Court finds that Petitioner's Petition is properly brought in habeas and that no further exhaustion is required for the Court to consider his claims. Moreover, on the merits, the Court finds that Petitioner is entitled to relief on his claims.

### A. Petitioner is Entitled to Relief on his Fifth Amendment Substantive Due Process Claims Regarding His Conditions of Confinement and Medical Care.

Petitioner argues that his substantive due process rights under the Fifth Amendment are being violated due to the conditions of confinement and/or inadequate medical care due to the COVID-19 pandemic and his individual health risks. As an initial matter, the Government contends that Petitioner's claims are not properly brought in habeas and that Petitioner has failed to exhaust his administrative remedies. The Court disagrees on both counts.

[1] Additionally, while not expressly included in his initial petition, Petitioner's reply asserts that he also seeks to bring a claim related to the reasonableness of his prolonged detention. *See* Reply at 3 (Doc. 11). As the Government has not had a chance to respond to this claim and as the Court is granting Petitioner's Petition on other grounds, the Court declines to address Petitioner's prolonged detention claim at this time.

A federal court may grant the writ of habeas corpus if a detainee "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(a), (c)(3); *see INS v. St. Cyr,* 533 U.S. 289, 305 (2001). A petition seeking habeas corpus relief is appropriate under 28 U.S.C. § 2241 when a petitioner is challenging the fact or duration of his confinement. *Preiser v. Rodriguez,* 411 U.S. 475, 490, 93 S.Ct. 1827 (1973); *Waletzki v. Keohane,* 13 F.3d 1079, 1080 (7th Cir. 1994). Habeas corpus has been recognized as an appropriate vehicle through which noncitizens may challenge the fact of their civil immigration detention. *See Zadvydas v. Davis*, 533 U.S. 678, 688 (2001); s*ee generally Jennings v. Rodriguez*, 138 S. Ct. 830 (2018) (ruling on merits of habeas petition challenging validity of indefinite mandatory detention).

The Government argues, however, that the Petitioner's claim cannot be brought in a petition for habeas corpus, but should, instead, be brought in a civil rights action. The Seventh Circuit has generally found that "habeas corpus is not a permissible route for challenging prison conditions." *Robinson v. Sherrod*, 631 F.3d 839, 841 (7th Cir. 2011). However, the Seventh Circuit has also noted that "the Supreme Court [has] left the door open a crack for prisoners to use habeas corpus to challenge a condition of confinement." *Id.* at 840 (internal quotation marks omitted) (citing *Glaus v. Anderson*, 408 F.3d 382, 387 (7th Cir.2005); *Nelson v. Campbell*, 541 U.S. 637, 644–46 (2004); *Bell v. Wolfish*, 441 U.S. 520, 526 n.6 (1979); *Preiser v. Rodriguez*, 411 U.S. 475, 499–500 (1973)). And, the Supreme Court has repeatedly said that a petition seeking habeas corpus relief is appropriate under 28 U.S.C. § 2241 when a petitioner is challenging the fact or duration of his confinement. *Preiser v. Rodriguez,* 411 U.S. 475, 490, 93 S.Ct. 1827 (1973); *Waletzki v. Keohane,* 13 F.3d 1079, 1080 (7th Cir. 1994). While a "run-of-the-mill" condition of confinement claim may not touch upon the fact or duration of

confinement, here, Petitioner is seeking immediate release based upon the claim that there are essentially no conditions of confinement that are constitutionally sufficient given the facts of the case. Notably, in the past month, courts across the country have found that petitioners raising similar COVID-19-based claims for release from immigration custody can proceed in a habeas petition. *See, e.g., Thakker, et. al, v. Doll*, No. 1:20-CV-480, 2020 WL 1671563 (M.D. Pa. Mar. 31, 2020); *Coreas v. Bounds*, No. CV TDC-20-0780, 2020 WL 1663133 (D. Md. Apr. 3, 2020). Accordingly, the Court finds that because Petitioner is challenging the fact of his confinement through his conditions of confinement and it can be brought in a habeas corpus petition.

Next, the Government argues that Petitioner was first required to exhaust his administrative remedies by seeking a bond hearing or a bond reduction in the immigration courts. Habeas corpus petitions under 28 U.S.C. § 2241 have no express exhaustion requirements, but courts have generally found it prudent to require direct appeals and administrative remedies to be exhausted before entertaining a habeas petition. *See, e.g., Kane v. Zuercher*, 344 F. App'x 267, 269 (7th Cir. 2009) (While "there is no express exhaustion requirement in 28 U.S.C. § 2241, a district court is entitled to require a prisoner to exhaust the administrative remedies that the BOP offers before it will entertain a petition."); *United States v. Robinson*, 8 F.3d 398, 405 (7th Cir. 1993) ("The well established general rule is that, absent extraordinary circumstances, the district court should not consider § 2255 motions while a direct appeal is pending."). However, exhaustion may be excused where: (1) requiring exhaustion of administrative remedies causes prejudice, due to unreasonable delay or an indefinite timeframe for administrative action; (2) the agency lacks the ability or competence to resolve the issue or grant the relief requested; (3) appealing through the administrative process would be futile because the agency is biased or has predetermined the issue; or (4) where

substantial constitutional questions are raised. *Gonzalez v. O'Connell*, 355 F.3d 1010, 1016 (7th Cir. 2004).

The Court finds that further exhaustion on Petitioner's claims under the Fifth Amendment of substantive due process violations is not required. These claims exceed the jurisdictional limits of the Immigration Court and the Board of Immigration Appeals and it would be futile to require Petitioner to pursue them in the immigration courts. *See Yanez v. Holder*, 149 F. Supp. 2d 485, 489 (N.D. Ill. 2001). *See also, Castillo v. Barr*, No. CV2000605TJHAFMX, 2020 WL 1502864, at *4 (C.D. Cal. Mar. 27, 2020) (citing *Garcia-Ramirez v. Gonzales*, 423 F.3d 935, 938 (9th Cir. 2005)). And, while ICE has discretionary authority to release Petitioner on parole pursuant to INA § 212(d)(5)(A) (8 U.S.C. § 1182(d)(5)(A)) and INA § 236(a) (8 U.S.C. § 1226(a)), the parties do not dispute that Petitioner made a parole request and it was denied on April 3, 2020.

Finding that the Government's procedural arguments are without merit, the Court now turns to the merits of Petitioner's substantive due process claim. Whenever the government detains or incarcerates someone, it has an affirmative duty to provide conditions of reasonable health and safety. As the Supreme Court has explained, "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989). As a result, the government must provide those in its custody with "food, clothing, shelter, medical care, and reasonable safety." *Id.* at 200.

As a federal civil detainee, Petitioner's due process claim is rooted in the Fifth Amendment of the Constitution, rather than the Eighth Amendment. *See Belbachir v. Cty. of*

*McHenry*, 726 F.3d 975, 979 (7th Cir. 2013) (ICE detainees are entitled to "at least as much protection as," and "probably more" than, "convicted criminals are entitled to under the Eighth Amendment. . .—namely protection from harm caused by a defendant's deliberate indifference to the detainee's safety or health" (citations omitted)); *Smith v. Dart*, 803 F.3d 304, 309 (7th Cir. 2015) ("In the context of a conditions of confinement claim, a pretrial detainee is entitled to be free from conditions that amount to 'punishment,' while a convicted prisoner is entitled to be free from conditions that constitute 'cruel and unusual punishment.'" (citations omitted)); *Hardeman v. Curran*, 933 F.3d 816, 821 (7th Cir. 2019) ("Pretrial detainees are in a different position, because their detention is unrelated to punishment."). Civil detainees are entitled to more considerate treatment and conditions of confinement than convicted prisoners. *Youngberg v. Romeo*, 457 U.S. 307, 322 (1982); *Hughes v. Scott*, 816 F.3d 955, 956 (7th Cir. 2016) ("Remember that he's not a prison inmate but a civil detainee.").

The Seventh Circuit has held that for a pretrial detainee to establish constitutionally deficient conditions of confinement, he must prove that the conditions are "objectively unreasonable." *See Hardeman*, 933 F.3d at 822-23 (citing *Kingsley v. Hendrickson*, 576 U.S. 389, 135 S. Ct. 2466, 2472 (2015)). As civil immigration detainees are in substantially the same position, the Court finds that the same standard applies. Accordingly, under Seventh Circuit law, the analysis of a due process challenge to conditions of confinement for a civil detainee involves two steps. First, the Court must determine whether the Government's conduct was purposeful, knowing, or "perhaps even reckless" with respect to the consequences of his conduct, and the conditions created must be objectively serious. *See Miranda v. County of Lake*, 900 F.3d 335, 350-51 (7th Cir. 2018); *see also Castro v. County of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016). Second, the Court must assess the objective reasonableness of the Government's conduct

in light of the "totality of facts and circumstances" facing the Government. *McCann v. Ogle County*, 909 F.3d 881, 886 (7th Cir. 2018). The reasonableness of the Government's conduct is measured objectively "without regard to any subjective belief held by the [Government]." *Id.*

Here, the Government does not appear to dispute that it has knowledge of the conditions created by detaining Petitioner, an individual at a high risk of serious illness or death if he contracts COVID-19, during the COVID-19 pandemic. Nor does it argue that Petitioner would have a substantial risk of suffering serious harm or death should he contract the virus. Its argument, rather, is that the facility's precautionary measures have been objectively reasonable with regard to Petitioner, such that he is not at a substantial risk of suffering serious harm.

While the facility has taken a number of measures, as detailed above, to prevent the spread of the virus, Petitioner maintains that even in light of these measures, to the extent they have been implemented, Petitioner is still at a substantial risk of suffering serious harm by remaining in detention. The Court agrees. The Government does not argue that the facility is enforcing social distancing among the detainees or that they are providing cloth masks to detainees, even though the CDC recommends both of these measures. Rather, they appear to primarily be relying on the voluntary actions of new detainees to wear masks and the detainees as a whole to practice social distancing in a confined environment. Notably, they do not allege that any testing has taken place, only that new detainees are screened for symptoms. Screening measures, while good, are only so effective. Screening will only allow the facility to identify individuals with active symptoms, not those asymptomatic individuals who can nevertheless spread the virus undetected. The Government's response does not address the potential for asymptomatic spread and does not appear to be mandating use of masks by its staff or detainees that would help to contain any asymptomatic spread. Additionally, as Petitioner argues, while

the Government asserts that "[a]symptomatic inmates with exposure risk factors are quarantined," Petitioner, who has exposure risk factors, was not quarantined. Petitioner also refutes that hand sanitizer and other disinfectants are readily available to the detainees. Regardless, sanitizing practices are of limited effectiveness when detainees are housed in close proximately to each other. In light of the seriousness of the pandemic, the Court finds these precautions are insufficient address Petitioner's medical needs and conditions of confinement. *See Fraihat, et al. v. U.S. Immigration & Customs Enf't, et al.,* No. EDCV191546JGBSHKX, 2020 WL 1932570, at *26 (C.D. Cal. Apr. 20, 2020) ("During a pandemic such as this, it is likely punitive for a civil detention administrator to fail to mandate compliance with widely accepted hygiene, protective equipment, and distancing measures until the peak of the pandemic, and to fail to take similar systemwide actions as jails and prisons. Here, the protective actions taken by comparable prison and jail administrators have been as favorable or more favorable than Defendants'.").

Moreover, the Court finds that the measures cannot be seen as objectively reasonable in light of the Government's interest in detaining Petitioner. As an immigration judge has already determined that Petitioner is not a danger to the community, the Government's only legitimate interest in detaining Petitioner is to ensure his presence at his removal proceedings. The Government has the discretion to release Petitioner through parole, but has declined to do so, despite his high risk of serious illness or death from COVID-19 and despite the immigration judge's previous finding that he was not a flight risk or danger to society. Petitioner's continued detention under these conditions is not objectively reasonable nor is it logically related to the Government's interest in ensuring Petitioner's presence at his removal hearing when there are "a plethora of means *other than* physical detention at [the Government's] disposal by which they

may monitor civil detainees and ensure that they are present at removal proceedings, including remote monitoring and routine check-ins." *Thakker, et. al, v. Doll,* No. 1:20-CV-480, 2020 WL 1671563 (M.D. Pa. Mar. 31, 2020); *see also Fraihat*, 2020 WL 1932570 at *26 ("[A]ttendance at hearings cannot be secured reliably when the detainee has, is at risk of having, or is at risk of infecting court staff with a deadly infectious disease with no known cure. Participation in immigration proceedings is not possible for those who are sick or dying, and is impossible for those who are dead.").

The Government also argues that Petitioner's claim cannot succeed because he has submitted no evidence of actual exposure at the facility. *See Helling v. McKinney*, 509 U.S. 25, 32 (1993) (remanding for consideration of whether prisoner might potentially prove an Eighth Amendment violation because of his ongoing exposure to actual tobacco smoke from his cellmate); *see also, Dawson, et al., v. Asher, et al.*, 2020 WL 1704324 (W.D. Wash. Apr. 8, 2020) (denying request for temporary injunction based on finding that there was no evidence that COVID-19 was at the facility and the facility's precautionary measures were sufficient). The Government relies on the Supreme Court's decision in *Helling,* which addressed a condition of confinement claim under the Eighth Amendment. The Supreme Court held that to succeed on his conditions of confinement claim based on exposure to the toxin ETS, the inmate must show that defendant had, with deliberate indifference, exposed him to levels of ETS that pose an unreasonable risk of serious damage to his future health. *Id.* at 35. Accordingly, the Government claims that Petitioner's claim must fail because he has provided no evidence that COVID-19 is in the facility.

However, unlike the toxin in *Helling*, the Court finds that any amount of exposure to COVID-19 would pose an unreasonable risk of serious damage to Petitioner's health.

Petitioner's detention in a highly confined setting "[i]n the face of a deadly pandemic with no vaccine, no cure, limited testing capacity, and the ability to spread quickly through asymptomatic human vectors" in and of itself creates a substantial risk of Petitioner catching the virus and suffering serious illness or death. *Malam v. Adducci, et al.,* No. 20-10829, 2020 WL 1672662, at *9 (E.D. Mich. Apr. 5, 2020), *as amended* (Apr. 6, 2020). *See also, Bent v. Barr*, No. 19-CV-06123-DMR, 2020 WL 1812850, at *3 (N.D. Cal. Apr. 9, 2020) ("Given the exponential spread of the virus, the ability of COVID-19 to spread through asymptomatic individuals, and the inevitable delays of court proceedings, effective relief for Bent and other detainees may not be possible if they are forced to wait until their particular facility records a confirmed case."); *United States v. Kennedy*, 2020 WL 1493481, at *5 (E.D. Mich. Mar. 27, 2020) ("[W]aiting for either Defendant to have a confirmed case of COVID-19, or for there to be a major outbreak in Defendant's facility, would render meaningless this request for release."); *Thakker*, 2020 WL 1671563, at *2 ("Respondents would have us offer no substantial relief to Petitioners until the pandemic erupts in our prisons. We reject this notion."). While the Government claims that no staff or detainees have tested positive for COVID-19, they do not allege that any staff or detainees have been tested *at all* for COVID-19. The facility certainly cannot be faulted for this, as nationwide testing is limited. However, looking at the totality of the circumstances—which include Petitioner's heightened risk of serious illness or death from COVID-19, the inability of other jails and detention centers to control the spread of the virus once it enters the facility, and the limits of the precautionary measures taken by the facility and that could conceivably be taken at the facility in light of the potential for asymptomatic spread—the Court finds that Petitioner's continued detention under these conditions is objectively unreasonable and violates his

substantive due process rights under the Fifth Amendment. Accordingly, at least during the pendency of the COVID-19 pandemic, the Court orders that Petitioner must remain released.

**B. Petitioner's Bond Order Violates His Fifth Amendment Right to Procedural Due Process.**

Petitioner argues, separately from the circumstances of the COVID-19 pandemic, that his due process rights were violated when the immigration judge entered a bond order without considering his financial ability to pay. Petitioner is detained pursuant to 8 U.S.C. § 1226(a). Pursuant to regulations interpreting this statute, the DHS district director makes an initial custody determination as to each non-citizen, including the setting of a bond. 8 C.F.R. § 236.1(d). The noncitizen may then appeal the custody decision to the immigration judge, who "is authorized to exercise the authority in section 236 of the Act [8 U.S.C. § 1226] . . . to detain the alien in custody, release the alien, and determine the amount of bond, if any, under which the respondent may be released." 8 C.F.R. § 236.1(d)(1).

The Government first argues that Petitioner has not exhausted his administrative remedies. The Government claims that Petitioner was not in fact being held pursuant to a $2000 bond order because his bond order had expired or was otherwise made ineffective when he was temporarily taken into Kankakee County custody to address a pending criminal matter. It is unclear why this would be the case and the Government has provided no legal basis for why the Immigration Judge's bond order would expire. Further, in Petitioner's reply, Petitioner's immigration attorney asserts that both the immigration judge and the ICE Trial Attorney believed the bond order to still be in effect at his removal hearing on February 20, 2020. Pet. Reply, Ex. A, Fernandez Decl. ¶¶ 4-6 (Doc. 11). Given the lack of support for the Government's assertion that the immigration judge's bond order expired, and the immigration judge's and ICE Trial

Attorney's beliefs that the order was still in effect, the Court is hesitant to agree with the Government.

Curiously, however, the parties both agree that the immigration judge does not have the statutory authority to set the bond lower than $1,500. If this is the case, then further exhaustion—whether or not there is currently an effective bond order—is plainly futile as the immigration judge will continue to set the bond beyond Petitioner's financial ability to pay without the ability to consider the financial circumstances of Petitioner. However, while the immigration judge may not have authority to set a monetary bond lower than $1,500, from the statutory and regulatory language quoted above, it appears straightforward that an immigration judge does have the statutory authority to release Petitioner on conditional parole. At least one district court has held that an immigration judge does have the authority to grant release on conditional parole as an alternative to release on a monetary bond. *Rivera v. Holder*, 307 F.R.D. 539, 553 (W.D. Wash. 2015). In *Hernandez v. Sessions*, 872 F.3d 976, 1000 (9th Cir. 2017), the Ninth Circuit also assumed that an immigration judge could consider "whether non-monetary alternative conditions of release would suffice to ensure his future appearance," and addressed instead "the government's policy of allowing ICE and IJs to set immigration bond amounts without considering the detainees' financial circumstances or alternative conditions of release." *Hernandez,* 872 F.3d at 1000.

Still, as the Ninth Circuit found in *Hernandez*, further exhaustion is not necessary, as regardless of this Court's findings regarding the immigration judge's authority, further administrative review would be futile. This is because the Board of Immigration Appeals has already held in numerous cases that a noncitizen's ability to pay the bond amount is not a relevant bond determination factor. *See Hernandez v. Sessions*, 872 F.3d 976, 989 (9th Cir. 2017)

(citing *In Re Guerra*, 24 I. & N. Dec. 37, 38 (BIA 2006); *In re Castillo-Cajura*, 2009 WL 3063742, *1 (B.I.A. Sept. 10, 2009) (unpublished); *In re Serrano–Cordova*, 2009 Immig. Rptr. LEXIS 2444, *2 (B.I.A. June 17, 2009) (unpublished); *In re Sandoval–Gomez*, 2008 WL 5477710, *1 (B.I.A. Dec. 15, 2008) (unpublished); *In re Castillo-Leyva*, 2008 Immig. Rptr. LEXIS 10396, *1 (B.I.A. Sept. 18, 2008)(unpublished)). Accordingly, the Court finds that any further exhaustion available must be excused as it will not lead to a different result.

The Court also notes the Government's reliance on *Hmaidan v. Ashcroft*, 258 F.Supp.2d 832 (N.D. Ill. 2003), is inapposite. The petitioners in that case were subject to indefinite detention pending their removal from the country. In response to the Supreme Court's decision in *Zadvydas v. Davis*, 533 U.S. 678, 121 S. Ct. 2491 (2011), which held that such detention was subject to an implicit reasonableness restriction, the Attorney General had offered some petitioners release but only upon posting bonds between $20,000 and $25,000. In that case, Government had pointed to an INS policy that allowed the petitioners to seek relief by the Attorney General by showing that they did not have sufficient funds to post a monetary bond set by the Attorney General. *Id.* at 840. Accordingly, this case does not support the argument that a further bond hearing would be necessary or appropriate to exhaust Petitioner's remedies. The Government has given no indication that such a policy applies to Petitioner or how Petitioner would exhaust such an administrative remedy. Further, to any extent that there is an applicable informal policy like the one mentioned in *Hmaidan*, it would appear that the Government could have addressed it when Petitioner made his parole request pursuant to INA § 212(d)(5)(A) (8 U.S.C. § 1182(d)(5)(A)) and INA § 236(a) (8 U.S.C. § 1226(a)).

Again, finding no jurisdictional bars, the Court proceeds to the merits of Petitioner's claim. Petitioner argues that due process requires an immigration judge to consider a

noncitizen's ability to pay a bond before imposing one. Notably, the Government has offered no defense on the merits this claim. Civil immigration detention requires adequate due process safeguards to ensure that the Government's justification for confinement "outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'" *Zadvydas v. Davis,* 533 U.S. 678, 690 (2001) (citations omitted); *see also Singh v. Holder*, 638 F.3d 1196, 1203 (9th Cir. 2011) ("due process requires 'adequate procedural protections' to ensure that the government's asserted justification for physical confinement 'outweighs the individual's constitutionally protected interest in avoiding physical restraint.'"). The Supreme Court has long recognized that "imprisoning a defendant solely because of his lack of financial resources" violates the Due Process Clause. *Bearden v. Georgia*, 461 U.S. 660, 661 (1983); *see also Turner v. Rogers*, 564 U.S. 431, 447-48 (2011) (holding that due process requires specific findings as to individual's *ability* to pay before incarcerating him for civil contempt); *Pugh v. Rainwater*, 572 F.2d 1053, 1058 (5th Cir. 1978) (en banc) (holding a pretrial detainee solely due to his " inability to post money bail would constitute imposition of an excessive restraint.").

Addressing this issue, the Ninth Circuit has concluded that due process likely requires "consideration of the detainees' financial circumstances, as well as of possible alternative release conditions . . . to ensure that the conditions of their release will be reasonably related to the governmental interest in ensuring their appearance at future hearings." *Hernandez v. Sessions*, 872 F.3d 976, 990-91 (9th Cir. 2017). The plaintiffs in *Hernandez* had already been determined to not be dangerous or a flight risk. Accordingly, the Ninth Circuit concluded that "consideration of the detainees' financial circumstances, as well as of possible alternative release conditions [is] necessary to ensure that the conditions of their release will be reasonably related to the governmental interest in ensuring their appearance at future hearings." *Id.* at 991.

Here, the Government has not submitted any argument to the contrary. Like the plaintiffs in *Hernandez,* by issuing the bond order in August 2019, and reasserting its validity on February 20, 2020, the immigration judge has already made the determination that Petitioner is not a flight risk or danger to the community. *See* 8 C.F.R §§ 236.1(c); 12326.1(d)(1). At the bond hearing, the ICE trial attorney was free to present any and all of the arrest and conviction information the Government now presents to this Court, and Petitioner asserts that this information was, in fact, before the immigration judge. Despite this information, the immigration judge found that Petitioner was not a flight risk or a danger and the Government has given this Court no reason or basis to second-guess the immigration judge's decision. Accordingly, this Court agrees with the Ninth Circuit and finds that Petitioner's due process rights were violated when his financial circumstances and ability to pay were not considered when his bond amount was set.

On this claim alone, however, the proper remedy may not be immediate release. Given the Court's ruling on Petitioner's COVID-19 related claims, the Court continues to find that Petitioner's immediate and continued release is constitutionally required. However, in lieu of the monetary bond, the Government has clearly expressed its desire to seek non-monetary conditions of release. Accordingly, the Court's order will not impede the Government from seeking a bond order before the immigration judge that would impose reasonable non-monetary conditions of release. However, Petitioner shall remain released solely on his own recognizance unless and until a further bond order is entered by the immigration judge. Nor shall the conditions of his bond restrict his ability to protect himself from the COVID-19 pandemic through measures including, but not limited to, social distancing.

## III. CONCLUSION

For the reasons stated above, Petitioner Juan Manuel Hernandez's Emergency Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 and Complaint for Injunctive Relief (Doc. 1) is GRANTED. The Court ORDERS Petitioner's continued release from custody. However, this Order does not restrict the Government from seeking reasonable non-monetary conditions of release from the immigration judge in the future. Petitioner shall remain released solely on his own recognizance unless and until a further bond order is entered by the immigration judge. The conditions of his bond restrict may not restrict Petitioner's ability to protect himself from the COVID-19 pandemic through measures including, but not limited to, social distancing. As the Court has granted Petitioner's Petition, the Court finds that the Temporary Restraining Order issued on April 9, 2020 pursuant to Fed. R. Civ. P. 65(b) is now moot and no further order is necessary. This Case is CLOSED. The Clerk is directed to prepare the Judgment in favor of the Petitioner.

ENTERED on this 23rd day of April 2020.

*/s/ Sara Darrow*
Sara Darrow
Chief United States District Judge

# Attachment B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ADRIAN RODRIGUEZ ALCANTARA; YASMANI OSORIO REYNA; MARIA FLOR CALDERON LOPEZ; MARY DOE; on behalf of themselves and all others similarly situated,

Plaintiffs-Petitioners,

v.

GREGORY ARCHAMBEAULT, San Diego Field Office Director, Immigration and Customs Enforcement; et al.,

Defendants-Respondents.

Case No.: 20cv0756 DMS (AHG)

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

This case is one of many that have been filed throughout the country concerning the detention of immigration detainees during the COVID-19 pandemic. The facilities at issue in this case are Otay Mesa Detention Center ("Otay Mesa" or "OMDC") and Imperial Regional Detention Facility. Currently there are no COVID-19 cases at Imperial. However, Otay Mesa is "home to the largest confirmed COVID-19 outbreak in any federal immigration detention facility in the entire country[.]" (Compl. ¶4.) As of April 30, 2020, ninety-eight (98) Immigration and Customs Enforcement ("ICE") detainees at Otay Mesa had tested positive for COVID-19. Over the course of the pandemic, six ICE detainees

from Otay Mesa have been hospitalized, four have been discharged, two remain hospitalized, and one, an individual with diabetes, has recently been placed on a ventilator.

One of the Plaintiffs in this case is Adrian Rodriguez Alcantara, a 31-year-old asylum seeker from Cuba with HIV. In February 2020, he passed his credible fear interview, and he is currently awaiting a merits hearing on his asylum claim. (□3 ¶33.) When the present case was filed, Mr. Rodriguez Alcantara was detained at Otay Mesa. Since that time, he has been granted parole subject to the posting of a $4,000 bond and final medical clearance, (Fed. Defs.' Opp'n to Mot. at 6), but as of April 28, 2020, he was still in custody. In the present case, Mr. Rodriguez Alcantara seeks to represent "All civil immigration detainees incarcerated at the Otay Mesa Detention Center who are age 45 years or older or who have medical conditions that place them at heightened risk of severe illness or death from COVID-19" ("the Otay Mesa Medically Vulnerable Subclass"). (Compl. ¶155.) Mr. Rodriguez Alcantara alleges Defendants are violating Plaintiffs' Fifth Amendment rights to substantive due process by subjecting Plaintiffs "to punishment or unreasonable heightened risk of contracting COVID-19" for no legitimate reason or justification. (□3 ¶167.) He also alleges Defendants' practices, "including but not limited to maintaining population levels too high for social distancing to be possible," subjects Plaintiffs "to an unreasonable risk of serious harm, including severe illness and death, in violation of their due process rights." (□3)

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

conference with counsel to discuss the newly discovered facts. During that conference, counsel for Warden LaRose represented to the Court that he received the updated numbers from the Federal Defendants as part of their compliance with a preliminary injunction issued in another class action case, 9 [illegible] 3 [illegible] 6 [illegible] 8 [illegible], ___ F.Supp.3d ___, No. EDCV 19-1546 JGB (SHKx), 2020 WL 1932570 (C.D. Cal. Apr. 20, 2020). At the conclusion of that conference, the Court issued an oral ruling granting in part Plaintiffs' motion to certify the Otay Mesa Medically Vulnerable Subclass and granting the emergency motion for a TRO. In that oral ruling and in the order that followed, (ECF No. 38), the Court stated it would set out its reasoning for those decisions in a more detailed order to follow. This order sets out that reasoning.

## I.

## BACKGROUND

Otay Mesa Detention Center houses both ICE detainees and United States Marshals Service detainees. (Decl. of Warden C. LaRose in Supp. of Opp'n to Mot. ("LaRose Decl.") ¶7.) It has a design capacity of 1,970 detainees, ([illegible]3 ¶8), but as of April 26, 2020, was operating at 50% capacity, with 987 detainees. ([illegible]3 ¶12.) Six hundred sixty-two of those detainees are ICE detainees, 649 of which are in the general population and 13 of which are assigned to Restricted Housing Units ("RHUs"). ([illegible]3)

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

OMDC has also instituted the practice of protective cohorting and medical quarantine/isolation strategies. ([illegible]3 ¶28.) "Protective cohorts are considered 'protective areas,' the opposite of a containment area, the objective being to keep the space free of the COVID-19 virus." ([illegible]3 ¶36.)

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

(☐3¶35.) According to Warden LaRose,

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

(☐3 ¶42.) During the April 30 status conference, counsel for Warden LaRose acknowledged that OMDC instituted the practice of protective cohorting even though ICE's Health Service Corps ("IHSC"), which provides healthcare service to ICE detainees at Otay Mesa, (☐3¶8), does not do so.

Consistent with this practice of protective cohorting, on or about March 23, 2020, IHSC produced "a list of 15 ICE OMDC detainees … identified as having heightened COVID-19 risk-factors." (☐3 ¶37.) OMDC staff thereafter "moved the identified vulnerable ICE detainees into previously empty units to establish protective cohorts, separated from the rest of the detainee population." (☐3 ¶38.) Those detainees are currently housed in R Pod. (☐3¶39.) R Pod has capacity for 128 detainees,[1] but as of

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

April 26, 2020, was housing only 20 ICE detainees, all male.[2] (☐3) As of April 28, 2020, the number of high-risk detainees in R Pod had decreased to eight. "Detainees in R Pod have not had any positive COVID-19 tests." (☐3)

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

As for the J Pod, Warden LaRose states it has capacity for 128 detainees, although as of April 26, 2020, it was housing only 102 detainees. Warden LaRose explains that J Pod is an open sleeping bay unit, which is apparent in the photographs attached to his Declaration. (LaRose Decl., Attach. 12.) In addition to the open sleeping bays, J Pod has a dayroom area where detainees are allowed to congregate. Although OMDC promotes social distancing in these areas, it does not require social distancing between detainees, and claims there is no way for it to enforce that practice. Indeed, OMDC admits that detainees are not social distancing from each other, which is confirmed in the photos of J Pod. (☐3)

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[2] According to Warden LaRose, female detainees "identified as having heightened COVID-19 risk factors have left OMDC." (☐3)

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

## II.

## MOTION FOR CLASS CERTIFICATION[4]

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" [illegible], 564 U.S. 338, 348 (2011) (quoting 6 [illegible], 442 U.S. 682, 700-01 (1979)). To qualify for the exception to individual litigation, the party seeking class certification must provide facts sufficient to satisfy the requirements of Federal Rule of Civil Procedure 23(a) and (b). 7 [illegible], 564 F.2d 1304, 1308-09 (9th Cir. 1977). "The Rule 'does not set forth a mere pleading standard.'" 6 [illegible], 569 U.S. 27, 33 (2013) (quoting 7 [illegible], 564 U.S. at 350). "Rather, a party must not only 'be prepared to provide that there are [illegible] sufficiently numerous parties, common questions of law or fact,' typicality of claims of defenses, and adequacy of representation, as required by Rule 23(a). The party must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b)[.]" [illegible] (quoting 7 [illegible], 564 U.S. at 350) (internal citation omitted).

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

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

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

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

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

**B. Rule 23(a)**

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

1. Numerosity

Rule 23(a)(1) requires the class to be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1); [illegible] 327 F.3d 938, 953 (9th Cir. 2003). The plaintiff need not state the exact number of potential class members; nor is a specific minimum number required. [illegible] 158

F.R.D. 439, 448 (N.D. Cal. 1994). Rather, whether joinder is impracticable depends on the facts and circumstances of each case. □3

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

2. Commonality

The second element of Rule 23(a) requires the existence of "questions of law or fact common to the class[.]" Fed. R. Civ. P. 23(a)(2). This element has "'been construed permissively,' and '[a]ll questions of fact and law need not be common to satisfy the rule.'" 8 □□□ □3 6 □□□□ □ □□□□□□□6 □□3, 657 F.3d 970, 981 (9th Cir. 2011) (quoting □ □□□□ □3 6 □□□□□□6 □□3, 150 F.3d 1011, 1019 (9th Cir. 1998)). "However, it is insufficient to merely allege any common question[.]" □3 Instead, the plaintiff must allege the existence of a "common contention" that is of "such a nature that it is capable of classwide resolution[.]" 7 □□□, 564 U.S. at 350. As summarized by the Supreme Court:

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

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

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

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

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

Third, Defendants contend that commonality does not exist here because "the Court must determine whether the facility was aware of each detainee's vulnerable condition and consider the measures taken to abate their specific risk." ( 3 at 10.) Contrary to Defendants' argument, however, Plaintiffs' claim does not require a showing that Defendants were aware of the medical vulnerabilities of each subclass member, nor does it require investigation into the measures taken to protect each one individually. The only test for Plaintiffs' claim is whether the continued confinement or conditions of confinement of subclass members in Otay Mesa, in light of the spread of COVID-19 throughout the facility, amounts to punishment. 5 3 , 441 U.S. 520, 535 (1979). That is a question common to the subclass, and its answer will drive resolution of the case.

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

3. Typicality

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

'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." [illegible], 150 F.3d at 1020. "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." [illegible] 37 [illegible] 6 [illegible], 976 F.2d 497, 508 (9th Cir. 1992) (citation and internal quotation marks omitted). The typicality requirement will occasionally merge with the commonality requirement, [illegible], 754 F.3d at 687, because "[b]oth serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." 7 [illegible], 564 U.S. at 349 n.5.

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

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

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

4. Adequacy of Representation

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

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

**C. Rule 23(b)**

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

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

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

7 [illegible], 564 U.S. at 360.

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

The only other issue on certification is whether the 9 [illegible] decision precludes certification of the subclass in this case. In 9 [illegible], the court granted provisional class certification to two subclasses that could possibly overlap with the Otay Mesa Medically Vulnerable Subclass proposed here. Those subclasses include detainees in ICE custody who (1) are over 55 years of age and have certain Risk Factors that place them at heightened risk of severe illness and death upon contracting COVID-19 and (2) have certain disabilities that place them at heightened risk of severe illness and death upon contracting COVID-19. 9 [illegible] 3 [illegible] 6 [illegible] 8 [illegible], No. EDCV 19-1546 JGB (SHKx), 2020 WL 1932393, at *1 (C.D. Cal. Apr. 20, 2020). Plaintiffs here argue the Otay Mesa Medically Vulnerable Subclass is different in that it includes people age 45 and older. They also assert the relief sought in this case is different from that ordered in 9 [illegible].

Although there is some overlap between this case and 9 [illegible], this Court declines to find that 9 [illegible] precludes certification of the Otay Mesa Medically Vulnerable Subclass. As stated in a recent decision addressing this issue, "It does not appear that Judge Bernal intended, by the general nationwide relief he ordered, to interfere with the ability of facility-specific litigation to proceed. Nor, in any event, does a nationwide class action

covering specific relief at specific facilities seem manageable." [illegible], ___ F.Supp.3d ___, No. 20-cv-02731-VC, 2020 WL 2059848, at *4 (N.D. Cal. Apr. 29, 2020). This Court agrees with that reasoning, and thus declines to deny the present motion in light of 9 [illegible].

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

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

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

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## III.

## EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER

Turning to Plaintiffs' motion for a TRO, the purpose of a TRO is to preserve the status quo before a preliminary injunction hearing may be held; its provisional remedial nature is designed merely to prevent irreparable loss of rights prior to judgment. [illegible] 9 [illegible] 1 [illegible] 3 35 [illegible] [illegible] 0 4 [illegible] 7 [illegible], 415 U.S. 423, 439 (1974). The standard for issuing a temporary restraining order is identical to the standard for issuing a preliminary injunction. [illegible] 0 [illegible] 6 31 [illegible] 3 3 [illegible] 4 [illegible] 6 3, 887 F. Supp. 1320, 1323 (N.D. Cal. 1995). Injunctive relief is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." [illegible] 3 [illegible] 37 36 [illegible] 1 [illegible] 3, 555 U.S. 7, 22 (2008). To meet that showing, Plaintiffs must demonstrate "'[they are] likely to succeed on the merits, that [they are] likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is in the public interest.'" 4 3 [illegible] 4 [illegible] 36 [illegible] 4 [illegible], 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting [illegible], 555 U.S. at 20).[5]

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[5] Warden LaRose argues Plaintiffs are requesting a mandatory injunction rather than a prohibitory injunction. The Ninth Circuit applies separate standards for injunctions depending on whether they are prohibitory, 3 3 they prevent future conduct, or mandatory, 3 3 "they go beyond 'maintaining the status quo[.]'" [illegible] 3 [illegible], 872 F.3d 976, 997 (9th Cir. 2017). To the extent Plaintiffs are requesting mandatory relief, that request is "subject to a higher standard than prohibitory injunctions," namely that relief will issue only "when 'extreme or very serious damage will result' that is not capable of compensation in damages,' and the merits of the case are not 'doubtful.'" 3 at 999 (quoting [illegible] 1 [illegible] 3 3 [illegible] 0 6 3, 571 F.3d 873, 879 (9th Cir. 2009)). The Ninth Circuit recognizes that application of these different standards "is controversial[,]" and that other Circuits have questioned this approach. 3 at 997-98. This Court need not, and does not, address that discrepancy here. To the extent some portion of Plaintiffs' requested relief is subject to a standard higher than the traditional standard for injunctive relief, Plaintiffs have met their burden for the reasons set out below.

**A. Likelihood of Success**[6]

"The first factor under [illegible] is the most important—likely success on the merits." [illegible], 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. [illegible], 451 U.S. 390, 395 (1981).

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

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

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

Amendment's substantive due process clause. [illegible], 3:3 [illegible], ___ F.Supp.3d ___, 2020 WL 2059848 (N.D. Cal. Apr. 29, 2020); 7 [illegible] 35 [illegible], No. 20-CV-02263-RMI, 2020 WL 1984266 (N.D. Cal. Apr. 27, 2020); [illegible] 9 [illegible] 3 [illegible], No. 20-CV-02474-CRB, 2020 WL 1976423 (N.D. Cal. Apr. 24, 2020); 9 [illegible], 2020 WL 1932570; [illegible] 3 5 [illegible], No. 20-CV-02346-VKD, 2020 WL 1929366 (N.D. Cal. Apr. 20, 2020); [illegible] 2 [illegible] 35 [illegible], No. 20cv0682 LAB(MDD), 2020 WL 1905341 (S.D. Cal. Apr. 17, 2020); [illegible], 2020 WL 1864642; [illegible] 3 [illegible], No. 5:19-CV-05191-EJD, 2020 WL 1865303 (N.D. Cal. Apr. 14, 2020); 5 [illegible] 3 5 [illegible], No. 19-CV-06123-DMR, 2020 WL 1812850 (N.D. Cal. Apr. 9, 2020); [illegible] 3 [illegible], No. 20-CV-02064-MMC, 2020 WL 1701724 (N.D. Cal. Apr. 8, 2020); 7 [illegible] 34 [illegible], No. C20-0409JLR-MAT, 2020 WL 1704324 (W.D. Wash. Apr. 8, 2020); [illegible] 35 [illegible], ___ F.Supp.3d ___, No. ED CV 20-00331-AB(RAOX), 2020 WL 1502607 (C.D. Cal. Mar. 27, 2020); 6 [illegible] 35 [illegible], ___ F.Supp.3d ___, No. CV 20-00605 TJH (AFMX), 2020 WL 1502864 (C.D. Cal. Mar. 27, 2020). In the Ninth Circuit, the majority of district courts that have considered the issue have concluded there is a likelihood plaintiffs will prevail on those claims. [illegible], 3:3 [illegible], 2020 WL 2059848; 7 [illegible], 2020 WL 1984266; [illegible], 2020 WL 1929366; 9 [illegible], 2020 WL 1932570; [illegible], 2020 WL 1865303. This Court agrees with that majority.

Although "under normal circumstances" the confinement of ICE detainees "pending removal proceedings is rationally related to the legitimate governmental interest of ensuring their appearance for their deportation proceedings and preventing danger to the community[,]" [illegible] 2 [illegible], 2020 WL 1905341, at *5, the current circumstances, and in particular, the circumstances at Otay Mesa, are anything but normal. As of April 30, 2020, there have been 490 confirmed cases of COVID-19 among those in ICE custody out of 1,030 detainees who have been tested, https://www.ice.gov/coronavirus, which translates to a near fifty-percent infection rate. Otay Mesa currently has the highest number of cases (98) in any ICE detention facility, [illegible] and all but one of its available housing units are currently under quarantine with at least one confirmed case of COVID-19.

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

**B. Irreparable Injury and Balance of Equities**

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

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

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

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

**C. Public Interest**

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

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

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## IV.

## CONCLUSION

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

**IT IS SO ORDERED**.

DATED: May 1, 2020

DANA M. SABRAW
United States District Judge

# Attachment C

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ADRIAN RODRIGUEZ ALCANTARA; YASMANI OSORIO REYNA; MARIA FLOR CALDERON LOPEZ; MARY DOE; on behalf of themselves and all others similarly situated,

Plaintiffs-Petitioners,

v.

GREGORY ARCHAMBEAULT, San Diego Field Office Director, Immigration and Customs Enforcement; et al.,

Defendants-Respondents.

Case No.: 20cv0756 DMS (AHG)

**ORDER GRANTING PLAINTIFF-PETITIONERS' EMERGENCY EX PARTE MOTION FOR SUBCLASS-WIDE TEMPORARY RESTRAINING ORDER**

After consideration of the briefs and arguments of counsel, the evidence filed in support of and opposition to Plaintiffs-Petitioners' Emergency Motion for Subclass-wide Temporary Restraining Order, Preliminary Injunction and Writ of Habeas Corpus Regarding the Otay Mesa Medically Vulnerable Subclass, and being fully advised, the Court finds that Plaintiff-Petitioners have met their burden of demonstrating a need for a temporary restraining order. Accordingly, IT IS HEREBY ORDERED THAT Plaintiffs-Petitioners' Motion is GRANTED as follows:

1. The Court provisionally certifies the Otay Mesa Medically Vulnerable subclass, defined as follows:

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

2. The Court hereby appoints ACLU Foundation of San Diego & Imperial Counties attorneys as class counsel.

3. The Court HEREBY DECLARES that current conditions of confinement for Otay Mesa Medically Vulnerable subclass members held at the Otay Mesa Detention Center are unconstitutional under the Fifth Amendment because the conditions of their confinement place subclass members at substantial risk of serious illness or death.

4. The Court will issue a more detailed order setting out its reasoning for granting certification of the subclass and issuance of the temporary restraining order. Pending that order, however, the Court orders as follows:

a. Defendants shall immediately review subclass members for release, and release all subclass members suitable for release in the discretion of Defendants after considering the subclass members' health, public safety and mandatory detention requirements, with appropriate conditions to protect the public, and the health, safety and well being of each subclass member;

b. By **10:30 a.m.** on **May 4, 2020**, Defendants shall identify and disclose to class counsel a list, in a spreadsheet or comparable searchable format, of all Otay Mesa Medically Vulnerable subclass members, including, where practicable, every subclass member's name, A number, age, underlying medical condition, immigration lawyer or representative (if any), primary language, current housing unit, prior custody determinations made by Defendants, and the names, relationship, and contact information for any points of contact in the United States that subclass members have provided Defendants in the course of their arrest, processing, and detention, along with any other information that becomes relevant during the course of implementation of this Order, subject to approval by the Court or magistrate judge assigned to this case. Although pregnant women are not included in the subclass,

Defendants shall also identify and provide to class counsel the information set out above for any pregnant ICE detainees currently in Otay Mesa, if any;

c. Immediately upon identifying Otay Mesa Medically Vulnerable subclass members, Defendants shall release them in accordance with Paragraph 4.a. and in a manner that comports with public health guidelines for self-quarantine (if necessary due to infection or exposure), social distancing, and other recommendations of public health departments in their destination cities or counties; the name and contact information for the responsible adult at that location; information detailing their travel plans to that location; and any other information this Court deems necessary to ensure release plans comport with public health guidelines related to COVID-19;

d. Defendants may not condition subclass members' release on paying a bond or providing proof of a sponsor's legal status and/or a sponsor's financial documents where release plans otherwise comport with public health guidelines related to COVID-19;

e. Release plans shall be appropriate to the individual circumstances of each subclass member, including whether they have been tested for COVID-19 or have been in close contact with confirmed cases of COVID-19, and a copy shall be provided to class counsel promptly upon a subclass member's release;

f. Release of subclass members shall begin immediately, with the expectation that most subclass members will be released under appropriate conditions determined by Defendants;

g. Defendants shall provide to released subclass members a phone number and email address at which subclass members can reach class counsel;

h. If Defendants cannot determine adequate release plans for any Otay Mesa Medically Vulnerable subclass members, or in exercising their discretion believe that release is not appropriate, they shall provide to the Court and class counsel by **10:30 a.m.** on **May 4, 2020**, the names of those subclass members and the reason(s) why they have not been released;

i. Upon identification of any new or previously unidentified Otay Mesa Medically Vulnerable subclass members following this Order, Defendants shall promptly notify class counsel and release any such subclass members consistent with the requirements of this Order;

5. A further telephonic status conference shall be held at **noon** on **May 4, 2020**. The dial-in number for any counsel who wish to listen in only and members of the public is as follows.

a. Dial the toll free number: **877-411-9748**;

b. Enter the Access Code: **6246317** (Participants will be put on hold until the Court activates the conference call);

c. Enter the Participant Security Code **05040756** and Press # (The security code will be confirmed);

d. Once the Security Code is confirmed, participants will be prompted to Press 1 to join the conference or Press 2 to re-enter the Security Code.

All persons dialing in to the conference are reminded that Civil Local Rule 83.7(c) prohibits any recording of court proceedings.

**IT IS SO ORDERED**.

Dated: April 30, 2020

Hon. Dana M. Sabraw
United States District Judge

# Attachment D

**UNITED STATES COURT OF APPEALS**
FOR THE SIXTH CIRCUIT

100 EAST FIFTH STREET, ROOM 540
Deborah S. Hunt — POTTER STEWART U.S. COURTHOUSE — Tel. (513) 564-7000
Clerk — CINCINNATI, OHIO 45202-3988 — www.ca6.uscourts.gov

Filed: May 04, 2020

Re: Case No. 20-3447, *Craig Wilson, et al v. Mark Williams, et al*
Originating Case No. : 4:20-cv-00794

Dear Counsel:

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Amy E. Gigliotti on behalf of Karen S. Fultz
Case Manager
Direct Dial No. 513-564-7036

cc: Mr. James Raymond Bennett II
Mr. David Joseph Carey
Ms. Sara E. DeCaro
Ms. Jacqueline C. Greene
Ms. Freda Levenson
Mr. Joseph Wilfred Mead
Ms. Sandy Opacich
Ms. Laura A. Osseck
Mr. David Allan Singleton
Mr. Mark A. Vander Laan
Mr. Michael Louis Zuckerman

Enclosure

No. 20-3447

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**FILED**
May 04, 2020
DEBORAH S. HUNT, Clerk

CRAIG WILSON, on behalf of themselves and all others similarly situated, et al.,

Petitioners-Appellees,

v.

MARK WILLIAMS, in his official capacity as Warden of Elkton Federal Correctional Institution, et al.,

Respondents-Appellants.

O R D E R

Before: COLE, Chief Judge; GIBBONS and COOK, Circuit Judges.

Petitioners, four inmates housed in the Elkton Federal Correctional Institution and its low-security satellite prison FSL Elkton (collectively "Elkton"), on behalf of themselves and others housed or to be housed there, filed a petition under 28 U.S.C. § 2241 to obtain enlargement of their custody to limit their exposure to the COVID-19 virus. They sought to represent all current and future inmates, including a subclass of inmates who—through age and/or certain medical conditions—were particularly vulnerable to complications, including death, if they contracted COVID-19. Following a hearing, the district court entered a preliminary injunction directing Respondents Mark Williams, Elkton's warden, and Michael Carvajal, the Director of the Federal Bureau of Prisons ("BOP"), to take certain steps for the subclass that included: (1) evaluating each subclass member's eligibility for transfer out of

Elkton by any means within two weeks; (2) transferring those deemed ineligible for compassionate release to other facilities utilizing certain measures to contain transmission of COVID-19; and (3) prohibiting those transferred from returning to Elkton until certain conditions were met. Respondents appeal, and move to stay the injunction pending resolution of their appeal. Petitioners move to strike the motion to stay, and separately oppose a stay. Respondents reply. Disability Rights of Ohio, a not-for-profit organization advocating for people with disabilities in Ohio, files an amicus brief in support of Petitioners.

First, we address the procedural motion. Petitioners move to strike Respondents' motion to stay, and more particularly, the portion of that motion seeking an administrative stay. To the extent Petitioners sought to strike the request for an administrative stay, our prior denial of this request renders that portion of their motion moot. More generally, however, Petitioners contend Respondents have abused the stay process by requesting relief in this court without first obtaining a ruling from the district court. A party must first move the district court for a stay unless it would be impracticable, the district court denied a motion to stay, or it otherwise already failed to afford the relief requested. Fed. R. App. P. 8(a)(1)(A), (a)(2)(A). We find Respondents complied with Rule 8 and protected their interests by simultaneously seeking relief here, given the short time frame in which they sought relief.

We balance four factors to determine whether, in our discretion, a stay is appropriate: (1) whether the movant "has made a strong showing that he is likely to succeed on the merits"; (2) whether the movant "will be irreparably injured absent a stay"; (3) whether issuance of a stay will "substantially injure" other interested parties; and (4) "where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (citation omitted). The first two factors are "the most critical." *Id.*

Respondents challenge the preliminary injunction on multiple grounds, alleging that: the district court lacked jurisdiction under § 2241 over the action; if the suit had been properly brought under the Prison Litigation Reform Act ("PLRA"), the injunction would contravene its requirements for the release of prisoners; Petitioners failed to establish a violation of their Eighth Amendment rights; and the case is not suitable for classwide adjudication. We review legal conclusions de novo, factual findings for clear error, and the district court's ultimate decision to issue injunctive relief for abuse of discretion. *Graveline v. Johnson*, 747 F. App'x 408, 412 (6th Cir. 2018).

Section 2241 provides jurisdiction to district courts over habeas petitions when a petitioner "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). The Supreme Court has neither foreclosed a prisoner from using, nor authorized a prisoner to use, habeas relief to challenge his conditions of confinement. *See Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973). We need not reach this question here, however. Petitioners seek release for the subclass not because the conditions of their confinement fail to prevent irreparable constitutional injury at Elkton, but based on the fact of their confinement. Where a petitioner claims no set of conditions would be constitutionally sufficient, we construe the petitioner's claim as challenging the fact of the confinement. *See Adams v. Bradshaw*, 644 F.3d 481, 483 (6th Cir. 2011); *cf. Terrell v. United States*, 564 F.3d 442, 446–48 (6th Cir. 2009). Petitioners' proper invocation of § 2241 also forecloses any argument that the PLRA applies given its express exclusion of "habeas corpus proceedings challenging the fact or duration of confinement in prison" from its ambit. 18 U.S.C. § 3626(g)(2).

Given the procedural posture of the case, we review not the merits of Petitioners' Eighth Amendment claim, but whether the district court abused its discretion in entering the preliminary

injunction. We accept the district court's factual findings unless we find them clearly erroneous. Fed. R. Civ. P. 52(a)(6). The district court found that Elkton's dorm-style structure rendered it unable to implement or enforce social distancing. The COVID-19 virus, now a pandemic, is highly contagious, and can be transmitted by asymptomatic but infected individuals. Older individuals or those who have certain underlying medical conditions are more likely to experience complications requiring significant medical intervention, and are more likely to die. At Elkton, COVID-19 infections are rampant among inmates and staff, and numerous inmates have passed away from complications from the virus. Elkton has higher occurrences of infection than most other federal prisons. Respondents lack adequate tests to determine if inmates have COVID-19. While the district court's findings are based on a limited evidentiary record, its "account of the evidence is plausible in light of the record viewed in its entirety." *United States v. Ables*, 167 F.3d 1021, 1035 (6th Cir. 1999). Thus, at this juncture and given our deferential standard of review on motions to stay, "[t]he district court's choice between two permissible views of the evidence cannot . . . be clearly erroneous." *Id.*

Finally, Respondents challenge the conditional certification of a class action for the subclass. Respondents, however, have neither petitioned for nor received permission to appeal that decision. *See* Fed. R. Civ. P. 23(f). Regardless, we will not generally consider "[i]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation." *United States v. Sandridge*, 385 F.3d 1032, 1035 (6th Cir. 2004) (citation omitted).

Respondents also argue that the enormous burden compliance with the injunction places on the BOP's time and resources constitutes irreparable harm. "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are

not enough." *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991) (citation omitted). Further, Respondents received fourteen days in which to evaluate each subclass member's eligibility for transfer out of Elkton. Assuming Respondents have been complying with this directive while the motion to stay is pending, their time to comply is about to expire, rendering any remaining harm slight. Based on this, we cannot find that Respondents have established irreparable harm.

The motion to stay is **DENIED**. The motion to strike is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk