

Case No. S261827

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE
LAWYERS, CALIFORNIA ATTORNEYS FOR
CRIMINAL JUSTICE, and YOUTH JUSTICE COALITION,

Petitioners,

v.

GAVIN NEWSOM,
California Governor, in His Official Capacity
and XAVIER BECERRA,
California Attorney General, in His Official Capacity

Respondents.

**PETITIONERS NATIONAL ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS, CALIFORNIA ATTORNEYS FOR
CRIMINAL JUSTICE, AND YOUTH JUSTICE COALITION'S
APPENDIX OF EXHIBITS VOLUME 1 OF 4 - PAGES 1 - 203**

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TABLE OF EXHIBITS SUPPORTING PETITION FOR WRIT OF MANDATE

Ex. No.	DOCUMENT	VOL.	PAGE
1	Order, United States v. Barkman, No. 3:19-cr-0052 (D. Nev. Mar. 17, 2020)	1	001
2	Order, United States v. Garlock, No. 18-cr-00418 (N.D. Cal. Mar. 25, 2020)	1	005
3	Verified Petition for Writ of Habeas Corpus (“NYLAS Petition”), People ex rel. Stoughton v. Brann, No. 260154/2020, at ¶ 3 (N.Y. Sup. Ct. Mar. 25, 2020) (Exh. X)	1	006
4	Memo and Order, Basank v. Decker, No. 20 civ 2518 (S.D.N.Y. Mar. 26, 2020)	1	047
5	Temp Restraining Order and OSC, Castillo v. Barr, No. CV 20-00605 (C.D. Cal. Mar. 27, 2020)	1	062
6	Order on Defs Am. Mot for Release, United States v. Grobman, No. 18-cr-20989 (S.D. Fla. Mar. 29, 2020)	1	073
7	Memo and Order, Unites States v. Muniz, No. 4:09-cr-00199 (S.D. Tex Mar. 30, 2020)	1	092
8	Memo and Order, Unites States v. Davis, No. ELH-20-09 (D. Md. Mar. 30, 2020)	1	097
9	Opinion, Unites States v. Roeder, No. 20-1682 (E.D. Pa. Apr. 1, 2020)	1	108
10	Judicial Council, California Rules of Court, Emergency Rules 1-11 (Apr. 6, 2020)	1	111
11	Memo and Order, Hope v. Doll, No. 1:20-cv-562 (M.D. Pa. Apr. 7, 2020)	1	127
12	Order, Ortuno v. Jennings, No. 20-cv-02064 (N.D. Cal. Apr. 8, 2020)	1	142

Document received by the CA Supreme Court.

EX. NO.	DOCUMENT	VOL.	PAGE
13	Notice of Opposition to Setting of Bail at \$0 and Requesting a Hearing Under Penal Code Section 1269c, People v. Defendants as Set Forth in Exhibit A, Case No. XXXXX (Super. Ct., Sacramento Cty, Apr. 10, 2020)	1	152
14	Order, Doe v. Barr, No. 20-cv-02141 (N.D. Cal. Apr. 12, 2020)	1	164
15	Opinion, Cristian v. Decker, No. 20-3600 D. N.J. Apr. 12, 2020)	1	175

PROOF OF SERVICE

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 350 South Grand Avenue, Fiftieth Floor, Los Angeles, CA 90071-3426.

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**PETITIONERS NATIONAL ASSOCIATION OF CRIMINAL DEFENSE
LAWYERS, CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE,
AND YOUTH JUSTICE COALITION'S APPENDIX OF EXHIBITS
VOLUME 1 OF 4 - PAGES 1 - 203**

on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 24, 2020, at Los Angeles, California.



Anna Velasquez

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2020 WL 1811343

Only the Westlaw citation is currently available.
United States District Court, D. Nevada.

UNITED STATES of America, Plaintiff,

v.

Robert BARKMAN, Defendant.

Case No. 3:19-cr-0052-RCJ-WGC

|
Signed 03/17/2020

Attorneys and Law Firms

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**ORDER GRANTING EMERGENCY MOTION
TO TEMPORARILY MODIFY INTERMITTENT
CONFINEMENT AS A CONDITION OF
PROBATION DUE TO THE COVID-19 PANDEMIC**

ROBERT C. JONES, District Judge

Introduction

*1 Mr. Barkman moves this Court for an order temporarily modifying his conditions of probation by suspending for a minimum of 30 days the requirement that he present himself to the Washoe County Detention Facility for intermittent confinement given the COVID-19 pandemic.

COVID-19 is a dangerous illness spreading rapidly across the country and through Northern Nevada. The CDC has issued guidance that individuals at higher risk of contracting severe forms COVID-19—adults over 60 years old and people with chronic medical conditions—take immediate preventative actions, including avoiding crowded areas and staying home as much as possible.¹ As of a few hours ago, the White House announced that the COVID-19 crisis could last until July and that gatherings over 10 people should be avoided.²

With confirmed cases that indicate community spread, the time is now to take action to protect vulnerable populations and the community at large. To date, protective measures have

been taken in Washoe County, Nevada to slow the spread of the virus, including indefinitely cancelling all events with an expected attendance of 250 or more people. The following is a sample of events that have been cancelled in Nevada: (1) K-12 schooling; (2) All school, district and non-district sponsored athletics, extra-curricular activities, assemblies, practices, proms and events; (3) all district sponsored travel; (4) all previously scheduled spring break childcare related camps; (5) UNR is moving to online classes starting on March 23, 2020.

With 26 confirmed cases in Nevada, indicating community spread, we must take every necessary action to protect vulnerable populations and the community at large. The men and women incarcerated at Washoe County Detention Facility are a part of our community and all reasonable measures must be taken to protect their health and safety.

1. Conditions of Confinement and Spread of Coronavirus

Conditions of pretrial confinement create the ideal environment for the transmission of contagious disease.³ Inmates cycle in and out of detention facilities from all over the world and country, and people who work in the facilities including correctional officers, and care and service providers leave and return daily, without screening. Incarcerated people have poorer health than the general population, and even at the best of times, medical care is limited.⁴ Many people who are incarcerated also have chronic conditions, like diabetes, asthma, high blood pressure, hepatitis, or HIV, which makes them vulnerable to severe forms of COVID-19.

*2 According to public health experts, incarcerated individuals “are at special risk of infection, given their living situations,” and “may also be less able to participate in proactive measures to keep themselves safe;” because “infection control is challenging in these settings.”⁵ Outbreaks of the flu regularly occur in jails, and during the H1N1 epidemic in 2009, many jails and prisons dealt with high numbers of cases.⁶

In China, officials have confirmed the coronavirus spreading at a rapid pace in Chinese prisons, counting 500 cases.⁷ Secretary of State Mike Pompeo has called for Iran to release Americans detained there because of the “deeply troubling” “[r]eports that COVID-19 has spread to Iranian prisons,” noting that “[t]heir detention amid increasingly deteriorating

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conditions defies basic human decency.”⁸ Courts across Iran have granted 54,000 inmates furlough as part of the measures to contain coronavirus across the country.⁹ In the U.S., steps are already being taken in some jurisdictions to facilitate the release of elderly and sick prisoners and to reduce jail populations by discouraging the refusing the admission of individuals arrested on non-violent misdemeanor charges.¹⁰

Faced with the threat, jails and prisons have to prepare for two states: Before COVID-19 gets into the facility and the jail is trying to keep the virus out. When the disease is discovered inside the facility and efforts then are made to keep the virus in. There is ample opportunity for a virus to enter a prison or jail, and for it to go back out into the community. Once a contagious illness enters, conditions in correctional facilities are highly conducive to it spreading. This pandemic is unprecedented in our lifetime. While measures are being taken by facilities all over the world, no facility is prepared.

*3 Screening inmates is important. Current guidelines do not go far enough given the catastrophic consequences of missing a single case. Moreover, it is statistically far more likely that someone else, not an inmate, will be the initial carrier of COVID-19 into a jail. New inmates are brought to jail by an arresting officer or two every day. The jail is also visited by lawyers, probation and parole officers, volunteers (who put on church services and educational programs), and many more. By sheer numbers alone, these people present a bigger threat than inmates. These people are also more likely to have recently traveled out of the country than the average inmate. Tests are still, as of this writing, hard to come by. The question is not if there will be a COVID-19 outbreak at the jail. It is when.

2. Specific Conditions at the Washoe County Detention Facility

The Washoe County Detention Facility houses people in small cells with beds close to the other, which prevents detainees from engaging in social distancing and self-quarantine precautions as recommended by the CDC. Those detained at the Washoe County Detention Facility also share limited toilets, sinks and showers with the other people in their housing unit, which creates a greater risk to exposure to the virus. There are also significant restrictions on movement, so people are held together in close quarters at all times.

The Washoe County Detention Facility also has limited access to personal hygiene items such as tissues, soap,

disinfectant, or hot water, which prevent individuals from taking recommended precautions to minimize the spread of the virus. Moreover, if people cannot afford to buy personal hygiene products then their ability to maintain proper hygiene is even more limited.

There are also significant limitations on the detention facility's medical services. The detention facility does not have a hospital unit on-site, medical staffing in general is limited, and the Renown tent will quickly become overwhelmed if an outbreak occurs at the detention facility. It is unknown if the Washoe County Detention Facility possesses a single ventilator.

Washoe County Detention Facility has made the following policy adjustments to address COVID-19, Exhibit A. Unsurprisingly, given the unprecedented scope of this pandemic, many questions are still without answers.

- How will all people in the facility — incarcerated people, staff, and visitors — be educated so they can understand the risks, protect themselves, and protect others?
- Under what circumstances will staff and people incarcerated in the facilities be tested for the virus? How many tests are needed?
- If people who are incarcerated require quarantine and/or treatment, how will that be accomplished? Can it be accomplished in a humane way and within Constitutional parameters?
- If medical staff must be quarantined or become ill, how will the facility monitor, quarantine and treat the prison or jail population?
- If correctional staff must be quarantined or become ill, how will the facility operate, both in terms of addressing the virus and in terms of simply maintaining necessary services, safety, and security?
- If incarcerated people must be quarantined or become ill, how will the facility continue necessary operations that are reliant on the prison or jail population, such as food preparation?
- How are particularly vulnerable populations, such as the elderly, or immunocompromised, being protected?
- How will the facility meet the challenges of COVID-19 without violating the rights of the people in its custody?

The Washoe County Detention Facility simply lacks the resources necessary to engage in aggressive screening and testing of inmates, correctional staff, law enforcement officers and other care and service providers who enter the facility. The limitations mean the Washoe County Detention Facility is not screening people as they are being brought into the detention facility by first segregating them, testing them for the virus, questioning them about community exposure and travel, and then monitoring their temperature for a period of 14 days before admitting them into the general population.

*4 As new arrestees arrive, if they are not symptomatic or have knowingly been exposed, they will be brought into the Washoe County Detention Facility and held with the existing population, potentially bringing COVID-19 into this population held in large numbers, close quarters, and low sanitary conditions. Given the rapid community spread of this virus, variability in symptoms and the likelihood of it being spread before a patient is symptomatic, these measures are inadequate.

Argument

1. 18 U.S.C. § 3563.

Under 18 U.S.C. § 3563, “[t]he court may modify, reduce, or enlarge the conditions of a sentence of probation at any time prior to the expiration or termination of the term of probation.”

Earlier this year, the Court sentenced Mr. Barkman to one year of probation and sixty days of intermittent confinement to be served for two consecutive days (Tuesday and Wednesday) at a designated facility beginning on February 11, 2020. ECF No. 17. Since Mr. Barkman, the spread of COVID-19 has reached pandemic proportions. Mr. Barkman not only potentially risks exposing the general inmate population of the Washoe County Detention Facility to the disease, but also risks becoming exposed himself.

The circumstances that existed when Mr. Barkman was sentenced to probation with intermittent confinement as a condition have now changed. There is a pandemic that poses a direct risk that is far greater if Mr. Barkman appears is admitted to the inmate population of the Washoe County

Detention Facility. The risk runs in two directions—to Mr. Barkman, and to the institution. In considering the “total harm and benefits to prisoner and society”¹¹ of continuing to intermittent confinement as normal against the heightened health risks posed to Mr. Barkman and the Washoe County Detention Facility, temporarily suspending Mr. Barkman's intermittent confinement would appear to satisfy the interests of everyone during this rapidly encroaching pandemic.

2. Emergency relief.

Mr. Barkman is scheduled to surrender at the jail tomorrow at or around 9:00 a.m. to begin two consecutive days of intermittent confinement. Accordingly, Mr. Barkman seeks this Court's immediate intervention in modifying his conditions of probation by suspending for a minimum of 30 days the intermittent confinement requirement in light of the COVID-19 public health crisis. Counsel for Mr. Barkman has conferred with the prosecuting attorney for the government before filing this motion. The government has no objection to temporarily suspending for 30 days the condition requiring Mr. Barkman's intermittent confinement. Should the Court grant this motion, counsel will seek to be heard regarding any extension of relief before expiration of the 30-day suspension sought herein.

ORDER

IT IS HEREBY ORDERED that the Emergency Motion To Temporarily Modify Intermittent Confinement as a Condition of Probation Due to the COVID-19 Pandemic (ECF No. 20) is GRANTED.

IT IS FURTHER ORDERED that given the COVID-19 pandemic, Mr. Barkman's condition of probation that he present himself to the Washoe County Detention Facility for intermittent confinement is SUSPENDED for 30 days from entry of this Order.

*5 IT IS SO ORDERED this 17th day of March, 2020.

All Citations

--- F.Supp.3d ----, 2020 WL 1811343

Footnotes

- 1 *People at Risk for Serious Illness from COVID-19*, CDC (March 12, 2020) at <https://bit.ly/2vgUt1P>.
- 2 *Trump Says Criss Could Last Until July, Recommends No Gathering Of 10 People* (March 16, 2020) at <https://www.forbes.com/sites/rachelsandler/2020/03/16/cdc-all-americans-should-avoid-gathering-in-groups-of-more-than-10-people/#5f9fd51a283d>.
- 3 Joseph A. Bick (2007). *Infection Control in Jails and Prisons*. *Clinical Infectious Diseases* 45(8):1047-1055, at <https://doi.org/10.1086/521910>.
- 4 Laura M. Maruschak et al. (2015). *Medical Problems of State and Federal Prisoners and Jail Inmates, 2011-12*. NCJ 248491. Washington, D.C.: U.S. Department of Justice, Bureau of Justice Statistics, at <https://www.bjs.gov/content/pub/pdf/mpsfpi1112.pdf>
- 5 “Achieving A Fair And Effective COVID-19 Response: An Open Letter to Vice-President Mike Pence, and Other Federal, State, and Local Leaders from Public Health and Legal Experts in the United States,” (March 2, 2020), at <https://bit.ly/2W9V6oS>.
- 6 *Prisons and Jails are Vulnerable to COVID-19 Outbreaks*, The Verge (Mar. 7, 2020) at <https://bit.ly/2TNcNZY>.
- 7 Rhea Mahbubani, *Chinese Jails Have Become Hotbeds of Coronavirus As More Than 500 Cases Have Erupted, Prompting the Ouster of Several Officials*, Business Insider (Feb. 21, 2020) at <https://bit.ly/2vSzSRT>.
- 8 Jennifer Hansler and Kylie Atwood, *Pompeo calls for humanitarian release of wrongfully detained Americans in Iran amid coronavirus outbreak*, CNN (Mar. 10, 2020) at <https://cnn.it/2W4OpV7>.
- 9 Claudia Lauer and Colleen Long, *US Prisons, Jails On Alert for Spread of Coronavirus*, The Associated Press (Mar. 7, 2020) at <https://apnews.com/af98b0a38aaabedbc059092db356697>.
- 10 In New York Brooklyn District Attorney Eric Gonzalez, joined by public health experts, has asked Governor Cuomo to grant emergency clemencies to elderly and sick prisoners (Sarah Lustbader, *Coronavirus: Sentenced to COVID-19*, The Daily Appeal (Mar. 12, 2020) at <https://theappeal.org/sentenced-to-covid-19/>); Cuyahoga County (Ohio) is holding mass pleas and bail hearings to reduce the current jail population (<https://www.cleveland.com/court-justice/2020/03/cuyahoga-county-officials-will-hold-mass-plea-hearings-to-reduce-jail-population-over-coronavirus-concerns.html>); Mahoning County (Ohio) jail is refusing all non-violent misdemeanor arrestees (<https://www.wkbn.com/news/coronavirus/mahoning-county-jail-refusing-some-inmates-due-to-coronavirus-outbreak/>); see also Collin County (TX) (<https://www.dallasnews.com/news/public-health/2020/03/12/facing-coronavirus-concerns-collin-county-sheriff-asks-police-not-to-bring-petty-criminals-to-jail/>).
- 11 See *Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring) (calling for heightened judicial scrutiny of the projected impact of jail and prison conditions on a defendant); *United States v. Mateo*, 299 F. Supp. 2d 201, 212 (S.D.N.Y. 2004) (reducing sentence where defendant’s pretrial conditions were “qualitatively more severe in kind and degree than the prospect of such experiences reasonably foreseeable in the ordinary case”).

2020 WL 1439980

Only the Westlaw citation is currently available.
United States District Court, N.D. California.

UNITED STATES of America, Plaintiff,

v.

GARLOCK, Defendant.

Case No. 18-cr-00418-VC-1

|
Signed 03/25/2020**Attorneys and Law Firms**

[Kyle F. Waldinger](#), Office of the United States Attorney, San Francisco, CA, for Plaintiff.

[Daniel Benjamin Olmos](#), Nolan Barton & Olmos LLP, Palo Alto, CA, for Defendant.

ORDER DEFERRING SURRENDER DATE

[VINCE CHHABRIA](#), United States District Judge

*1 This Court sentenced the defendant to 12 months and one day in prison. *See* Dkt. No. 37. The defendant is not presently in custody; he remains out on pretrial release. He was sentenced on February 11, 2020 and his self-surrender date is June 12, 2020. *Id.* That the defendant is on pretrial release reflects a determination by a magistrate judge that he is neither a danger to the community nor a flight risk. *See* 18 U.S.C. § 3142(b).

By now it almost goes without saying that we should not be adding to the prison population during the COVID-19 pandemic if it can be avoided. Several recent court rulings have explained the health risks—to inmates, guards, and the

community at large—created by large prison populations. *See, e.g., United States v. Stephens*, No. 15-cr-95-AJN, 2020 WL 1295155, at *2 (S.D.N.Y. Mar. 19, 2020); *United States v. Barkman*, No. 3:19-cr-0052-RCJ-WGC, 2020 U.S. Dist. LEXIS 45628 (D. Nev. Mar. 17, 2020); *In the Matter of Extradition of Toledo Manrique*, No. 3:19-mj-71055-MAG-1 (TSH), 2020 WL 1307109 (N.D. Cal. Mar. 19, 2020). The chaos has already begun inside federal prisons—inmates and prison employees are starting to test positive for the virus, quarantines are being instituted, visits from outsiders have been suspended, and inmate movement is being restricted even more than usual. *See, e.g., Sadie Gurman, Bureau of Prisons Imposes 14-Day Quarantine to Contain Coronavirus*, Wall Street Journal (March 24, 2020), <https://www.wsj.com/articles/bureau-of-prisons-imposes-14-day-quarantine-to-contain-coronavirus-11585093075>. To avoid adding to the chaos and creating unnecessary health risks, offenders who are on release and scheduled to surrender to the Bureau of Prisons in the coming months should, absent truly extraordinary circumstances, have their surrender dates extended until this public health crisis has passed.

Accordingly, this sua sponte order extends the defendant's surrender date from June 12, 2020 to September 1, 2020. The defendant is ordered to self-surrender directly to the designated Bureau of Prisons facility on that date, at 2:00 p.m. If a facility has not been designated, he is ordered to surrender to the United States Marshal for this district at 450 Golden Gate Avenue, 20th Floor, in San Francisco on the same date and time. Should conditions necessitate a longer extension, the Court will entertain a request to that effect from the defendant.

IT IS SO ORDERED.**All Citations**

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

PEOPLE OF THE STATE OF NEW YORK
EX REL. Corey Stoughton, Esq.
On behalf of

VENUS WILLIAMS, ET AL.

Petitioners,

v.

CYNTHIA BRANN, Commissioner, New York City
Department of Correction; and ANTHONY ANNUCCI,
Acting Commissioner, New York State Department of
Corrections and Community Supervision,

Respondents.

Index No. _____

SCID No. _____

WRIT OF HABEAS CORPUS

THE PEOPLE OF THE STATE OF NEW YORK

Upon the relation of Corey Stoughton, Esq.,

TO THE COMMISSIONER, NEW YORK CITY
DEPARTMENT OF CORRECTION and THE
COMMISSIONER, NEW YORK STATE DEPARTMENT
OF CORRECTIONS AND COMMUNITY SUPERVISION:

WE COMMAND YOU, that you have and produce the body of Petitioners named in the Verified Petition attached hereto, by you imprisoned and detained, as it is said, together with your full return to this writ and the time and cause of such imprisonment and detention, by whatsoever name the said Petitioners are called or charged, or show cause why the Petitioners should not be produced, before the Justice presiding at Part ____ of the Supreme Court, New York County, at 100 Centre Street, on ____ of March, 2020, to do and receive what shall then and there be considered concerning the said Petitioners and have you then and there this writ.

WITNESS, Honorable _____, one of the Justices of
the Supreme Court of the State of New York, this ___ day of March, 2020.

By the Court Clerk

The above writ allowed this _____ day of March, 2020.

Justice of the Supreme Court
of the State of New York

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

PEOPLE OF THE STATE OF NEW YORK
EX REL. Corey Stoughton, Esq.
On behalf of

VENUS WILLIAMS, et al.,

Petitioners,

v.

CYNTHIA BRANN, Commissioner, New York City
Department of Correction; ANTHONY ANNUCCI, Acting
Commissioner, New York State Department of Corrections
and Community Supervision,

Respondents.

Index No. _____

SCID No. _____

**VERIFIED PETITION FOR
WRIT OF HABEAS CORPUS**

Corey Stoughton, an attorney duly admitted to practice law in the State of New York, hereby affirms the following under penalty of perjury:

INTRODUCTION

1. Petitioners are 116 people who, by virtue of their age and/or underlying medical condition, are particularly vulnerable to serious illness or death if infected by COVID-19. This petition seeks their immediate release from jails in New York City on the grounds that continuing to hold them on bail or parole holds constitutes deliberate indifference to the risk of serious medical harm in violation of the Fourteenth Amendment and state constitutional right to due process.

2. In only a few months, 229,289 people worldwide have been diagnosed with COVID-19 and more than 9,324 of those people have died. As of the date of this filing, on a Thursday, there are more than 1,871 confirmed cases of coronavirus within the New York City area, up from 923 on Wednesday, and at least 11 deaths. These numbers are growing rapidly every day. There is no vaccine or cure for COVID-19. No one is immune.

3. COVID-19 is most likely to cause serious illness and death for older adults and those with certain underlying medical conditions. Petitioners all fall into this category of heightened vulnerability.

4. Because risk mitigation is the only known strategy to protect vulnerable groups from COVID-19 and risk mitigation is effectively impossible in jails, including those in New York City, correctional public health experts—including the New York City Board of Correction, the lead doctor of New York’s own correctional health system and several expert witnesses cases around the country—have recommended the release from custody of people most vulnerable to COVID-19. Release is the only effective means to protect the people with the greatest vulnerability to COVID-19 from transmission of the virus and also allows for greater risk mitigation for all people who remain held or working on Rikers Island and other New York City jails.

5. COVID-19 has already reached Rikers Island and is currently spreading, posing an unconscionable and entirely preventable risk of harm to Petitioners. All across New York City, extraordinary and unprecedented measures affecting every aspect of life are being taken in the name of protecting people from this pandemic. New York cannot leave people in jails behind to suffer and die.

PARTIES

6. I am the Attorney in Charge of the Special Litigation Unit of the Legal Aid Society’s Criminal Defense Practice, which is counsel to Petitioners in this matter. I make this application on behalf of the below-named Petitioners.

7. Petitioner Venus Williams is detained in a jail controlled by the New York City Department of Correction. They are 64 years old and suffers from asthma and chronic obstructive pulmonary disease. As a result they are at high risk for severe illness or death if they contract COVID-19.

8. Petitioner Melinda Morales is detained in a jail controlled by the New York City Department of Correction. They are 54 years old and suffer from a heart condition. As a result, they are at high risk for severe illness or death if they contract COVID-19.

9. Petitioner Freddie Johnson is detained in a jail controlled by the New York City Department of Correction. They are 61 years old and diagnosed with asthma and other serious respiratory diseases. As a result, they are at high risk for severe illness or death if they contract COVID-19.

10. Petitioner Tony Roman is detained in a jail controlled by the New York City Department of Correction. They are 76 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

11. Petitioner James King is detained in a jail controlled by the New York City Department of Correction. They are 46 years old and deemed high risk by the Correctional Health Services (“CHS”) because of several severe medical diagnoses. As a result, they are at high risk for severe illness or death if they contract COVID-19.

12. Petitioner Elijah Green is detained in a jail controlled by the New York City Department of Correction. They are 19 years old and suffers from asthma. As a result, they are at high risk for severe illness or death if they contract COVID-19.

13. Petitioner Ricardo Gonzales is detained in a jail controlled by the New York City Department of Correction. They are 45 years old and diagnosed with diabetes. As a result, they are at high risk for severe illness or death if they contract COVID-19.

14. Petitioner Dennis Smalls is detained in a jail controlled by the New York City Department of Correction. They are 55 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

15. Petitioner Vincent Brown is detained in a jail controlled by the New York City Department of Correction. They are years old 56 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

16. Petitioner Lambert Kitching is detained in a jail controlled by the New York City Department of Correction. They are 54 years old. As a result they are at high risk for severe illness or death if they contract COVID-19.

17. Petitioner Thomas Hammond is detained in a jail controlled by the New York City Department of Correction. They are 60 years old. As a result they are at high risk for severe illness or death if they contract COVID-19.

18. Petitioner Gregory Jason is detained in a jail controlled by the New York City Department of Correction. They are 60 years old. As a result they are at high risk for severe illness or death if they contract COVID-19.

19. Petitioner Willie Vasquez is detained in a jail controlled by the New York City Department of Correction. They are 50 years old . As a result they are at high risk for severe illness or death if they contract COVID-19.

20. Petitioner David Russell is detained in a jail controlled by the New York City Department of Correction. They are 55 years old. As a result they are at high risk for severe illness or death if they contract COVID-19.

21. Petitioner Edward Monks is detained in a jail controlled by the New York City Department of Correction. They are 56 years old. As a result they are at high risk for severe illness or death if they contract COVID-19.

22. Petitioner Ramon Lorenzo is detained in a jail controlled by the New York City Department of Correction. They are 53 years old. As a result they are at high risk for severe illness or death if they contract COVID-19.

23. Petitioner Luis Richards is detained in a jail controlled by the New York City Department of Correction. They are 53 years old. As a result they are at high risk for severe illness or death if they contract COVID-19.

24. Petitioner Henry Iszard is detained in a jail controlled by the New York City Department of Correction. They are 64 years old. As a result they are at high risk for severe illness or death if they contract COVID-19.

25. Petitioner Michael Irby is detained in a jail controlled by the New York City Department of Correction. They are 59 years old. As a result they are at high risk for severe illness or death if they contract COVID-19.

26. Petitioner Alson Ray is detained in a jail controlled by the New York City Department of Correction. They are 55 years old. As a result they are at high risk for severe illness or death if they contract COVID-19.

27. Petitioner John Blanding is detained in a jail controlled by the New York City Department of Correction. They are 56 years old. As a result they are at high risk for severe illness or death if they contract COVID-19.

28. Petitioner John Springs is detained in a jail controlled by the New York City Department of Correction. They are 69 years old. As a result they are at high risk for severe illness or death if they contract COVID-19.

29. Petitioner Alan Bell is detained in a jail controlled by the New York City Department of Correction. They suffer from asthma. As a result they are at high risk for severe illness or death if they contract COVID-19.

30. Petitioner Gregory Bynum is detained in a jail controlled by the New York City Department of Correction. They are 60 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

31. Petitioner Thomas Peterson is detained in a jail controlled by the New York City Department of Correction. They are 50 years old. As a result they are at high risk for severe illness or death if they contract COVID-19.

32. Petitioner Hernino Fraticelli is detained in a jail controlled by the New York City Department of Correction. They are 64 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

33. Petitioner Kevin Ingram is detained in a jail controlled by the New York City Department of Correction. They are 54 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

34. Petitioner Michael Hoyt is detained in a jail controlled by the New York City Department of Correction. They are 54 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

35. Petitioner Ronald Chestnut is detained in a jail controlled by the New York City Department of Correction. They are 51 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

36. Petitioner Michael Lopez is detained in a jail controlled by the New York City Department of Correction. They are 51 years old. As a result they are at high risk for severe illness or death if they contract COVID-19.

37. Petitioner Al Smith is detained in a jail controlled by the New York City Department of Correction. They are 58 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

38. Petitioner Herverto Martinez is detained in a jail controlled by the New York City Department of Correction. They are 60 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

39. Petitioner Jerome Thompson is detained in a jail controlled by the New York City Department of Correction. They are 57 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

40. Petitioner Wilson Lee is detained in a jail controlled by the New York City Department of Correction. They are 56 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

41. Petitioner Anthony Brown is detained in a jail controlled by the New York City Department of Correction. They are 55 years old and has asthma. As a result, they are at high risk for severe illness or death if they contract COVID-19.

42. Petitioner Carlos Victor-Sanchez is detained in a jail controlled by the New York City Department of Correction. They are 52 years old and suffers from asthma and heart disease. As a result, they are at high risk for severe illness or death if they contract COVID-19.

43. Petitioner Christopher Greene is detained in a jail controlled by the New York City Department of Correction. They are 58 years old. As a result they are at high risk for severe illness or death if they contract COVID-19.

44. Petitioner James Eleby is detained in a jail controlled by the New York City Department of Correction. They are 52 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

45. Petitioner Deane Lopez is detained in a jail controlled by the New York City Department of Correction. They are 62 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

46. Petitioner Allen Nimmons is detained in a jail controlled by the New York City Department of Correction. They are 55 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

47. Petitioner Jeffrey Harrison, is detained in a jail controlled by the New York City Department of Correction. They are 61 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

48. Petitioner Lisa Davis is detained in a jail controlled by the New York City Department of Correction. They are 58 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

49. Petitioner Joseph Torres is detained in a jail controlled by the New York City Department of Correction. They are 55 years old and suffer from heart disease. As a result, they are at high risk for severe illness or death if they contract COVID-19.

50. Petitioner Hector Castro Diaz is detained in a jail controlled by the New York City Department of Correction. They are 60 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

51. Petitioner Bernard Gardner is detained in a jail controlled by the New York City Department of Correction. They are 51 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

52. Petitioner Gian Verdelli is detained in a jail controlled by the New York City Department of Correction. They are 68 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

53. Petitioner Robert McCoy is detained in a jail controlled by the New York City Department of Correction. They are 57 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

54. Petitioner Ronald Hutt is detained in a jail controlled by the New York City Department of Correction. They are 56 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

55. Petitioner Terhan Bey is detained in a jail controlled by the New York City Department of Correction. They are 55 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

56. Petitioner Melvin Harrell is detained in a jail controlled by the New York City Department of Correction. They are 54 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

57. Petitioner Daniel Figueroa is detained in a jail controlled by the New York City Department of Correction. They are 60 years old and suffers from diabetes. As a result, they are at high risk for severe illness or death if they contract COVID-19.

58. Petitioner Jimmy Jones is detained in a jail controlled by the New York City Department of Correction. They are 66 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

59. Petitioner Davis Willis is detained in a jail controlled by the New York City Department of Correction. They have been diagnosed with severe asthma. As a result, they are at high risk for severe illness or death if they contract COVID-19.

60. Petitioner Stephon Eans is detained in a jail controlled by the New York City Department of Correction. They are 30 years old and suffers from severe asthma. As a result, they are at high risk for severe illness or death if they contract COVID-19.

61. Petitioner Providence E. Hernandez is detained in a jail controlled by the New York City Department of Correction. They are 57 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

62. Petitioner George Paredes is detained in a jail controlled by the New York City Department of Correction. They are 51 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

63. Petitioner Gregory Jones is detained in a jail controlled by the New York City Department of Correction. They are 58 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

64. Petitioner Craig Schumate is detained in a jail controlled by the New York City Department of Correction. They are 51 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

65. Petitioner Anthony Jones is detained in a jail controlled by the New York City Department of Correction. They are 60 years old and suffers from diabetes. As a result, they are at high risk for severe illness or death if they contract COVID-19.

66. Petitioner Eddie Lamar is detained in a jail controlled by the New York City Department of Correction. They are 56 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

67. Petitioner Eric Richardson is detained in a jail controlled by the New York City Department of Correction. They are 52 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

68. Petitioner Erick Alequin is detained in a jail controlled by the New York City Department of Correction. They suffer from asthma. As a result they are at high risk for severe illness or death if they contract COVID-19.

69. Petitioner Leslie Farfan is detained in a jail controlled by the New York City Department of Correction. They suffer from hypertension and are displaying respiratory symptoms. As a result they are at high risk for severe illness or death if they contract COVID-19.

70. Petitioner Hollis Hosear is detained in a jail controlled by the New York City Department of Correction. They are 57 years old. As a result they are at high risk for severe illness or death if they contract COVID-19.

71. Petitioner William Cusberts is detained in a jail controlled by the New York City Department of Correction. They are 58 years old and are diagnosed with asthma and diabetes. As a result, they are at high risk for severe illness or death if they contract COVID-19.

72. Petitioner Joseph Callahan is detained in a jail controlled by the New York City Department of Correction. They are 47 years old and suffer from diabetes. As a result, they are at high risk for severe illness or death if they contract COVID-19.

73. Petitioner Dominick Williams is detained in a jail controlled by the New York City Department of Correction. They suffer from asthma. As a result, they are at high risk for severe illness or death if they contract COVID-19.

74. Petitioner Eleuterio Carmona is detained in a jail controlled by the New York City Department of Correction. They are 62 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

75. Petitioner Edward Byrd is detained in a jail controlled by the New York City Department of Correction. They are 57 years old. As a result they are at high risk for severe illness or death if they contract COVID-19.

76. Petitioner Ralph Torres is detained in a jail controlled by the New York City Department of Correction. They are 50 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

77. Petitioner Kevin Gamble is detained in a jail controlled by the New York City Department of Correction. They are 59 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

78. Petitioner Robert Kellam is detained in a jail controlled by the New York City Department of Correction. They are 58 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

79. Petitioner Guillermo Estrada is detained in a jail controlled by the New York City Department of Correction. They are 54 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

80. Petitioner Junior Wilson is detained in a jail controlled by the New York City Department of Correction. They are 60 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

81. Petitioner Derek Roberson is detained in a jail controlled by the New York City Department of Correction. They are 58 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

82. Petitioner Edward Pemberton is detained in a jail controlled by the New York City Department of Correction. They are 55 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

83. Petitioner Steven Sanders is detained in a jail controlled by the New York City Department of Correction. They are 51 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

84. Petitioner Elieser Flores is detained in a jail controlled by the New York City Department of Correction. They are 50 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

85. Petitioner William Goggins is detained in a jail controlled by the New York City Department of Correction. They are 64 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

86. Petitioner Samuel Sosa is detained in a jail controlled by the New York City Department of Correction. They are 55 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

87. Petitioner Willie Florence is detained in a jail controlled by the New York City Department of Correction. They are 54 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

88. Petitioner George Shaw is detained in a jail controlled by the New York City Department of Correction. They are 55 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

89. Petitioner Sekou Salaam is detained in a jail controlled by the New York City Department of Correction. They are 54 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

90. Petitioner Rigoberto Reyes is detained in a jail controlled by the New York City Department of Correction. They are 58 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

91. Petitioner William Saunders is detained in a jail controlled by the New York City Department of Correction. They are 52 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

92. Petitioner Efren Olivares is detained in a jail controlled by the New York City Department of Correction. They are 56 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

93. Petitioner James Bulwer is detained in a jail controlled by the New York City Department of Correction. They are 59 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

94. Petitioner Charles Jackson is detained in a jail controlled by the New York City Department of Correction. They are 53 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

95. Petitioner Govinda Pyakurel is detained in a jail controlled by the New York City Department of Correction. They are 60 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

96. Petitioner Michael Reid is detained in a jail controlled by the New York City Department of Correction. They are 56 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

97. Petitioner Victor Chapman is detained in a jail controlled by the New York City Department of Correction. They are 55 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

98. Petitioner Kip Wilson is detained in a jail controlled by the New York City Department of Correction. They are 58 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

99. Petitioner Ricky Luckey is detained in a jail controlled by the New York City Department of Correction. They are 62 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

100. Petitioner Luis Gonzalez is detained in a jail controlled by the New York City Department of Correction. They are 52 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

101. Petitioner John Rivera is detained in a jail controlled by the New York City Department of Correction. They are 54 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

102. Petitioner Ronnie Barnes is detained in a jail controlled by the New York City Department of Correction. They are 56 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

103. Petitioner Wayne Davis is detained in a jail controlled by the New York City Department of Correction. They are 65 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

104. Petitioner Michael Virdree is detained in a jail controlled by the New York City Department of Correction. They are 54 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

105. Petitioner James Jersey is detained in a jail controlled by the New York City Department of Correction. They are 58 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

106. Petitioner Keith Garner, Sr., is detained in a jail controlled by the New York City Department of Correction. They are 61 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

107. Petitioner Ramon A. Antigua is detained in a jail controlled by the New York City Department of Correction. They are 52 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

108. Petitioner Andrew Turner is detained in a jail controlled by the New York City Department of Correction. They are 56 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

109. Petitioner John Curtis is detained in a jail controlled by the New York City Department of Correction. They are 56 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

110. Petitioner Anibal Quinones is detained in a jail controlled by the New York City Department of Correction. They are 55 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

111. Petitioner Noel Manaiza is detained in a jail controlled by the New York City Department of Correction. They are 58 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

112. Petitioner Elijah Johnson is detained in a jail controlled by the New York City Department of Correction. They are 57 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

113. Petitioner Sonny Seals is detained in a jail controlled by the New York City Department of Correction. They are 55 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

114. Petitioner Scott Harris is detained in a jail controlled by the New York City Department of Correction. They are 57 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

115. Petitioner Thomas Perez is detained in a jail controlled by the New York City Department of Correction. They are 51 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

116. Petitioner Nelson Correa is detained in a jail controlled by the New York City Department of Correction. They are 58 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

117. Petitioner Victor Duke is detained in a jail controlled by the New York City Department of Correction. They are 54 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

118. Petitioner Anthony Cummings is detained in a jail controlled by the New York City Department of Correction. They are 52 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

119. Petitioner Hector Vasquez is detained in a jail controlled by the New York City Department of Correction. They suffer from asthma. As a result they are at high risk for severe illness or death if they contract COVID-19.

120. Petitioner Eliezer Delacruz is detained in a jail controlled by the New York City Department of Correction. They suffer from asthma. As a result they are at high risk for severe illness or death if they contract COVID-19.

121. Petitioner Leroy Brown is detained in a jail controlled by the New York City Department of Correction. They are 50 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

122. Petitioner Raphael Vega is detained in a jail controlled by the New York City Department of Correction. They are 56 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

123. Petitioner Victor Flood is detained in a jail controlled by the New York City Department of Correction. They are 52 years old. As a result, they are at high risk for severe illness or death if they contract COVID-19.

124. Respondent Cynthia Brann is the Commissioner of the New York City Department of Correction. Respondent is a legal custodian of Petitioners.

125. Respondent Anthony J. Annucci is the Acting Commissioner of the New York State Department of Correction and Community Supervision (“DOCCS”). Respondent is a legal custodian of Petitioners who are detained pursuant to a parole warrant.

JURISDICTION AND VENUE

126. This court has subject matter jurisdiction over this matter under CPLR § 7001.

127. Petitioners have made no prior application for the relief requested herein.

128. Copies of the mandates pertaining to individual Petitioners are not attached hereto due to the emergency nature of this proceeding.

STATEMENT OF FACTS

The COVID-19 Pandemic Presents a Grave Risk of Harm, Including Serious Illness and Death, to People Over Age 50 and Those With Certain Medical Conditions

129. COVID-19 is a coronavirus that has reached pandemic status. As of the afternoon of March 19, 2020, over 229,289 people worldwide have confirmed diagnoses, including over 10,000 people in the United States and 4,152 in New York. Over 9,324 people have died, including at least 149 in the United States and 21 in New York. On the single day of March 18 alone, more than 1,000 new cases were announced in New York State. As of the date of this writing, on a Thursday, there are more than 1,871 confirmed cases of coronavirus within the New York City area, up from 923 on Wednesday, and at least 11 deaths.¹

130. The World Health Organization has declared COVID-19 a pandemic.² On March 7, 2020, the governor of the State of New York issued Executive Order Number 202, declaring a disaster emergency for the entire State of New York.³ Subsequently, the Mayor of New York City declared a State of Emergency for the City.⁴ The President of the United States has now officially declared a national emergency.⁵

131. The transmission of COVID-19 is expected to grow exponentially. Nationally, projections by the Center for Disease Control and Prevention (“CDC”) indicate that over 200 million people in the United States could be infected with COVID-19 over the course of the

Mitch Smith et al., *Coronavirus Map: U.S. Cases Surpass 10,000*, N.Y. TIMES (Mar. 19, 2020, 11:28 AM), <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (updating live; numbers expected to rise)..

² Betsy McKay et al., *Coronavirus Declared Pandemic by World Health Organization*, WALL ST. J. (Mar. 11, 2020, 11:59 PM), <https://www.wsj.com/articles/u-s-coronavirus-cases-top-1-000-11583917794>

³ Jesse McKinley & Edgar Sandoval, *Coronavirus in N.Y.: Cuomo Declares State of Emergency*, N.Y. TIMES, (Mar. 7, 2020), <https://www.nytimes.com/2020/03/07/nyregion/coronavirus-new-york-queens.html>.

⁴ *DeBlasio Declares State of Emergency in N.Y.C., and Large Gatherings Are Banned*. N.Y. TIMES (Mar. 12, 2020), <https://www.nytimes.com/2020/03/12/nyregion/coronavirus-new-york-update.html>.

⁵ Derek Hawkins et al., *Trump Declares Coronavirus Outbreak a National Emergency*, WASH. POST (Mar. 13, 2020, 10:46 AM), <https://www.washingtonpost.com/world/2020/03/13/coronavirus-latest-news/>.

pandemic without effective public health intervention, with as many as 1.5 million deaths in the most severe projections.⁶

132. COVID-19 is a particularly contagious disease. A recent study showed that the virus could survive for up to three hours in the air, four hours on copper, up to twenty-four hours on cardboard, and up to two to three days on plastic and stainless steel.⁷ Indeed, a new study of an early cluster of COVID-19 cases in Wuhan, China revealed the dangers of indirect transmission resulting from infected people contaminating common surfaces—in the study, it was a communal mall bathroom.⁸ New research also shows that controlling the spread of COVID-19 is made even more difficult because of the prominence of asymptomatic transmission—people who are contagious but who exhibit limited or no symptoms, rendering ineffective any screening tools dependent on identifying symptomatic behavior.⁹

133. There is no vaccine for COVID-19. No one is immune.

134. Older adults and those with certain medical conditions face greater chances of serious illness or death from COVID-19.¹⁰

⁶ Chas Danner, *CDC's Worst-Case Coronavirus Model: 214 Million Infected, 1.7 Million Dead*, N.Y. Mag. (Mar. 13, 2020), <https://nymag.com/intelligencer/2020/03/cdcs-worst-case-coronavirus-model-210m-infected-1-7m-dead.html>.

⁷ *Novel Coronavirus Can Live on Some Surfaces for Up to 3 Days, New Tests Show*. TIME (<https://time.com/5801278/coronavirus-stays-on-surfaces-days-tests/>) (last visited Mar. 19, 2020).

⁸ Cai J, Sun W, Huang J, Gamber M, Wu J, He G. Indirect virus transmission in cluster of COVID-19 cases, Wenzhou, China, 2020. *Emerg Infect Dis.* 2020 Jun. (<https://doi.org/10.3201/eid2606.200412>) (last visited Mar. 18, 2020).

⁹ *Coronavirus: Are People Who Are Asymptomatic Still Capable of Spreading COVID-19?* Independent. Available at <https://www.independent.co.uk/life-style/health-and-families/coronavirus-symptoms-asymptomatic-covid-19-spread-virus-a9403311.html> (last visited Mar. 18, 2020).

¹⁰Medical information in this and the petition paragraphs that follow are drawn from the expert testimony of two medical professionals filed in a recent filed federal case in Washington State, as well the website of the Harvard Medical School. See Expert Declaration of Dr. Marc Stern: <https://www.aclu.org/legal-document/dawson-v-asher-expert-declaration-dr-marc-stern>; Expert Declaration of Dr. Robert Greifinger: <https://www.aclu.org/legal-document/dawson-v-asher-expert-declaration-dr-robert-greifinger>; Expert Declaration of Dr. Jonathan Golob <https://www.aclu.org/legal-document/dawson-v-asher-expert-declaration-dr-jonathan-golob?redirect=dawson-v-asher-expert-declaration-dr-jonathan-golob>; HARVARD MEDICAL SCHOOL, CORONAVIRUS RESOURCE CENTER, *As coronavirus spreads, many questions and some answers*, <https://www.health.harvard.edu/diseases-and-conditions/coronavirus-resource-center>, (last visited Mar. 19, 2020).

135. Certain underlying medical conditions increase the risk of serious COVID-19 disease for people of any age – including lung disease, heart disease, chronic liver or kidney disease (including hepatitis and dialysis patients), diabetes, epilepsy, hypertension, compromised immune systems (such as from cancer, HIV, or autoimmune disease), blood disorders (including sickle cell disease), inherited metabolic disorders, stroke, developmental delay, and pregnancy.

136. For people over the age of 50 or with medical conditions that increase the risk of serious COVID-19 infection, symptoms such as fever, coughing and shortness of breath can be especially severe.¹¹

137. COVID-19 can cause severe damage to lung tissue, sometimes leading to a permanent loss of respiratory capacity, and can damage tissues in other vital organs including the heart and liver. Patients with serious cases of COVID-19 require advanced medical support, including positive pressure ventilation and extracorporeal mechanical oxygenation in intensive care. Patients who do not die from serious cases of COVID-19 may face prolonged recovery periods, including extensive rehabilitation from neurological damage and loss of respiratory capacity.

138. COVID-19 may also target the heart muscle, causing a medical condition known as myocarditis, or inflammation of the heart muscle. Myocarditis can affect the heart muscle and electrical system, reducing the heart’s ability to pump. This reduction can lead to rapid or abnormal heart rhythms in the short term, and long-term heart failure that limits exercise tolerance and ability to work.

¹¹ *Id.*

139. Emerging evidence suggests that COVID-19 can also trigger an over-response of the immune system, further damaging tissues in a cytokine release syndrome that can result in widespread damage to other organs, including permanent injury to the kidneys and neurologic injury.

140. These complications can manifest at an alarming pace. Patients can show the first symptoms of infection in as little as two days after exposure, and their condition can seriously deteriorate in as little as five days or sooner.

141. Most people in higher risk categories who develop serious disease will need advanced supportive care requiring highly specialized equipment that is in limited supply, and an entire team of care providers, including 1:1 or 1:2 nurse to patient ratios, respiratory therapists, and intensive care physicians. This level of support can quickly exceed local health care resources. Patients in high-risk categories should expect a prolonged recovery, including the need for extensive rehabilitation for profound reconditioning, loss of digits, neurologic damage, and the loss of respiratory capacity.

142. The need for care, including intensive care, and the likelihood of death, is much higher from COVID-19 than from influenza. According to recent estimates, the fatality rate of people infected with COVID-19 is about ten times higher than a severe seasonal influenza, even in advanced countries with highly effective health care systems. According to preliminary data from China, 20 percent of people in high-risk categories who contracted COVID-19 there died.¹²

¹² *Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19)*, World Health Organization (Feb. 28, 2020), at 12, <https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf> (finding fatality rates for patients with COVID-19 and co-morbid conditions to be: “13.2% for those with cardiovascular disease, 9.2% for diabetes, 8.4% for hypertension, 8.0% for chronic respiratory disease, and 7.6% for cancer”); Wei-jie Guan et al., *Comorbidity and its impact on 1,590 patients with COVID-19 in China: A Nationwide Analysis*, medRxiv (Feb. 27, 2020), at 5, <https://www.medrxiv.org/content/10.1101/2020.02.25.20027664v1.full.pdf> (finding that even after adjusting for age and smoking status, patients with COVID-19 and comorbidities of chronic obstructive pulmonary disease, diabetes,

143. There is no cure for COVID-19 nor is there any known medication to prevent or treat infection.

144. The only known methods to reduce the risk for vulnerable people of serious illness or death from COVID-19 are to prevent infection in the first place through social distancing and improved hygiene, including washing hand frequently with soap and water.

People Imprisoned in New York City Jails Face an Elevated Risk of COVID-19 Transmission

145. COVID-19 has already reached Rikers Island. As of mid-day on March 19, 2020, at least one incarcerated person has tested positive for the virus.¹³ Later in the day on March 19, Legal Aid staff learned of reports of additional infections, indicating rapid spread has already progressed.

146. In addition, one corrections officer has tested positive and a DOC investigator working on Rikers Island has died of the virus.¹⁴ The officer worked at the security gate of a Rikers Island facility, a post which requires searching and screening very large numbers of people entering and exiting the facility.¹⁵ The other staff member, a 56-year-old Investigation Division

hypertension, and malignancy were 1.79 times more likely to be admitted to an ICU, require invasive ventilation, or die, the number for two comorbidities was 2.59); Fei Zhou et al., *Clinical course and risk factors for mortality of adult inpatients with COVID-19 in Wuhan, China: a retrospective cohort study*, *Lancet* (March 11, 2020), tb. 1, [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)30566-3/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30566-3/fulltext) (finding that among hospital patients, who tended to be older, of those who had COVID-19 and died, 48% had hypertension, 31% had diabetes, and 24% had coronary heart disease).

¹³ Chelsia Rose Marcus, *Rikers Island inmate has contracted coronavirus: officials*, N.Y. DAILY NEWS (Mar. 18, 2020), <https://www.nydailynews.com/coronavirus/ny-coronavirus-rikers-island-inmate-tests-positive-20200318-gf3r7q4cefaxzmqmwrnuevzz3y-story.html>.

¹⁴ Sydney Pereira, *[UPDATE] Inmate and Correction Officer on Rikers Island Tests Positive for Coronavirus as Calls To Release Inmates Intensify*, GOTHAMIST (Mar. 18, 2020, 8:15 PM), <https://gothamist.com/news/correction-officer-rikers-island-tests-positive-coronavirus-calls-release-inmates-intensify>.

¹⁵ *Rikers Island inmate has contracted coronavirus, supra*.

staffer, whose position entailed interviewing detainees in several facilities as part of investigations, died on March 15, 2020.¹⁶ He reportedly had underlying health conditions, just as Petitioners do.¹⁷

147. The Legal Aid Society continues to receive daily reports of symptomatic, suspected COVID-19 positive individuals in the borough facilities and throughout Rikers Island.

148. Infectious diseases that are communicated by air or touch are more likely to spread in congregate environments such as jails – places where people live, eat, and sleep in close proximity.

149. The highest known person-to-person transmission rate for COVID-19 to date took place in a skilled nursing home facility in Kirkland, Washington, and on afflicted cruise ships in Japan and off the coast of California.

150. The conditions of New York City jails pose a higher risk of the spread of COVID-19 than in non-carceral locations like a nursing home or cruise ship. Jails have a greater risk because of closer quarters, the proportion of vulnerable people detained, and scant medical care resources.

151. Severe outbreaks of contagious illness regularly occur in jails. For example, during the H1N1 epidemic in 2009, many jails and prisons saw a particularly high number of cases.¹⁸ H1N1 is far less contagious than COVID-19. Not surprisingly, Chinese prison officials report that over five-hundred (500) COVID-19 cases in the current outbreak stemmed from the Hubei

¹⁶ Chelsia Rose Marcius, *Coronavirus kills NYC Correction Department official*, N.Y. DAILY NEWS (Mar. 18, 2020) <https://www.nydailynews.com/coronavirus/ny-coronavirus-department-correction-employee-dies-from-coronavirus-20200316-akeai6gop5alledhzhi7u3pivm-story.html>.

¹⁷ *Id.*

¹⁸ Nicole Westman, The Verge, *Prisons and jails are vulnerable to COVID-19 outbreaks*, available at <https://www.theverge.com/2020/3/7/21167807/coronavirus-prison-jail-health-outbreak-covid-19-flu-soap> (Mar. 12 2020). *See also* David M. Reutter, Swine Flu Widespread in Prisons and Jails, but Deaths are Few, PRISON LEGAL NEWS, (Feb. 15, 2020) at <https://www.prisonlegalnews.org/news/2010/feb/15/swine-flu-widespread-in-prisons-and-jails-butdeaths-are-few/>.

province prisons.¹⁹ The rate of incarceration in China is far lower than in the United States, suggesting the problem here will be much worse. Experts predict that “[a]ll prisons and jails should anticipate that the coronavirus will enter their facility[.]”²⁰

152. In New York City jails, jail design and operations make it impossible for Petitioners to engage in the necessary social distancing required to mitigate the risk of transmission. Many people live in dormitory-like sleeping arrangements. They have limited freedom of movement and no control over the movements of others with whom they are required to congregate on a daily basis. They are unable to maintain anything close to the recommended distance of 6 feet from others.

153. Petitioners also cannot maintain adequate levels of preventive hygiene. They are required to share or touch objects used by others. Toilets, sinks and showers are shared, without disinfection between each use.

154. Food preparation and service is communal, served by other incarcerated workers drawn from many different housing areas within the jail, with little opportunity for surface disinfection.

155. There have been shortages of basic cleaning supplies to disinfect housing areas in New York City jails, including housing areas where people with respiratory illnesses are currently confined.

156. DOC cleaning protocols for common spaces are often not followed.

¹⁹ Evelyn Cheng and Huileng Tan, China Says More than 500 Cases of the New Coronavirus Stemmed from Prisons, CNBC, Feb. 20, 2020, available at <https://www.cnbc.com/2020/02/21/coronavirus-china-says-two-prisons-reported-nearly-250-cases.html>.

²⁰ *Id.* (quoting Tyler Winkelman, co-director of the Health, Homelessness, and Criminal Justice Lab at the Hennepin Healthcare Research Institute in Minneapolis).

157. Petitioners lack ready access to soap and water for washing hands. If a sink in a housing area is broken, they do not have a choice to walk to an area with a working sink. Soap and paper towels are not provided by the jail. Often, the only means to access soap is by purchasing it in commissary—which is not an option for many detainees who lack access to funds. There is no recourse if another person takes a vulnerable person’s bar of soap.

158. Hand sanitizer capable of killing COVID-19 contains alcohol, which has been treated as contraband in jails.

159. New York City jails lack adequate infrastructure to address the spread of infectious disease and the treatment of people most vulnerable to illness.

160. Neither DOC nor Correctional Health Services (“CHS”), the medical services provider in New York City jails, has implemented protocols sufficient to screen, detect or identify incarcerated people or staff who have been infected.

161. On March 10, 2020, DOC officials testified at a Board of Correction meeting that the Communicable Disease Unit (“CDU”) has only 88 respiratory isolation beds available for people who become infected. Officials did not identify how many of these beds are already occupied by other ill people or what actions would be taken by the Department in the event that CDU and hospital ward capacity is exhausted.²¹

162. The procedures outlined in the DOC’s “COVID19 Preparation & Action Plan” issued on March 5, 2020 are not sufficient to mitigate the risk of serious harm. According to this plan, newly admitted detainees will only be separated from other detainees if they exhibit “flu-like” symptoms upon admission.²² This initial screening process overlooks the fact that COVID-

²¹ Testimony of Dept. of Corr. Official, N.Y.C. Bd. of Corr. Mtg., Mar. 10, 2020 at 17:40, <https://www1.nyc.gov/site/boc/meetings/mar-10-2020.page>.

²² See N.Y.C. Dept. of Corr., *COVID19 Preparaton & Action Plan*, <https://www1.nyc.gov/site/doc/media/coronavirus-news.page> (last visited Mar. 19, 2020).

19 may present with a slower onset of symptoms than the flu — meaning that many who are infected with COVID-19 do not show signs of illness.²³ The dangers of asymptomatic transmission continue within DOC facilities. DOC and CHS have revealed only symptom-reactive policies—that staff will be sent home and incarcerated people will be separated and treated *if they display symptoms*²⁴—which are ineffective to stop the rampant asymptomatic transmission of the disease.²⁵

163. DOC plans to warehouse all of its “sick” detainees together, in communal living spaces, where they will “sleep head to toe thereby increasing breathable space between inmates,”²⁶ a measure that will do little to avoid transmission among detainees.

164. Even if all of these problems could be resolved, however, they would not sufficiently address the risk of serious medical harm to Petitioners. As Dr. Homer Venters, former chief medical officer of New York City jails, recently said, “[i]n ordinary times, crowded jails overlook prisoners’ medical problems and struggle to separate them based on their security classification...[i]f jails have to add quarantines and sequestration of high-risk prisoners to the mix...they will find managing a COVID-19 outbreak ‘*simply almost impossible.*’”²⁷

²³ CDC, *Coronavirus Disease 2019 (COVID-19) Symptoms*, <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html> (last visited Mar. 19, 2020); *see also* Yale New Haven Health, *Coronavirus (COVID-19) vs. Influenza (Flu)*, <https://www.ynhhs.org/patient-care/urgent-care/flu-or-coronavirus> (last visited Mar. 19, 2020).

²⁴ New York City Department of Correction: COVID19 Preparation & Action Plan, *available at* <https://www1.nyc.gov/site/doc/media/coronavirus-news.page> (last visited Mar. 18, 2020).

²⁵ *Coronavirus: Are People Who Are Asymptomatic Still Capable of Spreading COVID-19?* Independent. Available at <https://www.independent.co.uk/life-style/health-and-families/coronavirus-symptoms-asymptomatic-covid-19-spread-virus-a9403311.html>.

²⁶ *Id.*

²⁷ Madison Pauly, *To Arrest the Spread of Coronavirus, Arrest Fewer People*, MOTHER JONES (Mar. 12, 2020), https://www.motherjones.com/crime-justice/2020/03/coronavirus-jails-bail-reform-arrests/?utm_source=The+Appeal&utm_campaign=0a31827f48-EMAIL_CAMPAIGN_2018_08_09_04_14_COPY_01&utm_medium=email&utm_term=0_72df992d84-0a31827f48-58432543.

165. Likewise, Correctional Health Services (“CHS”), which administers medical care in New York City jails, has acknowledged their limited capacity to manage the risk of the virus and has requested that courts reconsider the necessity of pretrial detention for high risk patients until the current state of emergency is resolved.

Release Is Required to Address the Risk of Serious Medical Harm

166. Because risk mitigation is the only known strategy to protect vulnerable groups from COVID-19, correctional public health experts, including the New York City Board of Correction, have recommended the release from custody of people most vulnerable to COVID-19. On March 17, 2020, they called on New York City to “immediately remove from jail all people at higher risk from COVID-19 infection” and to “drastically reduce the number of people in jail right now and limit new admissions to exceptional circumstances.”²⁸ The Board reasons that “[t]he City’s jails have particular challenges to preventing disease transmission on a normal day and even more so during a public health crisis.”²⁹ Accordingly, the Board recommends that DOC prioritize the release of “[p]eople who are over 50; [and] [p]eople who have underlying health conditions, including lung disease, heart disease, diabetes, cancer, or a weakened immune system[.]”³⁰

167. Ross McDonald, the Chief Medical Officer of CHS, publicly called for the release from Rikers Island of “as many [people] as possible” on Twitter on March 18, 2020.³¹

²⁸ Press Release, N.Y.C. Bd. of Corr., New York City Board of Correction Calls for City to Begin Releasing People from Jail as Part of Public Health Response to COVID-19 (Mar. 17, 2020), <https://www1.nyc.gov/assets/boc/downloads/pdf/News/2020.03.17%20-%20Board%20of%20Correction%20Statement%20re%20Release.pdf> .

²⁹ *Id.*

³⁰ *Id.*

³¹ <https://twitter.com/RossMacDonaldMD/status/1240455796946800641>



Ross MacDonald
@RossMacDonaldMD

A message from the Chief Physician of Rikers Island for the judges and prosecutors of New York: We who care for those you detain noticed how swiftly you closed your courts in response to [#COVID19](#) 1/x

9:51 PM · Mar 18, 2020 · [Twitter for iPhone](#)

5.7K Retweets 16.8K Likes



Ross MacDonald @RossMacDonaldMD · 15h

Replying to @RossMacDonaldMD

This was fundamentally an act of social distancing, a sound strategy in public health. But the luxury that allows you to protect yourselves, carries with it an obligation to those you detain. 2/x

3

475

4.1K



Ross MacDonald @RossMacDonaldMD · 15h

You must not leave them in harm's way 3/x

2

341

3.6K



Ross MacDonald @RossMacDonaldMD · 15h

To be clear, the public servants who care for those in your jails have been planning for this storm for weeks and months. We will muster every tool of public health, science and medicine to try to keep our patients safe. We will apply every novel treatment and scarce test. 4/x

3

349

3.5K



Ross MacDonald @RossMacDonaldMD · 15h

We will put ourselves at personal risk and ask little in return. But we cannot change the fundamental nature of jail. We cannot socially distance dozens of elderly men living in a dorm, sharing a bathroom. Think of a cruise ship recklessly boarding more passengers each day. 5/x

4

547

3.8K



Ross MacDonald @RossMacDonaldMD · 15h

A storm is coming and I know what I'll be doing when it claims my first patient. What will you be doing? What will you have done? We have told you who is at risk. Please let as many out as you possibly can. end.

37

947

6.1K



Document received by the CA Supreme Court.

168. Likewise, the District Attorneys of New York and Kings County have endorsed a plan to identify and release people who are “elderly” or other “[p]opulations that the CDC has classified as vulnerable (those with asthma, cancer, heart disease, lung disease, and diabetes).”³²

169. Courts and public officials in other jurisdictions, including in Los Angeles, California and parts of Ohio and Texas, have already responded by taking steps to facilitate the release of elderly and sick prisoners, and to reduce jail populations by refusing the admission to jails of individuals arrested on certain charges.³³ In Iran, one of the first countries to see the outbreak of COVID-19, 85,000 inmates were temporarily released back to their communities amid virus concerns.³⁴

170. In a recent court filing seeking the release of federal immigration detainees, Dr. Marc Stern, a correctional health expert, has concluded that “[f]or detainees who are at high risk of serious illness or death should they contract the COVID-19 virus, release from detention is a critically important way to meaningfully mitigate that risk.” For that reason, Dr. Stern has recommended the “release of eligible individuals from detention, with priority given to the elderly

³² Joint Statement from Elected Prosecutors on COVID-19 and Addressing the Rights and Needs of those in Custody (Mar. 18, 2020), <https://fairandjustprosecution.org/wp-content/uploads/2020/03/Coronavirus-Sign-On-Letter.pdf>.

³³ See, e.g., Alene Tchekmedyan et al, *L.A. County releasing some inmates from jail to combat coronavirus*, L.A. Times, (Mar. 16, 2020, 7:25 PM), <https://www.latimes.com/california/story/2020-03-16/la-jail-population-arrests-down-amid-coronavirus>; Cory Shaffer, *Cuyahoga County official will hold mass plea, bond hearings to reduce jail population over coronavirus concerns*, CLEVELAND.COM (Mar. 12, 2020), <https://www.cleveland.com/court-justice/2020/03/cuyahoga-county-officials-will-hold-mass-plea-hearings-to-reduce-jail-population-over-coronavirus-concerns.html>); WKBN Staff, *Local county jails making changes due to coronavirus outbreak*, WKBN (Mar. 12, 2020) (“The Mahoning County [Ohio] Sheriff’s Office is refusing all non-violent misdemeanor arrests at the county jail”), <https://www.wkbn.com/news/coronavirus/mahoning-county-jail-refusing-some-inmates-due-to-coronavirus-outbreak/>; see also Charles Scudder, *Facing coronavirus concerns, Collin County [Texas] Sheriff asks police not to bring petty criminals to jail*, DALLAS MORNING NEWS (Mar. 12, 2020 5:57 PM), <https://www.dallasnews.com/news/public-health/2020/03/12/facing-coronavirus-concerns-collin-county-sheriff-asks-police-not-to-bring-petty-criminals-to-jail/>.

³⁴ *Hard-hit Iran frees more prisoners amid coronavirus outbreak*, AL JAZEERA (Mar. 17, 2020), <https://www.aljazeera.com/news/2020/03/hard-hit-iran-frees-prisoners-coronavirus-outbreak-200317110516495.html>.

and those with underlying medical conditions most vulnerable to serious illness or death if infected with COVID-19.”³⁵

171. Another correctional health expert in that same court case, Dr. Robert Greifinger, concluded that “even with the best-laid plans to address the spread of COVID-19 in detention facilities, the release of high-risk individuals is a key part of a risk mitigation strategy.” Accordingly, in his opinion, “the public health recommendation is to release high-risk people from detention, given the heightened risks to their health and safety, especially given the lack of a viable vaccine for prevention or effective treatment at this stage.”³⁶

172. Release protects the people with the greatest vulnerability to COVID-19 from transmission of the virus and also allows for greater risk mitigation for all people held or working in prisons and jails.

173. Release of the most vulnerable people also reduces the burden on New York’s limited health care infrastructure, as it lessens the likelihood that an overwhelming number of people will become seriously ill from COVID-19 at the same time.

Failure to Release Petitioners Constitutes Deliberate Indifference to Serious Medical Harm

174. Continuing to incarcerate people who have been deemed by the CDC to be especially vulnerable to a deadly pandemic, in conditions where taking the only known steps to prevent transmission are virtually impossible, constitutes deliberate indifference to serious medical harm in violation of the United States and New York State constitutions.

175. The Due Process clause of the Fourteenth Amendment proscribes deliberate indifference to the serious medical needs of people held in pre-trial confinement. *Darnell v.*

³⁵Decl. of Dr. Marc Stern ¶¶ 9, 11, *Dawson v. Asher*, (No. 2:20-CV-409-JLR-MAT) (Mar. 16, 2020), <https://www.aclu.org/legal-document/dawson-v-asher-expert-declaration-dr-marc-stern>.

³⁶ Decl. of Dr. Robert Greifinger ¶ 13, *Dawson v. Asher*, (No. 2:20-CV-409-JLR-MAT) (Mar. 16, 2020), <https://www.aclu.org/legal-document/dawson-v-asher-expert-declaration-dr-robert-greifinger>

Pineiro, 849 F.3d 17, 29 (2d Cir. 2017). To establish a federal constitutional claim, Petitioners must prove that Respondents (1) acted intentionally to impose the alleged condition, or recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though (2) they knew, or should have known, that the condition posed an excessive risk to health or safety. *Id.* at 35. The same standard applies to pre-trial detainees held on bail and those held on parole warrants. *Benjamin v. Malcolm*, 646 F. Supp. 1550, 1556 (S.D.N.Y. 1986) (“[A]lleged parole violators ought not to be treated differently from other detainees, since the charges of parole violation standing against them are unproven, and in many instances, involve the same charges as those for which they are substantively detained.”); *Hamilton v. Lyons*, 74 F.3d 99, 106 (5th Cir. 1996) (“[We] apply *Bell*’s standard to detained parolees only to the extent that we recognize that a parolee arrested for a subsequent crime has a due process right to be free from punishment for the subsequent crime until convicted of the subsequent crime.”).

176. There is an even stronger due process right to be free from unconstitutional conditions of confinement under the New York State Constitution. In *Cooper v. Morin*, 49 N.Y.2d 69, 79 (1979), the Court of Appeals concluded that the state due process clause accords even greater protection for pretrial detainees than the federal constitution, holding that “what is required is a balancing of the harm to the individual resulting from the condition imposed against the benefit sought by the government through its enforcement.” For the government to prevail, it must prove a “compelling governmental necessity” for any restrictions on pretrial detainees’ liberty interests. *People ex rel. Schipski v. Flood*, 88 A.D.2d 197 (2nd Dep’t 1982). This is an “exacting standard.” *Id.* The state’s interests are limited to those arising from the “only legitimate purpose for pretrial detention . . . to assure the presence of the detainee for trial.” *Id.* at 81; *see also Schipski*, 88 A.D.2d at 199-200 (holding county jail’s blanket policy of 22-hour lock-in for a certain category of pretrial

detainees violates the state’s due process guarantee); *Powlowski v. Wullich*, 102 A.D.2d 575, 587 (1984) (holding that because a jail’s practice of depriving pretrial detainees of recreation and exercise “violates the federal standard, it, a fortiori, must fail the more stringent standard balancing test prescribed for violations of our state due process clause”).

177. The U.S. Supreme Court and courts throughout New York have recognized that the risk of contracting a communicable disease constitutes an “unsafe, life-threatening condition” that threatens “reasonable safety.” *Helling v. McKinney*, 509 U.S. 25, 33 (1993). *See also Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) (“[C]orrectional officials have an affirmative obligation to protect [forcibly confined] inmates from infectious disease”); *Narvaez v. City of New York*, No. 16-CV-1980 (GBD), 2017 WL 1535386, at *9 (S.D.N.Y. Apr. 17, 2017) (denying “motion to dismiss Plaintiff’s claim that the City of New York violated Plaintiff’s rights under the Due Process Clause by repeatedly deciding to continue housing him with inmates with active-TB” during his pretrial detention); *Bolton v. Goord*, 992 F. Supp. 604, 628 (S.D.N.Y. 1998) (acknowledging that prisoner could state claim under § 1983 for confinement in same cell as inmate with serious contagious disease).

178. Respondents are well aware of the extraordinary risk COVID-19 poses to people in New York City jails. As pleaded above, they have alerted to this risk by the Board of Correction, their own correctional health service, and at least two of New York’s elected District Attorneys.

179. On March 13, 2020, the Legal Aid Society sent a letter to Respondent the New York City Department of Correction (“DOC”) noting multiple complaints from incarcerated

clients about the lack of basic sanitation raising concerns about the ability to manage the risk of COVID-19 in New York City jails.³⁷

180. Throughout the week of March 15-19, 2020, attorneys in the Legal Aid Society's Parole Revocation Defense Unit have sent lists of medically vulnerable people held on parole warrants, including several of the Petitioners, to Respondent Department of Correction and Community Supervision ("DOCCS"), asking for their urgent release.

181. Numerous media outlets have covered these and other calls to action.³⁸

182. Whatever steps Respondents have taken to manage the risk of COVID-19 will fail because, as pleaded above, Respondents are not capable of managing that risk in a jail environment.

183. Respondents' intentional failure to release Petitioners while actually aware of the substantial risk of COVID-19 plainly constitutes deliberate indifference.

184. The affirmative obligation to protect against infectious disease empowers Courts to provide remedies designed to prevent imminent harm to future health. *Helling*, 509 U.S. at 33 ("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."); *Sanchez v. State of New York*, 99 N.Y.2d 247, 254 (2002) (recognizing that it is "duty of the State, as [petitioner's] custodian, to safeguard and protect him from the harms it should reasonably foresee based on its knowledge derived from operation of a maximum security prison."). *Jabbar v. Fischer*, 683 F.3d

³⁷ Letter from Justine Luongo, Attorney-in-Charge, Legal Aid Society Criminal Defense Practice, to Commissioner Cynthia Brann, N.Y.C. Department of Corrections, and Elizabeth Glazer, Mayor's Office of Criminal Justice (Mar. 13, 2020), <https://legalaidnyc.org/wp-content/uploads/2020/03/LAS-Letter-to-NYC-re-COVID-19-Preparedness-in-City-Jails.pdf>.

³⁸ See, e.g., Chelsia Rose Marcius, *Coronavirus prompts Legal Aid, Manhattan DA, to call for release of state parolees from city jails*, N.Y. DAILY NEWS (Mar, 17, 2020) <https://www.nydailynews.com/coronavirus/ny-coronavirus-nyc-rikers-island-parole-correction-department-20200317-flg4paly5nesddfbtkone6hki-story.html>; see also *supra* notes **Error! Bookmark not defined.**-**Error! Bookmark not defined.**, **Error! Bookmark not defined.**, **Error! Bookmark not defined.**.

54, 57 (2d Cir. 2012) (“We have held that prisoners may not be deprived of their basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—and they may not be exposed to conditions that pose an unreasonable risk of serious damage to [their] future health.”) (citation and internal quotation marks omitted)

185. Immediate release pursuant to a writ of habeas corpus is available to address constitutional violations arising from circumstances or conditions of confinement. *People ex rel. Brown v. Johnston*, 9 N.Y.2d 482, 485 (1961) (habeas petition may be used to address "restraint in excess of that permitted by...constitutional guarantees); *Kaufman v. Henderson*, 64 A.D.2d 849, 850 (4th Dep’t 1978) (“[W]hen appellant claims that he has been deprived of a fundamental constitutional right, habeas corpus is an appropriate remedy to challenge his imprisonment.”). A person is “not to be divested of all rights and unalterably abandoned and forgotten by the remainder of society” by virtue of incarceration. *Brown*, 9 N.Y.2d at 485. Hence, the “right to detain a prisoner is entitled to no greater application than its correlative duty to protect him from unlawful and onerous treatment[,] mental or physical.” *Id.* Thus, courts have addressed whether the failure to address medical needs has risen to the level of a constitutional violation, requiring immediate release. See, *e.g.*, *People ex rel. Kalikow on Behalf of Rosario v. Scully*, 198 A.D.2d 250, 250–51 (2d Dep’t 1993) (habeas petition addressing whether failure to provide adequate medical care constituted cruel and unusual punishment or deliberate indifference).

186. The Court of Appeals has explained that the State has a duty “to protect [incarcerated people] from unlawful and onerous treatment, mental or physical.” *Id.* at 485 (citations omitted). Indeed, habeas relief is the *only* remedy available in such circumstances. *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973).

187. While there is limited precedent on this issue, New York’s habeas jurisprudence in general has long contemplated the possibility that habeas claims for release based on conditions could be entertained *if* a petitioner could establish that the appropriate remedy was release. *See People ex rel. Sandson v Duncan*, 306 A.D.2d 716, 716–17 (3d Dept. 2003) (upholding denial of the writ because, “[w]hile success on the instant motion might entitle petitioner to the medication he seeks, it would not excuse him from serving the remainder of his sentence” and reasoning that “[h]abeas corpus will be granted only in cases where success would entitle the petitioner to immediate release”); *People ex rel. Barnes v. Allard*, 807 N.Y.S.2d 688, 689 (3d Dept. 2006) (“As for petitioner’s complaint regarding the correctional facility’s alleged deliberate indifference to his medical needs, . . . it would not entitle him to immediate release, thus making habeas corpus relief unavailable”).

Respondents Have Authority to Release Petitioners

188. Petitioners have not been committed and are not detained by virtue of any judgment, decree, final order or process of mandate issued by a court or judge of the United States in a case where such court or judge has exclusive jurisdiction to order him released.

189. Petitioners held on parole warrants may be released by Respondent Annucci without prejudice to later refiling of parole violation charges after the threat of COVID-19 has abated, pursuant to 9 NYCRR §8004.3(e)(i).

190. Petitioners are not detained by virtue of any final judgment or decree of a competent tribunal or civil or criminal jurisdiction. Petitioners have no other holds.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that this Court issue a writ of habeas corpus and order Petitioners' immediate release, with appropriate precautionary public health measures, on the ground that their continued detention violates the Due Process Clause of the United States and New York State constitutions.

Dated: March 19, 2020
New York, New York

Respectfully Submitted,



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Corey Stoughton an attorney admitted to practice law in the State of New York, states that she has read the foregoing petition and that same is true to her own knowledge, except for those portions stated on information and belief, for which citations are provided.

Dated: March 19, 2020
New York, NEW YORK

A handwritten signature in black ink, appearing to read "Corey Stoughton", is centered on the page. The signature is written in a cursive style with a long, sweeping tail.

Corey Stoughton

Document received by the CA Supreme Court.

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DATE FILED: 3/26/2020

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
VASIF “VINCENT” BASANK; FREDDY
BARRERA CARRERRO; MANUEL BENITEZ
PINEDA; MIGUEL ANGEL HERNANDEZ
BALBUENA; LATOYA LEGALL; CARLOS
MARTINEZ; ESTANLIG MAZARIEGOS;
MANUEL MENENDEZ; ANTAR ANDRES
PENA; and ISIDRO PICAZO NICOLAS,

Petitioner,

-against-

THOMAS DECKER, in his official capacity as
Director of the New York Field Office of U.S.
Immigrations & Customs Enforcement; and
CHAD WOLF, in his official capacity as Acting
Secretary, U.S. Department of Homeland
Security,

Respondents.

ANALISA TORRES, District Judge:

20 Civ. 2518 (AT)

**MEMORANDUM
AND ORDER**

Petitioners, Vasif “Vincent” Basank, Freddy Barrera Carrerro, Manuel Benitez Pineda, Miguel Angel Hernandez Balbuena; Latoya Legall, Carlos Martinez, Estanlig Mazariegos, Manuel Menendez, Antar Andres Pena, and Isidro Picazo Nicolas, are currently detained by Immigration and Customs Enforcement (“ICE”) in county jails where cases of COVID-19 have been identified. Petition ¶ 1, ECF No. 9.

Last night after 11:00 p.m., Petitioners filed an amended petition for a writ of habeas corpus under 28 U.S.C. § 2241, requesting release from ICE custody because of the public health crisis posed by COVID-19. *See* Petition. Petitioners also submitted an application for a temporary restraining order (“TRO”) pursuant to Rule 65 of the Federal Rules of Civil Procedure, seeking an order (1) releasing them on their own recognizance, subject to reasonable and appropriate conditions, and (2) restraining Respondents, Thomas Decker, in his official capacity

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as Director of the New York Field Office of ICE, and Chad Wolf, in his official capacity as Acting Secretary of the U.S. Department of Homeland Security, from arresting Petitioners for civil immigration detention purposes during the pendency of their immigration proceedings. TRO at 1, ECF No. 6.

For the reasons stated below, the TRO is GRANTED, and (1) Respondents, and the Hudson, Bergen, and Essex County Correctional Facilities, are ORDERED to **immediately** release Petitioners today on their own recognizance, and (2) Respondents are RESTRAINED from arresting Petitioners for civil immigration detention purposes during the pendency of their immigration proceedings.

BACKGROUND

Petitioners were detained by ICE in connection with removal proceedings pending at the Varick Street Immigration Court. They are housed in New Jersey county jails where either detainees or staff have tested positive for COVID-19. TRO at 3–4. Specifically, Basank, Benitez Pineda, and Mazariegos are detained at the Hudson County Correctional Facility (“Hudson County Jail”). Petition ¶¶ 5, 7, 11. Barrera Carrerro, Hernandez Balbuena, Legall, Martinez, and Menendez are detained at the Bergen County Correctional Facility (“Bergen County Jail”). *Id.* ¶¶ 6, 8, 9, 10, 12. Pena and Picazo Nicolas are detained at the Essex County Correctional Facility (“Essex County Jail”). *Id.* ¶¶ 13–14.¹

Each Petitioner suffers from chronic medical conditions, and faces an imminent risk of death or serious injury in immigration detention if exposed to COVID-19. Basank is 54 years old and has a lengthy history of smoking. *Id.* ¶ 5. Barrera Carrerro, age 39, has underlying

¹ During oral argument, Respondents represented to the Court that five Petitioners—Hernandez Balbuena, Legall, Menendez, Basank, and Benitez Pineda—are expected to be released today. However, because Petitioners are not yet released, and because counsel for Petitioners indicated, and Respondents did not dispute, that ICE may take as long as a day to complete the release process, the Court enters the TRO as to all Petitioners directing their immediate release today without fail.

health conditions, including obesity, respiratory problems, a history of gastrointestinal problems, and colorectal bleeding. *Id.* ¶ 6. Benitez Pineda is 44, with pulmonary issues and a history of hospitalization for severe pneumonia. *Id.* ¶ 7. Hernandez Balbuena suffers from diabetes and diabetes-related complications. *Id.* ¶ 8. Legall is 33 years old, and suffers from respiratory problems, including asthma. *Id.* ¶ 9. Martinez, age 56, suffers from severe heart disease, and has a history of hospitalization for congestive heart failure, severe aortic valvular insufficiency, and acute systolic failure, requiring immediate heart valve replacement surgery. *Id.* ¶ 10. Mazariegos is 44, and suffers from high blood pressure and pre-diabetes. *Id.* ¶ 11. Menendez is 31 years old and suffers from chronic asthma. *Id.* ¶ 12. At 36, Pena is asthmatic and has chronic obstructive pulmonary disease (“COPD”), which require inhalers and other medical treatment. *Id.* ¶ 13. Picazo Nicolas, age 40, suffers from Type II diabetes and morbid obesity. *Id.* ¶ 14.

On March 16, 2020, Hannah McCrea, an attorney with Brooklyn Defender Services, emailed Assistant United States Attorney Michael Byars, requesting that ICE release particularly vulnerable individuals, including Basank, Legall, Martinez, and Picazo Nicolas. Harper Decl. ¶ 2, ECF No. 6-1. On March 18, 2020, AUSA Byars responded that he did “not have a timeframe for ICE’s response.” *Id.* ¶ 3. On March 24, 2020, Alexandra Lampert, also a lawyer with Brooklyn Defender Services, emailed Byars to request the release of additional individuals identified as particularly vulnerable, including Barrera Carrerro, Benitez Pineda, Hernandez Balbuena, Mazariegos, Menendez, and Pena. *Id.* ¶ 4. On March 25, 2020, Lampert again emailed Byars and informed him of Petitioners’ intent to seek a temporary restraining order in the Southern District of New York, with the amended petition attached, thus putting Respondents on notice of Petitioners’ serious medical conditions and their request for injunctive relief. *Id.* ¶¶ 5, 7.

At 12:30 p.m. today, the Court held a telephonic hearing on Petitioners' request for a TRO.

DISCUSSION

I. Legal Standard

“A plaintiff seeking a temporary restraining order 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.” *Natera, Inc. v. Bio-Reference Labs., Inc.*, No. 16 Civ. 9514, 2016 WL 7192106, at *2 (S.D.N.Y. Dec. 10, 2016) (internal quotation marks, citation, and alteration omitted).

“It is well established that in this Circuit the standard for an entry of a TRO is the same as for a preliminary injunction.” *Andino v. Fischer*, 555 F. Supp. 2d 418, 419 (S.D.N.Y. 2008) (collecting cases). “The showing of irreparable harm is perhaps the single most important prerequisite for a preliminary injunction.” *CF 135 Flat LLC v. Triadou SPY N.A.*, No. 15 Civ. 5345, 2016 WL 2349111, at *1 (S.D.N.Y. May 3, 2016) (internal quotation marks, citation, and alteration omitted). Under this prong, the movant “must show that the injury it will suffer is likely and imminent, not remote or speculative, and that such injury is not capable of being fully remedied by money damages.” *NAACP v. Town of E. Haven*, 70 F.3d 219, 224 (2d Cir. 1995). To satisfy this requirement, a movant must demonstrate “that he would suffer irreparable harm if the TRO does not issue.” *Andino*, 555 F. Supp. 2d at 419. “The district court has wide discretion in determining whether to grant a preliminary injunction.” *Almontaser v. N.Y.C. Dep’t of Educ.*, 519 F.3d 505, 508 (2d Cir. 2008) (internal quotation marks and citation omitted) (per curiam).

II. Analysis

A. Irreparable Harm

In the Second Circuit, a “showing of irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction.” *Faiveley Transport Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (internal quotation marks and citations omitted). That harm must be “actual and imminent” rather than speculative. *Id.*

Petitioners have shown irreparable injury by establishing the risk of harm to their health and to their constitutional rights.

1. Risk of Death

On March 11, 2020, the World Health Organization declared COVID-19 a global pandemic. Petition ¶¶ 26. At that time, there were more than 118,000 cases in 114 countries, and 4,291 people had died. *Id.* ¶¶ 27. Merely two weeks later, there have been at least 458,927 cases identified in 172 countries and at least 20,807 people have died. *Id.* New York and its surrounding areas have become one of the global epicenters of the outbreak. *Id.* ¶¶ 35. Petitioners are held at detention facilities located in northern New Jersey. *See id.* ¶¶ 5–14.

As of March 26, 2020, New Jersey has 4,407 confirmed cases of COVID-19—the second highest number of reported cases by any state after New York. Niko Kommenda and Pablo Gutierrez, *Coronavirus map of the US: latest cases state by state*, *The Guardian* (Mar. 26, 2020), <https://www.theguardian.com/world/ng-interactive/2020/mar/26/coronavirus-map-of-the-us-latest-cases-state-by-state>. New Jersey also has the fourth most COVID-19 related deaths in the country. *Id.* The three counties where the jails are located—Bergen, Essex, and Hudson counties—comprise one-third of the confirmed cases of COVID-19 in New Jersey, with Bergen County reporting 819 positive results, Essex reporting 381 positives, and Hudson 260. Petition

¶ 36. The jails are no exceptions. Each of the jails where a Petitioner is being housed has reported confirmed cases of COVID-19. *Id.* ¶ 41. This includes two detainees and one correctional officer in the Hudson County Jail; one detainee at the Bergen County Jail; and a “superior officer” at the Essex County Jail. *Id.*

The nature of detention facilities makes exposure and spread of the virus particularly harmful. Jaimie Meyer, M.D., M.S., who has worked extensively on infectious disease treatment and prevention in the context of jails and prisons, recently submitted a declaration in this district noting that the risk of COVID-19 to people held in New York-area detention centers, including the Hudson, Bergen, and Essex County Jails, “is significantly higher than in the community, both in terms of risk of transmission, exposure, and harm to individuals who become infected.” Meyer Decl. ¶ 7, *Velesaca v. Wolf*, 20 Civ. 1803 (S.D.N.Y. Feb. 28, 2020), ECF No. 42.

Moreover, medical doctors, including two medical experts for the Department of Homeland Security, have warned of a “tinderbox scenario” as COVID-19 spreads to immigration detention centers and the resulting “imminent risk to the health and safety of immigrant detainees” and the public. Catherine E. Shoichet, *Doctors Warn of “Tinderbox scenario” if Coronavirus Spreads in ICE Detention*, CNN (Mar. 20, 2020), <https://www.cnn.com/2020/03/20/health/doctors-ice-detention-coronavirus/index.html>. “It will be nearly impossible to prevent widespread infections inside the Hudson, Bergen, and Essex County jails now that the virus is in the facilities because detainees live, sleep, and use the bathroom in close proximity with others, and because ‘[b]ehind bars, some of the most basic disease prevention measures are against the rules or simply impossible.’” Petition ¶ 47 (internal quotation marks and citation omitted).

Petitioners face serious risks to their health in their confinement. Each has underlying illnesses, including asthma, diabetes, heart disease, hypertension, obesity, and respiratory

problems including COPD. *Id.* ¶¶ 5–14. The Court takes judicial notice that, for people of advanced age, with underlying health problems, or both, COVID-19 causes severe medical conditions and has increased lethality. *People at Risk for Serious Illness from COVID-19*, Centers for Disease Control (Mar. 20, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html> (“Older people and people of all ages with severe underlying health conditions—like heart disease, lung disease and diabetes, for example—seem to be at higher risk of developing serious COVID-19 illness.”); *Information for Healthcare Professionals: COVID-19 and Underlying Conditions*, Centers for Disease Control (Mar. 22, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/underlying-conditions.html> (listing, among other medical diagnoses, “moderate to severe asthma,” “heart disease,” “obesity,” and “diabetes” as conditions that trigger higher risk of severe illness from COVID-19); *see* Fed. R. Evid. 201(b) (“The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned.”); *Brickey v. Superintendent, Franklin Corr. Facility*, No. 10 Civ. 085, 2011 WL 868148, at *2 n.3 (N.D.N.Y. Feb. 17, 2011) (taking judicial notice of the meaning and symptoms of the condition sciatica), *report and recommendation adopted*, 2011 WL 868087 (N.D.N.Y. Mar. 10, 2011); *Lin v. Metro. Life Ins. Co.*, No. 07 Civ. 03218, 2010 WL 668817, at *1 (S.D.N.Y. Feb. 25, 2010) (“In its decision, the Court took judicial notice of certain medical background information about Hepatitis B.”).

A number of courts in this district and elsewhere have recognized the threat that COVID-19 poses to individuals held in jails and other detention facilities. *See United States v. Stephens*, No. 15 Cr. 95, 2020 WL 1295155, at *2 (S.D.N.Y. Mar. 19, 2020) (“[I]nmates may be at a

heightened risk of contracting COVID-19 should an outbreak develop.”) (collecting authorities); *United States v. Garlock*, 18 Cr. 418, 2020 WL 1439980, at *1 (N.D. Cal. Mar. 25, 2020) (“By now it almost goes without saying that we should not be adding to the prison population during the COVID-19 pandemic if it can be avoided. Several recent court rulings have explained the health risks—to inmates, guards, and the community at large—created by large prison populations. The chaos has already begun inside federal prisons—inmates and prison employees are starting to test positive for the virus, quarantines are being instituted, visits from outsiders have been suspended, and inmate movement is being restricted even more than usual.” (citations omitted)); *see also* Letter from Mike McGrath, Chief Justice, Montana Supreme Court, to Montana Courts of Limited Jurisdiction Judges (Mar. 20, 2020), <https://courts.mt.gov/Portals/189/virus/Ltr%20to%20COLJ%20Judges%20re%20COVID-19%20032020.pdf?ver=2020-03-20-115517-333> (“Because of the high risk of transmittal of COVID-19, not only to prisoners within correctional facilities but staff and defense attorneys as well, we ask that you review your jail rosters and release, without bond, as many prisoners as you are able, especially those being held for nonviolent offenses. . . . Due to the confines of [correctional] facilities, it will be virtually impossible to contain the spread of the virus.”). Indeed, at least one court has ordered the release on bail of a non-citizen in immigration detention on the ground that detention conditions have been rendered unsafe by COVID-19. *Calderon Jimenez v. Wolf*, No. 18 Civ. 10225 (D. Mass. Mar. 26, 2020), ECF No. 507. Addressing the situation in New Jersey specifically, the New Jersey Supreme Court has held that “reduction of county jail populations, under appropriate conditions, is in the public interest to mitigate risks imposed by COVID-19” in light of “the profound risk posed to people in correctional facilities arising from the spread of COVID-19,” and has ordered the release of many individuals serving sentences in New Jersey

county jails. *In the Matter of the Request to Commute or Suspend County Jail Sentences*, Case No. 84230 (N.J. Mar. 22, 2020).

Courts have also recognized this health risk to be particularly acute—and of constitutional significance—for inmates who are elderly or have underlying illnesses. *See United States v. Martin*, No. 19 Cr. 140-13, 2020 WL 1274857, at *2 (D. Md. Mar. 17, 2020) (“[T]he Due Process Clauses of the Fifth or Fourteenth Amendments, for federal and state pretrial detainees, respectively, may well be implicated if defendants awaiting trial can demonstrate that they are being subjected to conditions of confinement that would subject them to exposure to serious (potentially fatal, if the detainee is elderly and with underlying medical complications) illness.”). At least one court has ordered the release on bail of an inmate facing extradition on the basis of the risk to his health the pandemic poses. *Matter of Extradition of Toledo Manrique*, No. 19 MJ 71055, 2020 WL 1307109, at *1 (N.D. Cal. Mar. 19, 2020) (“These are extraordinary times. The novel coronavirus that began in Wuhan, China, is now a pandemic. The nine counties in the San Francisco Bay Area have imposed shelter-in-place orders in an effort to slow the spread of the contagion. This Court has temporarily halted jury trials, even in criminal cases, and barred the public from courthouses. Against this background, Alejandro Toledo has moved for release, arguing that at 74 years old he is at risk of serious illness or death if he remains in custody. The Court is persuaded. The risk that this vulnerable person will contract COVID-19 while in jail is a special circumstance that warrants bail.”).

The risk that Petitioners will face a severe, and quite possibly fatal, infection if they remain in immigration detention constitutes irreparable harm warranting a TRO. *See Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 332 (2d Cir. 1995) (upholding finding of irreparable injury “premised . . . upon [the district court’s] finding that [plaintiff] was subject to risk of injury,

infection, and humiliation”); *Mayer v. Wing*, 922 F. Supp. 902, 909 (S.D.N.Y. 1996) (“[T]he deprivation of life-sustaining medical services . . . certainly constitutes irreparable harm.”).

2. Constitutional Violations

Second, Petitioners have also shown irreparable injury because, as discussed below, they face a violation of their constitutional rights. In the Second Circuit, it is well-settled that an alleged constitutional violation constitutes irreparable harm. *See, e.g., Connecticut Dep’t of Env’tl. Prot. v. O.S.H.A.*, 356 F.3d 226, 231 (2d Cir. 2004) (“[W]e have held that the alleged violation of a constitutional right triggers a finding of irreparable injury.” (internal quotation marks and citations omitted)); *Statharos v. New York City Taxi & Limousine Comm’n*, 198 F.3d 317, 322 (2d Cir. 1999) (“Because plaintiffs allege deprivation of a constitutional right, no separate showing of irreparable harm is necessary.”); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (clarifying that “it is the alleged violation of a constitutional right that triggers a finding of irreparable harm” and a substantial likelihood of success on the merits of a constitutional violation is not necessary); *Sajous v. Decker*, No. 18 Civ. 2447, 2018 WL 2357266, at *12 (S.D.N.Y. May 23, 2018) (finding that immigration detainee established irreparable injury by alleging that prolonged immigration detention violated his constitutional due process rights).

The Court finds, therefore, that Petitioners have established the threat of irreparable harm absent the TRO.

B. Likelihood of Success on the Merits

The Court concludes that Petitioners have met their burden of showing a likelihood of success on the merits. Petitioners argue that their continued confinement in ICE detention centers where COVID-19 is present and without adequate protection for their health violates their due process rights. TRO at 8. The Court agrees.

The Due Process Clause of the Fifth Amendment to the United States Constitution forbids the government from depriving a person of life, liberty, or property without due process of law. The protection applies to “all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). An application for habeas corpus under 28 U.S.C. § 2241 is the appropriate vehicle for an inmate in federal custody to challenge conditions or actions that pose a threat to his medical wellbeing. *See Roba v. United States*, 604 F.2d 215, 218–19 (2d Cir. 1979) (allowing a § 2241 application to challenge an inmate’s “transfer while seriously ill” where that transfer posed a risk of fatal heart failure).

Immigration detainees can establish a due process violation for unconstitutional conditions of confinement by showing that a government official “knew, or should have known” of a condition that “posed an excessive risk to health,” and failed to take appropriate action. *Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017); *Charles v. Orange Cty.*, 925 F.3d 73, 87 (2d Cir. 2019) (“Deliberate indifference . . . can be established by either a subjective or objective standard: A plaintiff can prove deliberate indifference by showing that the defendant official recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official knew, *or should have known*, that the condition posed an excessive risk to the plaintiff’s health or safety.” (internal quotation marks, citation, and alterations omitted)). The risk of contracting COVID-19 in tightly-confined spaces, especially jails, is now exceedingly obvious.² It can no longer be denied that Petitioners, who

² Other courts have recognized the heightened risk to detainees of contracting COVID-19. *See, e.g., Xochihua-Jaimes v. Barr*, 18-71460, Doc. No. 53 (9th Cir. Mar. 23, 2020) (unpublished) (“In light of the rapidly escalating public health crisis, which public health authorities predict will especially impact immigration detention centers, the court *sua sponte* orders that [p]etitioner be immediately released from detention”); *Stephens*, 2020 WL 1295155, at *2 (ordering “conditions of 24-hour home incarceration and electronic location monitoring”); Chris Villani, *Releasing ICE Detainee, Judge Says Jail No Safer Than Court*, Law360, March 25, 2020 (“We are living in the midst of a coronavirus pandemic, some infected people die, not all, but some infected people die,” U.S. District

suffer from underlying illnesses, are caught in the midst of a rapidly-unfolding public health crisis. The Supreme Court has recognized that government authorities may be deemed “deliberately indifferent to an inmate’s current health problems” where authorities “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,” including “exposure of inmates to a serious, communicable disease,” even when “the complaining inmate shows no serious current symptoms.” *Helling v. McKinney*, 509 U.S. 25, 33 (1993). Petitioners need not demonstrate that “they actually suffered from serious injuries” to show a due process violation. *Darnell*, 849 F.3d at 31; *see Helling*, 509 U.S. at 33. Instead, showing that the conditions of confinement “pose an unreasonable risk of serious damage to their future health” is sufficient. *Phelps v. Kapnolas*, 308 F.3d 180, 185 (2d Cir. 2002) (quoting *Helling*, 509 U.S. at 35) (alteration omitted).

Respondents have exhibited, and continue to exhibit, deliberate indifference to Petitioners’ medical needs. The spread of COVID-19 is measured in a matter of a single day—not weeks, months, or years—and Respondents appear to ignore this condition of confinement that will likely cause imminent, life-threatening illness. At oral argument, Respondents represented that ICE and the detention facilities in which Petitioners are housed are taking certain measures to prevent the spread of the virus: screening detainees upon intake for risk factors, isolating detainees who report symptoms, conducting video court appearances with only one detainee in the room at a time, providing soap and hand sanitizer to inmates, and increasing the frequency and intensity of cleaning jail facilities.

These measures are patently insufficient to protect Petitioners. At today’s hearing, Respondents could not represent that the detention facilities were in a position to allow inmates

Judge Wolf said. “Being in a jail enhances risk. Social distancing is difficult or impossible, washing hands repeatedly may be difficult. There is a genuine risk this will spread throughout the jail.”).

to remain six feet apart from one another, as recommended by the Centers for Disease Control and Prevention (“CDC”). See *How to Protect Yourself*, Centers for Disease Control (Mar. 18, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prepare/prevention.html>. Nor could Respondents provide the Court with any information about steps taken to protect high-risk detainees like Petitioners. And though Respondents represented that the detention facilities are below their full capacity, the appropriate capacity of a jail during a pandemic obviously differs enormously from its appropriate capacity under ordinary circumstances. Confining vulnerable individuals such as Petitioners without enforcement of requisite social distancing and without specific measures to protect their delicate health “pose[s] an unreasonable risk of serious damage to [their] future health,” *Phelps*, 308 F.3d at 185 (internal quotation marks and citation omitted), and demonstrates deliberate indifference.

The Court holds, therefore, that Petitioners are likely to succeed on the merits of their due process claim that Respondents knew or should have known that Petitioners’ conditions of confinement pose excessive risks to their health.³

C. Balance of Equities and Public Interest

The equities and public interest weigh heavily in Petitioners’ favor. First, Petitioners face irreparable injury—to their constitutional rights and to their health.

Second, the potential harm to Respondents is limited. At today’s hearing, Respondents were unable to identify a single specific reason for Petitioners’ continued detention. And the Court finds that there is none. Petitioners’ counsel committed to ensuring the continued appearance of Petitioners at immigration hearings. And, of course, Petitioners’ failure to appear at those hearings would carry grave consequences for their respective cases. The Court finds that

³ The Court does not reach Petitioners’ additional argument that they are likely to succeed on the merits of the claim that their due process rights were violated because their current conditions of confinement are punitive. TRO at 8–9.

those incentives are sufficient to safeguard Respondents' interest in Petitioners' in-person participation in future immigration court proceedings.

At oral argument, Respondents raised the fact that Petitioners Martinez and Pena are currently mandatorily detained pursuant to 18 U.S.C. § 1226(c).⁴ However, courts have the authority to order those detained in violation of their due process rights released, notwithstanding § 1226(c). *See Cabral v. Decker*, 331 F. Supp. 3d 255, 259 (S.D.N.Y. 2018) (collecting cases). Thus, Respondents have failed to justify Petitioners' continued detention in unsafe conditions.

Finally, the public interest favors Petitioners' release. Petitioners are confined for civil violations of the immigration laws. In the highly unusual circumstances posed by the COVID-19 crisis, the continued detention of aging or ill civil detainees does not serve the public's interest. *See* Declaration of Dr. Homer Venters ¶ 12, *Fraihat v. U.S. Imm. and Customs Enforcement*, 5:19 Civ. 1546, ECF No. 81-11 (C.D. Cal. Mar. 24, 2020) (opining that "the design and operation of detention settings promotes the spread of communicable diseases such as COVID-19"); Declaration of Dr. Carlos Franco-Paredes, *id.* at ECF No. 81-12 at 1 ("Immigration detention centers in the U.S. are tinderboxes for the transmission of highly transmissible infectious pathogens including the SARS-CoV-2, which causes COVID-19. Given the large population density of immigration detention centers and the ease of transmission of this viral pathogen, the attack rate inside these centers will take exponential proportions, consuming significant medical and financial resources."); *Urgent action needed to prevent COVID-19 "rampaging through places of detention" – Bachelet*, UNHCR (Mar. 25, 2020), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25745&LangID=e> (United Nations High Commissioner for Human Rights urging that detention of people in jails

⁴ As represented by Petitioners' counsel, Martinez's § 1226(c) detention was triggered by his conviction for controlled substances trafficking in 2014, an offense for which he served no term of imprisonment. Pena's § 1226(c) detention was triggered by misdemeanor marijuana convictions from 2002.

“should be a measure of last resort, particularly during this crisis”). To the contrary, public health and safety are served best by rapidly decreasing the number of individuals detained in confined, unsafe conditions. *See, e.g., Grand River Enterprises Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 169 (2d Cir. 2005) (referring to “public health” as a “significant public interest”).

CONCLUSION

For the reasons stated above, the TRO is GRANTED. Respondents, and the Hudson, Bergen, and Essex County Correctional Facilities are ORDERED to **immediately** release Petitioners today on their own recognizance without fail. Respondents are RESTRAINED from arresting Petitioners for civil immigration detention purposes during the pendency of their immigration proceedings.

The TRO will expire on **April 9, 2020, at 6:30 p.m.** No later than **April 2, 2020, at 12:00 p.m.**, Respondents must show cause why the TRO should not be converted to a preliminary injunction. Petitioners may file a response no later than **April 7, 2020, at 12:00 p.m.**

SO ORDERED.

Dated: March 26, 2020, at 6:30 p.m.
New York, New York



ANALISA TORRES
United States District Judge

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**United States District Court
Central District of California
Western Division**

**PEDRO BRAVO CASTILLO and
LUIS VASQUEZ RUEDA.,**

Petitioners,

v.

WILLIAM BARR, et al.,

Respondents.

CV 20-00605 TJH (AFMx)

**Temporary Restraining
Order**

and

Order to Show Cause

The Court has considered the application for a temporary restraining order filed by Petitioners Pedro Bravo Castillo and Luis Vasquez Rueda, together with the moving and opposing papers.

Castillo is a 58-year-old man who has, or had, suffered from kidney stones, arthritis and a hernia. Vasquez is a 23-year-old man who is recovering from a work-related facial fracture. Castillo and Vasquez are, currently, being detained at the Adelanto Detention Center [“Adelanto”], in San Bernardino County. San Bernardino County is within the Central District of California.

Castillo and Vasquez filed this case as a petition for a writ of *habeas corpus* and complaint for declaratory and injunctive relief. Castillo and Vasquez are civil

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1 detainees, having been arrested by officers from the United States Department of
2 Homeland Security's ["DHS"] Bureau of Immigration and Customs Enforcement
3 ["BICE"] on March 16, 2020, and March 17, 2020, respectively, and then placed into
4 removal proceedings, with the service of a Notice to Appear at the time of their arrest.
5 Castillo's removal proceedings are pursuant to the Immigration and Nationality Act
6 ["INA"] § 212(a)(6)(A)(i)(I), for being an alien present in the United States without
7 being admitted or paroled, while Vasquez's removal proceedings are pursuant to INA
8 § 237(a)(1)(B), for being an alien who after admission as a nonimmigrant under INA
9 § 101(a)(15) remained in the United States for a time longer than permitted.

10 Adelanto is a private, for-profit immigration detention facility operated by Geo
11 Group, Inc. Adelanto has the capacity to hold, under normal situations, well over
12 1,000 detainees through a contract with BICE. Over the years, and as recently as 2018,
13 DHS's Office of the Inspector General had, repeatedly, found that significant and
14 various health and safety risks existed at Adelanto.

15 On March 4, 2020, the State of California declared a state of emergency in
16 response to the coronavirus and the resulting COVID-19 disease. On March 10, 2020,
17 San Bernardino County followed suit and declared a state of emergency. On March 11,
18 2020, the World Health Organization ["WHO"] declared COVID-19 to be a global
19 pandemic. On March 13, 2020, President Donald J. Trump, formally acknowledged
20 and declared a national emergency in response to WHO's pandemic declaration.

21 On March 18, 2020, BICE announced that "[t]o ensure the welfare and safety of
22 the general public as well as officers and agents in light of the ongoing COVID-19
23 pandemic response, [it] will temporarily adjust its enforcement posture beginning today
24 ... [and that its] highest priorities are to promote life-saving and public safety
25 activities." Further, BICE stated that it would focus enforcement "on public safety risks
26 and individuals subject to mandatory detention based on criminal grounds [, and for
27 those people who do not fall into those categories, agents] will exercise discretion to
28 delay enforcement actions until after the crisis or utilize alternatives to detention, as

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1 appropriate."

2 According to the United States Centers for Disease Control and Prevention, the
3 coronavirus is spread mainly through person-to-person contact. More specifically, the
4 coronavirus is spread between people who are in close contact – within about 6 feet –
5 with one another through respiratory droplets produced when an infected person coughs
6 or sneezes. The droplets can land in the mouths or noses, or can be inhaled into the
7 lungs, of people who are within about 6 feet of the infected person. Moreover, studies
8 have established that the coronavirus can survive up to three days on various surfaces.

9 COVID-19 is highly contagious and has a mortality rate ten times greater than
10 influenza. Most troublesome is the fact that people infected with the coronavirus can
11 be asymptomatic during the two to fourteen day COVID-19 incubation period. During
12 that asymptomatic incubation period, infected people are, unknowingly, capable of
13 spreading the coronavirus. Despite early reports, no age group is safe from COVID-
14 19. While older people with pre-existing conditions are the most vulnerable to COVID-
15 19-related mortality, young people without preexisting conditions have, also,
16 succumbed to COVID-19. There is no specific treatment, vaccine or cure for COVID-
17 19.

18 Because of the highly contagious nature of the coronavirus and the, relatively
19 high, mortality rate of COVID-19, the disease can spread uncontrollably with
20 devastating results in a crowded, closed facility, such as an immigration detention
21 center. At Adelanto, a holding area can contain 60 to 70 detainees, with a large
22 common area and dormitory-type sleeping rooms housing four or six detainees with
23 shared sinks, toilets and showers. Guards regularly rotate through the various holding
24 areas several times a day. At meal times – three times a day – the 60 to 70 detainees
25 in each holding area line up together, sometimes only inches apart, in the cafeteria.
26 The guards, detainees and cafeteria workers do not regularly wear gloves or masks to
27 prevent the spread of the coronavirus. While detainees have access to gloves, there is
28 no requirement that they wear them. Detainees do not have access to masks or hand

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1 sanitizer – though thorough hand washing could be more effective than hand sanitizers
2 at preventing the spread of the coronavirus.

3 Just days ago, the first BICE detainee was confirmed to have been infected with
4 COVID-19 in New Jersey at the Bergen County Jail, a BICE detention facility.
5 Moreover, last week, a correctional officer at the Bergen County Jail was, also,
6 confirmed to have been infected.

7 Yesterday, Judge Analisa Torres of the United States District Court for the
8 Southern District of New York issued an order releasing certain immigration detainees,
9 stating the following:

10 The nature of detention facilities makes exposure and spread of the
11 virus particularly harmful. Jaimie Meyer M.D., M.S., who has worked
12 extensively on infectious diseases treatment and prevention in the context
13 of jails and prisons, recently submitted a declaration in this district noting
14 that the risk of COVID-19 to people held in New York-area detention
15 centers, including the Hudson, Bergen County, and Essex County jails, “is
16 significantly higher than in the community, both in terms of risk of
17 transmission, exposure, and harm to individuals who become infected.”
18 Meyer Decl. ¶ 7, *Velesaca v. Wolf*, 20 Civ. 1803 (S.D.N.Y. Feb. 28,
19 2020), ECF No. 42.

20 Moreover, medical doctors, including two medical experts for the
21 Department of Homeland Security, have warned of a “tinderbox scenario”
22 as COVID-19 spreads to immigration detention centers and the resulting
23 “imminent risk to the health and safety of immigrant detainees” and the
24 public. Catherine E. Shoichet, *Doctors Warn of “Tinderbox scenario” if*
25 *Coronavirus Spreads in ICE Detention*, CNN (Mar. 20, 2020),
26 [https://www.cnn.com/2020/03/20/health/doctors-ice-detention-](https://www.cnn.com/2020/03/20/health/doctors-ice-detention-coronavirus/index.html)
27 [coronavirus/index.html](https://www.cnn.com/2020/03/20/health/doctors-ice-detention-coronavirus/index.html). “It will be nearly impossible to prevent
28 widespread infections inside the Hudson, Bergen, and Essex County jails

1 now that the virus is in the facilities because detainees live, sleep, and use
2 the bathroom in close proximity with others, and because ‘[b]ehind bars,
3 some of the most basic disease prevention measures are against the rules
4 or simply impossible.’” Petition ¶ 47 (internal quotation marks and citation
5 omitted).

6 *Basank, et al., v. Decker, et al.*, 20 Civ. 2518 (S.D.N.Y., Feb. 28, 2020), ECF No.
7 11.

8 On March 23, 2020, the Ninth Circuit ordered, *sua sponte* and without further
9 explanation, the release of an immigration petitioner “[i]n light of the rapidly escalating
10 public health crisis, which public health authorities predict will especially impact
11 immigration detention centers.” *Xochihua-Jaimes v. Barr*, 2020 WL 1429877, No. 18-
12 71460 (9th Cir. Mar. 23, 2020).

13 Here, Petitioners base their petition on three claims: (1) Violation of the Fifth
14 Amendment for a state-created danger; (2) Violation of the Fifth Amendment based on
15 the special relationship between the Government and the persons in its custody; and (3)
16 Violation of the Fifth Amendment based on punitive detention.

17 The theme underlying the Petitioners’ various Fifth Amendment claims is that
18 they are civil, not criminal, detainees. When the Government detains a person for the
19 violation of an immigration law, the person is a civil detainee, even if he has a prior
20 criminal conviction. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). As civil
21 detainees, Petitioners are entitled to more considerate treatment than criminal detainees,
22 whose conditions of confinement are designed to punish. *See Youngberg v. Romeo*, 457
23 U.S. 307, 321-22 (1982). Moreover, under the Fifth Amendment’s Due Process
24 Clause, a civil detainee cannot be subjected to conditions that amount to punishment.
25 *See King v. Cty. of L.A.*, 885 F.3d 548, 556-557 (9th Cir. 2018).

26 When the Government takes a person into custody and detains him against the
27 person’s will, the Constitution imposes upon the Government a duty to assume
28 responsibility for that detainee’s safety and general well being. *See Helling v.*

1 *McKinney*, 509 U.S. 25, 32 (1993). Under the Eighth Amendment, the Government
2 must provide criminal detainees with basic human needs, including reasonable safety.
3 *Helling*, 509 U.S. at 32. The Government violates the Eighth Amendment if it confines
4 a criminal detainee in unsafe conditions. *See Helling*, 509 U.S. at 33. Moreover, the
5 Government may not “ignore a condition of confinement that is sure or very likely to
6 cause serious illness.” *See Helling*, 509 U.S. at 32.

7 The law is clear – the Government cannot put a civil detainee into a dangerous
8 situation, especially where that dangerous situation was created by the Government.
9 *See Hernandez v. City of San Jose*, 897 F.3d 1125, 1133 (9th Cir. 2018). The Due
10 Process Clause of the Fifth Amendment prohibits the Government from exposing an
11 individual to a danger which he would not have otherwise faced. *See Kennedy v. City*
12 *of Ridgefield*, 439 F.3d 1055, 1061 (9th Cir. 2006) citing *DeShaney v. Winnebago*
13 *County Dep’t of Soc. Serv.*, 489 U.S. 189, 197, 201 (1989). A civil detainee’s
14 constitutional rights are violated if a condition of his confinement places him at
15 substantial risk of suffering serious harm, such as the harm caused by a pandemic. *See*
16 *Smith v. Wash.*, 781 F. App’x. 595, 588 (9th Cir. 2019).

17 Here, Petitioners argued that the conditions at Adelanto expose them to a
18 substantial risk of suffering serious harm – increasing their exposure to or contracting
19 COVID-19. When the Government detains a person, thereby taking custody of that
20 person, it creates a special relationship wherein the Government assumes responsibility
21 for that detainee’s safety and well-being. *See, e.g., Henry A. v. Willden*, 678 F.3d 991,
22 998 (9th Cir. 2012). If the Government fails to provide for a detainee’s basic human
23 needs, including medical care and reasonable safety, the Due Process Clause is violated.
24 *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 200 (1989). Indeed,
25 the Due Process Clause mandates that civil immigration detainees are entitled to more
26 than minimal human necessities. *See Jones v. Blanas*, 393 F.3d 918, 931 (9th Cir.
27 2004). At a minimum, here, the Government owes a duty to Petitioners, as civil
28 immigration detainees, to reasonably abate known risks. *See Castro v. Cty. of Los*

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1 *Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016). Inadequate health and safety measures
2 at a detention center cause cognizable harm to every detainee at that center. *See*
3 *Parsons v. Ryan*, 754 F.3d 657, 679 (9th Cir. 2014).

4 Petitioners are entitled to a temporary restraining order if they show: (1) A
5 likelihood of success on the merits; (2) That they are likely to suffer irreparable harm
6 in the absence of relief; (3) The balance of equities tip in their favor; and (4) An
7 injunction is in the public's interest. *See Winter v. Natural Res. Def. Council, Inc.*, 555
8 U.S. 7, 20 (2008). Under the Ninth Circuit's sliding scale approach, a stronger
9 showing of one element may offset a weaker showing of another. *See Pimentel v.*
10 *Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012). Accordingly, Petitioners are entitled
11 to a temporary restraining order if "serious questions going to the merits [are] raised
12 and the balance of hardships tips sharply in [their] favor." *All. for the Wild Rockies v.*
13 *Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

14 In its opposition brief, the Government sets forth the United States Attorney
15 General's discretionary right to detain an alien in removal proceedings prior to a final
16 order of removal. *See* 8 U.S.C. § 1226. Indeed, the Attorney General has the
17 discretion to either: (1) Detain the person without bond or (2) Release the person on a
18 bond of at least \$1,500.00 or on conditional parole. 8 U.S.C. § 1226(a). In making
19 the initial bond determination, a BICE officer must assesses whether the person has
20 "demonstrate[d]" that "release would not pose a danger to property or persons, and that
21 the alien is likely to appear for any future proceeding." 8 C.F.R. § 236.1(c)(8). If the
22 BICE officer determines that release, with or without bond, is not appropriate, then the
23 person may appeal to an Immigration Judge. 8 C.F.R. §§ 236.1(d)(1), 1003.19,
24 1236.1(d)(1). The Immigration Judge's decision, then, would be appealable to the
25 Board of Immigration Appeals. 8 C.F.R. §§ 1003.1(b)(7), 1003.19(f), 1003.38.

26 However, because the Petitioners, here, have asserted claims for violations of
27 their Fifth Amendment substantive due process rights, and those claims exceed the
28 jurisdictional limits of the Immigration Court and the Board of Immigration Appeals,

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1 Petitioners need not first exhaust their administrative remedies. *Garcia-Ramirez v.*
2 *Gonzales*, 423 F.3d 935, 938 (9th Cir. 2005).

3 The Government argued that Petitioners lack standing because they cannot
4 establish that they would suffer a concrete, non-hypothetical injury absent a temporary
5 restraining order in that their likelihood of contracting COVID-19 is speculative. *See*
6 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

7 However, it is clear that “[a] remedy for unsafe conditions need not await a tragic
8 event.” *Helling*, 509 U.S. at 33. The Government cannot be “deliberately indifferent
9 to the exposure of [prisoners] to a serious, communicable disease on the ground that the
10 complaining [prisoner] shows no serious current symptoms.” *Helling*, 509 U.S. at 33.
11 “That the Eighth Amendment protects against future harm to inmates is not a novel
12 proposition.” *Helling*, 509 U.S. at 33. The Supreme Court clearly stated that “... the
13 Eighth Amendment protects [prisoners] against sufficiently imminent dangers as well
14 as current unnecessary and wanton infliction of pain and suffering... .” *Helling*, 509
15 U.S. at 33. Indeed, the Court concluded that where prisoners in punitive isolation were
16 crowded into cells and some of them had infectious maladies, “... the Eighth
17 Amendment required a remedy, even though it was not alleged that the likely harm
18 would occur immediately and even though the possible infection might not affect all of
19 those exposed.” *Helling*, 509 U.S. at 33. Civil detainees are entitled to greater liberty
20 protections than individuals detained under criminal processes. *See Jones*, 393 F.3d at
21 932.

22 In its *amicus* brief filed in *Helling*, the Government stated that it “... recognizes
23 that there may be situations in which exposure to toxic or similar substances would
24 present a risk of sufficient likelihood or magnitude – and in which there is a sufficiently
25 broad consensus that exposure of *anyone* to the substance should therefore be prevented
26 – that the [Eighth] [A]mendment’s protection would be available even though the effects
27 of exposure might not be manifested for some time.” *Helling*, 509 U.S. at 34. The
28 Government, here, cannot say, with any degree of certainty, that no one – staff or

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1 detainee – at Adelanto has not been, or will not be, infected with the coronavirus. The
2 science is well established – infected, asymptomatic carriers of the coronavirus are
3 highly contagious. Moreover, the Petitioners presently before the Court are suffering
4 from a condition of confinement that takes away, *inter alia*, their ability to socially
5 distance. The Government cannot be deliberately indifferent to the Petitioners’ potential
6 exposure to a serious, communicable disease on the ground that they are not, now,
7 infected or showing current symptoms. *See Helling*, 509 U.S. at 32.

8 It is “cruel and unusual punishment to hold convicted criminals in unsafe
9 conditions.” *Helling*, 509 U.S. at 33. The Eighth Amendment is violated when a
10 condition of a criminal detainee’s confinement puts him at substantial risk of suffering
11 serious harm and that the condition causes suffering inconsistent with contemporary
12 standards of human decency. *See Smith v. Wash.*, 781 F. App’x. 595, 597-598 (9th
13 Cir. 2019). However, a civil detainee seeking to establish that the conditions of his
14 confinement are unconstitutional need only show that his conditions of confinement
15 “put [him] at substantial risk of suffering serious harm.” *See Smith*, 781 F. App’x.
16 597-598. Here, BICE cannot be deliberately indifferent to the potential exposure of
17 civil detainees to a serious, communicable disease on the ground that the complaining
18 detainee shows no serious current symptoms, or ignore a condition of confinement that
19 is more than very likely to cause a serious illness. *See Helling*, 509 U.S. at 32.

20 Under the Due Process Clause, a civil detainee cannot be subject to the current
21 conditions of confinement at Adelanto. The Supreme Court has acknowledged that it
22 has “... great difficulty agreeing that prison authorities may not be deliberately
23 indifferent to an inmate’s current health problems but may ignore a condition of
24 confinement that is sure or very likely to cause serious illness and needless suffering the
25 next week or month or year.” *Helling*, 509 U.S. at 33

26 As the Court writes this order, the number of confirmed COVID-19 cases in the
27 United States has already exceeded the number of confirmed cases in every other
28 country on this planet. Indeed, all of the experts and political leaders agree that the

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1 number of confirmed cases in the United States will only increase in the days and weeks
2 ahead. The number of cases in the United States has yet to peak. In San Bernardino
3 County, the number of confirmed cases, there, has tripled over the past five days.

4 The risk that Petitioners, here, will flee, given the current global pandemic, is
5 very low, and reasonable conditions can be fashioned to ensure their future appearance
6 at deportation proceedings. While both Petitioners have committed prior criminal
7 offenses in this country related to driving under the influence, both Castillo and
8 Vasquez have completed their sentences of five days and three days incarceration,
9 respectively. Petitioners are not criminal detainees, they are civil detainees entitled to
10 more considerate treatment than criminal detainees. *See Youngberg*.

11 Civil detainees must be protected by the Government. Petitioners have not been
12 protected. They are not kept at least 6 feet apart from others at all times. They have
13 been put into a situation where they are forced to touch surfaces touched by other
14 detainees, such as with common sinks, toilets and showers. Moreover, the Government
15 cannot deny the fact that the risk of infection in immigration detention facilities – and
16 jails – is particularly high if an asymptomatic guard, or other employee, enters a
17 facility. While social visits have been discontinued at Adelanto, the rotation of guards
18 and other staff continues.

19 The Petitioners have established that there is more than a mere likelihood of their
20 success on the merits. *See Winter*, 555 U.S. at 20.

21 The Petitioners have established that they are likely to suffer irreparable harm in
22 the absence of relief. *See Winter*, 555 U.S. at 20. It is well established that the
23 deprivation of constitutional rights unquestionably constitutes irreparable injury. *See*
24 *Hernandez v. Session*, 872 F.3d 976, 994 (9th Cir. 2017).

25 The balance of the equities tip sharply in favor of the Petitioners. The Petitioners
26 faces irreparable harm to their constitutional rights and health. Indeed, there is no harm
27 to the Government when a court prevents the Government from engaging in unlawful
28 practices. *See Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013).

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1 Finally, the emergency injunctive relief sought, here, is absolutely in the public’s
2 best interest. The public has a critical interest in preventing the further spread of the
3 coronavirus. An outbreak at Adelanto would, further, endanger all of us – Adelanto
4 detainees, Adelanto employees, residents of San Bernardino County, residents of the
5 State of California, and our nation as a whole.

6 This is an unprecedented time in our nation’s history, filled with uncertainty,
7 fear, and anxiety. But in the time of a crisis, our response to those at particularly high
8 risk must be with compassion and not apathy. The Government cannot act with a
9 callous disregard for the safety of our fellow human beings.

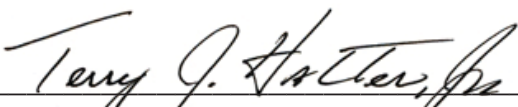
10 Accordingly,

11 **It is Ordered** that the motion for a temporary restraining order be, and hereby
12 is, **Granted**.

13 **It is further Ordered** that the Respondents shall, forthwith and without delay,
14 release Petitioners Pedro Bravo Castillo and Luis Vasquez Rueda from custody pending
15 further order of this Court.

16 **It is further Ordered** the Respondents shall show cause, if they have any, as
17 to why the Court should not issue a preliminary injunction in this case. The
18 Respondents’ response, if any, to this order to show cause shall be filed by Noon on
19 April 6, 2020. Petitioners’ reply, if any, to Respondents’ response shall be filed by
20 Noon on April 9, 2020. The matter will then stand submitted.

21
22 Date: March 27, 2020

23 
24 _____
25 Terry J. Hatter, Jr.
26 Senior United States District Judge
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHNNY GROBMAN, et al.,

Defendant.

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

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

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

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

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

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

I. Grobman's Position

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

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

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

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

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

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

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

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

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

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

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

II. Government’s Position

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

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

III. Factual Background

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

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

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

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

Just before remanding the Defendant, Judge Altman heard argument from Grobman's counsel, who argued that Grobman should be allowed to remain on bond, contending that his family circumstances and compliance with the previous conditions of bond provided clear and convincing evidence that Grobman did not pose a flight risk. *See* Feb. 6, 2020 Trial Tr. at 16:17-17:3.¹ Judge Altman ordered Grobman be remanded, noting, "[T]hings are different once you get convicted at trial. Because until that point, hope springs eternal in human beings. And now after that point, I think it's understandable that things may have changed." *Id.* at 17:8-11.

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

But Grobman argues that this advisory recommendation is substantially and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Applicable Legal Standards and Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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release to home confinement”).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. A \$1 million personal surety bond signed by Grobman and his wife, Noemi. Neither Grobman nor his wife will be able to sell, pledge, mortgage or do anything to affect the title to the marital home which will serve as the collateral for this bond.
2. A \$1 million, 10% bond, signed by Abraham Vurnbrand. There will be a *Nebbia* requirement for the \$100,000 which Mr. Vurnbrand will deposit with the Clerk.
3. A \$500,000 personal surety bond signed by Edy Gross, who will not be able to sell, pledge, mortgage or do anything to affect any interest she has in any real estate,

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

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

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

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

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

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

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

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

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

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

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

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

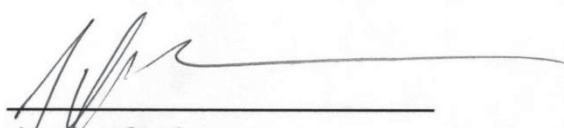
V. Conclusion

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

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

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

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



Jonathan Goodman
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

The Honorable Roy K. Altman
All counsel of record

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

ENTERED

March 30, 2020

David J. Bradley, Clerk

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

UNITED STATES OF AMERICA,

VS.

PEDRO MUNIZ,

Defendant.

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CRIMINAL ACTION NO. 4:09-CR-0199-1

MEMORANDUM AND ORDER

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

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

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

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

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

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

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

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

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

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

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

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

IT IS SO ORDERED.

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



HON. KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

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2020 WL 1529158

Only the Westlaw citation is currently available.

United States District Court, D. Maryland.

UNITED STATES of America

v.

Michael DAVIS, Jr., Defendant.

Case No.: ELH-20-09

Signed 03/30/2020

Attorneys and Law Firms

Lauren E. Perry, [Paul Anthony Riley](#), United States Attorney's Office, Baltimore, MD, for United States of America.

MEMORANDUM OPINION

[Deborah L. Boardman](#), United States Magistrate Judge

*1 Pending before the Court is the government's motion for pretrial detention. For the reasons stated in this Memorandum Opinion and on the record, the motion is denied, and the defendant Michael Davis, Jr. ("Davis") is ordered released from U.S. Marshal's custody subject to the conditions set forth below and in the accompanying Order Setting Conditions of Release, ECF No. 20.

Procedural History

On January 9, 2020, a grand jury sitting in this Court returned an indictment against Davis charging him with conspiracy to distribute and possess with intent to distribute a controlled dangerous substance, cocaine base, in violation of [21 U.S.C. § 846](#) (Count I); distribution of a controlled dangerous substance, cocaine base, in violation of [21 U.S.C. § 841\(a\)\(1\)](#) (Count II); and distribution of a controlled dangerous substance, fentanyl, in violation of [21 U.S.C. § 841\(a\)\(1\)](#) (Count IV). ECF No. 1. The maximum penalty for each charge is 20 years' imprisonment. On January 14, 2020, Davis appeared in Court for his initial appearance and was appointed counsel. At the hearing, the government moved for his detention. A detention hearing was scheduled for January 16, 2020, and a temporary order of detention was entered. Davis ultimately consented to detention and no hearing was conducted. An Order of Detention by Agreement was entered

"without prejudice to either side requesting a prompt hearing to set appropriate conditions of release or otherwise address the detention of the defendant." ECF No. 14.

On March 21, 2020, Davis notified the Court that he now requests a detention hearing. ECF No. 16. He is entitled to a hearing under [18 U.S.C. § 3142\(f\)](#). The hearing occurred on March 30, 2020.¹ No trial date has been set.

The Bail Reform Act

Under the Bail Reform Act, the government may move for a defendant's pretrial detention if the case involves, among other offenses, "an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act ([21 U.S.C. 801 et seq.](#))" [18 U.S.C. § 3142\(f\)\(1\)\(C\)](#). When a defendant is charged with such an offense, as is the case here, and the Court finds probable cause to believe the defendant committed the crime, there is a presumption, subject to rebuttal by the defendant, that "no combination of conditions will reasonably assure the appearance of the person as required and the safety of the community." [18 U.S.C. § 3142\(e\)\(3\)](#). The presumption of detention "places 'a limited burden of production—not a burden of persuasion' on the defendant to 'com[e] forward with evidence that he does not pose a danger to the community or a risk of flight.'" *United States v. Khusanov*, 731 F. App'x 19, 21 (2d Cir. 2018) (quoting *United States v. English*, 629 F.3d 311, 319 (2d Cir. 2011)); see *United States v. Stone*, 608 F.3d 939, 945 (6th Cir. 2010); *United States v. Moss*, 887 F.2d 333, 338 (1st Cir. 1989); *United States v. Suppa*, 799 F.2d 115, 119 (3d Cir. 1986); *United States v. Portes*, 786 F.2d 758, 764 (7th Cir. 1985); *United States v. Alatishe*, 768 F.2d 364, 371 (D.C. Cir. 1985). When the defendant meets his burden of production, it "remains a factor to be considered among those weighed by the district court" but "does not eliminate the presumption favoring detention." *Khusanov*, 731 F. App'x at 21 (quoting *English*, 629 F.3d at 319). The government bears the burden of proving by a preponderance that no condition or combination of conditions will reasonably assure the defendant's appearance and by a clear and convincing showing that "no condition or combination of conditions will reasonably assure the safety of any other person and the community." [18 U.S.C. § 3142\(f\)](#); see *Khusanov*, 731 F. App'x at 21 (noting that the "ultimate burden" of proof remains on the government to "mak[e] a preponderance showing that the defendant poses a risk of flight and a clear and convincing showing that he presents a danger to

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persons or the community”); *Stone*, 608 F.3d at 945 (“As our sister circuits have found, section 3142(e)(3)’s presumption in favor of detention imposes only a ‘burden of production’ on the defendant, and the government retains the ‘burden of persuasion.’”) (citing *United States v. Mercedes*, 254 F.3d 433, 436 (2d Cir. 2001)); *Moss*, 887 F.2d at 338; *Suppa*, 799 F.2d at 119; *Portes*, 786 F.2d at 764; *Alatishe*, 768 F.2d at 371.

*2 The Bail Reform Act requires that the Court consider the following factors:

- (1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence, a violation of section 1591, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device;
- (2) the weight of the evidence against the person;
- (3) the history and characteristics of the person, including —
 - (A) the person’s character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and
 - (B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and
- (4) the nature and seriousness of the danger to any person or the community that would be posed by the person’s release....

18 U.S.C. § 3142(g).

If after a hearing, and upon consideration of these factors, the Court finds “that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community,” then the Court “shall order the detention of the person before trial.” 18 U.S.C. § 3142(e)(1). Alternatively, if the Court finds that there are conditions or a combination of conditions that will reasonably assure the person’s appearance and the safety of any other person and the community, the person may be released subject to certain conditions,

including, among others, home confinement and third-party custodianship. 18 U.S.C. § 3142(c)(1).

The Supreme Court has held that pretrial detention is disfavored. See *United States v. Salerno*, 481 U.S. 739, 755 (1987) (“In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”). In *Salerno*, the Supreme Court ultimately approved pretrial detention based on dangerousness, but the Court was clear that the Bail Reform Act is preventative, rather than punitive, in nature. *Id.* at 747–48. Consistent with the Supreme Court’s holding, the Bail Reform Act states that nothing in it “shall be construed as modifying or limiting the presumption of innocence.” 18 U.S.C. § 3142(j).

Analysis of Bail Reform Act Factors

Davis is 34 years old. He was born and raised in Baltimore, Maryland. Before his arrest, he was in regular contact with his mother, brother, two sisters, and four children, all of whom live in Baltimore. He does not possess a passport and has never traveled outside of the United States. At the time of his arrest, Davis was unemployed, but his most recent employment was as a roofing laborer. Before that, Davis was employed, through a temporary staffing agency, with a Baltimore County trash pickup service from approximately 2017 until 2018. Davis has performed various manual labor jobs, such as moving, hauling, and construction, since he was 18.

*3 Davis has no prior criminal convictions. He has been arrested and charged with offenses on six prior occasions, but every prior charge has been dismissed. After these prior arrests, he was released by a court on his own recognizance four times and once on bond. There is no release information for the final arrest. Davis has no history of failing to appear for court.

Davis reported two months ago to Pretrial Services that he is in excellent physical health. He now reports that he has **bronchitis**. He appears to have significant mental health issues. His mother reported to the Pretrial Services Officer that her son exhibits symptoms of **bipolar disorder** and **major depressive disorder**. She said that she has been diagnosed with those mental health conditions, and she observes similar behavior in her son, including a short temper, headaches, lack of appetite, alcohol consumption, and marijuana use. Davis’s mother also reported that he has a history of **suicidal**

ideation and suicide attempts. As recently as October 2019, he threatened to commit suicide. He attempted suicide in 2017 and August 2019. Davis has a history of substance abuse. He reported that at the time of his arrest, he smoked marijuana three times a day and consumed alcohol weekly. He previously consumed ecstasy approximately once a month. According to his mother, Davis has never been hospitalized or participated in mental health treatment or substance abuse treatment. At the time of his arrest, Davis had been homeless for two years, staying with friends and family.

Davis has been charged with federal drug offenses. In the indictment, it is alleged that Davis conspired with his co-defendant to distribute cocaine base between August and October 2019. It is further alleged that on two occasions in the fall of 2019, Davis unlawfully distributed cocaine base and fentanyl. These charges are serious.

The government has proffered additional information about Davis's alleged criminal conduct. During the hearing and in its submission in support of continued detention, the government asserts that beginning in the spring of 2019, the ATF placed an undercover agent and a confidential informant (CI) in Baltimore's Pigtown neighborhood who conducted numerous controlled buys of drugs and firearms from Davis and others. ECF No. 17 at 2. From June until October 2019, the government claims that the CI conducted more than 10 controlled buys from Davis, purchasing cocaine base, cocaine, heroin, and fentanyl from him. *Id.* It is further alleged that the CI purchased five firearms from Davis during this period. *Id.* at 2–3.

The weight of the evidence against Davis is strong. According to the government, Davis was repeatedly captured on audio and video conducting the drug and firearm transactions and most of them were also witnessed by an undercover agent. *Id.* at 4.

Davis argues that he should be released because of the COVID-19 public health emergency. The current public health crisis certainly factors into the decision to detain or release someone pending trial. See *United States v. Jefferson*, No. CCB-19-487, 2020 WL 1332011, at *1 (D. Md. Mar. 23, 2020); *United States v. Martin*, No. PWG-19-140-13, 2020 WL 1274857, at *3–4 (D. Md. Mar. 17, 2020). The Court finds that the COVID-19 public health emergency must be considered when weighing “the nature and seriousness of the danger to any person or the community that would be posed

by the person’s release” and the defendant’s “physical and mental health.” 18 U.S.C. § 3142(g)(3)(A) & (4).

*4 In the midst of a public health crisis, the Court must rely largely on the expertise of the Centers for Disease Control and Prevention (CDC), public health officials, and medical professionals when it assesses “the danger to any person or the community that would be posed by the person’s release.” In that regard, the Court has been educated by a March 25, 2020 letter to Governor Hogan signed by over 200 public health experts, doctors, and nurses who teach at Johns Hopkins Bloomberg School of Public Health, School of Nursing, and School of Medicine expressing their “urgent concern about the spread of COVID-19 in Maryland’s prisons, jails, and juvenile detention centers.” See Mar. 25, 2020 Ltr. from Johns Hopkins Faculty to Gov. Hogan (“Hopkins Faculty Ltr.”), available at <https://bioethics.jhu.edu/wp-content/uploads/2019/10/Johns-Hopkins-faculty-letter-on-COVID-19-jails-and-prisons.pdf>, attached to this Memorandum Opinion as Exhibit 1. These Hopkins faculty members believe “an urgent priority in this time of national public health emergency [is] to reduce the number of persons in detention as quickly as possible.” *Id.* They advise that reducing the number of detained persons in Maryland will make the community safer. The Court agrees.

In their words:

This pandemic is shedding a bright light on the extent of the connection between all members of society: jails, prisons and other detention facilities are not separate, but are fully integrated with our community. As public health experts, we believe these steps are essential to support the health of incarcerated individuals, who are some of the most vulnerable people in our society; the vital personnel who work in prisons and jail; and all people in the state of Maryland. Our compassion for and treatment of these populations impact us all.

Id.

The CDC, the Hopkins faculty, and other public health officials are instructing us that social distancing is the only way to slow down the spread of COVID-19, to flatten the curve, and to avoid a strain on our scarce healthcare resources. Social distancing in a pretrial facility is nearly impossible for anyone who enters its doors, especially detainees. The inability to practice social distancing in jails makes “transmission of COVID-19 more likely.” *Id.*²

The risk caused by the inability to social distance is exacerbated by the fact that pretrial detention facilities see a daily flow of people entering and leaving the facility who could be carrying the virus but are asymptomatic.³ *See id.* (noting that “population mixing of staff and detainees also increases likelihoods of exposure” and “[t]his has led to prison outbreaks of COVID-19 in multiple detention facilities in China, associated with introduction into facilities by staff”); *United States v. Barkman*, No. 19-cr-52-RCJ-WGC, 2020 U.S. Dist. LEXIS 45628, at *3 (D. Nev. Mar. 17, 2020) (“Conditions of pretrial confinement create the ideal environment for the transmission of contagious disease.”).

As of today, there are five detainees at the Correctional Treatment Facility (CTF), where Davis is detained, who have tested positive for COVID-19. It would be a welcome relief if the number stopped there, but that is unlikely. The first positive was reported last Wednesday, the second a day later, and three more over the weekend.⁴ There is no evidence that Davis has been infected. He reported to Pretrial Services two months ago that he was in excellent health. He reports today that he has [bronchitis](#). Other than [bronchitis](#), he does not have any other apparent underlying health conditions that put him at greater risk of harm if he were exposed to the virus. The government argues that because he is in excellent health, this factor does not support release. ECF No. 17 at 5. The Court disagrees. If released, Davis will be removed from a custodial setting where the risk of infection is higher for everyone, including the healthy, and he will live in the community where he is able to practice social distancing, self-quarantine, self-isolate if infected, and seek medical treatment if necessary. The Court finds that the “physical and mental health” factor cuts in favor of release for any defendant during this public health crisis. If Davis has [bronchitis](#), this underlying health condition would raise his risk for greater harm if exposed, which in turn would make this factor even more compelling.⁵

*5 Experts agree that pretrial detention facilities are poorly equipped to manage a crisis resulting from this potentially

deadly, highly contagious novel coronavirus within their walls. By design, jails are not medical facilities. “[F]or incarcerated individuals who are infected or very sick, the ability properly to treat them and save their lives is very limited. Testing kits are in short supply, and prisons and jails have limited options for proper respiratory isolation.” *See Hopkins Faculty Ltr.*⁶ The spillover effect that an outbreak in a pretrial facility would have on the greater community is undeniable and concerning. *See id.* (“Prison, jail, and detention center staff may bring the virus into the facility and are also at risk of acquisition from infected incarcerated individuals. Once infected, staff may also transmit the virus back into the communities and to their families. As jail, prison, and detention center health care staff themselves get sick with COVID-19, workforce shortages will make it even more difficult to adequately address all the health care needs in facilities.”). “The risk of overburdening the jail’s healthcare resources, and the healthcare resources of the surrounding community is real.” *United States v. Harris*, No. 19-356, 2020 WL 1482342, at *1 (D.D.C. Mar. 26, 2020).⁷

The Court finds that the presumption of detention as to dangerousness has been rebutted due to the COVID-19 health crisis. The “danger to the community” analysis, however, does not stop there. The Court must take into consideration whether Davis himself poses a danger to the community such that releasing him would be more dangerous than keeping him detained. *See United States v. McLean*, Crim. No. 19-380, slip op. at 4 (D.D.C. Mar. 28, 2020) (“Defendant’s continued pretrial detention poses a risk to community safety, which the Court must weigh against the risk posed by his release to home confinement ...”); *see also United States v. Stephens*, No. 15-cr-95-AJN, 2020 WL 1295155, at *2 (S.D.N.Y. Mar. 19, 2020) (“Although there is not yet a known outbreak [of COVID-19] among the jail and prison populations, inmates may be at a heightened risk of contracting COVID-19 should an outbreak develop ... A comprehensive view of the danger the Defendant poses to the community requires considering all factors—including this one—on a case-by-case basis.”).

As evidence of Davis’s danger to the community, the government points to his alleged drug dealing and his unlawful sale of firearms to a confidential informant over a six-month period last year. These are serious allegations, and the alleged conduct presents a danger to the community. However, rare is the case in which there will be no evidence of danger to the community based on alleged criminal conduct. The plain language of the statute requires the Court to evaluate the “nature and seriousness of the danger.” This

language makes clear that there are different types of dangers and varying levels of seriousness. Selling narcotics, for example, is different than identity theft, which is different than carjacking. Having identified the specific nature of the danger and how serious it is, the Court then must consider available release conditions that will address those concerns and “reasonably assure” the safety of the community. The statute requires “reasonable assurance,” not a “guarantee.” *United States v. Orta*, 760 F.2d 887, 891–92 (8th Cir. 1985). At times, there will be no such conditions. Here, there are.

*6 Davis has no prior criminal convictions and no history of violence. The government agrees that he did not engage in violent acts during the period of alleged criminal conduct. The government’s concerns about danger to the community if he were released – that he would return to dealing drugs and selling firearms unlawfully – can be addressed with release conditions. With these conditions in mind, the Court finds that Davis’s continued incarceration poses a greater risk to community safety than his release. *See Harris*, 2020 WL 1482342, at *1 (“The Court is convinced that incarcerating Defendant while the current COVID-19 crisis continues to expand poses a far greater risk to community safety than the risk posed by Defendant’s release to home confinement on these strict conditions.”); *United States v. Jaffee*, Crim. No. 19-cr-88 (D.D.C. Mar. 26, 2020) (minute order concluding that release to home confinement on high intensity supervision was appropriate after considering “all of the factors specified in 18 U.S.C. 3142(g), and, in particular, the overall safety of the community” because “the Court is now convinced that incarcerating the defendant while the current COVID-19 crisis continues to expand poses a greater risk to community safety than posed by Defendant’s release to home confinement.”); *United States v. Ramos*, No. 18-CR-30009-FDS, 2020 WL 1478307, at *1 (D. Mass. Mar. 26, 2020) (finding that Ramos’s “continued detention poses a risk of danger to himself and others”).

With respect to flight, the Court finds that the government has not shown by a preponderance that Davis poses a risk of non-appearance. He has strong ties to Baltimore. His entire family lives here. He has lived here his entire life. He does not have a passport and has never traveled out of the country. When he has been ordered to appear in court on charges in the past, he has complied with the court’s orders. Additionally, the pandemic has significantly curtailed travel throughout the region, including through Governor Hogan’s order today that all Marylanders stay at home, providing additional assurance that Davis would not leave the area even if he had the financial

resources to do so. *See Ramos*, 2020 WL 1478307, at *1 (“[T]he court finds that the circumstances of the COVID-19 pandemic diminish the risk that Mr. Ramos will flee pending trial ...”).

The Court has considered the arguments and proffers of counsel, the Pretrial Services Report, and the publicly available information about COVID-19. Having applied them to the factors in the Bail Reform Act, the Court finds that there are conditions that will reasonably assure Davis’s appearance in court and the safety of the community. Davis must reside at his girlfriend’s home in Baltimore. She will serve as his third-party custodian.⁸ He is confined to the residence except for medical appointments, meetings with counsel, court appearances, and other activities specifically approved by the Court and as pre-approved by Pretrial Services. Davis also must comply with all directives from federal, state, or local government pertaining to public health, including COVID-19. Pretrial Services should monitor his compliance with home confinement through location monitoring technology it deems appropriate. Davis may not use any controlled dangerous substances or illegal narcotics; he must attend substance abuse and mental health evaluation and counseling, if deemed appropriate by Pretrial Services; and he must submit to drug testing. Every condition of release is identified in the Order Setting Conditions of Release, ECF No. 20. Defense counsel should review the release order with his client, have Davis and his third-party custodian sign it acknowledging the conditions and consequences of a failure to abide by them, and submit a signed copy to the Court as soon as practicable.

Access to Counsel

*7 The Bail Reform Act does not address the extent to which pretrial detention may interfere with the attorney-client relationship. In ordinary times, the Court would not address it either. But these are not ordinary times. The current public health crisis has upended the world as we know it. It has dramatically altered and limited our interactions with family, friends, co-workers, and members of our community. And it will similarly alter and limit a defendant’s interaction with his attorney – especially if the defendant is detained pending trial.⁹

Because of COVID-19 concerns, CDF has eliminated contact meetings with counsel. Instead, counsel may meet with their clients in visitation booths traditionally used for non-

contact family visits. In these booths, the defendant and his attorney are separated by plexiglass and must use a phone to communicate. CTF has not eliminated contact visits with counsel; attorneys are still permitted to meet with their clients in the attorney-client meeting rooms.

Both arrangements pose myriad challenges for the lawyer, the defendant, and the attorney-client relationship. As a general matter, attorneys may not want to enter any of the detention facilities out of fear for their and their family's health. They also may not want to risk unwittingly carrying the virus into the facilities and transmitting it to their clients, other detainees, or jail employees. Attorneys will be even more deterred from visiting a client now that five detainees at CTF have tested positive for COVID-19. For those attorneys who do venture into the facilities during this public health crisis, they do so at their own risk.

If an attorney does not visit his client at the jail, his only means of communication is by telephone and U.S. mail. The various technological alternatives to in-person meetings that many of us have taken advantage of during this crisis – FaceTime and Zoom, for example – are unavailable to incarcerated people. Even if these means of communication were an available option, there is no substitute for a face-to-face, in-person, contact meeting between an attorney and his client.

The disruption to the attorney-client relationship caused by this public health crisis likely will have broader implications for the Court and the administration of justice. If attorneys cannot regularly have meaningful in-person meetings with their clients, regularly review discovery with them, or thoroughly advise them about the consequences of going to trial, the number of jury trials may increase. This will strain Court and prosecutorial resources and may result in unnecessarily longer prison sentences. The extent of the disruption of the attorney-client relationship and the strain on the Court depends on how long this crisis lasts and how many people are detained pending trial. Even though access to counsel is not a specified factor in the Bail Reform Act, the Court has considered it in its decision.

Conclusion

*8 In conclusion, the Court finds that there is a combination of conditions that will reasonably assure Davis's appearance as required and the safety of the community. Those conditions are identified in the accompanying Order Setting Conditions

of Release, ECF No. 20. The government's motion for pretrial detention is denied.

Attachment

March 25, 2020

Hon. Larry Hogan

Governor of Maryland

Annapolis, MD

Dear Governor Hogan:

We are writing as faculty members of the Johns Hopkins Bloomberg School of Public Health, School of Nursing and School of Medicine to express our urgent concern about the spread of COVID-19 in Maryland's prisons, jails, and juvenile detention centers. As you know, COVID-19 is highly contagious, difficult to prevent except through social distancing, and especially dangerous to individuals over age 60 or with a chronic disease. Moreover, recent data suggest that the virus can remain on surfaces for up to 72 hours, thus rendering social distancing less effective in circumstances where the virus is present.

Jails, prisons, detention facilities and other closed settings have long been known to be associated with high transmission probabilities for infectious diseases, including tuberculosis, multi-drug resistant tuberculosis, influenza, MRSA (methicillin resistant staph aureus), and viral hepatitis. Several deaths were reported in the US in immigration detention facilities associated with ARDS (acute respiratory distress syndrome) following influenza A, including a 16 year old immigrant child who died of untreated ARDS in custody in May 2019. ARDS is the life-threatening complication of COVID-19 disease and has a 30% mortality given ideal care. A correctional officer in New York has also died of the disease.

The close quarters of jails and prisons, the inability to employ effective social distancing measures, and the many high-contact surfaces within facilities, make transmission of COVID-19 more likely. Soap and hand sanitizers are not freely available in some facilities. Hand sanitizers like Purell, are banned in many facilities, because they contain alcohol. Further, for incarcerated individuals who are infected or very sick, the ability properly to treat them and save their lives is very limited. Testing kits are in short supply, and prisons and jails have limited options for proper respiratory isolation.

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A number of features of these facilities can heighten risks for exposure, acquisition, transmission, and clinical complications of COVID-19 and other infectious diseases. These include physical/mechanical risks such as overcrowding, population density in close confinement, insufficient ventilation, shared toilets, showers, and eating environments and limited availability of hygiene and personal protective equipment such as masks and gloves in some facilities. The high rate of turnover and population mixing of staff and detainees also increases likelihoods of exposure. This has led to prison outbreaks of COVID-19 in multiple detention facilities in China, associated with introduction into facilities by staff.

These populations are also at additional risk, due to high rates of chronic health conditions; substance use; mental health issues; and, particularly in prisons, aging and chronically ill populations who may be vulnerable to more severe illnesses after COVID-19 infection, and to death. Given that Maryland prisons, jails, and juvenile detention centers incarcerate high numbers of marginalized populations and African Americans will be disproportionately affected by these risks.

*9 Prison, jail, and detention center staff may bring the virus into the facility and are also at risk of acquisition from infected incarcerated individuals. Once infected, staff may also transmit the virus back into the communities and to their families. As jail, prison, and detention center health care staff themselves get sick with COVID-19, workforce shortages will make it even more difficult to adequately address all the health care needs in facilities.

Every effort should be made to reduce exposure in jails and other detention facilities, and we appreciate the efforts thus far of administrators toward this goal. To ensure that there are no impediments for inmates to come forward when sick, health care must be available to inmates without co-pays. But there should also be efforts to reduce the state prison population as well. It may be extremely difficult, however, to achieve and sustain prevention of transmission in these closed settings and given the design feature of the facilities. Moreover, lockdowns and use of solitary confinement should not be used as a public health measure, both because they have limited effectiveness and because they are a severe infringement of the rights of incarcerated people. It is therefore an urgent priority in this time of national public health emergency to reduce the number of persons in detention as quickly as possible.

Treatment needs of infected incarcerated individuals also need to be met, including expanded arrangements with local hospitals. It is essential that these facilities, which are public institutions, be transparent about their plans for addressing COVID-19. Such transparency will help public health officials and families of incarcerated people know what facilities are doing, and it also can help jurisdictions across the state share information and best practices. Other counties across the country have shared their action plans with the public and Maryland should follow these examples.

We therefore urge you to take the following steps:

1. Require correctional facility administrators to make their plans for prevention and management of COVID-19 in their institutions publicly available, as the San Francisco Sheriff's Department has done. Protocols should be in line with national CDC guidance. Frequently updated recommendations and model protocols are available from the National Commission on Correctional Health Care (<https://www.ncchc.org/blog/covid-19-coronavirus-what-you-need-to-know-in-corrections>)
2. Ensure that intake screening protocols are updated to include COVID-specific questions.
3. Ensure the availability of sufficient soap and hand sanitizer for incarcerated individuals without charge; restrictions on alcohol (in hand sanitizers) should be suspended.
4. Implement other precautions to limit transmission within prisons and jails without relying on widespread use of lockdowns and solitary confinement. Additional precautions jointly issued by the Vera Institute of Justice and Community Oriented Correctional Health Services are available at <https://cochs.org/files/covid-19/covid-19-jails-prison-immigration.pdf>
5. Consider pre-trial detention only in genuine cases of security concerns. Persons held for non-payment of fees and fines, or because of insufficient funds to pay bail, or parole or probation violations, should be prioritized for release. No one in these categories should be sent to jail
6. Expedite consideration of all older incarcerated individuals and those with chronic conditions predisposing to severe COVID-19 disease ([heart disease](#), [lung disease](#), [diabetes](#), immune-compromise) for parole or other form of release from prison, with alternative

forms of supervision and with supports in the community once released. Clemency power and expanded authority in Maryland law for administrative parole should be employed.

*10 7. Invest in increased resources for discharge planning and re-entry transitions to facilitate prison release of people under these revised policies.

8. Arrange for COVID-19 testing of incarcerated individuals and correctional facility workers who become ill.

9. Cease any collection of fees or co-pays or medical care.

10. Seek a Medicaid 1135 waiver to enable hospitals to provide an appropriate level of care to incarcerated individuals who are sick. See <https://cochs.org/files/medicaid/COVID-19-Justice-Involved-1135-Waiver.pdf>

This pandemic is shedding a bright light on the extent of the connection between all members of society: jails, prisons and other detention facilities are not separate, but are fully integrated with our community. As public health experts, we believe these steps are essential to support the health of incarcerated individuals, who are some of the most vulnerable people in our society; the vital personnel who work in prisons and jail; and all people in the state of Maryland. Our compassion for and treatment of these populations impact us all.

Thank you very much.

This letter represents the views of the following signatories, and do not necessarily reflect the views of The Johns Hopkins University

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All Citations

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Footnotes

- 1 Davis, counsel, and the Pretrial Services Officer participated in the hearing by telephone. After consultation with counsel, Davis consented to the audio hearing. This procedure was authorized by Congress and has been adopted by this Court. See *In Re: Video Teleconferencing for Criminal Proceedings Under CARES Act*, Misc. No. 00-308, Standing Order 2020-06. These procedures are necessary to preserve the health and well-being of the participants in the hearing and the community. See *In Re: Court Operations Under the Exigent Circumstances Created by COVID-19*, Misc. No. 00-308 (Mar. 20, 2020).
- 2 See also *United States v. Harris*, No. 19-356, 2020 WL 1482342, at *1 (D.D.C. Mar. 26, 2020) (“The risk of the spread of the virus in the jail is palpable....”); *Basank v. Decker*, No. 20 CIV. 2518 (AT), 2020 WL 1481503, at *5 (S.D.N.Y. Mar. 26, 2020) (“The risk of contracting COVID-19 in tightly-confined spaces, especially jails, is now exceedingly obvious.”); *United States v. Ramos*, No. 18-CR-30009-FDS, 2020 WL 1478307, at *1 (D. Mass. Mar. 26, 2020) (“[I]t is not possible for a medically vulnerable inmate ... to isolate himself in [an] institutional setting as recommended by the CDC.”).
- 3 The daily flow of human traffic includes correctional officers, kitchen workers, administrative staff, attorneys, and newly admitted pretrial detainees who were recently in the community or in another jail or prison.
- 4 Governor Hogan announced yesterday that Maryland “will be looking more like New York” around Easter, which is less than two weeks away. If that is the case, the COVID-19 outbreak in New York City’s jails should be considered, even if the comparisons are not perfect. During the week of March 15, the New York Department of Corrections reported 21 cases of COVID-19 in inmates. Today, about two weeks later, it has been reported that 167 New York City inmates and 114 city corrections staff members at Riker’s Island have tested positive. Additionally, here in Maryland, the Clifton T. Perkins Hospital Center, Maryland’s maximum-security state psychiatric hospital, reported today that several patients have tested positive for COVID-19, and the Maryland state prisons have reported their first case.
- 5 Even if Davis were at a jail where there have not yet been reports of positive tests, the “danger to the community” analysis still would apply. Public health officials and experts have not advised us to wait until the virus is found in a facility before we act. Rather, they urge us to take preventative steps to avoid, stem, or curtail the crisis. The most important step we can take is to reduce the detainee population when possible, regardless of whether the virus has been detected in the facility.
- 6 Cf. *United States v. Stephens*, No. 15-cr-95 (AJN), 2020 WL 1295155, at *2 (S.D.N.Y. Mar. 19, 2020) (“Though the BOP has admirably put transmission mitigation measures in place ... in the event of an outbreak at the Metropolitan Correctional Center ... substantial medical and security challenges would almost certainly arise.”).
- 7 The government argues that the pretrial detention facilities are equipped to handle the situation. The institutional efforts cited by the government include increased sanitation and hygiene, elimination of family visits, training of correctional officers, screening new inmates for symptoms, and quarantining inmates if necessary. ECF No. 17 at 5–7. These

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measures are important. However, they do not prevent the virus from entering the facilities, and they do not enable social distancing. Moreover, the Court agrees with the Hopkins experts that pretrial facilities are not equipped to provide the necessary medical care.

8 At the hearing, the government raised concerns about the third-party custodian. The Court agrees that Davis's girlfriend is not an ideal custodian, but the Court finds her suitable under these circumstances. She is 33 years old, has two minor children, and lives in Baltimore. She works as a pizza delivery driver five nights a week. She is willing to have Davis live in her home and serve as a third-party custodian. She appeared at the detention hearing by telephone. She has a dated criminal history of drug charges when she was younger, but she completed drug treatment and has no recent charges. The Court finds that she is suitable, particularly in light of Davis's compliance with prior court-ordered conditions, lack of criminal history, and the location monitoring release condition.

9 Counsel for Davis did not raise the access to counsel issue as a basis for release. However, counsel in another matter before the Court today provided an email exchange from March 24 and 25 in which a CTF staff member told him that "due to the increase of legal call requests, there will be a delay in processing legal calls. Diligent efforts are being made to accommodate everyone's request under these circumstances. The case manager/supervisor cc'd on this email will contact you for scheduling. Please Note: In-person legal visits are still allowed and the most frequently used option ... Thank you for your understanding as we all are adjusting to the concerns of COVID-19." No legal call has been scheduled.

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Only the Westlaw citation is currently available.

This case was not selected for

publication in West's Federal Reporter.

See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of Appeals 3rd Cir. App. I, IOP 5.1, 5.3, and 5.7. United States Court of Appeals, Third Circuit.

UNITED STATES of America

v.

Calvin ROEDER, Appellant

No. 20-1682

|
(Filed: April 1, 2020)

Appeal from the United States District Court for the Eastern District of Pennsylvania, District Court No. 2-18-cr-00259-001, District Judge: The Honorable [Wendy Beetlestone](#)

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Before: [SMITH](#), Chief Judge, [AMBRO](#) and [CHAGARES](#), Circuit Judges

OPINION *

PER CURIAM.

*1 Calvin Roeder filed an emergency appeal seeking review of the District Court's denial of his motion to postpone his self-surrender date in light of the COVID-19 pandemic. We reversed the District Court's denial on March 29, 2020. We now provide the reasons for our order.

I.

Roeder pleaded guilty to charges of possession and distribution of child pornography under [18 U.S.C. § 2252\(a\)](#). On February 18, 2020, the District Court entered a judgment sentencing him to 78 months' imprisonment and ordered him to self-surrender to the Bureau of Prisons, at a prison in Pennsylvania, on March 30, 2020.

After Roeder's sentencing but before his surrender date, Pennsylvania, along with the rest of the United States, began experiencing the effects of the COVID-19 pandemic. "COVID-19 is the infectious disease caused by the novel coronavirus."¹ The virus was unknown until an outbreak began in December 2019 in Wuhan, China. The most common symptoms of the illness are fever, tiredness, and a dry cough, which may progress and cause difficulty breathing and respiratory distress.² The elderly and those with pre-existing medical conditions are at increased risk of severe illness and death from the virus.³ On March 11, 2020, the World Health Organization declared COVID-19 a global pandemic.⁴

In response to COVID-19, the Commonwealth of Pennsylvania has suspended schools indefinitely. In addition, on March 19, 2020, Pennsylvania Governor Thomas Wolf entered an order prohibiting the operation of businesses that are not life sustaining.⁵ On March 23, 2020, residents in several northeastern Pennsylvania counties were ordered to stay home.⁶

On March 25, 2020, Roeder filed a motion in the District Court to delay the execution of his sentence due to the COVID-19 pandemic. He argued that his surrender should be delayed until May 4, 2020,⁷ or until the COVID-19 crisis subsides, "[i]n the interest of the health and safety of Mr. Roeder and every member of the staff of the Federal Prison at Allentown, in addition to their families, and other inmates." Motion at 3. Roeder cited no law in support of his request, contending that the "ends of justice" would be served because a delay would promote public safety. *Id.* at 4. Later that day, the Government responded that it did not object to Roeder's request.

*2 The next day, March 26, 2020, the District Court summarily denied, without reasoning, Roeder's unopposed motion and directed him to surrender as scheduled on March 30, 2020.

Roeder promptly filed this emergency appeal seeking review of the District Court's order and a postponement of 90 days.

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II.

We have jurisdiction to review the District Court's order pursuant to 18 U.S.C. § 3145(c) and 28 U.S.C. § 1291. *See also Fed. R. App. P. 9(b)* ("A party entitled to do so may obtain review of a district-court order regarding release after a judgment of conviction by filing a notice of appeal from that order in the district court."). To facilitate our review, Rule 9(a)(1) requires the District Court to contemporaneously "state in writing, or orally on the record, the reasons for an order regarding the release or detention of a defendant in a criminal case." *Fed. R. App. P. 9(a)(1)*.⁸ If there has been a finding by clear and convincing evidence that "the person is not likely to flee or pose a danger to the safety of any other person or the community if released," *see* 18 U.S.C. § 3143(a), we may grant relief "if it is clearly shown that there are exceptional reasons why such person's detention would not be appropriate." 18 U.S.C. § 3145(c).

III.

According to Pennsylvania's Department of Health, a primary strategy for minimizing the spread of COVID-19 is "social distancing."⁹ This means avoiding large gatherings of people and keeping at least six feet away from other individuals.¹⁰ It goes without saying that prisons generally are crowded spaces and therefore are less than conducive to the practice of social distancing. During this rapidly evolving public health emergency, there are many valid concerns about the possibility of contagion in prisons.

The Federal Bureau of Prisons (BOP), which is responsible for the custody and care of more than 175,000 federal inmates,¹¹ has significantly modified its operations in light of the COVID-19 pandemic.¹² It has suspended all social visits, limits inmate movement, screens inmates for symptoms and temperature elevations, and, if present, isolates symptomatic inmates.¹³ Due to continuously changing circumstances surrounding the COVID-19 pandemic, it is unclear to what extent these measures have been or will be effective in mitigating spread of the disease. The BOP, like the rest of the country, is still learning how best to deal with this public health threat.

IV.

Section 3143(a) provides that an individual who has been convicted and sentenced must be detained unless there is a finding "by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released." 18 U.S.C. § 3143(a)(1).

*3 As Roeder observed in his motion before the District Court,¹⁴ the District Court previously extended the execution of his sentence due to his mother's illness and subsequent death. *See* Motion at 3. In addition, after a very brief imprisonment, the District Court again determined that it was appropriate to re-release him to home detention. *Id.* Most recently, the Government filed a non-opposition to his motion before the District Court, an implicit concession that it continues to be the case that Roeder is unlikely to flee or pose a danger to anyone in the community if his surrender date is delayed. *See* 18 U.S.C. § 3143(a).

Because the District Court previously concluded that there was clear and convincing evidence that Roeder poses neither a flight risk nor a danger to the community, and because the Government implicitly agreed with this determination,¹⁵ the District Court should have explained why it denied Roeder's request for an extension of his self-surrender date in light of the COVID-19 pandemic. Unfortunately, the District Court provided no reason whatsoever for its ruling. Instead, it summarily denied Roeder's unopposed motion without further discussion.

V.

We are tasked with reviewing the District Court's decision to deny an unopposed motion. Although we must independently determine whether relief is appropriate, we give careful consideration to the reasons offered by the District Court. *See, e.g., United States v. Smith*, 793 F.2d 85, 87 (3d Cir. 1986) (reviewing a district court order regarding bail pending appeal); *United States v. Delker*, 757 F.2d 1390, 1400 (3d Cir. 1985) (reviewing a district court order of detention pending trial). Our task is hampered in this case by the District Court's lack of substantive reasoning. We simply cannot say whether it adequately considered Roeder's motion and applied the requirements of 18 U.S.C. § 3143, as it was required to do.

Under ordinary circumstances, it would be our preference to vacate the District Court's order and permit it to provide substantive conclusions concerning the merits of Roeder's motion. These are not, however, ordinary times. In light of the exigent circumstances surrounding the COVID-19 pandemic and the timing of our ruling (less than 24 hours before Roeder's scheduled surrender date), we were compelled to grant relief and reverse the District Court's order—even though the existence of a widespread health risk is not, without more, a sufficient reason for every individual subject to a properly imposed federal sentence of imprisonment to avoid or substantially delay reporting for that sentence.¹⁶

While the COVID-19 pandemic has given rise to exceptional and exigent circumstances that require the prompt attention of the courts, it is imperative that they continue to carefully and impartially apply the proper legal standards that govern each individual's particular request for relief. If, in the future, Roeder seeks an additional modification of his self-surrender date, we expect that the District Court will provide an adequately reasoned decision so that, if an appeal follows, we may engage in a thorough appellate review.

All Citations

--- Fed.Appx. ----, 2020 WL 1545872

Footnotes

- * This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.
- 1 <https://www.bop.gov/coronavirus/> (Mar. 30, 2020).
- 2 <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses> (Mar. 30, 2020).
- 3 *Id.*
- 4 <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen>. (Mar. 30, 2020).
- 5 <https://www.governor.pa.gov/wp-content/uploads/2020/03/20200319-TWW-COVID-19-business-closure-order.pdf> (Mar. 30, 2020).
- 6 <https://www.governor.pa.gov/wp-content/uploads/2020/03/03.23.20-TWW-COVID-19-Stay-at-Home-Order.pdf> (Mar. 30, 2020).
- 7 The motion requests a 30-day postponement (which would fall on April 22, 2020), see Motion at 3, and also requests a report date of May 4, 2020, see *id.* at 4. For present purposes, we will assume Roeder intended the later date.
- 8 [Rule 9\(b\) of the Federal Rules of Appellate Procedure](#) directs that, where a party seeks review of a District Court order regarding release after a judgment of conviction, the District Court's order is subject to the requirements of [Rule 9\(a\)](#). See [Fed. R. App. P. 9\(b\)](#).
- 9 <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Stop-the-Spread.aspx> (Mar. 30, 2020)
- 10 *Id.*
- 11 <https://www.bop.gov/about/agency/> (Mar. 30, 2020).
- 12 https://www.bop.gov/coronavirus/covid19_status.jsp (Mar. 30, 2020).
- 13 *Id.*
- 14 On appeal, Roeder provided a notably more substantial motion than he did in the District Court. In issuing our order, however, we explicitly refused to take cognizance of arguments proffered for the first time in his submission to our Court.
- 15 Although the Government now argues to us that the District Court's order was within its authority, the Government has not indicated that it has changed its apparent view that Roeder does not pose a flight risk or a danger to the community.
- 16 Similarly, the existence of some health risk to every federal prisoner as the result of this global pandemic does not, without more, provide the sole basis for granting release to each and every prisoner within our Circuit.

Emergency Rules 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11 of the California Rules of Court are adopted effective April 6, 2020, to read:

1
2 **Emergency rule 1. Unlawful detainers**

3
4 **(a) Application**

5
6 Notwithstanding any other law, including Code of Civil Procedure sections 1166,
7 1167, 1169, and 1170.5, this rule applies to all actions for unlawful detainer.
8

9 **(b) Issuance of summons**

10
11 A court may not issue a summons on a complaint for unlawful detainer unless the
12 court finds, in its discretion and on the record, that the action is necessary to protect
13 public health and safety.
14

15 **(c) Entry of default**

16
17 A court may not enter a default or a default judgment for restitution in an unlawful
18 detainer action for failure of defendant to appear unless the court finds both of the
19 following:
20

21 (1) The action is necessary to protect public health and safety; and

22
23 (2) The defendant has not appeared in the action within the time provided by
24 law, including by any applicable executive order.
25

26 **(d) Time for trial**

27
28 If a defendant has appeared in the action, the court may not set a trial date earlier
29 than 60 days after a request for trial is made unless the court finds that an earlier
30 trial date is necessary to protect public health and safety. Any trial set in an
31 unlawful detainer proceeding as of April 6, 2020 must be continued at least 60 days
32 from the initial date of trial.
33

34 **(e) Sunset of rule**

35
36 This rule will remain in effect until 90 days after the Governor declares that the
37 state of emergency related to the COVID-19 pandemic is lifted, or until amended or
38 repealed by the Judicial Council.
39
40
41

Document received by the CA Supreme Court.

1 **Emergency rule 2. Judicial foreclosures—suspension of actions**

2
3 Notwithstanding any other law, this rule applies to any action for foreclosure on a
4 mortgage or deed of trust brought under chapter 1, title 10, of part 2 of the Code of Civil
5 Procedure, beginning at section 725a, including any action for a deficiency judgment, and
6 provides that, until 90 days after the Governor declares that the state of emergency
7 related to the COVID-19 pandemic is lifted, or until this rule is amended or repealed by
8 the Judicial Council:

- 9
10 (1) All such actions are stayed, and the court may take no action and issue no
11 decisions or judgments unless the court finds that action is required to further the
12 public health and safety.
13
14 (2) Any statute of limitations for filing such an action is tolled.
15
16 (3) The period for electing or exercising any rights under that chapter, including
17 exercising any right of redemption from a foreclosure sale or petitioning the court
18 in relation to such a right, is extended.
19
20

21 **Emergency rule 3. Use of technology for remote appearances**

22
23 **(a) Remote appearances**

24
25 Notwithstanding any other law, in order to protect the health and safety of the public,
26 including court users, both in custody and out of custody defendants, witnesses, court
27 personnel, judicial officers, and others, courts must conduct judicial proceedings and
28 court operations as follows:

- 29
30 (1) Courts may require that judicial proceedings and court operations be
31 conducted remotely.
32
33 (2) In criminal proceedings, courts must receive the consent of the defendant to
34 conduct the proceeding remotely and otherwise comply with emergency rule
35 5. Notwithstanding Penal Code sections 865 and 977 or any other law, the
36 court may conduct any criminal proceeding remotely. As used in this rule,
37 “consent of the defendant” means that the consent of the defendant is
38 required only for the waiver of the defendant’s appearance as provided in
39 emergency rule 5. For good cause shown, the court may require any witness
40 to personally appear in a particular proceeding.
41
42 (3) Conducting proceedings remotely includes, but is not limited to, the use of
43 video, audio, and telephonic means for remote appearances; the electronic

1 exchange and authentication of documentary evidence; e-filing and e-service;
2 the use of remote interpreting; and the use of remote reporting and electronic
3 recording to make the official record of an action or proceeding.

4
5 **(b) Sunset of rule**

6
7 This rule will remain in effect until 90 days after the Governor declares that the
8 state of emergency related to the COVID-19 pandemic is lifted, or until amended or
9 repealed by the Judicial Council.

10
11
12 **Emergency rule 4. Emergency Bail Schedule**

13
14 **(a) Purpose**

15
16 Notwithstanding any other law, this rule establishes a statewide Emergency Bail
17 Schedule, which is intended to promulgate uniformity in the handling of certain
18 offenses during the state of emergency related to the COVID-19 pandemic.

19
20 **(b) Mandatory application**

21
22 No later than 5 p.m. on April 13, 2020, each superior court must apply the
23 statewide Emergency Bail Schedule:

- 24
25 (1) To every accused person arrested and in pretrial custody.
26
27 (2) To every accused person held in pretrial custody.
28

29 **(c) Setting of bail and exceptions**

30
31 Under the statewide Emergency Bail Schedule, bail for all misdemeanor and felony
32 offenses must be set at \$0, with the exception of only the offenses listed below:

- 33
34 (1) A serious felony, as defined in Penal Code section 1192.7(c), or a violent
35 felony, as defined in Penal Code section 667.5(c);
36
37 (2) A felony violation of Penal Code section 69;
38
39 (3) A violation of Penal Code section 166(c)(1);
40
41 (4) A violation of Penal Code section 136.1 when punishment is imposed under
42 section 136.1(c);
43

- 1 (5) A violation of Penal Code section 262;
2
3 (6) A violation of Penal Code sections 243(e)(1) or 273.5;
4
5 (7) A violation of Penal Code section 273.6 if the detained person made threats
6 to kill or harm, has engaged in violence against, or has gone to the residence
7 or workplace of, the protected party;
8
9 (8) A violation of Penal Code section 422 where the offense is punished as a
10 felony;
11
12 (9) A violation of Penal Code section 646.9;
13
14 (10) A violation of an offense listed in Penal Code section 290(c);
15
16 (11) A violation of Vehicle Code sections 23152 or 23153;
17
18 (12) A felony violation of Penal Code section 463; and
19
20 (13) A violation of Penal Code section 29800.

21
22 **(d) Ability to deny bail**

23
24 Nothing in the Emergency Bail Schedule restricts the ability of the court to deny
25 bail as authorized by article I, section 12, or 28(f)(3) of the California Constitution.
26

27 **(e) Application of countywide bail schedule**

- 28
29 (1) The current countywide bail schedule of each superior court must remain in
30 effect for all offenses listed in exceptions (1) through (13) of the Emergency
31 Bail Schedule, including any count-specific conduct enhancements and any
32 status enhancements.
33
34 (2) Each superior court retains the authority to reduce the amount of bail listed in
35 the court's current countywide bail schedule for offenses in exceptions (1)
36 through (13), or for any offenses not in conflict with the Emergency Bail
37 Schedule.
38
39
40
41
42

1 **(f) Bail for violations of post-conviction supervision**

- 2
- 3 (1) Under the statewide Emergency Bail Schedule, bail for all violations of
4 misdemeanor probation, whether the arrest is with or without a bench
5 warrant, must be set at \$0.
- 6
- 7 (2) Bail for all violations of felony probation, parole, post-release community
8 supervision, or mandatory supervision, must be set in accord with the
9 statewide Emergency Bail Schedule, or for the bail amount in the court’s
10 countywide schedule of bail for charges of conviction listed in exceptions (1)
11 through (13), including any enhancements.

12

13 **(g) Sunset of rule**

14

15 This rule will remain in effect until 90 days after the Governor declares that the
16 state of emergency related to the COVID-19 pandemic is lifted, or until amended or
17 repealed by the Judicial Council.

18

19

20 **Emergency rule 5. Personal appearance waivers of defendants during health**
21 **emergency**

22

23 **(a) Application**

24

25 Notwithstanding any other law, including Penal Code sections 865 and 977, this
26 rule applies to all criminal proceedings except cases alleging murder with special
27 circumstances and cases in which the defendant is currently incarcerated in state
28 prison, as governed by Penal Code section 977.2.

29

30 **(b) Types of personal appearance waivers**

- 31
- 32 (1) With the consent of the defendant, the court must allow a defendant to waive
33 his or her personal appearance and to appear remotely, either through video
34 or telephonic appearance, when the technology is available.
- 35
- 36 (2) With the consent of the defendant, the court must allow a defendant to waive
37 his or her appearance and permit counsel to appear on his or her behalf. The
38 court must accept a defendant’s waiver of appearance or personal appearance
39 when:
- 40
- 41 (A) Counsel for the defendant makes an on the record oral representation
42 that counsel has fully discussed the waiver and its implications with the

1 defendant and the defendant has authorized counsel to proceed as
2 counsel represents to the court;

3
4 (B) Electronic communication from the defendant as confirmed by
5 defendant’s counsel; or

6
7 (C) Any other means that ensures the validity of the defendant’s waiver.
8

9 **(c) Consent by the defendant**

10
11 (1) For purposes of arraignment and entry of a not guilty plea, consent means a
12 knowing, intelligent, and voluntary waiver of the right to appear personally in
13 court. Counsel for the defendant must state on the record at each applicable
14 hearing that counsel is proceeding with the defendant’s consent.

15
16 (2) For purposes of waiving time for a preliminary hearing, consent also means a
17 knowing, intelligent, and voluntary waiver of the right to hold a preliminary
18 hearing within required time limits specified either in Penal Code section
19 859b or under emergency orders issued by the Chief Justice and Chair of the
20 Judicial Council.

21
22 (3) The court must accept defense counsel’s representation that the defendant
23 understands and agrees with waiving any right to appear unless the court has
24 specific concerns in a particular matter about the validity of the waiver.

25
26 **(d) Appearance through counsel**

27
28 (1) When counsel appears on behalf of a defendant, courts must allow counsel to
29 do any of the following:

30
31 (A) Waive reading and advisement of rights for arraignment.

32
33 (B) Enter a plea of not guilty.

34
35 (C) Waive time for the preliminary hearing.

36
37 (2) For appearances by counsel, including where the defendant is either
38 appearing remotely or has waived his or her appearance and or counsel is
39 appearing by remote access, counsel must confirm to the court at each
40 hearing that the appearance by counsel is made with the consent of the
41 defendant.
42

1 **(e) Conduct of remote hearings**

- 2
- 3 (1) With the defendant’s consent, a defendant may appear remotely for any
4 pretrial criminal proceeding.
- 5
- 6 (2) Where a defendant appears remotely, counsel may not be required to be
7 personally present with the defendant for any portion of the criminal
8 proceeding provided that the audio and/or video conferencing system or other
9 technology allows for private communication between the defendant and his
10 or her counsel. Any private communication is confidential and privileged
11 under Evidence Code section 952.

12

13 **(f) Sunset of rule**

14

15 This rule will remain in effect until 90 days after the Governor declares that the
16 state of emergency related to the COVID-19 pandemic is lifted, or until amended or
17 repealed by the Judicial Council.

18

19

20 **Emergency rule 6. Emergency orders: juvenile dependency proceedings**

21

22 **(a) Application**

23

24 This rule applies to all juvenile dependency proceedings filed or pending until the
25 state of emergency related to the COVID-19 pandemic is lifted.

26

27 **(b) Essential hearings and orders**

28

29 The following matters should be prioritized in accordance with existing statutory
30 time requirements.

- 31
- 32 (1) Protective custody warrants filed under Welfare and Institutions Code section
33 340.
- 34
- 35 (2) Detention hearings under Welfare and Institutions Code section 319. The
36 court is required to determine if it is contrary to the child’s welfare to remain
37 with the parent, whether reasonable efforts were made to prevent removal,
38 and whether to vest the placing agency with temporary placement and care.
- 39
- 40 (3) Psychotropic medication applications.
- 41
- 42 (4) Emergency medical requests.
- 43

- 1 (5) A petition for reentry of a nonminor dependent.
2
3 (6) Welfare and Institutions Code section 388 petitions that require an immediate
4 response based on the health and safety of the child, which should be
5 reviewed for a prima facie showing of change of circumstances sufficient to
6 grant the petition or to set a hearing. The court may extend the final ruling on
7 the petition beyond 30 days.
8

9 **(c) Foster care hearings and continuances during the state of emergency**

- 10
11 (1) A court may hold any proceeding under this rule via remote technology
12 consistent with rule 5.531 and emergency rule 3.
13
14 (2) At the beginning of any hearing at which one or more participants appears
15 remotely, the court must admonish all the participants that the proceeding is
16 confidential and of the possible sanctions for violating confidentiality.
17
18 (3) The child welfare agency is responsible for notice of remote hearings unless
19 other arrangements have been made with counsel for parents and children.
20 Notice is required for all parties and may include notice by telephone or other
21 electronic means. The notice must also include instructions on how to
22 participate in the court hearing remotely.
23
24 (4) Court reports
25
26 (A) Attorneys for parents and children must accept service of the court
27 report electronically.
28
29 (B) The child welfare agency must ensure that the parent and the child
30 receive a copy of the court report on time.
31
32 (C) If a parent or child cannot receive the report electronically, the child
33 welfare agency must deliver a hard copy of the report to the parent and
34 the child on time.
35
36 (5) Nothing in this subdivision prohibits the court from making statutorily
37 required findings and orders, by minute order only and without a court
38 reporter, by accepting written stipulations from counsel when appearances
39 are waived if the stipulations are confirmed on the applicable Judicial
40 Council forms or equivalent local court forms.
41
42 (6) If a court hearing cannot occur either in the courthouse or remotely, the
43 hearing may be continued up to 60 days, except as otherwise specified.

1
2 (A) A dispositional hearing under Welfare and Institutions Code section
3 360 should not be continued more than 6 months after the detention
4 hearing without review of the child’s circumstances. In determining
5 exceptional circumstances that justify holding the dispositional hearing
6 more than 6 months after the child was taken into protective custody,
7 the impact of the state of emergency related to the COVID-19
8 pandemic must be considered.

9
10 i. If the dispositional hearing is continued more than 6 months after
11 the start date of protective custody, a review of the child must be
12 held at the 6-month date. At the review, the court must determine
13 the continued necessity for and appropriateness of the placement;
14 the extent of compliance with the case plan or available services
15 that have been offered; the extent of progress which has been
16 made toward alleviating or mitigating the causes necessitating
17 placement; and the projected likely date by which the child may
18 return home or placed permanently.

19
20 ii. The court may continue the matter for a full hearing on all
21 dispositional findings and orders.

22
23 (B) A judicial determination of reasonable efforts must be made within 12
24 months of the date a child enters foster care to maintain a child’s
25 federal title IV-E availability. If a permanency hearing is continued
26 beyond the 12-month date, the court must review the case to determine
27 if the agency has made reasonable efforts to return the child home or
28 arrange for the child to be placed permanently. This finding can be
29 made without prejudice and may be reconsidered at a full hearing.

30
31 (7) During the state of emergency related to the COVID-19 pandemic, previously
32 authorized visitation must continue, but the child welfare agency is to
33 determine the manner of visitation to ensure that the needs of the family are
34 met. If the child welfare agency changes the manner of visitation for a child
35 and a parent or legal guardian in reunification, or for the child and a
36 sibling(s), or a hearing is pending under Welfare and Institutions Code
37 section 366.26, the child welfare agency must notify the attorneys for the
38 children and parents within 5 court days of the change. All changes in
39 manner of visitation during this time period must be made on a case by case
40 basis, balance the public health directives and best interest of the child, and
41 take into consideration whether in-person visitation may continue to be held
42 safely. Family time is important for child and parent well-being, as well as
43 for efforts toward reunification. Family time is especially important during

1 times of crisis. Visitation may only be suspended if a detriment finding is
2 made in a particular case based on the facts unique to that case. A detriment
3 finding must not be based solely on the existence of the impact of the state of
4 emergency related to the COVID-19 pandemic or related public health
5 directives.

6
7 (A) The attorney for the child or parent may ask the juvenile court to
8 review the change in manner of visitation. The child or parent has the
9 burden of showing that the change is not in the best interest of the child
10 or is not based on current public health directives.

11
12 (B) A request for the court to review the change in visitation during this
13 time period must be made within 14 court days of the change. In
14 reviewing the change in visitation, the court should take into
15 consideration the factors in (c)(7).

16
17 **(d) Sunset of rule**

18
19 This rule will remain in effect until 90 days after the Governor declares that the
20 state of emergency related to the COVID-19 pandemic is lifted, or until amended or
21 repealed by the Judicial Council.

22
23 **Advisory Committee Comment**

24
25 When courts are unable to hold regular proceedings because of an emergency that has resulted in
26 an order as authorized under Government Code section 68115, federal timelines do not stop.
27 Circumstances may arise where reunification services to the parent, including visitation, may not
28 occur or be provided. The court must consider the circumstances of the emergency when deciding
29 whether to extend or terminate reunification services and whether services were reasonable given
30 the state of the emergency. (Citations: 42 U.S.C. § 672(a)(1)–(2), (5); 45 CFR § 1355.20; 45 CFR
31 § 1356.21 (b) – (d); 45 C.F.R. § 1356.71(d)(1)(iii); Child Welfare Policy Manual, 8.3A.9 Title
32 IV-E, Foster Care Maintenance Payments Program, Reasonable efforts, Question 2
33 (www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=92)); Letter dated March 27, 2020, from Jerry Milner, Associate Commissioner, Children’s
34 Bureau, Administration for Children and Families, U.S. Department of Health and Human
35 Services.)

1 **Emergency rule 7. Emergency orders: juvenile delinquency proceedings**

2
3 **(a) Application**

4
5 This rule applies to all proceedings in which a petition has been filed under Welfare
6 and Institutions Code section 602 in which a hearing would be statutorily required
7 during the state of emergency related to the COVID-19 pandemic.
8

9 **(b) Juvenile delinquency hearings and orders during the state of emergency**

10
11 (1) A hearing on a petition for a child who is in custody under Welfare and
12 Institutions Code section 632 or 636 must be held within the statutory
13 timeframes as modified by an order of the court authorized by Government
14 Code section 68115. The court must determine if it is contrary to the welfare
15 of the child to remain in the home, whether reasonable services to prevent
16 removal occurred, and whether to place temporary placement with the
17 probation agency if the court will be keeping the child detained and out of the
18 home.

19
20 (2) If a child is detained in custody and an in-person appearance is not feasible
21 due to the state of emergency, courts must make reasonable efforts to hold
22 any statutorily required hearing for that case via remote appearance within
23 the required statutory time frame and as modified by an order of the court
24 authorized under Government Code section 68115 for that proceeding. If a
25 remote proceeding is not a feasible option for such a case during the state of
26 emergency, the court may continue the case as provided in (d) for the
27 minimum period of time necessary to hold the proceedings.

28
29 (3) Without regard to the custodial status of the child, the following hearings
30 should be prioritized during the state of emergency related to the COVID-19
31 pandemic:

32
33 (A) Psychotropic medication applications.

34
35 (B) All emergency medical requests.

36
37 (C) A petition for reentry of a nonminor dependent.

38
39 (D) A hearing on any request for a warrant for a child.

40
41 (E) A probable cause determination for a child who has been detained but
42 has not had a detention hearing within the statutory time limits.
43

1 (4) Notwithstanding any other law, and except as described in (5), during the
2 state of emergency related to the COVID-19 pandemic, the court may
3 continue for good cause any hearing for a child not detained in custody who
4 is subject to its juvenile delinquency jurisdiction until a date after the state of
5 emergency has been lifted considering the priority for continued hearings in
6 (d).

7
8 (5) For children placed in foster care under probation supervision, a judicial
9 determination of reasonable efforts must be made within 12 months of the
10 date the child enters foster care to maintain a child’s federal title IV-E
11 availability. If a permanency hearing is continued beyond the 12-month date,
12 the court must nevertheless hold a review to determine if the agency has
13 made reasonable efforts to return the child home or place the child
14 permanently. This finding can be made without prejudice and may be
15 reconsidered at a full hearing.

16
17 **(c) Proceedings with remote appearances during the state of emergency.**

18
19 (1) A court may hold any proceeding under this rule via remote technology
20 consistent with rule 5.531 and emergency rule 3.

21
22 (2) At the beginning of any hearing conducted with one or more participants
23 appearing remotely, the court must admonish all the participants that the
24 proceeding is confidential and of the possible sanctions for violating
25 confidentiality.

26
27 (3) The court is responsible for giving notice of remote hearings, except for
28 notice to a victim, which is the responsibility of the prosecuting attorney or
29 the probation department. Notice is required for all parties and may include
30 notice by telephone or other electronic means. The notice must also include
31 instructions on how to participate in the hearing remotely.

32
33 (4) During the state of emergency, the court has broad discretion to take evidence
34 in the manner most compatible with the remote hearing process, including
35 but not limited to taking testimony by written declaration. If counsel for a
36 child or the prosecuting attorney objects to the court’s evidentiary
37 procedures, that is a basis for issuing a continuance under (d).

38
39 **(d) Continuances of hearings during the state of emergency.**

40
41 Notwithstanding any other law, the court may for good cause continue any hearing
42 other than a detention hearing for a child who is detained in custody. In making this
43 determination, the court must consider the custody status of the child, whether there

1 are evidentiary issues that are contested, and, if so, the ability for those issues to be
2 fairly contested via a remote proceeding.

3
4 **(e) Extension of time limits under Welfare and Institutions Code section 709**

5
6 In any case in which a child has been found incompetent under Welfare and
7 Institutions Code section 709 and that child is eligible for remediation services or
8 has been found to require secure detention, any time limits imposed by section 709
9 for provision of services or for secure detention are tolled for the period of the state
10 of emergency if the court finds that remediation services could not be provided
11 because of the state of emergency.

12
13 **(f) Sunset of rule**

14
15 This rule will remain in effect until 90 days after the Governor declares that the
16 state of emergency related to the COVID-19 pandemic is lifted, or until amended or
17 repealed by the Judicial Council.

18
19 **Advisory Committee Comment**

20
21 This emergency rule is being adopted in part to ensure that detention hearings for
22 juveniles in delinquency court must be held in a timely manner to ensure that no child is
23 detained who does not need to be detained to protect the child or the community. The
24 statutory scheme for juveniles who come under the jurisdiction of the delinquency court
25 is focused on the rehabilitation of the child and thus makes detention of a child the
26 exceptional practice, rather than the rule. Juvenile courts are able to use their broad
27 discretion under current law to release detained juveniles to protect the health of those
28 juveniles and the health and safety of the others in detention during the current state of
29 emergency related to the COVID-19 pandemic.

30
31
32 **Emergency rule 8. Emergency orders: temporary restraining or protective orders**

33
34 **(a) Application**

35
36 Notwithstanding any other law, this rule applies to any emergency protective order,
37 temporary restraining order, or criminal protective order that was requested, issued,
38 or set to expire during the state of emergency related to the COVID-19 pandemic.
39 This includes requests and orders issued under Family Code sections 6250 or 6300,
40 Code of Civil Procedure sections 527.6 , 527.8, or 527.85, Penal Code sections
41 136.2, 18125 or 18150, or Welfare and Institutions Code sections 213.5, 304,
42 362.4, or 15657.03, and including any of the foregoing orders issued in connection
43 with an order for modification of a custody or visitation order issued pursuant to a

1 dissolution, legal separation, nullity, or parentage proceeding under Family Code
2 section 6221.

3
4 **(b) Duration of orders**

5
6 (1) Any emergency protective order made under Family Code section 6250 that
7 is issued or set to expire during the state of emergency, must remain in effect
8 for up to 30 days from the date of issuance.

9
10 (2) Any temporary restraining order or gun violence emergency protective order,
11 issued or set to expire during the state of emergency related to the COVID-19
12 pandemic, must be continued for a period of time that the court determines is
13 sufficient to allow for a hearing on the long-term order to occur, for up to 90
14 days.

15
16 (3) Any criminal protective order, subject to this rule, set to expire during the
17 state of emergency, must be automatically extended for a period of 90 days,
18 or until the matter can be heard, whichever occurs first.

19
20 (4) Any restraining order or protective order after hearing that is set to expire
21 during the state of emergency related to the COVID-19 pandemic must be
22 automatically extended for up to 90 days from the date of expiration to enable
23 a protected party to seek a renewal of the restraining order.

24
25 **(c) Ex parte requests**

26
27 (1) Courts must provide a means for the filing of ex parte requests for temporary
28 restraining orders. Courts may do so by providing a physical location, drop
29 box, or, if feasible, through electronic means.

30
31 (2) Any ex parte request may be filed using an electronic signature by a party or
32 a party's attorney.

33
34 **(d) Service of Orders**

35
36 If a respondent appears at a hearing by video, audio, or telephonically, and the
37 court grants an order, in whole or in part, no further service is required upon the
38 respondent for enforcement of the order, provided that the court follows the
39 requirements of Family Code section 6384.

1 **(e) Entry of orders into California Law Enforcement Telecommunications System**

2
3
4 Any orders issued by a court modifying the duration or expiration date of orders
5 subject to this rule, must be transmitted to the Department of Justice through the
6 California Law Enforcement Telecommunications System (CLETS), as provided in
7 Family Code section 6380, without regard to whether they are issued on Judicial
8 Council forms, or in another format during the state of emergency.
9

10
11 **Emergency rule 9. Toll the statutes of limitations for civil causes of action**

12
13 Notwithstanding any other law, the statutes of limitation for civil causes of action are
14 tolled from April 6, 2020, until 90 days after the Governor declares that the state of
15 emergency related to the COVID-19 pandemic is lifted.
16

17
18 **Emergency rule 10. Extensions of time in which to bring a civil action to trial**

19
20 **(a) Extension of five years in which to bring a civil action to trial**

21
22 Notwithstanding any other law, including Code of Civil Procedure section 583.310,
23 for all civil actions filed on or before April 6, 2020, the time in which to bring the
24 action to trial is extended by six months for a total time of five years and six
25 months.
26

27 **(b) Extension of three years in which to bring a new trial**

28
29 Notwithstanding any other law, including Code of Civil Procedure section 583.320,
30 for all civil actions filed on or before April 6, 2020, if a new trial is granted in the
31 action, the three years provided in section 583.320 in which the action must again
32 be brought to trial is extended by six months for a total time of three years and six
33 months. Nothing in this subdivision requires that an action must again be brought
34 to trial before expiration of the time prescribed in (a).
35

36
37 **Emergency rule 11. Depositions through remote electronic means**

38
39 **(a) Deponents appearing remotely**

40
41 Notwithstanding any other law, including Code of Civil Procedure section
42 2025.310(a) and (b), and rule 3.1010(c) and (d), a party or nonparty deponent, at

1 their election or the election of the deposing party, is not required to be present
2 with the deposition officer at the time of the deposition.

3

4 **(b) Sunset of rule**

5

6 This rule will remain in effect until 90 days after the Governor declares that the
7 state of emergency related to the COVID-19 pandemic is lifted, or until amended or
8 repealed by the Judicial Council.

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**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

AARON HOPE,	:	1:20-cv-562
<i>et al.</i> ,	:	
Petitioners-Plaintiffs,	:	
	:	
v.	:	Hon. John E. Jones III
	:	
CLAIR DOLL, <i>in his official capacity</i>	:	
<i>as Warden of York County Prison,</i>	:	
<i>et al.</i> ,	:	
Respondents-Defendants.	:	

MEMORANDUM AND ORDER

April 7, 2020

Pending before the Court is the Motion for Temporary Restraining Order and/or Preliminary Injunction filed by Petitioners-Plaintiffs Aaron Hope, Iwan Rahardja, Jesus De La Pena, Rakibu Adam, Duc Viet Lam, Yelena Mukhina, Nashom Gebretinsae, Ismail Muhammed, Glenn Weithers, Konstantin Bugarenko, Brisio Balderas-Dominguez, Viviana Ceballos, Wilders Paul, Marcos Javier Ortiz Matos, Alexander Alvarenga, Armando AVECILLA, Coswin Ricardo Murray, Edwin Luis Crisostomo Rodriguez, Eldon Bernard Briette, Dembo Sannoh, Jesus Angel Juarez Pantoja and Alger Fracois, (collectively “Petitioners”). (Doc. 5).

For the reasons that follow, the temporary restraining order shall be granted and the Respondents shall be directed to immediately release Petitioners today on their own recognizance.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Petitioners are a diverse group of individuals from around the world who are being held in civil detention by Immigration and Customs Enforcement, (“ICE”), at York County Prison and Pike County Correctional facility, (“the Facilities”), while they await final disposition of their immigration cases.

Each Petitioner suffers from chronic medical conditions and faces an imminent risk of death or serious injury if exposed to COVID-19. Hope is 32 years old and has serious respiratory problems that have led to his hospitalization for pneumonia. He also has sleep apnea and high blood pressure. (Doc. 1, ¶ 3).

Rahardja is 51 years old and suffers from diabetes and hypertension.

(Doc. 1, ¶ 4). De La Pena is 37 years old and suffers from severe asthma and hypertension and is over-weight. (Doc. 1, ¶ 5). Adam, 34 years old, suffers from asthma and high blood pressure. (Doc. 1, ¶ 6). Viet Lam is 50 years old and suffers from diabetes and high blood pressure. *Id.* at ¶ 7. Mukhina is 35 years old and suffers from asthma, a heart murmur, and hepatitis C, and has a history of blood clots and seizures. (Doc.1, ¶ 8). Gebretnisae is 28 years old and suffers from Cn’s arthritis and nerve pain, requiring many medications. (Doc. 1, ¶ 9).

Muhammed is 69 years old and suffers from asthma, is pre-diabetic, and has recently lost a significant amount of weight. (Doc. 1, ¶ 10). Weithers is 59 years old and suffers from emphysema and chronic obstructive pulmonary

disease. (Doc. 1, ¶ 11). Bugarenko, age 49, suffers from pre-diabetes, high blood pressure, and diverticulitis, as well as debilitating pain that inhibits his ability to walk. (Doc. 1, ¶ 12). Baldarez-Domingez is 47 years old and suffers from diabetes, atrial fibrillation, and high blood pressure. (Doc. 1, ¶ 13).

Ceballos, 56 years old, suffers from high blood pressure. (Doc. 1, ¶ 14). Paul is 32 years old and suffers from traumatic brain injury, seizures, and headaches. (Doc. 1, ¶ 15).

Matos is 32 years old and suffers from diabetes. (Doc. 1, ¶ 16).

Alvargena, age 46, suffers from diabetes, high blood pressure, atrial fibrillation, high cholesterol, and partial physical disability from a prior accident. (Doc. 1, ¶ 17). Avecilla is 53 years old and suffers from diabetes. (Doc 1, ¶ 18). Murray is 45 years old and suffers from asthma but has been unable to obtain an inhaler. (Doc. 1, ¶ 19). Rodriguez is 31 years old and suffers from asthma. (Doc. 1, ¶ 20). Briette is 46 years old and suffers from diabetes, high blood pressure, high cholesterol, depression, and anxiety. (Doc. 1, ¶ 21). Sannoh, 41 years old, suffers from diabetes requiring daily medication. (Doc. 1, ¶ 22). Pantoja is 36 years old and suffers from asthma, sleep apnea, and high blood pressure. (Doc.

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1, ¶ 23). Francois is 45 years old and suffers from hypertension, pain when he urinates, and swollen feet. (Doc. 1, ¶ 24).¹

Named as Respondents are: Clair Doll, Warden of York County Prison; Craig A. Lowe, Warden of Pike County Correctional Facility; Simona Flores-Lund, Field Office Director, ICE Enforcement and Removal Operations; Matthew Albence, Acting Director of ICE; and Chad Wolf, Acting Secretary of the Department of Homeland Security.

II. DISCUSSION

We had occasion to consider the substantially same set of circumstances less than a week ago in our opinion *Thakker v. Doll*, No. 1:20-CV00480 (M.D. Pa. Mar. 31, 2020) (Jones, J.) (discussing in-depth the potential severity of COVID-19, its prevalence across the globe, and its impact upon ICE detention facilities in particular). We now begin our analysis of Petitioners' claims guided by our previous findings.

i. Legal Standard

Courts apply one standard when considering whether to issue interim injunctive relief, regardless of whether a petitioner requests a temporary restraining order (“TRO”) or preliminary injunction. *See Ellakkany v. Common Pleas Court of*

¹ We have previously held that ICE detainees have the requisite standing to bring claims based upon imminent contraction of COVID-19, and that a *habeas* petition is the proper vehicle to do so. *Thakker v. Doll*, No. 1:20-CV00480, at 5-6 (M.D. Pa. Mar. 31, 2020).

Montgomery Cnty., 658 Fed.Appx. 25, 27 (3d Cir. July 27, 2016) (applying one standard to a motion for both a TRO and preliminary injunction). “A plaintiff seeking a preliminary injunction 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.” *Apple Inc. v. Samsung Electronics Co.*, 695 F.3d 1370, 1373–74 (Fed. Cir. 2012) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365 (2008)).

The Supreme Court has emphasized that “a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997); *Apotex Inc. v. U.S. Food and Drug Admin.*, 508 F.Supp.2d 78, 82 (D.D.C. 2007) (“Because interim injunctive relief is an extraordinary form of judicial relief, courts should grant such relief sparingly.”). “Awarding preliminary relief, therefore, is only appropriate ‘upon a clear showing that the plaintiff is entitled to such relief.’” *Groupe SEC USA, Inc. v. Euro-Pro Operating LLC*, 774 F.3d 192, 197 (3d Cir. 2014) (quoting *Winter*, 555 U.S. at 22).

ii. Irreparable Harm

COVID-19 is a novel coronavirus that causes “serious, potentially permanent, damage to lung tissue, and can require extensive use of a ventilator. [20-cv-562, Doc. 3, Ex. 2]. The virus can also place greater strain on the heart muscle and can cause damage to the immune system and kidneys. (*Id.*)” *Thakker* at 10.

Because of these potentially catastrophic complications, COVID-19 has radically transformed our everyday lives in ways previously inconceivable. Most of the county can no longer leave their homes unless absolutely necessary.² “Large portions of our economy have come to a standstill. Children have been forced to attend school remotely. Workers deemed ‘non-essential’ to our national infrastructure have been told to stay home.” *Thakker*. at 4. Indeed, the World Health Organization (“WHO”) has declared a global pandemic³ in light of the

² Sarah Mervosh, Denise Lu, and Vanessa Swales, “See Which States and Cities have Told Residents to Stay at Home,” *NEW YORK TIMES*, <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html> (last accessed April 7, 2020).

³ The World Health Organization (“WHO”) officially declared COVID-19 as global pandemic on March 11, 2020. *See WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020*, WORLD HEALTH ORGANIZATION, (March 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

stark realities we now face: over one million people worldwide have contracted COVID-19. Well over sixty thousand have perished as a result.⁴

Less than one week ago, we found that the threat of a COVID-19 outbreak in the Facilities constituted irreparable harm to substantially similar Petitioners, despite the fact that there were, at that time, *no* confirmed cases of COVID-19 in the Facilities. *Thakker*, at 7-19.⁵ In so doing, we noted that “it is not a matter of *if* COVID-19 will enter Pennsylvania prisons, but *when* it is finally detected therein.” *Id.* at 8 (emphasis in original).

We have, unfortunately, been proven correct in this regard. As of the time of this writing, the Pike County Correctional Facility has officially reported that four ICE detainees housed therein have tested positive for COVID-19.⁶ Four Pike County Correctional employees have also tested positive. (Doc. 6, Ex. 3). An additional detainee at York County Prison has also tested positive. *See ICE Latest Statement*. And we can only assume that these numbers may well be much higher

⁴ See *Coronavirus Disease (COVID-19) Pandemic*, WORLD HEALTH ORGANIZATION, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019> (last accessed April 7, 2020).

⁵ In *Thakker*, we considered the potential harm faced by ICE detainees in county prisons located in York, Pike, and Clinton Counties, finding that there was a high likelihood that Petitioners would face severe complications, and even death, should they contract COVID-19 in the Facilities—which we found to be a likely outcome of their continued detention. *Thakker* 7-19. Here, we again consider the likelihood of irreparable harm in two of those same facilities: those in York and Pike Counties.

⁶ *ICE Latest Statement*, ICE GUIDANCE ON COVID-19, <https://www.ice.gov/coronavirus#wcm-survey-target-id> (last accessed April 7, 2020).

than reported—we have allegations before us that requests by detainees for COVID-19 tests have not been granted, despite explicit knowledge that the virus has entered the Facilities. (Doc. 6, Ex. 7).

We also have further declarations that no effective containment measures have been put into place to protect Petitioners.⁷ Officers and medical staff, who regularly leave the confines of the Facilities and have ample opportunities to contract the virus elsewhere, do not reliably wear gloves and masks when interacting with inmates. (Doc. 3, Ex. 17; Doc. 3, Ex. 16, Doc. 3, Ex. 4; Doc. 3, Ex. 8; Doc. 3, Ex. 23). Temperature checks are infrequently conducted, even among detainees who had close contact with others who have since tested positive. (Doc. 3, Ex. 23). The cell blocks which housed those who test positive are not thoroughly evacuated and cleaned to prevent the spread. (Doc. 3, Ex. 4). We even have reports that detainees exhibiting COVID-like symptoms are remaining in general housing for days, and that once they are quarantined, no testing is being provided to those who remain. (Doc. 3, Ex. 8).

We have previously discussed in great detail how the incursion of COVID-19 into ICE detention facilities could result in catastrophic outcomes, particularly in light of the grim conditions present in these specific Facilities. *See Thakker* at

⁷ We have previously discussed the overcrowding and unsanitary conditions present at these Facilities. *See Thakker* at 14-15.

14-15. It now seems that our worst fears have been realized—COVID-19 is spreading, and not nearly enough is being done to combat it. We cannot allow the Petitioners before us, all at heightened risk for severe complications from COVID-19, to bear the consequences of ICE’s inaction. We therefore find that irreparable harm faces the Petitioners before us should they contract COVID-19.⁸

iii. Likelihood of Success on the Merits

Petitioners argue that they are “likely to establish a due process violation through conditions of confinement that expose them to the serious risks associated with COVID-19.” (Doc. 6 at 13). For the reasons that follow, we agree.

As we previously stated in *Thakker*, Petitioners must show that their conditions of confinement “amount to punishment of the detainee.” *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). “To determine whether challenged conditions of confinement amount to punishment, this Court determines whether a condition of confinement is reasonably related to a legitimate governmental objective; if it is not, we may infer ‘that the purpose of the governmental action is punishment that may not be constitutionally inflicted upon detainees *qua* detainees.’” *E. D. v. Sharkey*, 928 F.3d 299, 307 (3d Cir. 2019) (quoting *Hubbard v. Taylor*, 538 F.3d

⁸ Many of our sister courts across the nation have agreed with our conclusion. See *Thakker* at 16-19.

229, 232 (3d Cir. 2008)). We therefore ask whether the conditions imposed are rationally related to a legitimate government purpose. They are not.

We previously held, considering the present living conditions present at the *same detention Facilities* now at issue here, that, “we can see no rational relationship between a legitimate government objective and keeping Petitioners detained in unsanitary, tightly-packed environments—doing so would constitute a punishment to Petitioners.” *Thakker* at 20-21. There is no indication that there has been an improvement in conditions at the Facilities. Indeed, all indications point towards the contrary. There are now individuals who have tested positive at both Facilities,⁹ and we have further accusations that those situations are not being properly contained.¹⁰ “Considering, therefore, the grave consequences that will result from an outbreak of COVID-19, particularly to the high-risk Petitioners in this case, we cannot countenance physical detention in such tightly-confined, unhygienic spaces.” *Thakker* at 21.

We further note that Respondents previously proffered legitimate government objective holds no greater sway here than it did in *Thakker*. The Respondents had

⁹ *ICE Latest Statement, ICE GUIDANCE ON COVID-19*, <https://www.ice.gov/coronavirus#wcm-survey-target-id> (last accessed April 7, 2020).

¹⁰ *See* Doc. 3, Ex. 17; Doc. 3, Ex. 16, Doc. 3, Ex. 4; Doc. 3, Ex. 8; Doc. 3, Ex. 23 (alleging that proper medical protective equipment is not being used by Facility staff, that temperature checks and COVID-19 testing are not being performed on detainees in close contact with the virus, and that proper cleaning of housing blocks is not taking place).

maintained that “preventing detained aliens from absconding and ensuring that they appear for removal proceedings is a legitimate governmental objective.” (*Thakker*, 20-cv-480, Doc. 35 at 38). However, “we note that ICE has a plethora of means *other than* physical detention at their disposal by which they may monitor civil detainees and ensure that they are present at removal proceedings, including remote monitoring and routine check-ins. Physical detention itself will place a burden on community healthcare systems and will needlessly endanger Petitioners, prison employees, and the greater community. We cannot see the rational basis of such a risk.” *Thakker* at 21-22. We therefore find that Petitioners are likely to succeed on the merits of their due process “conditions of confinement” claim.¹¹

¹¹ As previously discussed in *Thakker*, we also think it likely Petitioners will prevail under the more exacting Eighth Amendment standards as well. To succeed on an Eighth Amendment conditions of confinement claim, the Petitioners must show: (1) the deprivation alleged must objectively be “sufficiently serious,” and (2) the “prison official must have a sufficiently culpable state of mind,” such as deliberate indifference to the prisoner’s health or safety. See *Thomas v. Tice*, 948 F.3d 133, 138 (3d Cir. 2020) (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)). “COVID-19 has been shown to spread in the matter of a single day and would well prove deadly for Petitioners. Such a risk is objectively ‘sufficiently serious.’” *Thakker* at n.15. Furthermore, we note that authorities can be “deliberately indifferent to an inmate’s current health problems” when they “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,” including “exposure of inmates to a serious, communicable disease,” even when “the complaining inmate shows no serious current symptoms.” *Helling v. McKinney*, 509 U.S. 25, 33 (1993). There is no requirement that Petitioners show that “they actually suffered from serious injuries” to succeed on this claim. See *Helling*, 509 U.S. at 33. “The current measures undertaken by ICE, including ‘cohorting’ detainees, are patently ineffective in preventing the spread of COVID-19,” as is now evidenced by multiple positive COVID-19 tests in both Facilities. *Thakker* at n.15.

iv. Balancing of the Equities and Public Interest

The equities at issue and public interest “weigh heavily in Petitioners’ favor.” *Thakker* at 23. We have already noted that Petitioners face a very real risk of serious COVID-19 complications. We also find that Respondents face very little potential harm from Petitioner’s immediate release. While we “agree that preventing Petitioners from absconding. . . is important, we note that Petitioners’ failure to appear at future immigration proceedings would carry grave consequences of which Petitioners are surely aware. Further, it is our view that the risk of absconding is low, given the current restricted state of travel in the United States and the world during the COVID-19 pandemic.” *Id.*

Finally, the public interest strongly encourages Petitioners’ release. “As mentioned, Petitioners are being detained for civil violations of this country’s immigration laws. Given the highly unusual and unique circumstances posed by the COVID-19 pandemic and ensuing crisis, ‘the continued detention of aging or ill civil detainees does not serve the public’s interest.’” *Thakker* at 23 (citing *Basank*, 2020 WL 1481503, *6; see also *Fraihat v. U.S. Imm. and Customs Enforcement*, 5:19 Civ. 1546, ECF No. 81-11 (C.D. Cal. Mar. 24, 2020) (opining that “the design and operation of detention settings promotes the spread of communicable diseases such as COVID-19”); *Castillo v. Barr*, CV-20-00605-TJH (C.D. Cal. 2020)). Releasing these high-risk Petitioners, and therefore providing more space for effective social

distancing within the Facilities, will clearly benefit the surrounding areas. Rural hospitals will be less overwhelmed by potential detainee COVID-19 cases and there will be less of a risk that Facilities staff will carry the virus into their homes and communities. “Efforts to stop the spread of COVID-19 and promote public health are clearly in the public’s best interest, and the release of these fragile Petitioners from confinement is one step further in a positive direction.” *Thakker* at 23-24.

III. CONCLUSION

“In times such as these, we must acknowledge that the *status quo* of a mere few weeks ago no longer applies. Our world has been altered with lightning speed, and the results are both unprecedented and ghastly. We now face a global pandemic in which the actions of each individual can have a drastic impact on an entire community. The choices we now make must reflect this new reality.” *Thakker* at 24.

We have before us clear evidence that the protective measures in place in the York and Pike County prisons are not working. We can only expect the number of positive COVID-19 cases to increase in the coming days and weeks, and we cannot leave the most fragile among us to face that growing danger unprotected.

We are mindful that judicial decisions such as these are both controversial and difficult for the public to absorb. It is all too easy for some to embrace the notion that individuals such as Petitioners should be denied relief simply because they lack citizenship in this country. However, Article III Courts do not operate according to

polls or the popular will, but rather to do justice and to rule according to the facts and the law.

Based on the foregoing, we shall grant the requested temporary restraining order. Respondents, and the York County Prison and Pike County Correctional Facility shall be ordered to immediately release the Petitioners **today** on their own recognizance without fail.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Petitioners' Motion for Temporary Restraining Order, (Doc. 5), is **GRANTED**.
2. Respondents, and the York County Prison and Pike County Correctional Facility **SHALL IMMEDIATELY RELEASE** the Petitioners **TODAY** on their own recognizance.
3. Petitioners will **SELF-QUARANTINE** in their respective homes for **FOURTEEN (14) DAYS** from the date of release.
4. This TRO will expire on April 20, 2020 at 5:00 p.m.
5. No later than noon on April 13, 2020, the Respondents shall **SHOW CAUSE** why the TRO should not be converted into a preliminary injunction.
6. The Petitioners may file a response before the opening of business on April 16, 2020.

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s/ John E. Jones III

John E. Jones III
United States District Judge

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United States District Court
Northern District of California

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

SOFIA BAHENA ORTUÑO, et al.,
Petitioners-Plaintiffs,
v.
DAVID JENNINGS, et al.,
Respondents-Defendants.

Case No. 20-cv-02064-MMC

**ORDER RE: PETITIONERS' MOTION
FOR TEMPORARY RESTRAINING
ORDER; DIRECTIONS TO PARTIES**

Before the Court is petitioners' Motion, filed March 24, 2020, for a Temporary Restraining Order, by which they seek an order releasing them from detention. Respondents have filed opposition, to which petitioners have replied; in addition, with leave of court, respondents have filed two supplemental declarations, to which petitioners have filed their objections.

Having read and considered the above-referenced filings,¹ the Court rules as follows to the extent the motion is brought on behalf of all petitioners other than Olvin Said Torres Murillo and Mauricio Ernesto Quinteros Lopez, as to whom the Court, for the reasons stated in its order of April 3, 2020, has deferred ruling pending further briefing.

BACKGROUND

Petitioners are individuals who are being detained at either the Yuba County Jail ("Yuba") or the Mesa Verde ICE Processing Facility ("Mesa Verde"), pending ongoing

¹On April 6, 2020, petitioners filed a Statement of Recent Decisions and respondents filed a Statement of Recent Decision, both of which the Court has also considered.

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United States District Court
Northern District of California

1 removal proceedings or effectuation of a final order of removal.² Petitioners allege they
2 are being detained under circumstances that violate their due process rights, specifically,
3 their "substantive due process right" to be free from "conditions of confinement that
4 amount to punishment or create an unreasonable risk to detainees' safety and health."
5 As relief, petitioners seek, pursuant to 28 U.S.C. § 2241, an order of release from
6 detention.

7 **LEGAL STANDARD**

8 "Temporary restraining orders are governed by the same standard applicable to
9 preliminary injunctions." Quiroga v. Chen, 735 F. Supp. 2d 1226, 1228 (D. Nev. 2010).
10 "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on
11 the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief,
12 that the balance of equities tips in his favor, and that an injunction is in the public
13 interest." Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 24 (2008).
14 Additionally, where, as here, a plaintiff seeks a mandatory injunction, the plaintiff, to
15 establish the first factor, must show a "clear likelihood of success on the merits." See
16 Stanley v. University of Southern California, 13 F.3d 1313, 1316 (9th Cir. 1994).

17 **DISCUSSION**

18 The world is currently experiencing a global pandemic in light of the coronavirus
19 COVID-19. As of today's date, more than 419,000 persons in the United States have
20 become infected with COVID-19, more than 14,250 persons have died, and there is no
21 indication the pandemic has reached its peak.

22 In a very short period of time, and particularly in the past month, COVID-19 has
23 brought dramatic changes to the country, including the State of California's issuance of
24 an order directing all persons living in the state to "stay home" and to "at all times practice

25 _____
26 ²Although petitioners Sofia Bahena Ortuño and Roxana del Carmen Trigueros
27 Acevedo were, at the time the motion was filed, being detained at Mesa Verde, both said
28 petitioners subsequently were released. (See Defs.' Opp. at 5:23-24; Supp. Bonnar Decl.
¶ 5.) Accordingly, to the extent the motion is brought on their behalf, it will be denied as
moot.

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1 social distancing." See Cal. Executive Order N-33-20. The Centers for Disease Control
 2 and Prevention ("CDC") likewise has advised all person to "stay home as much as
 3 possible," to "take everyday precautions to keep space between yourself and others,"
 4 and to "avoid crowds as much as possible," noting that the "risk of exposure . . . may
 5 increase in crowded, closed-in settings with little air circulation." See
 6 www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/get-ready.html.

7 Although there is no indication, at least in the record before the Court, that any
 8 particular person or type of person is more susceptible to becoming infected with COVID-
 9 19, the CDC has determined that certain types of persons who do become infected are
 10 significantly more likely to have a severe illness or to die, including persons who are 65
 11 years of age or older, and those who have certain medical conditions, such as moderate
 12 to severe asthma, diabetes, chronic kidney disease, liver disease and hypertension. See
 13 www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html;
 14 www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html.

15 Petitioners argue that each of them has one or more of the above-described high-
 16 risk factors, and that they are unable to engage in social distancing and to take other
 17 steps to avoid infection. Under such circumstances, they seek release from detention
 18 until the pandemic is over.

19 In opposing the motion, respondents make two threshold arguments, specifically,
 20 (1) that petitioners lack Article III standing and (2) that a claim challenging conditions of
 21 confinement cannot be brought under § 2241.

22 With respect to standing, respondents argue, in essence, that no petitioner
 23 presently has COVID-19 and that any petitioner's likelihood of becoming infected is
 24 speculative. COVID-19 infections, however, are rapidly increasing in the United States,
 25 including California, and, when introduced into a confined space, such as a nursing
 26 home, a cruise ship, and, recently, a naval aircraft carrier, it can rapidly spread. Indeed,
 27 it has quickly spread in a number of jails and prisons. (See Wells Decl. Exs. C-E.) Under
 28 such circumstances, the Court finds petitioners have standing to assert their claims.

1 Turning to petitioner's reliance on § 2241, which provides district courts with the
 2 power to issue writs of habeas corpus to persons being held in the custody of the United
 3 States, the Court notes that the Ninth Circuit, as early as 1974, has found it "fairly well
 4 established" that "federal habeas corpus actions are now available to deal with questions
 5 concerning both the duration and the conditions of confinement." See Workman v.
 6 Mitchell, 502 F.2d 1201, 1208 n.9 (9th Cir. 1974). Respondents have not cited any later
 7 case holding to the contrary. Accordingly, the Court finds petitioners may seek, pursuant
 8 to § 2241, relief from what they allege are unconstitutional conditions of confinement, and
 9 next addresses the factors that are "pertinent in assessing the propriety of any injunctive
 10 relief." See Winter, 555 U.S. at 32.

11 As to the first factor, likelihood of success on the merits, petitioner's claim, as
 12 noted, is that their conditions of confinement, in light of the present COVID-19 pandemic,
 13 are unconstitutional. In evaluating a claim that a detainee's conditions of confinement are
 14 unconstitutional, "the proper inquiry is whether those conditions amount to punishment."
 15 See Bell v. Wolfish, 441 U.S. 520, 535 (1979). "[P]unitive conditions," i.e., conditions
 16 amounting to punishment, occur "(1) where the challenged restrictions are expressly
 17 intended to punish, or (2) where the challenged restrictions serve an alternative, non-
 18 punitive purpose but are nonetheless excessive in relation to the alternative purpose, or
 19 are employed to achieve objectives that could be accomplished in
 20 . . . alternative and less harsh methods." See Jones v. Blanas, 393 F.3d 918, 932 (9th
 21 Cir. 2004) (internal quotations and citations omitted).

22 Here, petitioners do not assert respondents, by detaining them in the conditions
 23 petitioners challenge, are intending to punish them. Nor do petitioners dispute
 24 respondents' asserted purpose in detaining them, specifically, to ensure petitioners'
 25 presence at immigration proceedings and the government's ability to effectuate any final
 26 orders of removal. Consequently, the issue here presented is whether petitioners are
 27 likely to show that, given their alleged health concerns, their detention is excessive in
 28 relation to the government's needs. In resolving that issue, the Court considers each

1 petitioner's showing separately, as "constitutional rights are personal." See Broadrick v.
 2 Oklahoma, 413 U.S. 601, 610 (1973).

3 First, as to Ricardo Vasquez Cruz ("Vasquez Cruz"), Ernesto Abroncio Uc
 4 Encarnacion ("Uc Encarnacion"), Julio Cesar Buendia Alas ("Buendia Alas"), and Marco
 5 Montoya Amaya ("Montoya"), the Court finds petitioners have not shown a "clear
 6 likelihood of success on the merits." See Stanley, 13 F.3d at 1316.³ Specifically, the
 7 record lacks evidence clearly demonstrating a medical condition that places any of them
 8 at a "higher risk for severe illness from COVID-19." See [www.cdc.gov/coronavirus/2019-](http://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html)
 9 [ncov/need-extra-precautions/people-at-higher-risk.html](http://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html).⁴ Vasquez Cruz describes
 10 himself as diabetic, but Yuba medical staff lists him as prediabetic (see Kaiser Decl.
 11 ¶ 13), and he is taking metformin, a drug commonly used to treat prediabetics, see
 12 www.mayoclinic.org/diseases-conditions/prediabetes/diagnosis-treatment/drc-20355284;
 13 prediabetes has not been recognized by the CDC as a high-risk factor. Uc Encarnacion
 14 told his immigration counsel he had asthma as a child (see Yamane Decl. ¶ 5), but he
 15 has denied to the Yuba medical staff that he presently has asthma (see Kaiser Decl.
 16 ¶ 11). Although Buendia Alas states that, on dates that are undisclosed, he had
 17 "readings of high blood pressure" (see Buendia Alas Decl. ¶ 5), there is no showing he
 18 has been diagnosed with hypertension, i.e., that his blood pressure "consistently ranges
 19 from 130-139 systolic or 80-89 mm Hg diastolic," see [www.heart.org/en/health-](http://www.heart.org/en/health-topics/high-blood-pressure/understanding-blood-pressure-readings)
 20 [topics/high-blood-pressure/understanding-blood-pressure-readings](http://www.heart.org/en/health-topics/high-blood-pressure/understanding-blood-pressure-readings). Lastly, the parasitic
 21 infection with which Montoya has been "tentatively diagnosed" (see Wolfe-Roubatis Decl.

22
 23
 24 ³In making this finding and the findings set forth below, the Court has considered
 25 hearsay evidence offered by petitioners and by respondents. See Flynt Distrib. Co. v.
 26 Harvey, 734 F. 2d 1389, 1394 (9th Cir. 1984) (holding district court did not err by
 27 considering hearsay evidence offered in connection with motion for preliminary injunction;
 28 finding "trial court may give even inadmissible evidence some weight when to do so
 serves the purpose of preventing irreparable harm before trial").

⁴Petitioners do not argue, and the Court does not consider whether, during the
 COVID-19 pandemic, it is unconstitutional for respondents to detain in crowded facilities
 persons who are not at such increased risk.

1 ¶¶ 8-9), is not included in the list of conditions identified by the CDC as high risk factors,
 2 and, although he states he has tuberculosis, his last chest x-ray was "within normal
 3 limits" and his last skin test was "found negative for TB" (see Bonnar Decl. ¶ 15).
 4 Accordingly, issuance of a temporary restraining order as to the above four petitioners
 5 will be denied.

6 The Court finds, however, petitioners have clearly shown four other petitioners are
 7 at high risk of severe illness if infected with COVID-19. The parties agree Salomon
 8 Medina Calderon ("Medina Calderon") has been diagnosed with and receives treatment
 9 for diabetes (see Medina Calderon Decl. ¶ 6; Kaiser Decl. ¶ 10); he has been
 10 "hospitalized many times despite taking diabetic medication" and has lost all vision in one
 11 eye and 70% of his vision in the other (see Medina Calderon ¶ 6). The parties agree
 12 Gennady V. Lavrus ("Lavrus") likewise has been diagnosed with and receives treatment
 13 for diabetes (see Upshaw Decl. ¶ 5; Kaiser Decl. ¶ 12); his condition is of a severity that
 14 requires him to take insulin by injection (see Upshaw Decl. ¶¶ 5, 7). The parties agree
 15 Charles Joseph ("Joseph") has asthma (see Joseph Decl. ¶ 13; Bonnar Decl. ¶ 10),
 16 which condition has required him, for the past six years, to use albuterol (see Joseph
 17 Decl. ¶ 13). Lastly, J Elias Solorio Lopez ("Solorio Lopez") is 82 years of age (see
 18 Waldron Decl. ¶ 3; Bonnar Decl. ¶ 11), and, as reported by a physician who examined
 19 him in January 2020, has a "history of hypertension" and "polycystic kidney disease," as
 20 well as "severe malnutrition" and other ailments (see Waldron Decl. ¶ 8; Haar Decl.
 21 ¶ 2 and attachment thereto).

22 The Court further finds petitioners have clearly shown the above-referenced four
 23 petitioners cannot practice meaningful social distancing in their respective detention
 24 facilities. Petitioners have offered evidence, undisputed by respondents, that detainees,
 25 both at Yuba and Mesa Verde, are kept in close proximity, i.e., less than six feet apart,
 26 not only when in their living quarters (see Medina Calderon Decl. ¶ 16; Upshaw Decl.
 27 ¶ 19; Minchaca Ramos ¶¶ 12, 15; Joseph Decl. ¶¶ 9-10; Knox Decl. ¶ 9), but also during
 28 meals (see Supp. Weisner Decl. ¶ 4.ii; Rodarte ¶ 10; Knox Decl. ¶ 10; Bent Decl. ¶ 11;

1 Joseph Decl. ¶ 11), and, at Yuba, when lining up for temperature checks as well (see
 2 Supp. Upshaw Decl. ¶ 6; Rodarte ¶ 10).⁵ Additionally, petitioners have offered evidence,
 3 undisputed by respondents, that detainees at Yuba and Mesa Verde have not been
 4 provided with masks (see Yamane Decl. ¶ 12; Rodarte Decl. ¶ 9; Bent Decl. ¶ 13; Wolfe-
 5 Roubatis Decl. ¶ 13), and respondents do not assert they have any plans to do so.
 6 Similarly, there is undisputed evidence that staff at Yuba and Mesa Verde, with limited
 7 exception, do not wear masks or other protective equipment when in the immediate
 8 vicinity of detainees. (See Yamane Decl. ¶ 12; Upshaw Decl. ¶¶ 12, 14; Supp. Upshaw
 9 ¶¶ 7-8; Rodarte Decl. ¶ 9; Bent Decl. ¶ 13; Knox Decl. ¶¶ 7, 15; Supp. Joseph Decl. ¶ 7.)

10 Although, as noted, it is undisputed that respondents have a non-punitive purpose
 11 in detaining Medina Calderon, Lavrus, Joseph, and Solorio Lopez, namely to ensure their
 12 respective appearances at immigration proceedings and to effectuate any final orders of
 13 removal, the Court finds petitioners have made a strong showing that respondents'
 14 detaining them in the above-referenced conditions, in spite of their knowledge of said
 15 petitioners' respective high-risk status, is "excessive in relation to [that] purpose." See
 16 Jones, 393 F.3d at 932. Accordingly, with respect to these four petitioners, the Court
 17 finds a clear showing has been made that they are likely to succeed on the merits of their
 18 Fifth Amendment claim.

19 Next, with respect to the question of whether petitioners have shown a likelihood
 20 of irreparable harm, the Court first notes the virus, as explained by the CDC, "is thought
 21 to spread mainly from person-to-person, through respiratory droplets produced when an
 22 infected person coughs or sneezes," and that such "droplets can land in the mouths or
 23 noses of people who are nearby or be launched into the air and inhaled into someone's
 24 lungs." See [www.cdc.gov/coronavirus/2019-ncov/community/correction-](http://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/faq.html)
 25 [detention/faq.html](http://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/faq.html). Further, the Court finds petitioners have shown Medina Calderon,
 26 Lavrus, Joseph, and Solorio Lopez cannot meaningfully, if in any manner, adhere to the

27 _____
 28 ⁵There is no evidence Mesa Verde conducts temperature checks of detainees,
 other than one initially at "intake." (See Moon Decl. ¶ 18.)

United States District Court
Northern District of California

1 advice the country's health officials, including those at the CDC, have repeatedly given to
2 all persons in the United States as to how to avoid becoming infected with COVID-19,
3 specifically, to engage at all times in social distancing, to use protective equipment such
4 as masks, gloves, or other coverings when in close contact with others, and to frequently
5 wash or otherwise sanitize one's hands.

6 Under such circumstances, the Court finds petitioners have made a sufficient
7 showing that Medina Calderon, Lavrus, Joseph, and Solorio Lopez, as persons at high
8 risk of severe illness or death if infected with COVID-19, are likely to incur irreparable
9 injury in the absence of any relief from their present conditions of confinement.

10 The Court next finds the balance of hardships tips in favor of Medina Calderon,
11 Lavrus, Joseph, and Solorio Lopez. As noted, none of these petitioners is in a position to
12 meaningfully limit his exposure to COVID-19 while at Yuba or Mesa Verde. Although
13 respondents may have concerns about flight risk or other matters,⁶ the Court intends to
14 address those issues by imposing reasonable conditions upon release, as discussed
15 below.

16 Lastly, the Court finds, under the highly unusual circumstances presented, i.e., a
17 global pandemic of a type not seen within recent memory, the public interest is served by
18 the requested injunction. Specifically, the public interest in promoting public health is
19 served by efforts to contain the further spread of COVID-19, particularly in detention
20 centers, which typically are staffed by numerous individuals who reside in nearby
21 communities.

22 Accordingly, the Court will grant the motion to the extent it is brought on behalf of
23 Medina Calderon, Lavrus, Joseph, and Solorio Lopez.

24 //
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28 ⁶To date, respondents have not identified any concern specific to any of these four individuals.

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United States District Court
Northern District of California

1 The Court will not, however, order any such petitioner to be released without
2 reasonable conditions, and, as to each such petitioner, will include the following
3 conditions in its order of release:

4 (1) Petitioner is to reside and shelter in place at an address to be specified in said
5 order.⁷

6 (2) Petitioner shall be transported by a person to be specified in said order from
7 his place of detention to the residence where he will reside and shelter in place.⁸

8 (3) Pending further order of the Court, petitioner shall not leave the residence
9 where he will shelter in place, except to obtain medical care, to appear at immigration
10 court proceedings, or to obey any order issued by the Department of Homeland Security.

11 (4) Petitioner shall not violate any federal, state, or local law.

12 In addition, the Court will direct the parties' respective counsel to meet and confer,
13 by email, telephone, or other means, and to propose, in a joint statement any additional
14 reasonable conditions.

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26 ⁷The address for each petitioner is to be provided by petitioners' counsel.

27 ⁸The name of the transporter of each petitioner is to be provided by petitioners'
28 counsel.

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CONCLUSION

For the reasons stated, petitioners' motion is hereby GRANTED in part and DENIED in part, as follows:⁹

1. To the extent the motion is brought on behalf of petitioners Sofia Bahena Ortuño and Roxana del Carmen Trigueros Acevedo, the motion is DENIED as moot.


2. To the extent the motion is brought on behalf of petitioners Ricardo Vasquez Cruz, Ernesto Abroncio Uc Encarnacion, Julio Cesar Buendia Alas, and Marco Montoya Amaya, the motion is DENIED.

3. To the extent the motion is brought on behalf of petitioners Salomon Medina Calderon, Gennady V. Lavrus, Charles Joseph, and J Elias Solorio Lopez, the motion is hereby GRANTED, and said petitioners shall be released upon issuance of an order setting conditions of release. The parties' respective counsel are hereby DIRECTED to meet and confer forthwith and to propose, in a joint statement to be filed no later than April 10, 2020, at 11:00 a.m., any additional reasonable conditions.

4. Respondents are hereby DIRECTED to show cause, no later than April 22, 2020, why, as to Salomon Medina Calderon, Gennady V. Lavrus, Charles Joseph, and J Elias Solorio Lopez, a preliminary injunction should not issue. Petitioners' reply shall be filed no later than seven days after any such response is filed. As of the date the reply is filed, the Court, unless the parties are otherwise advised, will take the matter under submission.

IT IS SO ORDERED.

Dated: April 8, 2020


MAXINE M. CHESNEY
United States District Judge

⁹As noted in the Court's order of April 3, 2020, the Court has deferred ruling on the motion to the extent it is brought on behalf of Olvin Said Torres Murillo and Mauricio Ernesto Quinteros Lopez. To such extent, the motion remains pending.

United States District Court
Northern District of California

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8 **SUPERIOR COURT OF CALIFORNIA**
9 **COUNTY OF SACRAMENTO**

10 THE PEOPLE OF THE STATE OF CALIFORNIA

11 Plaintiff,

12 vs.

13 DEFENDANTS AS SET FORTH IN
14 EXHIBIT A

15 Defendants.
16

NO. SEE EXH. A DEPT. 47

NOTICE OF PEOPLE'S
OPPOSITION TO SETTING OF BAIL
AT \$0 AND REQUEST FOR
HEARING UNDER PENAL CODE
SECTION 1269c; EXHIBIT A

Hearing: TBD
Time: TBD

17 TO THE COURT AND COUNSEL OF RECORD:

18 The People respectfully request the opportunity to be heard in opposition to the court setting
19 bail at \$0, pursuant to Rule 4 of the Emergency Rules of the Judicial Council issued April 6, 2020,
20 in each the cases set forth in the attached Exhibit A.
21

22 **NOTICE OF OBJECTION TO SETTING BAIL AT \$0 AND REQUEST FOR HEARING**

23 On April 6, 2020, the Judicial Council adopted an Emergency Rule of Court, subdivision
24 4 which, among other things, established a statewide Emergency Bail Schedule to every accused
25 person arrested and in pretrial custody and to every accused person held in pretrial custody.

26 Under the statewide Emergency Bail Schedule, effective no later than 5 p.m. on April 13, 2020,
27

1 bail for all misdemeanor and felony offenses must be set at \$0, with the exclusion of certain
2 specified offenses. The Council’s Emergency Rule also sets forth the court’s ability to deny bail
3 as authorized by article I, section 12 or 28(f)(3) of the California Constitution, based on factors
4 identified therein.

5 The People have identified the cases set forth in Exhibit A as those who would otherwise
6 fall within the category of defendants to be released under the Emergency Bail Schedule, but
7 where the People object to the setting of bail at \$0. These cases have been determined by the
8 People as those where the defendant poses an unreasonable risk to public safety or the safety of
9 the victim.
10

11 **MEMORANDUM OF POINTS AND AUTHORITIES**

12 Pursuant to Penal Code section 1275, in setting, reducing or denying bail, the judge or
13 magistrate shall take into consideration the protection of the public, the seriousness of the offense
14 charged, the previous criminal record of the defendant, and the probability of his or her appearing at
15 trial or hearing of the case. The public safety shall be the primary consideration of bail
16 determinations. Under Article I, § 28(f)(3), the court can consider “the protection of the public, the
17 safety of the victim, the seriousness of the offense charged, the previous criminal record of the
18 defendant, and the probability of his or her appearing at the trial or hearing of the case.” The
19 identified cases set forth herein are those where the People request to be heard in opposition to
20 setting bail at \$0 under the Council’s Emergency Order.
21

22 The Council’s Emergency Rule 4, subdivision (d) provides that bail can also be denied
23 pursuant to California Constitution Article I, section 12. Section 12 provides that a person shall be
24 released on bail by sufficient sureties, except for specified cases. Those cases include:
25

26 (b) Felony offenses involving acts of violence on another person, or felony sexual assault
27 offenses on another person, when the facts are evident or the presumption great and the
28 court finds based upon clear and convincing evidence that there is a substantial likelihood

1 the person's release would result in great bodily harm to others; or
2 (c) Felony offenses when the facts are evident or the presumption great and the court finds
3 based on clear and convincing evidence that the person has threatened another with great
4 bodily harm and that there is a substantial likelihood that the person would carry out the
5 threat if released.

6 (California Constitution Article I, § 12, subdivisions (b) and (c).) While some of these types of
7 cases may already fall within the offenses specifically exempted under Emergency Rule 4,
8 subdivision (c), the cases in the attached list are those which are not exceptions by virtue of the
9 charges, but where the People have determined facts support that the defendants' release would
10 result in danger to the public and/or the victim in the case.

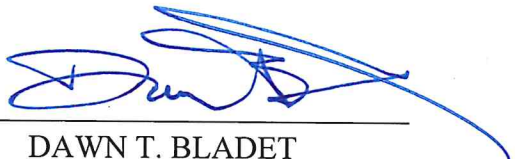
11 **CONCLUSION**

12 For the reasons stated above, the People request the court set for hearing on emergency bail
13 consideration in the following cases where the People contend there would be an unreasonable risk
14 to public safety were the defendant to be granted a bail amount of \$0.

15 Dated: April 10, 2020

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17
18 Respectfully submitted,

19 ANNE MARIE SCHUBERT
20 DISTRICT ATTORNEY

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24 BY: 
25 DAWN T. BLADET
26 Asst. Chief Deputy District Attorney

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EXHIBIT A

Document received by the CA Supreme Court.

Last Name	First Name	Docket	XREF	Primary Charge	Reason for Objection
Alam	Fakhar	20MI003672	2219812	PC 166(a)(4)	Pending 1368; danger to victim
Anderson	Arne	20FE000805	135953	VC 2800, HS 11378	Public safety; prior strike
Arthur	Michael	20FE003116	2202597	HS 11378	Prior Strike/public safety; Sentenced 2/3/20 on 20FE001769 to 90 days
Beckwith	James	19FE009264	2696205	VC 10851	Public safety; Prior 211 strike (2012); on Probation 18FE020169
Bell	John	19FE022936	4969359	PC 245(a)(4) w/ prior strike	Public safety; On parole for 211 (2015)
Blake	Edward	19FE007147	4102681	PC 4573.6	Public safety; history of violence
Bleak	Joseph	19FE015134	5246172	PC 4573, 4573.6 + prior strike	Public safety; On parole; multiple prior strikes
Blevis	Tyler	20FE005225	3723676	VC 664/10851, 148	Public safety; 1368 declared 4/8/20; Prior strike/prison 422 (V mother)
Bradley	Clarence	19FE023134	3319664	VC 10851	On parole/prior 211 strike (2018);
Bradley	Evan	20MI002130	5185651	PC 417	Public safety; safety of victim; 1368 doubt declared
Bruno	William	19FE022623	3647029	PC 530.5(c)(3), 11377	Public safety; Prior strike (2018); multiple grants Probation
Buckmaster	Dale	20FE005750	4792694	VC 10851(a), 2800.4 w/ prior strike	Public safety; Prior strike 215 (2020); On Multiple grants of Probation
Cafferty	Nicholas	19FE022899	3852305	VC 2800.2, VC 10851(a), VC 20002(A)	Career 10851/Dope and PRCS Firearms
Calderon-Hernandez	Juan	20FE004519	2489431	HS 11351	Flight Risk /Mult alias and 273(a) charges
Caroll	Arlon	19FE013085	2217302	PC 245(a)(4)	Violent Record/Violent current- 3 grants probation
Cassiano	Ruben	17FE009916 + 19FE010435	5028518	VOP, 4501, pending juvie 187	Pending Juv 187
Chandler	Dwayne	20FE005744	4739731	HS 11378	Prior 191.5/PRCS for firearms
Clinton	Robert	18FE002388	5180035	PC 4502	Violent prior and current 4502/Serving SP sent for 664/187
Corpos	Francisco	20FE003317	3820761	VOP	Danger to wits w/ threats
Corsbie	George	20FE005753	4454731	VC 2800.2	Long Record/ Public Danger- 7 Grants Probation
Crump	Archibald	19FE015862	2166353	VC 2800.2	Long Violent Record

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Last Name	First Name	Docket	XREF	Primary Charge	Reason for Objection
Cunningham	Taneisha	15F01808 + 16FE005852	3860875	VOPs - off 23152	VOP off two Felony DUIs
Dixon	Bobby	19FE017819	930113	VC 2800.2, 10851	Violent Prior 187 conviction
Dome	Sarah	19FE019232	3880352	HS 11379.6 (BHO Lab)	Danger to community, prior lab
Dominguez	Jerrad	19FE013288	3025620	VC 2800.2	Danger to Community, Violence
Dorsey	Terry	19MI020531 + 19MI019872	3597630	PC 148 / PC 148	1368, Danger to Community, Violence, on 4 grants of probation
Feng	Dao	19MI021820 + 16FE019253 + 15F01754	4549592	Misdo 23152 + misdo VOP on a 529 (2016) and Felony VOP on a 2800.2 (2015)	Danger to Community, criminal history inc. DUI / dangerous driving, violated bail condition
Fischer	Matthew	20MI000924 + 20MI001770	5291168	PC 594 + 148.9	Danger to Community, prior crim history incl. arson, flight risk
Fowler	Robert	20FE004823	10272	HS 11377	Danger to Community, lengthy crim history including 211's and 288(a)'s, 2 grants of prob
Hall	Isael	19FE014194	4153169	459 2nd x 2	Danger to Community, prior crim history incl. strike
Hirschler	Rudy	20FE001322	3417670	VC 2800, 10851, 148	Danger to Community, prior crim history incl. strike
Hone	Devin	19FE018975	3495547	PC 496 + prior strike	Danger to Community, prior strike, history of violence
Howard	Dave	19FE017812	2435644	HS 11378, 11351	Danger to Community, history of violence, firearms
Jenkins	Jakari	19FE018620	5284568	13 cts of 459 2nd	Danger to Community, crim history including prior strike
Johnson	Tanner	19FE022624	3307662	PC 29805, 10851, 27545	Danger to Community, history of violence
Jones	Shaun	19FE018620	4384985	13 cts of 459 2nd	Danger to Community, crim history including prior violent strike
Kanogataa	Grame	19FE019232	4176366	HS 11379.6 (BHO Lab), PC 273a(a)	Danger to Community, prior lab
Larson	Christopher	20FE005963	1214776	PC 368 + prior strike	Elder Abuse w/ violent prior conviction
Lee	Jana	19FE020778	3219260	PC 273a(a)	Child abuse involving two victims

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Last Name	First Name	Docket	XREF	Primary Charge	Reason for Objection
Leon-Alvarez	Vicente	20FE000786	4797749	PC 11370.1	Domestic violence related while armed with firearm
Lewis	Shane (Shayne)	20FE003683	5167208	PC 30305	Violent prior history
Lilly	Donte	19FE007823	3074355	PC 21310, 148, 11377	Danger to Community, history of domestic violence, firearms
Luna	Eduardo	20FE004923	2459503	PC 290.18(b)	Sex registrant with multiple prior failure to register convictions
Macpherson	Jacob	20FE001273	3736338	VC 2800.2	Aggravated high speed chase
Mahone	Tyler	18FE003876	5158186	PC 4573.6	State prison inmate with violent history
Marrero	Raymond	20FE005689 + 20FE005590 + 19FE023063 + 19FE018925 + 19FE016263	4983571	PC 4573.5 / 11378/ 148 / 2800 / 11351 + four out on bail enhancements	Convicted felon with five pending felony cases including high speed pursuit.
Martin	Robert	20FE005699	2572931	VC 2800.2, 10851, 496d	Vehicle pursuit in stolen car through shopping center parking lot
Martinez	Raymond	19FE020634	3500367	PC 368, 245(a)(4) + prior strike	Beat his elderly mother for no apparent reason. Mom suspects he was under influence of meth. 211 conviction in 2018
Medina	Jose	20FE004036	2800591	VC 2800.2, 148	High speed chase through residential area. Lasted 24 miles. Terrible record. On parole. 211 prior in 2010.
Mercado	Jason	20FE004843	2638318	PC 245(a)(4)	D beat a prospective roommate for no reason. was talking strangely about voodoo and Satanism prior to beating. Priors are all misdemeanors, but convicted of 273.5 3x
Mills	Torrance	19FE015919	5024481	HS 11351	On PRCS for pimping in 2017. Probation search 4 grams of cocaine in car. Record includes gun and violence. Robbery from Nevada in 2004

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Last Name	First Name	Docket	XREF	Primary Charge	Reason for Objection
Moos	James	19FE018728	902832	PC 484i(c), 530.5	On PRCS. Passenger in stolen car. Items of ID theft recovered in car- ID's, fake \$100 bills, credit card embosser, 4g meth. Terrible record includes old 459 1st from 1993. 9 different prison commitments. 2x offer.
Morales	Jeanette	20FE005000	5309642	HS 11352	Public safety: D had approx. 1.5 lbs of heroin, 3 prior convictions for drug sales & flight risk
Moralez	Alicia	20FE001292	2115760	PC 32	Crazy intox facts. Long story short, male co-D shoots victim. Our female D then helped hide the gun.
Mrofchak	Vincent	17FE000504	3043447	PC 245(a)(4) - mental health court	Beat mother causing orbital fracture. 459 1st from 2016. D is in mental health court.
Nalabalian	Abraham	20FE002190	4470953	PC 21810	On parole, went to his brothers house. Began to break furniture. Brother said D appeared "high." In possession of brass knuckles. 459 1st from 2017.
Nash	Henry	19FE018631	3040293	PC 487	Violence, gang member
Norasing	Athfem	20FE002069	3168515	PC 245(a)(4)	Danger to Community, Violence
Olson	Dwight	19FE009428	3968703	VC 2800.4	Danger to Community, Violence
Panyanouvong	Khot	20FE001882 + 19FE016125	4698227	VC 28002. / PC 32625(a)	Danger to Community, Violence
Parker	Arian	19FE022794	1923360	HS 11378, 11351.5, 11370	Danger to community, prior strike, on PRCS
Porter	Sumpter	19FE021681	4099502	PC 4501.1	Danger to community, lengthy criminal history spanning multiple states, includes violence
Powe	John	20FE004121	4301700	PC 459 2nd, 496, 148	Danger to community, prior strike
Pratt	Kacee	20FE003143	3697048	VC 2800.2, 10851	Danger to community, history of violence, on 3 grants of prob

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Last Name	First Name	Docket	XREF	Primary Charge	Reason for Objection
Ramos	Juan	20FE001388	3815327	HS 11351 x 3	Danger to community, violence/on parole for 211
Ratuloaloe	Aminias	18FE002885	4242423	PC 245(a)(4) - 1368	Danger to Community, violence, 1368
Raucha	Diego	20FE003750	2473280	VC 2800.4	Danger to Community, violence
Razo	Sarina	19FE021776	3981767	HS 11379	Public safety: possess kilo of meth and child endangerment
Resseguie	Jennifer	19MI009563	5115054	PC 422 + 417	Public safety: D threatened to kill V (stranger). D holding knives while making threats
Reyes	Miguel	20FE004164	3980703	PC 11370.1	Public safety: D had a loaded .38 caliber gun in car
Reyeslangsoen	Brandon	20FE003473	4750826	VC 20001(b)(1)	Public safety: Prior strike and fled scene of fatal crash.
Richards	Deron	19FE021468	3710266	PC 459 2nd, 594	Public safety: prior robbery and PC 245 convictions
Riddick	Ankoma	19FE018620	3511880	13 cts of 459 2nd	Public safety: part of burglary ring prior robbery and PC 245 convictions
Roberts	Mashari	20FE000999	4478139	PC 273a(a) + 12022.95	Public Safety: involved in child homicide
Robles-Villarba	Oscar	20FE001958	5214635	HS 11379 (meth)	Public safety: Possess 4 kilos of meth and gun.
Rosas	Santiago	20FE005000	5309642	HS 11352	Public safety: D had approx 1.5 lbs of heroin, 3 prior convictions for drug sales flight risk
Rose	Ricky	19FE013566	5237099	PC 459 x 2	Public Safety- history of committing armed robberies
Ruelas	Abel	20FE004035	2773762	VC 2800.4	Public safety: 2 prior strikes PC 245(a)(4)& vehicle pursuit cause damage to home.

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Last Name	First Name	Docket	XREF	Primary Charge	Reason for Objection
Salinas	Cesar	19MI019135	4986956	PC 243(b), 69, 476	Public safety: D came home drunk, exposed his penis to his sister and tried to touch her vagina. When ofc. Tried to arrest D, he resisted and kick officer.
SanAugustin	Justin	19FE001442 + 19FE001970 + 19FE001970	5047108	17 cts of PC 459 / 2800.4	Public Safety: Serial Burglar and evaded police
Sanders	Britney	19FE022488 + 20MI004047	4235208	VOP (PC 368) + 273.6	Unreasonable risk to public safety and safety of the victim; on felony probation (19FE022488)
Santamaria	Julio Efrain	19FE022465	5294728	Pending J&S on 7/14/20 on a PC 459 2nd - will get 4 years	Pending J&S on 7/14/20 on a PC 459 2nd degree & will be sentenced to 4 years SP
Say	Somesay	19FE018424	3721919	PC 30600	Unreasonable risk to public safety; Court heard bail motion/OR request on 4/8/20 and denied.
Sikta	Laith	19FE018728	3383725	PC 484i(c), 530.5	Unreasonable risk to public safety; Prior strike PC 211 2018 (BAF 1800687)
Simpson	Derrick	20MI001698	1898750	PC 368(c) + 166(a)(4)	Safety of the victim and public safety threat. D has 7 prior convictions for violations of court order. on probation (19MI02127 & 17MI008399)
Smith	Granvil	20FE001708	657438	PC 594	Unreasonable risk to public safety and threat of harm to the victim. D has three prior strike offenses.
Smith	Shaun	17FE006817	4101757	9 cts of 487, 115, 470d	D is criminally sophisticated and poses a danger to public safety.
Snyder	Juanita	20FE004989	2914069	VC 10851, 496d, 530.5	Unreasonable risk to public safety; D on parole (13F02574)
Steffes	Brian	20FE005467	4088583	HS 11550, PC 25850, 594, 422	Unreasonable risk to public safety.

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Last Name	First Name	Docket	XREF	Primary Charge	Reason for Objection
Thornton	Todd	20FE005569	3102943	PC 266h(a)	Unreasonable danger to public safety and to the safety of the victim. D also has a pending PC 290 (20FE000652). D on parole.
Torres	Angelo	20MI000449	3807080	PC 290.018	Unreasonable danger to public safety. D on 7 grants of probation (18FE008695 & 6 misdemeanor grants)
Trujillo	Skyler	20FE003901	4735590	VC 2800.2, VC 10851(a) w/ prior strii	Unreasonable danger to public safety. 2 prior felony convictions for same offenses.
Tyson	Keoni	20FE001079	4325338	PC 245(a)(4)	Unreasonable danger to public safety and a threat to the safety of the victim. D on 4 grants of probation (19FE009566 & 3 misdemeanor grants)
Urbietta	Gabriel	20FE002345	4287468	VC 2800.2, 20001	Unreasonable risk to public safety.

Varela	Dwight	19FE009672	95573	HS 11377 - prior strike per 290 - D is 1368	Unreasonable risk to public safety. Parolee-at-large. has 3 prior strikes including a PC 288 case of an 11 year old female with 37 year sentence.
Vaughn	Ajan	20FE003155	5122228	VC 2800, PC 29820, 25850	Unreasonable risk to public safety; D has prior which prevents him from having a firearm.

Vega	Jose	20FE003250	4211887	VC 2800 + 10851	Unreasonable risk to public safety; Convicted in 2019 on the same charges he is pending; on PRCS (19FE002728)
Voyce	Eric	20FE003749	3459625	VC 2800.4, 148	Unreasonable risk to public safety; previous felony conviction for same offense.

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Last Name	First Name	Docket	XREF	Primary Charge	Reason for Objection
Williams	Johnny	20FE003612	1665417	VC 20001(a)	Unreasonable risk to public safety. Pending DUI case and alcohol involved in present case. 2 prior strikes 1990 & 1995. On probation for DUI (19MI000807)
Williams	Christopher	20FE004745	3299055	VC 2800.2	Unreasonable risk to public safety. On parole. Prior strike.
Williams	David	19FE004842	3417024	PC 11370.1, 496d, 530.5d	Danger to Community, two prior strikes
Wilson	Marquess	20FE003467	4450731	HS 11351	Unreasonable risk to public safety. On parole.
Young	Andrew	20FE003136	4284796	PC 266h(a), 266i(a)	Pimping case w/DV style threats (g/friend)

2020 WL 1820667

Only the Westlaw citation is currently available.
 United States District Court, N.D. California,
 San Francisco Division.

John DOE, Plaintiff,

v.

William P. BARR, et al., Defendants.

Case No. 20-cv-02141-LB

Signed 04/12/2020

Attorneys and Law Firms

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**ORDER GRANTING PETITIONER'S MOTION
 FOR TEMPORARY RESTRAINING ORDER**

Re: ECF No. 6

[LAUREL BEELER](#), United States Magistrate Judge**INTRODUCTION**

*1 The petitioner, a citizen of Haiti and a lawful permanent resident of the United States, is in removal proceedings based on his conviction for second-degree robbery.¹ He finished his state sentence and has been in the custody of the U.S. Immigration and Customs Enforcement (“ICE”) at Yuba County Jail since April 15, 2019.² He has not had a bond hearing. He has medical issues — [chronic post-traumatic stress disorder](#) (“PTSD”), depression, and latent [tuberculosis](#) — and given the COVID-19 pandemic and his conditions of confinement at Yuba County Jail, he petitions under [28 U.S.C. § 2241](#) for his release or, alternatively, a bond hearing within seven days before an Immigration Judge (“IJ”). He also moved for a temporary restraining order (“TRO”) to obtain

the same relief.³ After full briefing and a hearing on April 9, 2020, the court grants the petitioner’s motion for a TRO and orders his release.

STATEMENT⁴**1. COVID-19**

The World Health Organization has designated COVID-19 a global pandemic.⁵ The state of California has declared a state of emergency, and the President has declared a national emergency.⁶ Our courthouses are mostly closed to in-person business, and counties have implemented shelter-in-place orders that require social distancing and the closing of schools and businesses.⁷ These are extraordinary times.⁸

*2 COVID-19 spreads “easily and sustainably” from person to person, infected people can spread it (even if they are asymptomatic), and COVID-19 can survive on surfaces for days.⁹ It spreads even faster when it is in confined spaces, such as cruise ships, aircraft carriers, and prisons.¹⁰

There is no approved vaccine to prevent infection.¹¹ Instead, to control the virus, the CDC (the Centers for Disease Control and Prevention) recommends that people stay at least six feet away from each other (a practice called “social distancing”), stay at home, wash their hands often, disinfect surfaces, and cover their mouths and nose with a cloth face cover when around others.¹²

“[J]ails and prisons present extraordinarily dangerous conditions for the spread of the virus.” *United States v. Daniels*, No. 5:19-cr-00709-LHK (NC), Order – ECF No. 24 at 5–7 (N.D. Cal. Apr. 9, 2020) (citing articles and cases and taking judicial notice of information on the U.S. Bureau of Prisons’ website).¹³

The CDC has determined that certain persons are more susceptible to being infected with COVID-19.¹⁴ These include people who are 65 and older, people who live in a nursing home or other long-term care facility, people who are homeless, and people of all ages with underlying medical conditions, particularly if not well controlled, including the following: people with [chronic lung disease](#) or moderate to severe [asthma](#), people who have [hypertension](#) or serious heart conditions, people with severe [obesity](#) (with a body-mass

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index of 40 or higher), people with [diabetes](#), people with [chronic kidney disease](#) undergoing dialysis, people with liver disease, and people who are immunocompromised (including from [cancer](#) treatment, smoking, [bone marrow](#) or [organ transplantation](#), immune deficiencies, poorly controlled HIV or AIDS, and prolonged use of corticosteroids and other immune-weakening medications).¹⁵

2. The Petitioner

*3 The petitioner is a citizen of Haiti who came to the United States in July 2005, when he was 16, after he witnessed Haitian police officers' beheading his parents.¹⁶ In 2007, he became a lawful permanent resident based on an approved Special Immigrant Juvenile Status petition.¹⁷ He initially lived in a foster home but ultimately moved to California, went to school, connected with many family members who live in the U.S. (including his cousins in East Oakland), and met (in 2009) and married (in 2012) his wife, a U.S. citizen.¹⁸ They have lived together since 2010.¹⁹

The petitioner pleaded no contest in December 2011 to second-degree robbery, in violation of [Cal. Penal Code § 211](#), with enhancements for bodily injury and use of a weapon, and was sentenced to three years for the robbery with a consecutive seven years for the enhancements.²⁰ (The weapon was a BB gun that the petitioner used to hit the person he robbed.²¹) He has no other criminal history.²² He served eight years of his ten-year sentence (slightly less than the ordinary 85% because of good-time and educational-merit credits) and was released from Folsom State Prison on April 15, 2019.²³ His declaration in support of his application for adjustment of status describes his activities at Folsom, including obtaining his high-school diploma, vocational training in electronics, mental-health treatment, reconnecting to the spiritual practice (called Ifa) of his father, learning and then teaching guitar, performing with a band, and charitable work.²⁴ He apparently had no disciplinary violations at Folsom.²⁵ A psychological assessment of him includes a review of his prison records, confirms his mental-health diagnosis and his extensive (and successful) educational, therapeutic, and charitable activities.²⁶

*4 The petitioner has been in ICE custody since April 15, 2019 and has not had a bond hearing.²⁷

A G4S security officer — a company that contracts with ICE — groped the petitioner on at least two separate legal visits in San Francisco between September and December 2019.²⁸ The petitioner and several other victims reported the assault to the San Francisco Police Department (“SFPD”), which investigated the assault.²⁹ SFPD Sergeant-Inspector Antonio Flores signed a Form I-918 Supplement, U Nonimmigrant Status Certification, certifying him as a victim of the qualifying crimes of Abusive Sexual Contact and Sexual Assault, and reflecting the petitioner’s cooperation and truthful information.³⁰ This allows the petitioner to file for a U visa.³¹

The petitioner has been diagnosed with chronic PTSD, depression, and latent [tuberculosis](#).³² He has nightmares, usually about his parents’ death, and experiences fear, anxiety, tightness in his chest, and trouble sleeping.³³

One article describes PTSD as — in addition to a chronic psychiatric illness — a “somatic condition, such that patients with PTSD have been found to have a biological alterations in several primary pathways involving the neuroendocrine and immune systems.”³⁴ Mira Zein, M.D., M.P.H., who is a Clinical Assistant Professor at Stanford University School of Medicine, Department of Psychiatry and Behavioral Sciences, describes how depression, stress, and PTSD affect the immune system.³⁵ “Growing evidence demonstrates that PTSD, anxiety/stress, and depression can lead to decreased immune response and increased risk of infections.”³⁶ These illnesses are “linked with elevated stress levels,” which can impact immune responses.³⁷ “Depression, anxiety, and PTSD have all been found to directly stimulate production of pro-inflammatory cytokines, as well as downregulate cellular immunity leading to increased risk of acute and prolonged infection, and delayed [wound](#) healing.”³⁸ She concludes that weakened immunity due to mental-health disorders can put detainees “at increased risk of contracting and suffering from more severe forms of COVID-19.”³⁹

Carlos Franco-Paredes, M.D., M.P.H., D.T.M.H., who is an Associate Professor of Medicine at the University of Colorado Department of Medicine, Division of Infectious Diseases, describes COVID-19 risks at immigration detention centers.⁴⁰ “The physical and emotional trauma that detainees and asylum seekers experience can weaken their immune systems, resulting in increased risk of severe manifestations

of infections.”⁴¹ Other countries have identified people with “severe psychiatric illness” as a group at “high risk of dying [from COVID-19] regardless of their age.”⁴²

*5 The petitioner also suffers from latent tuberculosis.⁴³ Initially, he described his medical condition thusly: “it is unclear how the novel coronavirus will interact with” the petitioner’s latent tuberculosis.⁴⁴ Subsequently, he submitted additional information.⁴⁵ Tuberculosis, like COVID-19, is a respiratory disease.⁴⁶ George Martinez, M.D., who conducted the petitioner’s medical examination for his immigration proceedings, did not specify a definite relationship between latent tuberculosis and COVID-19, given that the virus is still new to healthcare professionals.⁴⁷ One observational study studied the relationship of tuberculosis and COVID-19 in 36 confirmed COVID-19 patients.⁴⁸ It found that “individuals with latent or active TB [Tuberculosis] may be more susceptible to SARS-CoV-2⁴⁹ infection.”⁵⁰ It also found that “COVID-19 disease progression may be more rapid and severe” in those with latent or active tuberculosis.⁵¹ It identified “tuberculosis history (both of active TB and latent TB) [as] an important risk factor for SARS-CoV-2 infection.”⁵² The study noted that its findings are limited because it is based on a low number of cases.⁵³

If he is released, the petitioner has said that he will live with his wife in Oakland, California.⁵⁴ In her declarations, the petitioner’s wife describes their close relationship, his relationship with her son and other children in the family, his creativity and support, his rehabilitation, and her need for his support given her health issues.⁵⁵ She identifies her two-bedroom apartment in Oakland as their residence, describes how they will be able to practice social distancing, and describes the substantial precautions she follows to ensure her health, such as washing her hands, wearing a mask and gloves outside, immediately washing her clothes when she returns to her home, cleaning frequently, and washing her hands frequently.⁵⁶

Because the petitioner is on County parole, he will have access to robust mental-health, educational, job-training, and job-placement services.⁵⁷

3. Immigration Proceedings

The petitioner’s conviction is an aggravated felony, which means that he is removable under § 273(a)(2)(A)(iii) of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1227(a)(2)(A)(iii).⁵⁸ The petitioner advanced two claims for relief from removal: an adjustment of status (based on an approved spousal visa) and protection under the Convention Against Torture.⁵⁹ On February 13, 2020, the Immigration Judge (“IJ”) denied the application for relief and ordered the petitioner removed to Haiti.⁶⁰ The IJ “observed the [petitioner’s] demeanor and analyzed his testimony for consistency, specificity, and persuasiveness” and found his testimony “plausible, believable, candid, and generally consistent.”⁶¹ “After considering the totality of the evidence and weighing all the relevant factors,” the IJ found the petitioner “credible and accord[ed] his testimony full evidentiary weight,” and also found credible the testimony of the petitioner’s wife and the examining psychologist (summarized above).⁶²

*6 On March 2, 2020, the petitioner timely appealed to the Board of Immigration Appeals.⁶³ There is no briefing schedule, and the timeline for a decision is anywhere from six months to over a year.⁶⁴

As mentioned above, the petitioner has said that he will apply for a U visa.⁶⁵

4. The Conditions of Confinement at Yuba County Jail

The petitioner’s housing unit is detained in “Pod C,” a large open space in the basement, housing 50 people, and divided into an upstairs and a downstairs.⁶⁶ The detainees sleep downstairs, in an open room with beds about three to four feet apart.⁶⁷ The upstairs has a communal dining area, the commissary, and an exercise space.⁶⁸ There are phones and bathrooms upstairs and downstairs.⁶⁹ There are six sinks in the pod, and one has hot water for food preparation.⁷⁰ The sinks have push-button faucets that stay on for only a short time and require repeated pressing to complete a handwashing.⁷¹ The detainees have three meals a day, served communally, at tables that seat six people, and some eat on their cots because there are not enough spaces in the dining room.⁷²

Until March 19, 2020, according to the petitioner, no jail employee cleaned inside the pod, though detainees cleaned

occasionally (possibly weekly) and had to ask a guard for cleaning supplies (kept in a locked closet).⁷³ Before March 19, 2020, detainees could obtain soap only by buying it at the commissary, and they could not buy hand sanitizer.⁷⁴ Starting on March 20, 2020, jail officials began distributing small bars of soap that disintegrate quickly, allow only a couple of hand washes, and did not always allow distribution to all detainees.⁷⁵ There are no masks for detainees, but some (not all) staff members have masks now.⁷⁶

According to the government, the jail can house 210 detainees.⁷⁷ Since March 11, 2020 (the date that the World Health Organization declared COVID-19 a global pandemic), ICE's Enforcement and Removal Operations is "taking affirmative steps to reduce the number of detainees" at Yuba County Jail and has reduced the population (from 168 to 150) by 10 percent.⁷⁸ As of April 2, 2020, there are 150 detainees at Yuba, 140 male and 10 female.⁷⁹ The number of detainees can fluctuate based on book-ins and releases.⁸⁰ ICE is assessing detainees at intake, placing any detainees with COVID-19 symptoms in quarantine (and testing them), and thereafter providing appropriate treatment.⁸¹ As of April 9, 2020, there are no suspected or confirmed cases of COVID-19 at Yuba.⁸² The jail has "increased sanitation frequency and provides sanitation supplies including disinfectants, sanitizer, and soap in every housing unit," and the "administration is encouraging both staff and the general staff population to use these [hygiene] tools often and liberally."⁸³ It has suspended in-person visits and limited professional visits to noncontact visits.⁸⁴ It screens all staff and vendors for body temperature when they enter the facilities.⁸⁵ It provides education to staff and detainees on the importance of hand-washing and other hygiene measures.⁸⁶ It has "identified housing units for the quarantine of patients who are suspected of or test positive for COVID-19" (after the assessment and monitoring protocols that apply during intake).⁸⁷

5. Procedural Background

*7 In his § 2241 petition, the petitioner challenges the conditions of his confinement (based on his inability to address his medical vulnerabilities through CDC-recommended measures such as social distancing and using cleaning products) and claims that his continued detention violates (1) his substantive due-process right under the Fifth Amendment to the U.S. Constitution to be detained in a safe

situation, free from punitive conditions of confinement, and (2) his procedural due-process right to a bond hearing under the Fifth Amendment.⁸⁸

The court granted the petitioner's unopposed motion to proceed pseudonymously.⁸⁹ The court held a hearing on the TRO on April 9, 2020.⁹⁰

STANDARD OF REVIEW

A TRO preserves the status quo and prevents irreparable harm until a hearing can be held on a preliminary-injunction application. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 439 (1974). A TRO is an "extraordinary remedy" that the court should award only when a plaintiff makes a clear showing that it is entitled to such relief. *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7, 22 (2008).

The standards for a TRO and a preliminary injunction are the same. *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co., Inc.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). A movant must demonstrate (1) a likelihood of success on the merits, (2) a likelihood of irreparable harm that would result if an injunction were not issued, (3) the balance of equities tips in favor of the plaintiff, and (4) an injunction is in the public interest. *Winter*, 555 U.S. at 20. The irreparable injury must be both likely and immediate. *Id.* at 20–21. "[A] plaintiff must demonstrate immediate threatened injury as a prerequisite to preliminary injunctive relief." *Caribbean Marine Serv. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988).

Before *Winter*, the Ninth Circuit employed a "sliding scale" test that allowed a plaintiff to prove either "(1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) [] serious questions going to the merits were raised and the balance of hardships tips sharply in its favor." *Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 731 (9th Cir. 1999) (citation omitted). In this continuum, "the greater the relative hardship to [a movant], the less probability of success must be shown." *Id.* After *Winter*, the Ninth Circuit held that although the Supreme Court invalidated one aspect of the sliding scale approach,⁹¹ the "serious questions" prong of the sliding scale survived if the plaintiff satisfied the other elements for preliminary relief. *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131–32 (9th Cir. 2011). Thus, a preliminary injunction may be appropriate when a movant

raises “serious questions going to the merits” of the case and the “balance of hardships tips sharply in the plaintiff’s favor,” provided that the other elements for relief also are satisfied. *Id.* at 1134–35.

ANALYSIS

*8 The government argues that (1) the petitioner cannot challenge the conditions of his confinement in a § 2241 petition seeking immediate release, (2) the petitioner did not exhaust his administrative remedies, (3) the petitioner lacks standing because any injury is speculative, and (4) the petitioner does not establish his entitlement to a TRO.⁹² These arguments are not persuasive.

First, the court can address the petitioner’s challenges to the conditions of confinement in a § 2241 petition. *See, e.g., Ortuño*, No. 3:20-cv-02064-MMC, Order – ECF No. 38 at 4 (N.D. Cal. Apr. 8, 2020); *Bent v. Barr*, No. 4:19-cv-06123-DMR, 2020 WL 1812850, at *2–3 (N.D. Cal. Apr. 9, 2020) (collecting cases); *see Lopez-Marroquin v. Barr*, No. 18-72922, Order (9th Cir. Apr. 9, 2020) (construing immigration detainee’s COVID-19-related request for release under the All Writs Act as a 28 U.S.C. § 2241 petition and remanding to district court for consideration).

Second, for habeas claims, exhaustion of administrative remedies is prudential, not jurisdictional. *Hernandez v. Sessions*, 872 F.3d 976, 988 (9th Cir. 2017). A court “may require prudential exhaustion when: (1) agency expertise makes agency considerations necessary to generate a proper record and reach a proper decision; (2) relaxation of the requirement would encourage the deliberate bypass of the administrative scheme; and (3) administrative review is likely to allow the agency to correct its own mistakes and to preclude the need for judicial review.” *Id.* (citing *Puga v. Chertoff*, 488 F.3d 812, 815 (9th Cir. 2007)). “Nonetheless, a court may waive the prudential exhaustion requirement if administrative remedies are inadequate or not efficacious, pursuant of administrative remedies would be a futile gesture, irreparable injury will result, or the administrative proceedings would be void.” *Id.* (citation and quotation omitted).

Waiver of the prudential exhaustion requirement is appropriate here. Courts have entertained similar COVID-19 claims under habeas jurisdiction without mentioning prudential exhaustion. *See Bent*, 2020 WL 1812850 at *5–6 (collecting cases addressing habeas challenges). Also, the

petitioner’s claim of entitlement to a bond hearing is based on the Fifth Amendment (as opposed to being grounded in a statutory entitlement), and thus exceeds the jurisdiction of the immigration courts and the BIA. *See Hernandez v. Wolf*, No. 5:20-cv-00617-TJH (KSx), Order – ECF No. 17 at 10 (C.D. Cal. April 1, 2020) (waiving prudential exhaustion in a case with similar facts about the conditions of confinement). In addition, the petitioner suffers continued harm from the lack of a bond hearing, and given his health issues, irreparable injury results from his continued detention. *See Jimenez v. Wolf*, No. 5:19-cv-07996-NC, Order – ECF No. 25 at 3–4 (N.D. Cal. Mar. 6, 2020) (waiving the prudential-exhaustion requirement for similar reasons).

Third, the petitioner has standing. The risk of injury is not speculative. The petitioner submitted uncontested statements from public-health experts about the risks in jails, prisons, and detention centers. The risks are serious, even without a confirmed case of the virus in this detention center. *See Bent*, 2020 WL 1812850 at *3–4. The weight of authority supports the conclusion that detainees have standing. *See, e.g., id.* at *3 (“[g]iven the exponential spread of the virus, the ability of COVID-19 to spread through asymptomatic individuals[,] ... effective relief for [petitioner] and other detainees may not be possible if they are forced to wait until their particular facility records a confirmed case”) (collecting cases); *Ortuño*, No. 3:20-cv-02064-MMC, ECF No. 38 at 3 (where petitioners have not contracted COVID-19, standing is still met because of how rapidly the disease can spread in a confined space); *see also Castillo v. Barr*, No. 5:20-cv-00605-TJH (AFMx), 2020 WL 1502864, at *4–5 (C.D. Cal. Mar. 27, 2020) (standing based on similar facts); *see also Xochihua-Jaimes v. Barr*, No. 18-71460, 2020 WL 1429877 (9th Cir. Mar. 24, 2020) (sua sponte ordering the petitioner released (and his removal stayed) pending final disposition by the court “[i]n light of the rapidly escalating public health crisis, which public health authorities predict will especially impact immigration detention centers.”

*9

* * *

Fourth, as discussed in the next sections, the petitioner has satisfied the four TRO factors: (1) a likelihood of success on the merits, (2) a likelihood of irreparable harm, (3) the balance of equities tips in favor of the petitioner, and (4) an injunction is in the public interest.

1. Likelihood of Success on the Merits

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The petitioner has two claims: (1) a substantive due-process claim under the Fifth Amendment that his conditions of confinement — in light of his heightened risk to COVID-19 — amount to punishment, and (2) a procedural due-process claim under the Fifth Amendment because he has been in ICE custody for a year and has not had a bond hearing.⁹³

1.1 Substantive Due-Process Claim

The petitioner has at least raised a serious question that his continued detention poses risks that exceed the government’s needs to ensure his presence at immigration proceedings, in violation of his substantive due-process rights under the Fifth Amendment.

Because the petitioner is a civil detainee, his confinement is unconstitutional under the Fifth Amendment if his conditions of confinement “amount to punishment.” *Bell v. Wolfish*, 441 U.S. 520, 535 (1979); *Jonas v. Blanas*, 393 F.3d 918, 932 (9th Cir. 2004) (quoting *Bell*, 441 U.S. at 535); accord *Bent*, 2020 WL 1812850 at *4; *Ortuño*, No. 3:20-cv-02064-MMC, Order – ECF No. 38 at 4; *Castillo*, 2020 WL 1502864 at *3. “[P]unitive conditions may be shown (1) where the challenged restrictions are expressly intended to punish, or (2) where the challenged restrictions serve an alternative, non-punitive purpose but are nonetheless excessive in relation to the alternative purpose, ... or are employed to achieve objectives that could be accomplished in so many alternative and less harsh methods.” *Jonas*, 393 F.3d at 932 (citations and quotation marks omitted). The government’s legitimate, non-punitive interests include ensuring a detainee’s presence at immigration proceedings. *See id.* (ensuring a detainee’s presence at trial); *Ortuño*, No. 3:20-cv-02064-MMC, Order – ECF No. 38 at 4 (immigration proceedings).

The issue here is whether, in light of the petitioner’s health, his detention is excessive in relation to the government’s interest in securing his presence at immigration proceedings. The evidence is undisputed that those with respiratory ailments are more susceptible to being infected by COVID-19, and the petitioner’s other diagnoses of chronic PTSD and depression compound his susceptibility. His risk is heightened because detainees at Yuba County jail live in close quarters, cannot practice social distancing, do not have masks, and do not have access to adequate disinfecting and cleaning supplies.

Courts have found that similar conditions of confinement do not meet the constitutional standard for at-risk civil detainees. *See, e.g., Ortuño*, No. 3:20-cv-02064-MMC, Order

– ECF No. 38 at 6–7 (petitioners with diabetes and asthma; detainees are in close quarters, do not have masks, and cannot meaningfully practice social distancing); *Bent*, 2020 WL 1812850 at *2, 5–6 (petitioner with asthma, hypertension, and pre-diabetes; inadequate soap, sanitizer, and cleaning supplies; resulting inability — despite efforts to encourage social distancing — to implement the CDC’s social-distancing guidelines; “public health experts make clear that an outbreak in confined spaces is potentially devastating”) (collecting cases); *Castillo*, 2020 WL 1502864, at *5 (detainees cannot maintain a six-foot distance and were “put into a situation where they are forced to touch surfaces touched by other detainees, such as with common sinks, toilets, and showers;” noted the risks of infection in immigration facilities, given the rotation of facility guards and staff); *Hernandez*, No. 5:20-cv-00617-TJH (KSx), Order – ECF No. 17 at 1, 5–6, 13 (petitioner with hypertension and multiple medical ailments; similar conditions of confinement); *Basank v. Decker*, 20-cv-2518 (AT), 2020 WL 1481503, at *5 (S.D.N.Y. Mar. 26 2020) (inability to maintain social distancing to protect high-risk detainees shows a likelihood of success on the merits).

*10 In sum, the petitioner has at least shown a serious question that his continued detention exceeds the government’s legitimate interest in assuring his appearance in immigration proceedings. (The court addresses flight risk and danger to the community in section 2, below.)

1.2 Procedural Due-Process Claim

Because he has not had a bond hearing (despite a year in ICE custody), the petitioner has shown that he is likely to succeed on the merits of his procedural due-process claim.

A person who (like the petitioner) commits an aggravated felony may be detained in immigration proceedings, and the statutory scheme does not provide for a bond hearing or limit the length of detention. *See* 8 U.S.C. §§ 1226(a), (c); *Jennings v. Rodriguez*, 138 S. Ct. 830, 844, 846 (2018) (“§ 1226(c) does not on its face limit the length of the detention it authorizes.”); *Jimenez v. Wolf*, No. 5:19-cv-7996-NC, 2020 WL 510347, at *2 (N.D. Cal. Jan. 30, 2020). Still, the Fifth Amendment “entitles aliens to the due process of law in deportation proceedings.” *Demore v. Kim*, 538 U.S. 510, 523 (2003). When confinement continues past a year, courts are wary of continued custody absent a bond hearing. *Gonzalez v. Bonnar*, No. 3:18-cv-05321-JSC, 2019 WL 330906, at *3 (N.D. Cal. Jan. 26, 2019) (collecting cases). Courts apply the three-factor balancing test in *Mathews v. Eldridge*, 424

U.S. 319 (1976), to evaluate the constitutionality of the detention. See, e.g., *Jimenez*, 2020 WL 510347 at *3. The three factors are (1) the private interest affected by the official action, (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value of any additional procedural safeguards, and (3) the government's interest, "including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." *Mathews*, 424 U.S. at 334–35.

First, there is no briefing schedule for the BIA appeal, and the uncontested timeline is anywhere from another six months to over a year. Given the petitioner's detention for almost a year to date, and the likelihood of six months to a year in the future, the length of detention supports the conclusion that the petitioner's private interest militates in favor of his claim that the denial of a bond hearing violates his procedural due-process rights under the Fifth Amendment. *Gonzalez*, 2019 WL 330906, at *5; *Jimenez*, 2020 WL 510347 at *3.

Second, the other factors weigh in the petitioner's favor. The probable value of a hearing (given the lack of any bond hearing) is high. And while there is an important government interest in securing the petitioner's presence at any removal, the procedural due-process inquiry is about holding a bond hearing to assess whether the alien represents a flight risk or a danger to the community. *Jimenez*, 2020 WL 510347 at *3.

2. Remaining TRO Elements

The first element is irreparable harm. Continued detention and exposure to health-threatening conditions establish this element. *Sessions*, 872 F.3d at 994 (unconstitutional detention is irreparable harm); *Bent*, 2020 WL 1812850 at *6 (health issues establish irreparable harm to the petitioner's health and safety); *Ortuño*, No. 3:20-02064-MMC, Order – ECF No. 38 at 8 (same).

*11 The second and third elements — the balance of equities and whether an injunction is in the public interest — merge. *Bent*, 2020 WL 1812850 at *7. The public's interests are containing COVID-19, securing the petitioner's appearance in his immigration proceedings, and preventing any danger to the community. *Id.*; *Ortuño*, No. 3:20-cv-02064-MMC, ECF No. 38 at 8. Under the circumstances here, the balance of equities and the public interest weigh in favor of release.

The petitioner cannot meaningfully protect himself at Yuba County jail from the risks of his custody. *Ortuño*, No. 3:20-

cv-02064-MMC, ECF No. 38 at 8; *Bent*, 2020 WL 1812850 at *7. Injunctive relief that prevents the further spreading of the virus and allows social distancing is in the public's interest. *Ortuño*, No. 3:20-cv-02064-MMC, ECF No. 38 at 8 ("the public interest in promoting public health is served by efforts to contain the further spread of COVID-19, particularly in detention centers"); *Bent*, 2020 WL 1812850 at *7 (collecting cases); *Castillo*, 2020 WL 1502864 at *6 ("[t]he public has a critical interest in preventing the further spread of the coronavirus").⁹⁴ By living with his wife, the petitioner will be able to protect himself and others through social distancing and the other hygienic measures that the CDC recommends.

As to the risk of flight and danger to the community, the global pandemic is changing behavior and the way courts assess risk of flight and community safety. See *Bent*, 2020 WL 1812850 at *7 (collecting cases). The petitioner has substantial ties to the community and every incentive to comply with the conditions of his supervision, given the alternative of custody and the attendant dangers to his health there. He has a parole officer and considerable community resources, as discussed above, which means he has the supervision necessary to secure his appearance at immigration proceedings and ensure the safety of the community. His underlying crime is serious. But the record of his confinement shows his substantial rehabilitation. The IJ also found the petitioner to be plausible, believable, candid, and consistent, and the psychological evaluation of the petitioner confirmed his good behavior, his low risk of violence, and the likelihood that he will function successfully, both socially and vocationally.⁹⁵ Also, the court's conditions of release address any concern about flight risk and safety of the community.

In sum, given the petitioner's combination of medical issues (chronic PTSD, depression, and latent tuberculosis), the COVID-19 pandemic, the conditions of confinement at Yuba County jail, the irreparable harm to the petitioner, the balance of equities, and the public interest, the court grants the TRO and, as relief, orders the petitioner's release.

CONCLUSION

The court grants the petitioner's motion for a TRO and orders his immediate release from custody.

The petitioner must reside with his wife in Oakland (at the address that she provided in her declaration), and he must shelter in place unless otherwise directed by his parole officer.

What that means is that pending further order of the court or the permission of his parole officer, the petitioner may leave home only to obtain medical care, meet with his parole officer (as directed), meet with his attorneys, appear at any immigration proceedings, or to obey any order issued by the immigration authorities. While on release, he must not violate any federal, state, or local law. The petitioner's parole officer may impose additional conditions or modify these conditions — when it is appropriate to do so — to allow the petitioner to engage in gainful activity. His attorneys must file any modified conditions on the docket.

*12 Within two business days, the parties must confer about and submit a proposed schedule for the court's issuing a preliminary injunction. Ordinarily, that would require the government to show cause why the court should not issue a preliminary injunction, and the petitioner to thereafter file a response, and the government to file a reply.

IT IS SO ORDERED.

All Citations

Slip Copy, 2020 WL 1820667

Footnotes

- 1 Pet. – ECF No. 1. Citations refer to material in the Electronic Case File (“ECF”); pinpoint citations are to the ECF-generated page numbers at the top of documents.
- 2 Notice of Custody Determination, Ex. C to Pet. – ECF No. 1-2 at 13.
- 3 Pet. – ECF No. 1; Mot. – ECF No. 6.
- 4 In part because this is a TRO, the court overrules the government's objections to the evidence submitted with the petitioner's reply brief. Opp'n – ECF No. 16 at 11 n. 5; Objs. – ECF No. 22; see *Flynt Distrib. Co. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984) (“The trial court may give even inadmissible evidence some weight, when to do so serves the purpose of preventing irreparable harm”). The severity of COVID-19 is undisputed. The information about the petitioner's community support is helpful and cannot be reasonably disputed.
- 5 World Health Organization, *WHO Director-General's opening remarks at media briefing* (Mar. 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> (last visited April 10, 2020).
- 6 Proclamation of State Emergency (Mar. 4, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf> (last visited Apr. 10, 2020); Proclamation No. 994, 85 F3d. Reg. 15,337), <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/> (last visited Apr. 10, 2020).
- 7 See *United States v. Daniels*, No. 19-cr-00709-LHK (NC), Order – ECF No. 24 at 3–4 (N.D. Cal. Apr. 9, 2020); see Statewide “Shelter in Place” Order Replaces Yuba-Sutter directive, <https://yubanet.com/regional/statewide-shelter-in-place-order-replaces-yuba-sutter-directive/> (last visited Apr. 10, 2020); Mervosh, Lu, & Swales, *See Which States and Cities Have Told Residents to Stay at Home* (Apr. 7, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html> (last visited Apr. 10, 2020).
- 8 *In the Matter of the Extradition of Alejandro Toledo Manrique*, No. 19-mc-71055-TSH, 2020 WL 1307109, at *1 (N.D. Cal. Mar. 19, 2020).
- 9 Ctrs. For Disease Control & Prevention, *How COVID-19 Spreads* (Apr. 2, 2020), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fabout%2Findex.html (last visited Apr. 10, 2020).
- 10 *Ortuño v. Jennings*, No. 3:20-cv-02064-MMC, Order – ECF No. 28 at 3–4 (N.D. Cal. Apr. 8, 2020); *Daniels*, No. 5:19-cr-00709-LHK (NC) – ECF No. 24 at 4–5.
- 11 Ctrs. For Disease Control & Prevention, *How to Protect Yourself & Others*, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (last visited Apr. 10, 2020).
- 12 Ctrs. For Disease Control & Prevention, *Social Distancing, Quarantine, and Isolation* (April 4, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> (last visited Apr. 10, 2020); Ctrs. For Disease Control & Prevention, *How to Protect Yourself & Others* (April 8, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (last visited Apr. 10, 2020).
- 13 See also Mot. – ECF No. 6-1 at 12–15 (describing the risks and collecting authorities on the point). This factual issue matters because the government argues that the risk is speculative (and that it is safer to be incarcerated), in support

- of an argument that the petitioner lacks standing. See Opp'n – ECF No. 16 at 18. The government's fact assertions are unsubstantiated, and the evidence is to the contrary.
- 14 Ctrs. For Disease Control and Prevention, *Groups At Risk For Severe Illness* (April 2, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html> (last visited Apr. 10, 2020).
- 15 *Id.*
- 16 Pet. – ECF No. 1 at 6 (¶ 22); Petitioner's Decl., Ex. F. to Morales Decl. – ECF No. 1-2 at 23–24 (¶¶ 11–18); Lovedel Decl. – ECF No. 16-1 at 5 (¶ 12).
- 17 Pet. – ECF No. 1 at 6 (¶ 22); Rabinovich Decl. – ECF No. 1-4 at 2 (¶ 3); Lovedel Decl. – ECF No. 16-1 at 5 (¶ 12).
- 18 Pet. – ECF No. 1 at 6–7 (¶¶ 24–25); Petitioner's Decl., Ex. F. to Morales Decl. – ECF No. 1-2 at 24–26 (¶¶ 19–31); Wife's Decl., Ex. H to Morales Decl. – ECF No. 1-2 at 67 (¶ 2).
- 19 Wife's Decl., Ex. H to Morales Decl. – ECF No. 1-2 at 67 (¶ 2).
- 20 Pet. – ECF No. 1 at 7 (¶ 26); DHS Record, Ex. D to Morales Decl. – ECF No. 1-2 at 17–18.
- 21 Petitioner's Decl., Ex. F. to Morales Decl. – ECF No. 1-2 at 27 (¶ 35).
- 22 See Pet. – ECF No. 1 at 7 (¶¶ 26, 28); Rabinovich Decl. – ECF No. 1-4 at 2 (¶ 3); DHS Record, Ex. D to Morales Decl. – ECF No. 1-2 at 17–18.
- 23 Rabinovich Decl. – ECF No. 1-4 at 2 (¶ 3).
- 24 Petitioner's Decl., Ex. F to Morales Decl. – ECF No. 1-2 at 28–32 (¶¶ 40–71). Ifa is a practice focused on building a “character of humility and compassion.” *Id.* at 30 (¶ 56).
- 25 See *id.* at 31 (¶ 69).
- 26 In the psychological evaluation (credited by the IJ), the psychologist reviewed prison records reflecting the diagnosis of chronic PTSD, depression, anxiety, and symptoms that included sleeplessness and nightmares. Shidlo Decl., Ex. G to Morales Decl. – ECF No. 1-2 at 39 (¶¶ 14–22). The records show the petitioner's participation in therapy, religious programs, a band, and college and electronics courses. *Id.* (¶ 15). An annual review at Folsom notes that the petitioner did not engage in any cell violence or predatory behavior toward inmates or staff. *Id.* (¶ 16). The records reflect all of the petitioner's programming and describe him as a role model, a motivated student, disciplined, reliable, and hardworking, with the “right attitude for employment.” *Id.* at 40–41 (¶¶ 17–22). The assessment synthesizes the petitioner's background and experiences (including the crime), describes the tests that the psychologist administered, confirms the diagnosis of PTSD and **Depressive Disorder** NOS, finds him credible, finds that he presented a low risk of violence, and opines that with good mental-health treatment, the petitioner is likely to function successfully, both socially and vocationally. *Id.* at 41–53 (¶¶ 23–63).
- 27 Pet. – ECF No. 1 at 6 (¶ 21); Rabinovich Decl. – ECF No. 1-4 at 4 (¶ 8).
- 28 Rabinovich Decl. – ECF No. 1-4 at 3 (¶ 7).
- 29 *Id.*
- 30 *Id.*; Supp. B, U Nonimmigrant Status Certification, Ex. C to Morales Decl. – ECF No. 1-3 at 50–53.
- 31 Rabinovich Decl. – ECF No. 1-4 at 3 (¶ 7).
- 32 Pet. – ECF No. 1 at 2 (¶ 1), 9 (¶ 33), 26 (¶ 75); Shidlo Decl., Ex. G to Morales Decl. – ECF No. 1-2 at 36 (¶ 2); see also Zein Decl., Ex. AA to Morales Supp. Decl. – ECF No. 19-1 at 7–9.
- 33 Petitioner's Decl., Ex. F to Morales Decl. – ECF No. 1-2 at 28–29 (¶¶ 40–54).
- 34 Neigh & Ali, *Co-Morbidity of PTSD and Immune System Dysfunction: Opportunities for Treatment*, Curr. Opin. Pharmacol. (Author Manuscript) (Aug. 1, 2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4992603/pdf/nihms805030.pdf>
- 35 Zein Decl., Ex. AA to Morales Third Decl. – ECF No. 19-1. M.P.H. is a Master's Degree in Public Health.
- 36 *Id.* at 5.
- 37 *Id.* at 7.
- 38 *Id.*
- 39 *Id.* at 9.
- 40 Franco-Paredes Decl., Ex. S to Morales Decl. – ECF No. 1-3 at 78–90. D.T.M.H. is a diploma in tropical medicine and hygiene.
- 41 *Id.* at 81.
- 42 *Id.* at 82.
- 43 Pet. – ECF No. 1 at 26 (¶ 75); Rabinovich Decl. – ECF No. 1-4 at 7 (¶ 24).
- 44 Pet. – ECF No. 1 at 26 (¶ 75) (citing Rabinovich Decl. – ECF No. 1-4 at 7 (¶ 24)).

- 45 Mot. – ECF No. 26. Given the nature of the proceedings, and for the reasons described above, the court considers the additional submission.
- 46 Chen Study, Ex. A to Rabinovich Decl. – ECF No. 26-1 at 12.
- 47 Rabinovich Decl. – ECF No. 1-4 at 7 (¶ 24).
- 48 Chen Study, Ex. A to Rabinovich Decl. – ECF No. 26-1 at 6, 9–10.
- 49 SARS-COV-2 is the virus for COVID-19. World Health Org., *Naming the coronavirus (COVID-19) and the virus that causes it*, [https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-\(covid-2019\)-and-the-virus-that-causes-it](https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it) (last visited Apr. 11, 2020).
- 50 Chen Study, Ex. A to Rabinovich Decl. – ECF No. 26-1 at 11.
- 51 *Id.*
- 52 *Id.* at 5–6.
- 53 *Id.* at 12. The study has not been peer-reviewed, given that it was posted on March 16, 2020.
- 54 Rabinovich Decl. – ECF No. 1-4 at 8 (¶ 30).
- 55 See Wife’s Decl., Ex. H to Morales Decl. – ECF No. 1-2 at 67–71 (¶¶ 2–29); Wife’s Decl., Ex. BB to Morales Third Decl. – ECF No. 19-1 at 19 (¶¶ 3–4).
- 56 See Wife’s Decl., Ex. BB to Morales Third Decl. – ECF No. 19-1 at 19 (¶¶ 2–5).
- 57 Letter, Ex. CC to Morales Third Decl. – ECF No. 19-1 at 22–31. Alameda County is resource-rich for those on County supervision.
- 58 Pet. – ECF No. 1 at 7 (¶ 28); Notice to Appear, Ex. A to Morales Decl. – ECF No. 1-2 at 6.
- 59 Pet. – ECF No. 1 at 7–8 (¶ 29); see also IJ Order, Ex. L to Morales Decl. – ECF No. 1-3 at 32–42.
- 60 IJ Order, Ex. M to Morales Decl. – ECF No 1-3 at 42.
- 61 *Id.* at 34.
- 62 *Id.* at 36 (summarizing the psychologist’s diagnoses, the strong family relationships, and the petitioner’s wife’s need for support from her husband, given her own ailments, and also finding other witnesses credible).
- 63 Pet. – ECF No. 1 at 8 (¶ 32); Notice of Appeal, Ex. M to Morales Decl. – ECF No 1-3 at 44.
- 64 Rabinovich Decl. – ECF No. 1-4 at 3 (¶¶ 5–6).
- 65 *Id.* (¶ 7).
- 66 *Id.* at 4 (¶¶ 10–12).
- 67 *Id.* (¶ 12).
- 68 *Id.*
- 69 *Id.*
- 70 *Id.*
- 71 *Id.*
- 72 *Id.* at 5 (¶ 13).
- 73 *Id.* (¶ 14).
- 74 *Id.* (¶ 15).
- 75 Rabinovich Decl. – ECF No. 19-2 at 2 (¶ 4).
- 76 *Id.* at 2–3 (¶ 6).
- 77 Lovedel Decl. – ECF No. 16-1 at 4 (¶ 7).
- 78 *Id.*
- 79 *Id.*
- 80 *Id.* The petitioner replies to this point by pointing to increased book-ins and a resulting increased population of detainees. Reply – ECF No. 19 at 6–7; Zukin Decl., Ex. H to Morales Decl. – ECF No. 19-1 at 118–120 (¶¶ 4–8).
- 81 Moon Decl. – ECF No. 16-2 at 5–6 (¶¶ 8–10).
- 82 See Moon Decl. – ECF No. 16-2 at 6 (¶ 12) (“As of March 26, 2020 there are zero suspected cases of COVID-19 in the Yuba County Jail and zero confirmed cases”); Lovedel Decl. – ECF No. 16-1 at 5 (¶ 11). The respondent said at the April 9, 2020 hearing that this remains the case.
- 83 Moon Decl. – ECF No. 16-2 at 6 (¶ 14).
- 84 *Id.* (¶ 15).
- 85 *Id.* (¶ 16).

- 86 *Id.* at 7 (¶ 18).
- 87 *Id.* (¶ 19).
- 88 *Id.* at 29–30 (¶¶ 83–90).
- 89 Order – ECF No. 10; Statement of Non-Opposition – ECF No. 9.
- 90 Mot. – ECF No. 6; Opp'n – ECF Nos. 16, 17; Reply – ECF No. 19; Minute Entry – ECF No. 23.
- 91 The Supreme Court in *Winter* rejected the Ninth Circuit's holding that "the 'possibility' of irreparable harm was sufficient, in some circumstances to justify a preliminary injunction." *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). Instead, the *Winter* Court held that "plaintiffs must establish that irreparable harm is *likely*, not just possible, in order to obtain a preliminary injunction." *Id.* (emphasis in original).
- 92 Opp'n – ECF No. 16 at 15–24.
- 93 Pet. – ECF No. 1 at 29–30 (¶¶ 83–90).
- 94 Social distancing and sheltering in place are the means to prevent the spread of the virus and not overwhelm the health-care system. Siobhan Roberts, *Flattening the Coronavirus Curve* (Mar. 27, 2020), <https://www.nytimes.com/article/flatten-curve-coronavirus.html>.
- 95 IJ Order, Ex. M to Morales Decl. – ECF No. 1-3 at 34; Shidlo Decl., Ex. G to Morales Decl. – ECF No. 102 at 39–53 (¶¶ 14–63).

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

CRISTIAN A.R., et al.,

Petitioners,

v.

THOMAS DECKER, et al.,

Respondents.

Civil Action No. 20-3600

OPINION

ARLEO, UNITED STATES DISTRICT JUDGE

Petitioners Cristian A.R., Fedor B., Santiago C.C., Noe C.M., and Alvaro N.M. (collectively, “Petitioners”) are individuals in the custody of the United States Department of Homeland Security (“DHS”), Immigration and Customs Enforcement (“ICE”) who are detained at facilities in New Jersey under ICE’s discretionary authority pursuant to 8 U.S.C. § 1226(a). On April 6, 2020, Petitioners filed an Amended Petition for Writ of Habeas Corpus under 28 U.S.C. § 2241 and an Emergency Motion for Temporary Restraining Order (“TRO”) under Federal Rule of Civil Procedure 65, requesting the Court order their immediate release from detention based on their vulnerability to severe illness or death if they contract the novel coronavirus disease 2019 (“COVID-19”). ECF Nos. 12 (the “Petition”) & 13. Respondents oppose the Motion. ECF No. 20. Having reviewed the Petition and the parties’ submissions, heard oral argument, and examined the applicable law, the Court grants Petitioners’ TRO and orders Respondents to immediately release Petitioners subject to the conditions set forth below.

Document received by the CA Supreme Court.

I. FACTUAL BACKGROUND

A. COVID-19

The international community is in the grips of a rapidly-evolving health crisis. On March 11, 2020, the World Health Organization classified COVID-19 as a global pandemic, anticipating that “the number of cases, the number of deaths, and the number of affected countries” would increase.¹ Around that time, the United States had reported only seventy confirmed cases of COVID-19.² As of the date of this writing, that number has since risen to over 492,416, and the virus has taken a total of 18,559 lives nationally.³ New York and New Jersey have the greatest number of infections and deaths in the nation. Just yesterday alone, Saturday, April 11, 2020, New Jersey reported 3,599 new confirmed cases and 251 new deaths.⁴ Bergen County and Hudson County, where Petitioners are detained, are the epicenter of the virus in New Jersey.

According to the Centers for Disease Control and Prevention (the “CDC”), COVID-19 spreads “mainly from person-to-person” between those “who are in close contact with one another (within about 6 feet)” and from contact with contaminated surfaces.⁵ The most common symptoms of COVID-19 include fever, cough, and shortness of breath, but one need not present any symptoms to have the virus or be contagious.⁶ Certain individuals are at higher risk for severe

¹ World Health Org., *WHO Director-General’s Opening Remarks at the Media Briefing on COVID-19 – March 2020* (Mar. 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

² *Coronavirus in the U.S.: Latest Map and Case Count*, THE NEW YORK TIMES, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (last visited Apr. 12, 2020).

³ Ctrs. for Disease Control and Prevention, *Cases in U.S.*, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last visited Apr. 12, 2020).

⁴ Presently New Jersey has 61,850 confirmed cases and 2,350 deaths. *COVID-19 Information Hub*, STATE OF NEW JERSEY, <https://covid19.nj.gov/#live-updates> (last visited April 12, 2020).

⁵ Ctrs. for Disease Control and Prevention, *How COVID-19 Spreads*, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (last visited Apr. 12, 2020).

⁶ *Id.*; Ctrs. for Disease Control and Prevention, *Symptoms of Coronavirus*, <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html> (last visited Apr. 12, 2020).

illness or death if they contract COVID-19. Among them are persons who are “older,” are immunocompromised, or who have underlying health issues like asthma, chronic lung disease, HIV, heart conditions, diabetes, chronic kidney disease, and liver disease.⁷ There is presently no vaccine to prevent COVID-19 infections.⁸ In addition, testing is insufficient, especially in New Jersey, which ranks second in the country for confirmed cases but “19th in testing per capita.”⁹ The CDC and health experts thus emphasize the importance of “social distancing” (i.e. staying at least six feet apart), regularly disinfecting “high touch” surfaces, and wearing cloth face covering to curtail the spread of the virus.¹⁰

Ultimately, “[t]he best way to prevent illness is to avoid being exposed to this virus.”¹¹ But in truth, avoiding exposure to COVID-19 is impossible for most detainees and inmates. The Declaration of Robert B. Greifinger, M.D., attached to Petitioners’ motion, provides a glimpse into that reality. Dr. Greifinger has “worked in health care for prisoners for more than 30 years” and has served as an independent consultant on prison and jail health care for several government agencies, including DHS. Greifinger Decl. ¶¶ 1-2, ECF No. 13.1. He describes the conditions that make detention facilities particularly susceptible to COVID-spread: the centers are “enclosed” and crowded environments; detainees are placed in “closed quarters” and share toilets, sinks, and showers “without disinfection between use”; “[s]taff arrive and leave on a shift basis”; and many

⁷ Ctrs. for Disease Control and Prevention, *People Who Are at Higher Risk for Severe Illness*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html> (last visited Apr. 12, 2020).

⁸ Ctrs. for Disease Control and Prevention, *Prevent Getting Sick*, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/index.html> (last visited Apr. 12, 2020).

⁹ *N.J. Says It’s Leading the Way in Coronavirus Testing. The Data Tells a Different Story*, NJ.COM (Mar. 29, 2020), <https://www.nj.com/coronavirus/2020/03/nj-says-its-leading-the-way-in-coronavirus-testing-the-data-tells-a-different-story.html>.

¹⁰ Ctrs. for Disease Control and Prevention, *supra* note 8.

¹¹ *Id.*

facilities “lack adequate medical care infrastructure,” like full-time, on-site physicians. *Id.* ¶ 10. The CDC has similarly explained that, among other things, the crowded and fluid nature of detention facilities, the inadequate hygienic supplies, and the limited options for medical isolation present “unique challenges for control of COVID-19 transmission among incarcerated/detained persons, staff, and visitors.” *See* CDC March 2020 Interim Guidance (“CDC Interim Guidance”) at 2, ECF No. 20.1. Consequently, practicing social distancing and ensuring proper hygiene to minimize the risk of infection are exceedingly difficult. Detainees who meet the CDC’s criteria for “higher risk” are the most vulnerable to a detention facility’s shortcomings. *See* Greifinger Decl. ¶ 5 (observing that “preliminary data from China” indicates that “20% of people in high risk categories who contract COVID-19 have died”).

The COVID-19 pandemic’s effect on our immigration system stretches beyond the country’s detention centers. On March 18, 2020, the Executive Office of Immigration Review (“EOIR”) postponed all non-detained hearings scheduled through May 1.¹² Immigration courts have closed intermittently across the country.¹³ On March 27, 2020, soon after experiencing a one-day closure due to a confirmed COVID-19 case, the Varick Immigration Court in New York moved all of its cases to an adjudication center in Fort Worth, Texas, which were scheduled to be brought before immigration judges (“IJs”) in remote hearings. *See* Status Report, *Jovel v. Decker*, 20-cv-308 (S.D.N.Y. Apr. 3, 2020) (the “*Jovel* Status Report”) at 2, Haas Decl., Ex. 3, ECF No. 22.6. Since transitioning remotely to Fort Worth, New York-area attorneys have reported administrative and operational setbacks, including IJs not receiving evidentiary submissions or

¹² U.S. Dep’t of Justice, *EOIR Status During Coronavirus Pandemic*, <https://www.justice.gov/eoir/eoir-operational-status-during-coronavirus-pandemic> (last visited Apr. 12, 2020).

¹³ The EOIR has used Twitter to notify the public of court closures. *See generally* @DOJEOIR, TWITTER (last visited Apr. 12, 2020).

having case files, attorneys being unable to secure clients' appearances due to detention facility "lockdowns," and unexpected hearing cancellations. *See, e.g., Jovel Status Report at 2-4; Status Update, Aguilar Garcia v. Decker, 20-cv-1689 (D.N.J. Apr. 7, 2020) at 1, Haas Decl., Ex. 4.* Equally concerning, it appears that bond offices in Newark, New Jersey and New York City have closed, limiting access for a detainee's family to secure bond in the event an IJ grants release. *See Arcia-Quijano Decl. ¶ 17, ECF No. 22.5.*

It is during this unprecedented and troubling time, riddled with uncertainty, that Petitioners bring the instant motion.

B. Petitioners' Pre-Existing Medical Conditions

Petitioners are presently subject to immigration removal proceedings at the Varick Immigration Court and detained at ICE's discretion under 8 U.S.C. § 1226(a) at either the Hudson County Correctional Facility ("Hudson County Facility") or the Bergen County Correctional Facility ("Bergen County Facility," or together with the Hudson County Facility, the "Facilities") in New Jersey. Petition ¶¶ 1, 6-10. As described below, each Petitioner suffers from pre-existing medical conditions that no one disputes heighten their risk for serious health consequences if they contract COVID-19. *See id.*

i. Cristian A.R.

Cristian A.R. is thirty-three years old and has been detained at the Hudson County Facility since January 2020. Petition ¶ 6; Kim Decl. ¶¶ 2, 4, ECF No. 13.2. He has hypertension and Type 2 diabetes for which he has been prescribed daily medication and insulin shots. Kim Decl. ¶ 7. He submits that, while detained at the Hudson County Facility, he has had at least eleven blood sugar level readings over the American Diabetes Association's recommended range for

nonpregnant diabetic individuals. *Id.* ¶¶ 7-8. He has recently experienced “extremely painful headaches and partial face paralysis.” *Id.* ¶ 9.

ii. Fedor B.

Fedor B. is a thirty-five-year-old Russian national who has been detained at the Bergen County Facility since December 3, 2020. Petition ¶ 7; Ostolaza Decl. ¶ 4, ECF No. 13.3; Eisenzweig Decl. ¶ 1, ECF No. 22.3. He applied for asylum upon entering the United States on a visa three years ago, and before his detention, lived in New York City. Ostolaza Decl. ¶ 4. Fedor B. suffers from a number of ailments, including “asthma, high blood pressure, chronic hepatitis B, acute prostatitis (deep infection of the prostate), and post-operative complications of hemorrhoid surgery.” *Id.* ¶ 5. Of those conditions, his prostatitis is “so severe that it was [] not responding to multiple courses of antibiotics.” *Id.* In addition, he has “constant pain, intermittent bleeding due to hemorrhoids, and frequent urination” and a weakened immune system. *Id.*

iii. Santiago C.C.

Santiago C.C. is a thirty-six-year-old Ecuadorian national who has been detained at the Bergen County Facility since February 2020. Petition ¶ 7; Ostolaza Decl. ¶ 9. Santiago C.C. has had hypertension for the past six years and has kidney stones. Ostolaza Decl. ¶ 10. He recently received treatment from an external clinic, where a physician “prescribed him pain medication and recommended that he receive surgery for the kidney stones.” *Id.*

iv. Noe C.M.

Noe C.M. is forty years old and has been detained at the Bergen County Facility since August 5, 2019. Petition ¶ 9; Kim Decl. ¶ 11. He was recently diagnosed with Bell’s Palsy for which he was prescribed Prednisone, “an oral steroid” that purportedly suppresses his immune system. Petition ¶ 9; Kim Decl. ¶ 16. A doctor informed Noe C.M. that “he had experienced

symptoms of a stroke” from stress and that his condition “would take about 6 months to a year to recover.” Gordillo Decl. ¶ 6, ECF No. 22.2. Since then, “the numbing on his face has not stopped.” *Id.* ¶ 8. In late March of this year, Noe C.M. “started getting a fever and nose bleeds,” which persisted into early April. *Id.* ¶¶ 7-8.

v. Alvaro N.M.

Alvaro N.M. is fifty-nine years old and has been detained at the Hudson County Facility since March 2019. Petition ¶ 10; Kim Decl. ¶¶ 18-19. About five years ago, Alvaro N.M. had a heart attack. Petition ¶ 10; Kim Decl. ¶ 22. He suffers from Type 2 diabetes, hypertension, and high cholesterol for which he has been prescribed daily medication and insulin injections. *Id.* While detained at the Hudson County Facility, Alvaro N.M.’s “blood sugar has been higher than normal” and he has “felt that his condition is deteriorating.” Durkin Decl. ¶¶ 4-5, ECF No. 22.4.

C. The Hudson and Bergen County Facilities’ COVID-19 Prevention and Management Measures

It is undisputed that COVID-19 is spreading quickly through the Bergen and Hudson County Facilities. Bergen County Warden Steven Ahrendt indicated that as of 9:00 a.m. on April 8, 2020, two ICE detainees, one inmate, and sixteen corrections officers have tested positive for the virus and six ICE detainees, and eleven inmates are suspected of having contracted the virus. Ahrendt Decl. ¶ 9.M., ECF No. 20.4. The numbers of those infected at the Hudson County Facility are even more grim. According to Director Ron Edwards, as of 5:00 p.m. on April 6, 2020, two ICE detainees, twenty-four county and federal inmates, and fifty-eight staff members have tested positive for COVID-19. Edwards Decl. ¶ 19, ECF No. 20.5. One corrections officer and two nurses have died. *Id.* Neither Facility provides even an estimate of suspected positive cases, due in part, to lack of testing. Based on recent guidance, reports, and observations, describing the

particular vulnerabilities of detention and correctional centers for COVID-19 outbreak, the number of suspected and confirmed cases and casualties is certain to rise.¹⁴

Respondents maintain that the Facilities have implemented “preventative measures against the spread of COVID-19” and “ICE has implemented procedures and protocol to protect the detainees and staff in its care at [the Facilities.]” Gov. Br. at 22, 24, ECF No. 20. Based on a review of the certifications submitted by the Warden Ahrendt and Director Edwards, it appears that, for purposes of this opinion, those measures are best explained in two categories: external prevention and internal prevention and management.

i. External Prevention

The Facilities have taken precautions to mitigate the risk of COVID-19 exposure arising from external influences. The Bergen County Facility has indefinitely suspended all ICE detainee intakes and screens new county inmates, staff members, and vendors for the virus. Ahrendt Decl. ¶¶ 9.A., 9.B., 9.D. The Hudson County Facility is still accepting ICE detainees, with exceptions, and detainees, inmates, vendors, and staff are subject to medical evaluations before entering the Facility. Edwards Decl. ¶¶ 12.B.i., 12.B.ii., 12.B.vii. Both Facilities have suspended all social visitations and tours, and only “no-contact” visits and telephone conferences are permitted with attorneys. Ahrendt Decl. ¶ 9.C; Edwards Decl. ¶¶ 12.D.i, 12.H.-J.

¹⁴ See CDC Interim Guidance at 2 (listing the “components” that “present[] unique challenges for control of COVID-19 transmission among incarcerated/detained persons, staff, and visitors”); see also Greifinger Decl. ¶¶ 4, 13 (explaining that once it is introduced, COVID-19 “spreads like wildfire” through detention facilities, and noting the “severe lack of testing capacity nationwide”); Timothy Williams, et. al., ‘Jails are Petri Dishes’: Inmates Freed as the Virus Spreads Behind Bars, THE NEW YORK TIMES (Mar. 30, 2020), <https://www.nytimes.com/2020/03/30/us/coronavirus-prisons-jails.html> (describing the “rapid spread” of COVID-19 across United States jails and prisons).

ii. Internal Prevention and Management

In addition to their efforts at preventing exposure from external factors, the Facilities have taken affirmative steps to lessen the risk of COVID-19 exposure and transmission within the jails.

1. Social Distancing and Cleaning

At the Bergen County Facility, all detainees must remain in their cells at all times, “except for a thirty-minute period each day when they are permitted to exit the cell area.” Ahrendt Decl. ¶ 9.E. To promote social distancing, during that thirty-minute period, “only four inmates/detainees are permitted to leave the cell area” where they have “2643 square feet of space” for recreational use and showering. *Id.* Detainees and inmates have meals inside their cells to avoid congregating. *Id.* ¶ 9.K. With respect to cleaning and hygiene, “[a]ll housing units are sanitized no less than four times per day.”¹⁵ *Id.* Respondents also indicate that “[t]he Facility provides disinfectant spray, hand sanitizer, and soap in every housing unit,” *id.*, but do not claim that the detainees have access to those cleaning and hygienic supplies. To the contrary, as discussed *infra*, detainees complain that they have little, if any, access to basic hygiene products and no access to cleaning supplies.

The Hudson County Facility has implemented a “[r]estrictive schedule,” permitting one “tier . . . out in the morning and the other portion . . . out in the afternoon, rotating daily.” Edwards Decl. ¶ 11. As a social distancing measure, beginning on March 21, 2020, the “recreation period” is now staggered to permit only two “inmates/detainees” to leave their cells for a thirty-minute recreational-use period. *Id.* ¶ 12.K. Detainees have meals inside their cells to prevent congregation. *See id.* ¶¶ 12.E, 13.E. With respect to cleaning and hygiene, the Hudson County Facility “lock[s] down” each housing unit in between shifts for cleaning and sanitization, which

¹⁵ Based on this cleaning schedule and the number of persons in the shared spaces every thirty minutes, it follows that close to fifty inmates and detainees pass through common areas, potentially coming into contact with contaminated surfaces before they are routinely cleaned.

occurs, at a minimum, three times per day. *See id.* ¶¶ 11, 12.E.¹⁶ The Hudson County Facility also reports that it cleans the recreation areas “constantly” each day, *id.* ¶ 12.K, but does not state when, how often, and what that cleaning entails. It has provided its staff with Personal Protective Equipment (“PPE”). *Id.* ¶ 13.C. *See id.* ¶ 12.D.iv.

2. Medical Response, Quarantine, and Isolation

Both Facilities follow nearly identical isolation and quarantine protocols for confirmed and suspected cases of COVID-19. Confirmed cases that do not require hospitalization are isolated in a designated area. Ahrendt Decl. ¶ 9.H.; Edwards Decl. ¶ 15. Symptomatic inmates or detainees who are awaiting test results are quarantined. Ahrendt Decl. ¶ 9.H.; Edwards Decl. ¶ 16. Finally, those who are asymptomatic but “have had a known exposure” to a confirmed COVID-19 case are “cohorted” together with restrictive movement for fourteen-day period. Ahrendt Decl. ¶ 9.I.; Edwards Decl. ¶ 17. Cohorting ends if no new COVID-19 case develops within that period. *Id.*

Each Facility also has an on-site physician who is on-call 24/7 for emergencies. Ahrendt Decl. ¶ 7; Edwards Decl. ¶ 7. Detainees and inmates at the Facilities are able to make daily sick calls to on-site medical staff. Ahrendt Decl. ¶ 9.G.; Edwards ¶ 12.D.iii. If detainees or inmates complain of illness, medical staff evaluates them. Ahrendt Decl. ¶ 9.G.; Edwards ¶ 14. Those who present with COVID-19 symptoms are provided a “surgical mask.” *Id.* The Bergen County Facility indicates that detainees and inmates may be transported to a hospital for evaluation but does not describe the circumstances under which that option is exercised. *See* Ahrendt Decl.

¹⁶ Based on this cleaning schedule and the number of persons in the shared spaces every thirty minutes, it follows that over thirty inmates and detainees pass through common areas, potentially coming into contact with contaminated surfaces before they are routinely cleaned. Both Facilities indicate that they have provided education to inmates and detainees and have posted informative signs on COVID-19 and best practices to prevent its transmission, *see* Ahrendt Decl. ¶ 9.L.; Edwards Decl. ¶ 12.D.iii, but do not state when and how often education has been provided.

¶ 9.G. It also does not state whether high-risk detainees like Petitioners are subject to those same procedures, or whether the Facility makes other accommodations based on their needs.

The Hudson County Facility uses some form of COVID-19 testing on inmates. *Id.* ¶ 15. As for detainees and inmates with “underlying health conditions,” the Hudson County Facility “[e]stablished a protocol” that includes “daily monitoring” and establishing “a plan to remove [them] from the rest of the population if determined to be necessary” from the Facility’s “Medical Department.” *Id.* ¶ 12.G.iv. No explanation of what constitutes an “underlying health condition” or information on whether the Facility makes specific accommodations for at-risk individuals is provided.

D. Petitioners’ Experiences in the Facilities

During oral argument, the Government highlighted that the protocols implemented in the Bergen and Hudson County Facilities are objectively better than those employed at other detention centers. This may very well be true. Nonetheless, Petitioners’ direct experiences in the Facilities tell a different and less optimistic story and demonstrate that despite these enhanced measures, the Facilities are still woefully deficient in preventing exposure to and transmission of COVID-19, particularly among vulnerable detainees. And their stories are not inconsistent with the sworn declarations submitted by Respondents.

Petitioners at the Bergen County Facility describe a lack of attention to their and other detainees’ medical needs and basic hygiene. For example, Fedor B. “has been confined to his cell for 23.5 hours each day.” Eisenzweig Decl. ¶ 4. He notes that his cell is “damp and cold” and the water from the sink, “from which he has to drink,” appears to be “dirty[] [and] dotted with black material.” *Id.* ¶ 5. These conditions “have exacerbated his allergies and asthma, and he has been coughing frequently.” *Id.* Further, Fedor B. indicates that presently neither his cell nor nearby

cells have been sanitized or cleaned, and the Bergen County Facility has “refused to provide him with any cleaning supplies that would allow him to clean his own space.” *Id.* ¶ 6. Consequently, the floor of the cell “is grimy and the toilet—which is open to the cell and next to his bed—has not been sanitized in the last two weeks.” *Id.* Notwithstanding his daily requests, “the jail did not provide them with toothpaste for six days.” *Id.* ¶ 7. He is able to do “one small bag” worth of laundry once per week, and for that reason, “his bedding is seldom washed.” *Id.* ¶ 8. He has washed his undergarments “in a bucket in his cell, using the single bar of soap” that he was forced to share with his cellmate. *Id.* To make matters worse, when that bar of soap was finished, he requested a new one, and as of April 8, he “was still waiting for another bar.” *Id.* Without access to soap, he cannot perform the simplest measure of preventing the spread of COVID-19—washing his hands.

With respect to his medical needs, Fedor B. reports that on one instance he waited two days after making a sick call before a nurse responded. *Id.* ¶ 11. The responding nurse did not wear a mask. *Id.* His requests for an asthma pump and stronger allergy medication were not met. *Id.*

Fedor B. also shares his account of interactions with and exposure to others at the Bergen County Facility. Most disturbingly, during the thirty minutes they are permitted to leave their cell, he and his cellmate “are in contact with the occupants of another cell and several guards.” *Id.* ¶ 10. He is “forced to touch” certain high-contact objects and surfaces, like showers, phones, screens, chairs, and handles, some of which he admittedly “has seen being cleaned about three times a day.”¹⁷ *Id.* He “has never seen a guard wear a mask,” but only gloves. *Id.* During meals, his food is cold, sparse, and brought to him by “working detainees,” who wear gloves but not masks. *Id.*

¹⁷ The Eisenzweig Declaration does not indicate which objects and areas Fedor B. has seen cleaned or when he has seen them cleaned.

¶ 13. He indicates that medical staff and officers have not disseminated any information or guidance “about how to prevent the spread of the virus.” *Id.* ¶ 12.

Santiago C.C. shares a similar experience at the Bergen County Facility. He states that detainees “are using and touching the same bathroom/shower area, kitchenette area, and the phone” outside of their cells. Arcia-Quijano Decl. ¶ 5, ECF No. 22.5. The Bergen County Facility has not provided detainees with masks, gloves, or cleaning supplies. *Id.* ¶¶ 6, 8. His cell is not being “regularly sanitized” and “no other jail staff comes to the cells to clean.” *Id.* ¶ 8. He and other detainees have thus “resorted to using shampoo to clean their cells.” *Id.* Like Fedor B., he indicates that laundry is done only once per week, and “[l]aundry for bedsheets has not been done in around two weeks.” *Id.* ¶ 7. As a result, “he has been forced to attempt to wash them in his cell.” *Id.*

Santiago C.C. reports that the return time for detainee sick calls seeking medical attention has been longer since the pandemic began. *See id.* ¶ 10. On one occasion, he waited eight hours before he was taken to an outside clinic for stomach pain, and was later diagnosed with kidney stones. *Id.* At least once, he was not given his hypertension medication. *See id.* ¶ 12. Nurses and guards at the facility wear gloves but rarely, if ever, wear face masks. *Id.* ¶¶ 11-12.

Noe C.M., a Bergen County Facility detainee who suffers from Bell’s Palsy and has had symptoms of a stroke, was not seen by medical personnel for days despite these conditions. Gordillo Decl. ¶ 8. He states that only some Facility personnel wear face masks. *Id.* ¶ 11. He recalls a specific instance of witnessing another detainee “collapse to the floor” and being taken out of the facility in a stretcher to a hospital. *Id.* ¶ 10. In total, “he has seen about 4 detainees taken out on stretchers and 2 detainees taken to the emergency department because they had the virus.” *Id.* He states that the staff are “not ensuring that people received medical treatment for

most health issues.” *Id.* He indicates that the jail is “low on staff and that detainees ha[ve] limited access to services.” *Id.* ¶ 9.

At least one Petitioner detained at the Hudson County Facility raises similar concerns to those detained at the Bergen County Facility. Alvaro N.M. states that despite the typical thirty minutes he is permitted to leave his shared cell per day, many days he has had to wait 36 hours before permitted to leave for that brief thirty-minute period. *See* Durkin Decl. ¶ 6, ECF No. 22.4. Although he is a Type-2 diabetic, Alvaro N.M. receives his insulin at inconsistent times each day, and often after he has eaten, causing his blood sugar to rise. *Id.* ¶¶ 4, 7. As a result, he has experienced “worsening dizziness and fatigue.” *Id.* ¶ 7. He also indicates that he is no longer receiving meals from a designated-diet menu, originally ordered due to his diabetes, hypertension, and high cholesterol, and instead receives “regular meals.” *Id.* ¶ 8. He expressed concerns about receiving regular meals but was told that they are “the only meal[s] available.” *Id.* Alvaro N.M. has noticed that only the medical staff wear masks. *See id.* ¶ 9. He was given a mask on April 6, 2020 but “has never been provided with gloves or any type of sanitizing products.” *Id.* He has not had his temperature taken since on or about March 31, 2020. *See id.* ¶ 12.

Coupled with Petitioners’ experiences are the following facts submitted by Respondents describing the Facilities’ intake and post-intake quarters: Petitioners share bunk-bed-style cells with at least one other roommate, *see* Ahrendt Decl. ¶ 6; Edwards Decl. ¶ 10; “apart from the beds,” there is “70.6 square feet” in the cells at the Bergen County Facility, Ahrendt Decl. ¶ 6;¹⁸ and the Hudson Facility still operates “Bullpens” of “9 inmates,” which are located in the “Intake/Discharge area” where new detainee intakes and pre-admission medical screening of detainees occur. *See* Edwards Decl. ¶¶ 12.A., 12.B.i, 12.B.v., 12 B.vi.

¹⁸ It appears that the square footage of the cells shared by detainees at the Hudson County Facility is not included in the Government’s response or attached declarations.

Petitioners' underlying medical conditions, their direct accounts of the conditions under which they live, and the undisputed fact that COVID-19 has spread through the Facilities demonstrate that even under the improved protocols implemented at the Facilities, "there are certain realities that neither [the Facilities] nor ICE can overcome." *Rafael L.O. v. Tsoukaris*, No. 20-3481, 2020 WL 1808843, at *8 (D.N.J. Apr. 9, 2020).

II. LEGAL STANDARDS

A. Preliminary Injunction

Motions for temporary and preliminary injunctive relief are governed by a four-factor test. The movant must, as a threshold matter, establish the two "most critical" factors: likelihood of success on the merits and irreparable harm. *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017). Under the first factor, the movant must show that "it can win on the merits." *Id.* This showing must be "significantly better than negligible but not necessarily more likely than not." *Id.* The second factor carries a slightly enhanced burden: the movant must establish that it is "more likely than not" to suffer irreparable harm absent the requested relief. *Id.* If these "gateway factors" are satisfied, the Court considers the third and fourth factors, which aim to balance the equities by examining the potential for harm to others if relief is granted and whether the public interest favors injunctive relief. *Id.* at 176, 179. The Court must then balance all four factors to determine, in its discretion, whether the circumstances warrant injunctive relief. *Id.* at 179.

B. The "Extraordinary Circumstances Standard" for Bail

The parties agree that the Third Circuit's decision in *Lucas v. Hadden*, 790 F.2d 365 (3d Cir. 1986) establishes that "extraordinary circumstances" are required before "bail may be granted to a habeas petitioner prior to a ruling on the merits of the petition." *Id.* at 367. Citing *Johnston v. Marsh*, 227 F.2d 528 (3d Cir. 1955), the Third Circuit in *Lucas* noted that extraordinary

circumstances may be established where the district judge had ordered a state inmate released to enter a hospital because the inmate was extremely ill. *Id.* at 366-67. The panel, however, did not expressly limit the finding of extraordinary circumstances to situations involving a petitioner's poor health. *Id.* at 367. Like injunctive relief in general, granting bail to a habeas petitioner is an extraordinary remedy. *See Landano v. Rafferty*, 970 F.2d 1230, 1239 (3d Cir. 1992) (indicating that a court may only grant release pending a disposition of federal habeas claims when the petitioner has raised "substantial constitutional claims upon which he has a high probability of success, and . . . when extraordinary or exceptional circumstances exist which make the grant of bail necessary to make the habeas remedy effective") (citation omitted)); *see also In re Souels*, 688 F. App'x 134, 135-36 (3d Cir. 2017). Recent decisions have applied this standard to determine whether extraordinary circumstances exist in the context of the COVID-19 pandemic to grant bail to immigration habeas petitioners. *See, e.g., Rafael L.O.*, 2020 WL 1808843, at *5; *Coronel v. Decker*, No. 20-2472, 2020 WL 1487274, at *8 (S.D.N.Y. Mar. 27, 2020) (applying an analogous Second Circuit standard set forth in *Mapp v. Reno*, 241 F.3d 221, 226 (2d Cir. 2001)).

III. DISCUSSION

The Court finds that Petitioners have met the standard for a preliminary injunction and have likewise met the extraordinary circumstances standard for granting bail in a habeas matter.

A. Preliminary Injunction

1. Likelihood of Success on the Merits of Petitioners' Constitutional Claims

Respondents argue that Petitioners cannot succeed on their conditions of confinement and medical claims because such challenges are not properly brought through habeas. *See Gov. Br.* at 18-19, 27. Federal courts, however, including the Third Circuit, have condoned conditions of confinement challenges through habeas. *See Aamer v. Obama*, 742 F.3d 1023, 1032 (D.C. Cir.

2014); *see also Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235, 242-44 (3d Cir. 2005); *Ali v. Gibson*, 572 F.2d 971, 975 n.8 (3d Cir. 1978). Likewise, the Supreme Court has repeatedly left open the question of whether detainees may challenge their confinement conditions via a petition for a writ of habeas corpus. *See Bell v. Wolfish*, 441 U.S. 520, 526, n.6 (1979) (“[W]e leave to another day the question of the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement.”); *Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973) (“When a prisoner is put under additional and unconstitutional restraints during his lawful custody, it is arguable that habeas corpus will lie to remove the restraints making custody illegal.”); *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1862-63 (2017) (explaining that the habeas remedy, if necessity required its use, would have provided a faster and more direct route to relief for immigration detainees challenging a detention policy than a suit for money damages, as a successful habeas petition would have required officials to place respondents in less-restrictive conditions immediately).

Furthermore, under 28 U.S.C. § 2241, a district court may exercise jurisdiction over a habeas petition when the petitioner is in custody and alleges that his custody violates the Constitution, laws, or treaties of the United States. *See* 28 U.S.C. § 2241(c); *Maleng v. Cook*, 490 U.S. 488, 490 (1989). Petitioners in this action claim that their continued detention in their current conditions of confinement violates due process. Accordingly, this Court finds that Petitioners may challenge their conditions of confinement through a 28 U.S.C. § 2241 petition for writ of habeas corpus.

Respondents next assert that Petitioners cannot establish a likelihood of success on the merits of their constitutional claims because they are lawfully detained pursuant to the discretionary detention statute, which permits detention of individuals in removal proceedings

before a final order of removal. Gov. Br. at 20-21 (citing 8 U.S.C. § 1226(a)).¹⁹ Petitioners, however, have not asserted that they have a procedural or substantive due process right to be released on bond pursuant to 8 U.S.C. § 1226(a); rather, they have asserted claims for violations of their substantive due process rights, arguing that their conditions of confinement amount to punishment under the Due Process Clause and that Respondents’ policies evince deliberate indifference to their serious medical needs.²⁰

The Court first considers whether Petitioners have a likelihood of success on the merits on their claims that their conditions of confinement at the Facilities amount to punishment. Because Petitioners are civil detainees as opposed to prisoners who have been convicted and sentenced, their conditions of confinement claims are analyzed under the Due Process Clause of the Fifth (or Fourteenth) Amendment, as opposed to the Eighth Amendment. *See Bell*, 441 U.S. at 535-36.

¹⁹ Indeed, the Attorney General has the discretion to either: (1) detain the person without bond; or (2) release the person on a bond of at least \$1,500.00 or on conditional parole. 8 U.S.C. § 1226(a). In making the initial bond determination, an ICE officer must assess whether the person has “demonstrate[d]” that “release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding.” *Id.* § 236.1(c)(8). If the ICE officer determines that release, with or without bond, is not appropriate, then the person may appeal to an IJ. *Id.* §§ 236.1(d)(1), 1003.19, 1236.1(d)(1). The IJ’s decision, then, would be appealable to the Board of Immigration Appeals. *Id.* §§ 1003.1(b)(7), 1003.19(f), 1003.38. If the Attorney General fails to provide a bond determination or redetermination, the district court has the power under Section 2241 to direct an immigration court to provide it. As discussed later in this Opinion, the evidence presented by Petitioners shows that bond hearings are not being conducted in an expedient manner due to the COVID-19 pandemic.

²⁰ Respondents emphasize that they have lawfully exercised their discretionary authority to detain Petitioners during their removal proceedings. This detention triggers a corresponding obligation under the Constitution to provide for Petitioners’ reasonable safety and medical needs:

[W]hen 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. . . . The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment. . . .

Helling v. McKinney, 509 U.S. 25, 32 (1993) (alterations in original and internal quotation marks omitted) (considering the rights of convicted prisoners) (quoting *DeShaney v. Winnebago Cty. Dept. of Soc. Svcs.*, 489 U.S. 189, 199-200 (1989)). This same rationale applies here because a detainee’s rights are “at least as great as the Eighth Amendment protections available to a convicted prisoner.” *See City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983).

Convicted and sentenced prisoners are protected from punishment that is “cruel and unusual,” while pretrial and civil detainees are protected from any punishment. *See Hubbard v. Taylor*, 399 F.3d 150, 166-67 (3d Cir. 2005). The law in the Third Circuit is clear that civil immigration detainees are entitled to the “same due process protections” as pretrial detainees with respect to conditions of confinement. *See E.D. v. Sharkey*, 928 F.3d 299, 306-07 (3d Cir. 2019). An immigration detainee can bring a claim for violation of those protections when the conditions of confinement fall below constitutional minimums. *Id.*

In *Helling*, the Supreme Court held that exposure to environmental tobacco smoke states an Eighth Amendment cause of action even though the inmate was asymptomatic because the health risk posed by involuntary exposure to second-hand smoke was “sufficiently imminent.” *Id.* at 35. As relevant to Petitioners’ conditions claims, *Helling* also recognized that inmates are entitled to relief under the Eighth Amendment where they prove threats to personal safety from exposure to serious contagious diseases:

In *Hutto v. Finney*, 437 U.S. 678, 682, 98 S.Ct. 2565, 2569, 57 L.Ed.2d 522 (1978), we noted that inmates in punitive isolation were crowded into cells and that some of them had infectious maladies such as hepatitis and venereal disease. This was one of the prison conditions for which the Eighth Amendment required a remedy, even though it was not alleged that the likely harm would occur immediately and even though the possible infection might not affect all of those exposed. We would think that a prison inmate also could successfully complain about demonstrably unsafe drinking water without waiting for an attack of dysentery. Nor can we hold that prison officials may be deliberately indifferent to the exposure of inmates to a serious, communicable disease on the ground that the complaining inmate shows no serious current symptoms.

Id. at 33.²¹

²¹ Courts interpreting this language have held that inmates can state an Eighth Amendment claim for confinement with inmates who have a serious contagious disease that is spread by airborne particles, such as tuberculosis. *See Bolton v. Goord*, 992 F. Supp. 604, 628 (S.D.N.Y. 1998) (citing *Helling*, 509 U.S. at 33, for the proposition that “[t]he practice of putting inmates who have serious communicable diseases together is actionable under the Eighth Amendment,” but rejecting the petitioner’s claim because there were no cases of active tuberculosis cases among inmates since the practice of “double celling” began).

Helling provides the theory for Petitioners' conditions claim but not the legal standard. Because Plaintiffs are immigration detainees and not convicted prisoners, the Court asks whether the challenged conditions are reasonably related to a legitimate governmental objective. If they are not, the Court may infer "that the purpose of the governmental action is punishment that may not be constitutionally inflicted upon detainees qua detainees." *Sharkey*, 928 F.3d at 307 (quoting *Hubbard v. Taylor*, 538 F.3d 229, 232 (3d Cir. 2008)). A complained-of condition or deprivation amounts to punishment if: "the disability is imposed for the purpose of punishment"—that is, there is "an expressed intent to punish on the part of detention facility officials"; no "alternative purpose to which [the condition or deprivation] may rationally be connected is assignable for it"; or the condition or deprivation is "excessive in relation to the alternative purpose assigned [to it]." *See Bell*, 441 U.S. at 538 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)).

The Court's "inquiry into whether given conditions constitute 'punishment' must consider 'the totality of circumstances within an institution.'" *Hubbard*, 399 F.3d at 160 (quoting *Union Cty. Jail Inmates v. DiBuono*, 713 F.2d 984, 996 (3d Cir.1983)). In *Bell*, for instance, the Supreme Court held that "double-bunking" of inmates under the circumstances there did not constitute punishment where the pretrial detainees had sufficient space for sleeping and using common areas, and the average length of incarceration was sixty days. 441 U.S. at 541-43. Double-bunking thus did not violate the pre-trial detainees' due process rights. The Court cautioned, however, that different circumstances might produce a different result: "[C]onfining a given number of people in a given amount of space in such a manner as to cause them to endure genuine privations and hardship over an extended period of time might raise serious questions under the Due Process Clause as to whether those conditions amounted to punishment." *Id.* at 542.

Addressing this question in light of the COVID-19 pandemic, in *Thakker v. Doll*, 2020 WL 1671563, at *8 (M.D. Pa. Mar. 31, 2020), Judge Jones reasoned that placing immigration detainees in close proximity and in unsanitary conditions did not meet a legitimate governmental objective. He further explained that although preventing civil immigration detainees from absconding, standing alone, constituted a legitimate governmental aim, this objective was deeply weakened in light of the COVID-19 pandemic, particularly when ICE had many other options to monitor civil detainees. *Id.*

Just this week, Judge Vasquez reached a similar conclusion in *Rafael L.O.* There, he found that the conditions of confinement at Essex County Correctional Facility (“ECCF”), including the volume of ECCF detainees confined to inherently limited living and sleeping quarters, limited access to hygiene products, shared bathroom facilities, and the transmission of COVID-19 to detainees in custody, amounted to punishment of the Petitioners, who had underlying medical conditions that made them vulnerable to serious complications or death if they contract the virus. *Rafael L.O.*, 2020 WL 1808843, at *7-8. Judge Vasquez further determined that “[t]he Respondents [did not] have an express intent to punish Petitioners” but found “that such intent is not a necessary prerequisite” to a claim under *Bell*. *Id.* at *7.

The reasoning of *Thakker* and *Rafael L.O.* apply with equal force here. The totality of the circumstances compel a finding that the conditions of confinement at the Facilities are tantamount to punishment and therefore unconstitutional.

Respondents do not dispute that Petitioners are medically vulnerable such that they may have an up to a 20% chance of death if they contract COVID-19. *See* Greifinger Decl. ¶ 5. These odds are worse than a game of “Russian roulette.” *Coreas v. Bounds*, No. 20-780, 2020 WL 1663133, at *12 (D. Md. Apr. 3, 2020) (observing the risks of death to vulnerable detainees from

COVID-19). There has been a significant growth in confirmed or suspected cases at the Facilities since this case was filed. *See* Pet. Reply Br. at 2-3, ECF No. 22 (observing that between April 1 and April 8, “the number of positive or suspected detainees and staff has nearly quadrupled” at the Bergen County Facility, and between April 1 and April 6, “the number of positive COVID-19 cases has grown from 28 to a whopping 84 confirmed cases among detainees and staff” at the Hudson County Facility). Tragically, two nurses and one corrections officer at the Hudson County Facility have already died.

Given the heightened risk of COVID-19 exposure, the CDC Guidelines have made clear that correctional facilities must make “all possible accommodations” to prevent transmission of infection to high-risk individuals. CDC Interim Guidance at 16, 20. But despite the laudable, general protocols implemented generally at Bergen and Hudson County Facilities, Respondents do not point to any specific protocols to protect medically-vulnerable people in their custody. Nor do they contest the lack of available testing, and neither Facility indicates that it has sufficient testing supplies. Additionally, the Facilities’ declarations confirm that they are not testing asymptomatic individuals, even though those individuals can transmit the virus. *See* Ahrendt Decl. ¶¶ 9.H. & 9.I; Edwards Decl. ¶ 17. And, while they concede to cohorting those who have had a known exposure to the virus, they do not indicate whether high-risk individuals like Petitioners are ensured separation or adequate space from others in the cohorting environment. Thus, to the extent Respondents have taken measures to address the pandemic within the Facilities, they have not ensured protection for the most vulnerable people within their care.

While Respondents have taken some proactive measures to address the crisis, and the conditions in place at the Facilities appear to be better than those in *Thakker* and *Rafael L.O.*, the enhanced measures are still insufficient. Petitioners spend 23.5 hours a day in cramped cells that

they have to share with another person and the remaining thirty minutes out of their cells in common areas. It is during those thirty minutes that the detainees are at high risk for COVID-19 exposure and transmission. That brief period is the only time they have each day to take showers, make telephone calls to family members and attorneys, visit the commissary, and use recreation areas. Coming into close contact with frequently used items and shared spaces is unavoidable. Respondents do not state the Facilities clean and sanitize the common areas and frequently-touched common items in-between each period during which new detainees and inmates leave their cells. Instead, they provide that cleaning occurs at least three or four times per day. *See* Ahrendt Decl. ¶ 9.K; Edwards Decl. ¶¶ 11, 12.E. Accordingly, even crediting the Facilities' increased efforts to clean and disinfect shared spaces, Respondents cannot dispute that many, if not all, detainees use the common areas and objects in-between cleanings and are being exposed to potentially contaminated surfaces. Detainees also report that corrections officers' and medical staff's use of gloves and masks is inconsistent and certainly not in line with the CDC's recommendations, further compounding their risk of exposure. *See* Arcia-Quijano Decl. ¶ 5; Gordillo Decl. ¶ 11; Durkin Decl. ¶ 9.

To make matters worse, detainees who want to do their part in curtailing the spread of COVID-19 to themselves and others are not provided the resources to do so. Detainees are forced to share soap or have no soap at all, *see, e.g.*, Eisenzweig Decl. ¶ 8, and lack other basic hygiene items like hand sanitizer. Respondents do not indicate whether and how often soap or other hygiene products are provided to detainees. That means, when they return to their cells to begin their next 23.5-hour period of confinement, detainees are unable to perform the most effective measure of combatting the spread of the virus: washing and disinfecting their hands. Showering is not an option because their only access to showers is during their brief half-hour recreational

period. Covering their faces with masks or hands with gloves is also not possible, unless they have already shown signs of COVID-19, but by that time, avoiding infection is likely too late. *See* Ahrendt Decl. ¶ 9.G.; Edwards ¶ 14. And, because the Facilities have not provided detainees cleaning supplies, *see, e.g.*, Eisenzweig Decl. ¶¶ 6-8, 10; Gordillo Decl. ¶ 11; Arcia-Quijano Decl. ¶¶ 6-8, 11-12; Durkin Decl. ¶ 9, detainees are forced to remain in cramped, dirty quarters, lest they use their shampoo or soap, if they have any, to clean their shared cells and toilets or their laundry, *see* Arcia-Quijano Decl. ¶ 8; Eisenzweig Decl. ¶ 8. But even that last-ditch effort will not eliminate the threat of contamination from a potentially-infected roommate, who is responsible for his own hygiene. All of these glaring gaps in the Facilities' prevention and management protocols have been left open and unchallenged by Respondents.

Finally, while the Court is sympathetic to the increased burden on medical staff to attend to each detainee's medical needs, inadequate care aggravates the already heightened risk COVID-19 poses to vulnerable detainees. Detainees report that they are either irregularly receiving medications critical to treating the conditions that put them at higher risk for severe illness from the virus, like insulin for diabetes, *see* Durkin Decl. ¶¶ 1,7, or not receiving those medications at all, *see* Arcia-Quijano Decl. ¶ 12 (hypertension medication); Eisenzweig Decl. ¶ 11 (asthma pump). Some indicate that, while the Facilities permit them to make daily sick calls, those calls are often left without response for significant periods of time. *See* Arcia-Quijano Decl. ¶ 10; Eisenzweig Decl. ¶ 11. The Court raises these medical care issues to highlight the extraordinary circumstances surrounding Petitioners' detainment during this global crisis.²²

²² Civil detainees also have a constitutional right to a prison policy ensuring adequate health care, and such claims are governed by the deliberate indifference standard. *See Natale v. Camden Cty. Corr. Facility*, 318 F.3d 575, 585 (3d Cir. 2003) (holding that a reasonable jury could conclude that a governmental entity's failure to establish a policy to address inmates' immediate medication needs constituted deliberate indifference); *A.M. ex rel. J.M.K. v. Luzerne Cty. Juvenile Detention Ctr.*, 372 F.3d 572, 585 (3d Cir. 2004) (detention center's lack of policies to address the physical and mental health needs of residents caused the plaintiff harm). Because the Court finds that Petitioners are likely to

Here, having viewed the totality of the circumstances, the Court finds that Petitioners are likely to succeed on their claim. By failing to implement the CDC's instructions for the most vulnerable individuals, and by detaining those persons in a jail setting during a rapidly accelerating COVID-19 pandemic without providing them with adequate means to follow hygiene and other health protocols, Respondents have placed Petitioners at a substantially enhanced risk for severe illness or death. There can be no greater punishment. Accordingly, the Court is satisfied Petitioners have demonstrated that Respondents' conduct amounts to punishment under the Due Process Clause.

2. Irreparable Harm

To be entitled to a preliminary injunction, a movant must also establish that he or she is "more likely than not" to suffer irreparable harm absent the requested relief. *See Reilly*, 858 F.3d at 179. Respondents appear to argue that Petitioners cannot meet the irreparable harm requirement because their likelihood of contracting COVID-19 is speculative. *See Gov. Br.* at 26, 33-36. The Court disagrees.

As the Supreme Court observed in *Helling*, "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." 509 U.S. at 33 (noting that "the Courts of Appeals have plainly recognized that a remedy for unsafe conditions need not await a tragic event"). The Court rejects Respondents' argument that the risk of harm to these Petitioners is speculative.

Petitioners, who all suffer from underlying medical conditions, may have a 20% chance of death if they contract COVID-19 (according to preliminary data from China), and they are detained in facilities where the virus is still spreading and where they "cannot practically adhere to social

succeed on their claim that the conditions of confinement at the Facilities amount to punishment, the Court need not decide whether Petitioner can establish deliberate indifference to their serious medical needs.

distancing guidelines or the adequate level of personal hygiene, that have been touted as the most effective means to thwart the spread of the virus.” See *Rafael L.O.*, 2020 WL 1808843, at *8. The cases to which Respondents cite are readily distinguishable on this basis. *Francisco M. v. Decker*, No. 20-2176 (D.N.J. Mar. 25, 2020), see Gov. Br. at 3, 19, 20, 34, 35, involved a detainee who was not medically vulnerable to COVID-19, and, in an order granting expedited briefing on the merits of his petition, the court opined that the harms he alleged, at that time, were “speculative” when there were only two cases at the jail where he was housed. See *Francisco M.*, No. 20-2176, ECF No. 11 at 3-4. Similarly, *Nikolic v. Decker*, No. 19-6047, 2020 WL 1304398 (S.D.N.Y. Mar. 19, 2020), see Gov. Br. at 18, 19, 36, was decided before the confirmed outbreak of COVID-19 at area jails. Moreover, in that case, the court directed Mr. Nikolic to file a new petition seeking immediate release, which he did, and the court granted his immediate release last week. See *Nikolic*, No. 20-2500 (Tr. of Oral Decision) at 18-22, Haas Decl., Ex. 2.

Against this backdrop, Petitioners have demonstrated irreparable harm should they remain in confinement. *Rafael L.O.*, 2020 WL 1808843, at *8; *Thakker*, 2020 WL 1671563 at *7 (“[C]atastrophic results may ensue, both to Petitioners and to the communities surrounding the Facilities.”); see also *Hope v. Doll*, No. 20-562 (M.D. Pa. Apr. 7, 2020) (“We cannot allow the Petitioners before us, all at heightened risk for severe complications from COVID-19, to bear the consequences of ICE’s inaction.”); *Coronel*, 2020 WL 1487274, at *8 (finding that “[d]ue to their serious underlying medical conditions” and their placement in immigration detention, where they are “at significantly higher risk of contracting COVID-19,” the petitioners “face a risk of severe, irreparable harm”). The Court therefore finds that Petitioners have demonstrated irreparable harm should they remain incarcerated at the Facilities.

3. Balancing of the Equities

“Before granting an injunction, a district court must balance the relative harm to the parties, i.e., the potential injury to the plaintiff if an injunction does not issue versus the potential injury to the defendant if the injunction is issued.” *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co.*, 290 F.3d 578, 596 (3d Cir. 2002) (internal citation omitted). Here, the Court finds the potential of injury to Petitioners is high for the reasons set forth above. Notably, the public interest also supports the release of Petitioners before they contract COVID-19 to preserve critical medical resources and prevent further stress on the states’ and country’s already overburdened healthcare systems. *See Rafael L.O.*, 2020 WL 1808843, at *9.

Respondents also have a legitimate interest in ensuring that Petitioners do not flee and in protecting the public. As Judge Vasquez found in *Rafael L.O.*, the Court believes that it can address those very important interests in fashioning appropriate conditions of release for each Petitioner. *See id.* In that regard, Petitioners in this matter are each discretionally detained by ICE under 8 U.S.C. § 1226(a). Among them, they have no pending charges, and all have significant ties to this country such that they can be safely released on reasonable conditions of supervision. For those with the most serious criminal histories, the Court will impose the most stringent conditions of release, including electronic monitoring.

Fedor B. has never been criminally arrested. Ostolaza Decl. ¶¶ 4, 6. Noe C.M.’s two criminal convictions are for driving while intoxicated and driving without a license and aggravated driving while intoxicated and unlicensed operation. Kim Decl. ¶ 15. Santiago C.C. has been arrested twice in the fifteen years he has lived in the United States, resulting in only one conviction for driving while ability impaired, an infraction (a lower level offense than a misdemeanor) under New York law. Ostolaza Decl. ¶ 11; RAP Sheet, Ex. 8. Santiago C.C. disputes the charges from

the second arrest, involving allegations by his wife, which were fully dismissed and sealed in January 2020. *See* Bond Evid., Ex. 9. Cristian A.R. has a single arrest and conviction for attempted endangering the welfare of a child, a misdemeanor under state law, for which he received a one-year conditional discharge sentence and no term of incarceration. *See* Kim Decl. ¶¶ 4-6. Finally, Alvaro N.M. is fifty-nine years old and was last arrested for a felony twenty-eight years ago. Although his convictions involve very serious offenses, they date from the early 1990s, and are so temporally distant that they do not subject him to mandatory immigration detention. His only arrests in the last twenty years have been for failures to register as a sex offender in 2002 and 2007 related to the 1990s' felony convictions, and he has registered without incident every other year as required. *See* Kim Decl. ¶ 21.

B. Extraordinary Circumstances Justify Releasing Petitioners from Detention

Petitioners in this matter are vulnerable to severe complications and death if they contract COVID-19 and are incarcerated in Facilities at the epicenter of the outbreak where they cannot practically adhere to social distancing guidelines or the adequate level of personal hygiene to stop the spread of the virus. These facts warrant the extraordinary remedy of release on bail, and make bail necessary, to make the habeas remedy effective. *See Landano*, 970 F.2d at 1239.

The Court further notes that the current circumstances in the Varick Immigration Court render the bond hearing, which Petitioners requested in the alternative, an insufficient remedy. First, Respondents have made clear that they will not cooperate in the advancing of immediate bond hearings for Petitioners. Gov. Br. at 2. But even if the Court were to order Respondents to provide prompt bond hearings to Petitioners, the declarations of Petitioners' counsel strongly suggest that those bond hearings would not occur as scheduled, *see* Pet. Reply Br. at 21-22, and illustrate the severe impact on the New York Immigration Court due to COVID-19, *see* Oshiro

Decl. ¶¶ 30-52. Also rendering bond hearings unlikely to occur is attorneys' inability to communicate with their clients, which is necessary to prepare them to testify and/or to review documentary evidence. *See, e.g., id.* ¶¶ 53-55; Zacarias Decl. ¶ 10; Gordillo Decl. ¶ 12. Finally, even if Petitioners can have bond set, the bond offices in New York City and Newark are closed, and it is unclear where their families or friends would have to travel to post bond. *See* Arcia-Quijano Decl. ¶ 17. The Court finds that COVID-19's impact on the Varick Immigration Court, which has resulted in delays in bond proceedings, and the closure of bond offices in New York City and Newark, are extraordinary circumstances that weigh in favor of release under appropriate conditions for these medically-vulnerable Petitioners.

As to the conditions of release, the Court is satisfied that there are reasonable conditions that can adequately protect the public and ensure the Petitioners' appearance for future immigration proceedings. The specific conditions of release are set forth in the Order accompanying this Opinion.

IV. CONCLUSION

For the foregoing reasons, Petitioners' Emergency Motion for Temporary Restraining Order, ECF No. 13, is **GRANTED**, and the Court orders Petitioners' immediate release subject to the conditions as ordered. An appropriate Order accompanies this Opinion.

Dated: April 12, 2020

/s/ Madeline Cox Arleo
Hon. Madeline Cox Arleo
UNITED STATES DISTRICT JUDGE

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