IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAMAAL CAMERON; RICHARD BRIGGS; RAJ LEE; MICHAEL CAMERON; MATTHEW SAUNDERS, individually and on behalf of all others similarly situated, Plaintiffs, v. MICHAEL BOUCHARD, in his official capacity as Sheriff of Oakland County; CURTIS D. CHILDS, in his official capacity as Commander of Corrective Services; OAKLAND COUNTY, MICHIGAN, Defendants.	Case No. 20-cv-10949-LVP-MJH Hon. Linda V. Parker

PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Plaintiffs Jamaal Cameron, Richard Briggs, Raj Lee, Michael Cameron, and Mathew Saunders, hereby move this Court, pursuant to Fed. R. Civ. P. 65, for a temporary restraining order. The grounds for this motion are set forth in the Brief in Support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, filed herewith and the accompanying Declarations and Exhibits in support.

Because of the grave risk to health and life at stake, Plaintiffs request that this Court consider this motion on an emergency basis and that the Court grant a temporary restraining order requiring the release of members of the Medically Vulnerable Subclass pending briefing and argument.

Plaintiffs further request that the court issue a temporary restraining order requiring Defendants to immediately undertake the following minimum measures to improve the hygiene and safety at the Oakland County Jail:

1) Ensure that each incarcerated person receives, free of charge: (1) an individual supply of liquid hand soap and paper towels sufficient to allow frequent hand washing and drying each day, and (2) an adequate supply of disinfectant hand wipes or disinfectant products effective against the virus that causes COVID-19 for daily cleanings;

2) Ensure that all incarcerated people have access to hand sanitizer containing at least 60% alcohol;

3) Provide access to daily showers and daily access to clean laundry, including clean personal towels and washrags after each shower;

4) Require that all Jail staff wear personal protective equipment, including masks, when interacting with any person or when touching surfaces in cells or common areas;

5) Require that all Jail staff wash their hands with soap and water or use hand sanitizer containing at least 60% alcohol both before and after touching any person or any surface in cells or common areas;

6) Take each incarcerated person's temperature daily (with a functioning and properly operated thermometer) to identify potential COVID-19 infections;

7) Assess (through questioning) each incarcerated person daily to identify potential COVID-19 infections;

8) Conduct immediate testing for anyone displaying known symptoms of COVID-19;

9) Provide adequate spacing of six feet or more between people incarcerated, to the maximum extent possible at the Jail's current population level, so that social distancing can be accomplished;

10) Ensure that individuals identified as having COVID-19 or having been exposed to COVID-19 receive adequate medical care and are properly quarantined in a non-punitive setting, with continued access to showers, recreation, mental health services, reading materials, phone and video calling with loved ones, communications with counsel, and personal property; Respond to all emergency (as defined by the medical community) requests for medical attention within an hour;

11) Provide sufficient disinfecting supplies, free of charge, so incarcerated people can clean high-touch areas or items (including, but not limited to, phones and headphones) between each use;

12) Effectively communicate to all people incarcerated, including low-literacy and non-English-speaking people, sufficient information about COVID-19, measures taken to reduce the risk of transmission, and any changes in policies or practices to reasonably ensure that individuals are able to take precautions to prevent infection;

13) Waive all medical co-pays for those experiencing COVID-19-related symptoms;

14) Waive all charges for medical grievances during this health crisis;

15) Cease and desist (a) all use of punitive transfers or threats of transfers to areas of the jail that have higher infection rates (or any other form of threat involving increased exposure to infection) for any infraction whatsoever; (b) all retaliation in any form, against class members who raise concerns either formally or informally about the health and safety conditions in the Jail; (c) all punitive measures taken against class members who decline to engage in labor on the grounds that such labor represents a threat to their health and safety or the health and safety of other class members.

In addition, Plaintiffs request that the court immediately order Defendants to take the following measures in preparation for a TRO hearing, assuming the court orders such a hearing:

1) Require Defendants to promptly provide Plaintiffs and the Court with a list of all individuals who are members of the Medically Vulnerable Subclass as defined in paragraph 94 of Plaintiffs' Complaint, that includes their location, charge and bond status;

2) Require Defendants to promptly thereafter provide Plaintiffs and the Court with a list of any individuals in the Medically Vulnerable Subclass who Defendants object to releasing and the basis for that objection.

Lastly, Plaintiffs request that the court 1) set an evidentiary hearing to examine allegations in Plaintiffs' emergency motion for a Temporary Restraining Order and Preliminary Injunction; 2) set a time and date for a hearing in which the Court will resolve any disputes about whether certain listed individuals are entitled to relief; 3) order an inspection of the jail facilities by a medical expert in infectious disease who can report to the court at the hearing on allegations and answer critical questions; and 4) grant leave to conduct expedited narrow limited discovery, which the parties can confer about.

Local Rule 7.1(a) requires Plaintiffs to ascertain whether this motion will be opposed. Because this motion is being filed contemporaneously with the complaint,

there is not yet an attorney of record for Defendants in this case. Plaintiffs' counsel did place a telephone call to the Oakland County Corporation Counsel's office to explain the nature of this motion and its legal basis. Plaintiffs' counsel did not obtain concurrence in the relief sought.

Plaintiffs' counsel has emailed Corporation Counsel Joellen Shortley contemporaneously with this filing to alert her that this emergency filing is forthcoming and to provide her with copies of this motion, the supporting brief, Plaintiffs' complaint, and Plaintiffs' motion for class certification. Plaintiffs' counsel is prepared to appear by telephone immediately. Each day that passes risks Plaintiffs' lives. This case cannot wait.

Respectfully submitted,

/s/ Krithika Santhanam
Krithika Santhanam (DC Bar No. 1632807)*
Thomas B. Harvey (MBE #61734MO)*
Advancement Project National Office
1220 L Street, N.W., Suite 850
Washington, DC 20005
Tel: (202) 728-9557
Ksanthanam@advancementproject.org
Tharvey@advancementproject.org

/s/ Philip Mayor
Philip Mayor (P81691)
Daniel S. Korobkin (P72842)
American Civil Liberties Union
Fund of Michigan
2966 Woodward Ave.

/s/ Cary S. McGehee
Cary S. McGehee (P42318)
Kevin M. Carlson (P67704)
Pitt, McGehee, Palmer,
Bonanni & Rivers, PC
117 W. Fourth Street, Suite 200
Royal Oak, MI 48067
(248) 398-9800
cmcgehee@pittlawpc.com
kcarlson@pittlawpc.com

/s/ Allison L. Kriger
Allison L. Kriger (P76364)
LaRene & Kriger, PLC
645 Griswold, Suite 1717
Detroit, MI 48226

Detroit, MI 48201
(313) 578-6803
pmayor@aclumich.org
dkorobkin@aclumich.org

(313) 967-0100
Allison.kriger@gmail.com

/s/ Alexandria Twinem
Alexandria Twinem
(D.C. Bar No. 1644851)*
Civil Rights Corps
1601 Connecticut Ave NW, Suite 800
Washington, DC 20009
(202) 894-6126
alexandria@civilrightscorps.org

Attorneys for Plaintiffs/Petitioners
*Applications for admission forthcoming

Dated: April 17, 2020

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAMAAL CAMERON; RICHARD BRIGGS; RAJ LEE; MICHAEL CAMERON; MATTHEW SAUNDERS, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

MICHAEL BOUCHARD, in his official capacity as Sheriff of Oakland County; CURTIS D. CHILDS, in his official capacity as Commander of Corrective Services; OAKLAND COUNTY, MICHIGAN,

Defendants.

Case No. 20-cv-10949-LVP-MJH
Hon. Linda V. Parker

Emergency Motion

BRIEF IN SUPPORT OF PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

BACKGROUND AND FACTS 2

I. The COVID-19 Crisis Is a Health Crisis Unmatched in Living Memory 2

II. The COVID-19 Jail Outbreak Is An Extreme Threat to Public Health 4

III. The Oakland County Jail's Woefully Insufficient Hygienic Conditions 6

1. Detained people cannot practice social distancing. 6
2. Defendants do not properly screen or quarantine. 6
3. Defendants do not provide adequate or timely health care. 8
4. Defendants maintain dangerous conditions and fail to provide even basic hygiene supplies to the people confined at the Jail. 9
5. Defendants fail to provide information about COVID-19 and its spread. 11

ARGUMENT 12

A. Plaintiffs are likely to succeed on the merits because Defendants are violating their Eighth and Fourteenth Amendment rights. 13

1. Objective Risk of Harm 15
2. Subjective Indifference 17

B. Plaintiffs Will Suffer Irreparable Harm. 20

C. The Public Interest and Balance of Equities Weigh Heavily in Plaintiffs' Favor. 22

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

CASES

ACLU of Ky. v. McCreary Cty., Ky., 354 F.3d 438, 445 (6th Cir. 2003) 22
Brown v. Bargery, 207 F.3d 863, 867 (6th Cir. 2000) 16
City of Dearborn v. Comcast of Mich., 558 F. Supp. 2d 750, 754 (E.D. Mich. 2008) 14
City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983) 15
Dodds v. U.S. Dep't of Educ., 845 F.3d 217, 222 (6th Cir. 2016) 26
Elrod v. Burns, 427 U.S. 347, 373 (1976) 23
Estelle v. Gamble, 429 U.S. 97, 104 (1976) 15
Farmer v. Brennan, 511 U.S. 825, 834 (1994) 15
G & V Lounge, Inc. v. Mich. Liquor Control Comm'n, 23 F.3d 1071, 1079 (6th Cir. 1994) 25
Helling v. McKinney, 509 U.S. 25, 33 (1993) 17, 23
In re DeLorean Motor Co., 755 F.2d 1223, 1229 (6th Cir. 1985) 14
Malam v. Adducci, __ F. Supp. 3d __, No. 20-cv-10829, 2020 WL 1672662 (E.D. Mich. Apr. 6, 2020) 22
Ohio Republican Party v. Brunner, 543 F.3d 357, 361 (6th Cir. 2008) 13
Richko v. Wayne Cty., Mich., 819 F.3d 907, 915 (6th Cir. 2016) 15
Thakker v. Doll, __ F. Supp. 3d __, No. 20-cv-480, 2020 WL 1671563 (M.D. Pa. Mar. 31, 2020) 20
United States v. Stephens, __ F. Supp. 3d __, No. 15-CR-95, 2020 WL 1295155, at *2 (S.D.N.Y. Mar. 19, 2020) 6
Wilson v. Gordon, 822 F.3d 934, 958 (6th Cir. 2016) 23
Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) 13

Statutes

28 U.S.C. § 2241 ..... 2, 13
42 U.S.C. § 1983 ..... 2, 13

INTRODUCTION

An outbreak of the novel coronavirus is occurring in the Oakland County Jail ("Jail"), where Defendants confine over 800 human beings in life-threatening conditions. Plaintiffs sleep as close as one foot from each other, have limited or no access to hygiene products and cleaning supplies, are not properly quarantined when sick, and—because medical staff have stopped conducting rounds—must wait days to seek medical attention. Many people confined at the Jail are medically vulnerable to the COVID-19 disease, and their lives are at risk. As of the filing of this motion, more than 23 inmates as well as jail staff members have tested positive for the virus. Based on the virus's spread in other jails, this number will be in the hundreds in less than a week. *See* [Ex. A, Cook County Jail Population and COVID Tracker].

As COVID-19 spreads inside and outside the Jail, time is running out to save Plaintiffs' lives and to prevent the Jail from becoming an epicenter of community infection. Absent immediate intervention from this Court, people will die because of Defendants' deliberate indifference.

Plaintiffs seek two forms of immediate relief. First, they seek class-wide relief requiring Defendants to take critical steps inside the Jail to safeguard people who, due to the nature of their confinement, are at serious risk of infection and death in a global pandemic. Second, they seek immediate release from confinement for a subclass of people who, because of age or preexisting medical conditions, are at

particularly grave risk of death from COVID-19, a risk that cannot be sufficiently mitigated by safeguards or preventive measures in the Jail. This relief is appropriate either through 28 U.S.C. § 2241 or, in the alternative, through 42 U.S.C. § 1983.

This extraordinary moment requires the Court's immediate intervention. The "horizon of risk for COVID-19 in this facility is a matter of days, not weeks." Compl. Ex. 14 ("Lauring Decl.") ¶ 39. Immediate relief is also in the public interest. A rapid outbreak amongst the Jail population would drain the Southeast Michigan metropolitan area of limited resources, including ventilators. For these reasons, and for the reasons explained further below, the Court should grant Plaintiffs' motion.

BACKGROUND AND FACTS

I. The COVID-19 Crisis Is a Health Crisis Unmatched in Living Memory.

We are in the midst of an unprecedented public health emergency. *See* Compl. ¶ 19 (citing sources). The number of people infected by COVID-19 has grown exponentially in this country since the first case was identified in January. *Id*. ¶ 20. By March 11, 2020, the World Health Organization defined the outbreak as a global pandemic. *Id*. ¶ 19. As of April 15, over 600,000 people have been diagnosed with COVID-19 in the United States, with over 24,000 deaths confirmed.[1] Without

[1] Coronavirus 2019, Centers for Disease Control, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (last visited Apr. 15, 2020).

effective public health intervention, the Centers for Disease Control and Prevention ("CDC") project that as many as 2.2 million American people will die. *Id*. ¶ 20.

The experience of severe illness caused by COVID-19 has been compared to "drowning in your own blood." *Id*. ¶ 25. COVID-19 is a highly contagious virus that can severely damage lung tissue, impede cardiac functions (causing heart failure), and permanently harm other organs. *Id*. ¶ 24. Complications manifest at an alarming pace, and the required levels of medical support—which include highly specialized equipment like ventilators as well as an entire team of care providers—already exceeds local health care resources in Southeast Michigan.[2] Approximately 20% of people infected experience life-threatening complications; between 1% and 3.4% die. *Id*. ¶ 27. The fatality rate is about ten times higher than a severe seasonal influenza, even in countries with highly effective health care systems. *Id*.

Although everyone is at risk of contracting COVID-19, some populations are at higher risk for severe health results. Certain underlying medical conditions including lung disease, asthma, chronic obstructive pulmonary disease, chronic liver or kidney disease, diabetes, epilepsy, hypertension, compromised immune systems, blood disorders, inherited metabolic disorders, strokes, and pregnancy increase the

[2] *See*, *e.g*., Kristen Jordan Shamus & Darcie Moran, *Nurses Protest Conditions at Detroit's Sinai-Grace, Said They Were Told to Leave*, Detroit Free Press (Apr. 6, 2020), https://www.freep.com/story/news/health/2020/04/06/detroit-dmc-sinai-grace-nurses/2953385001/.

risk for individuals of any age. *Id*. ¶ 23. People over the age of fifty also face greater chances of serious illness or death. *Id*. The only known effective measure to mitigate the risk is to prevent infection in the first instance. *Id*. ¶ 29.

Accordingly, medical experts, officials, and the CDC urge "social distancing"—isolating oneself from other people at a minimum distance of six feet—as well as frequent hand-washing, use of hand sanitizer, and frequent cleaning and disinfecting of high touch surfaces and objects. *Id*. ¶ 30. These measures are particularly important in jails; congregate settings that can rapidly become a "public health disaster unfolding before our eyes." Lauring Decl. ¶ 10.

II. The COVID-19 Jail Outbreak Is An Extreme Threat to Public Health.

People incarcerated in the Jail are at heightened risk of infection and death from COVID-19. According to experts in public health in jails and prisons, "the risk posed by COVID-19 in jails and prisons is significantly higher than in the community, . . . in terms of risk of transmission, exposure, and harm to individuals who become infected." Compl. ¶ 32; *see also* Lauring Decl. ¶¶ 9-10. This is due to a number of factors, including forced proximity of detained individuals, their inability to protect themselves through social distancing, lack of medical and hygiene supplies, heavy reliance on outside hospitals for serious medical care, forced labor of incarcerated people in cleaning their own facilities with insufficient supplies, constant cycling of people through the jails, and inadequate medical care

within the jail itself. Compl. ¶ 32; Lauring Decl. ¶¶ 12-16.

The CDC's guidance for detention facilities acknowledges that incarcerated people live in conditions "heightening the potential for COVID-19 to spread." Compl. ¶ 36. The growing devastation in other jails around the country is a harbinger for what awaits Oakland County. The first case of COVID-19 in the Jail was first reported two weeks ago.[3] In New York City, less than a month from the detection of the first case at Riker's Island, 334 incarcerated people and 627 jail staff have tested positive; two jail officers have died; and more than 800 incarcerated people are in quarantine. *Id*. ¶ 40. The COVID-19 infection rate in the city's jails is presently eight times higher than the rest of the city. *Id*.

Nor can an outbreak be contained inside the Jail. What happens to the people trapped inside this ticking time bomb affects others who cycle through, including correctional and medical staff. Compl. Ex. 1 ("Stern Decl.") ¶11. The outbreak then spreads to staff's families and the community. *Id*. And jail outbreaks can quickly overwhelm regional hospitals, making resources unavailable to treat others suffering from COVID-19 or life-threatening conditions like heart attacks. Compl. ¶ 40; Stern Decl. ¶ 11. As courts have noted, "[t]he more people we crowd into [a] facility, the

[3] James Dickson, *First Oakland County Jail inmate tests positive for coronavirus*, Detroit News (Mar. 30, 2020), https://www.detroitnews.com/story/news/local/oakland-county/2020/03/30/first-oakland-county-jail-inmate-tests-positive-coronavirus/5088382002/.

more we're increasing the risk to the community." *United States v. Stephens*, __ F. Supp. 3d __, No. 15-CR-95, 2020 WL 1295155, at *2 (S.D.N.Y. Mar. 19, 2020).

III. The Oakland County Jail's Woefully Insufficient Hygienic Conditions

1. Detained people cannot practice social distancing.

Social distancing is impossible at the Jail. In some areas, people sleep a foot apart or less. Ex. G ("Saunders Decl.") ¶ 2; Ex. B ("J. Cameron Decl.") ¶ 9. At most, arrangements allow three feet of distance at night. Ex. H ("Arsineau Decl.") ¶ 2. Inmates share showers, toilets, and sinks. Ex. I ("Bates Decl.") ¶ 9. Some bunks adjoin toilets. Ex. C ("Briggs Decl.") ¶ 9.

When people are allowed to leave their cells or are in common space, they are often within one or two feet of others. Arsineau Decl. ¶ 3. Bates Decl. ¶ 9; J. Cameron Decl. ¶ 16. In the main building, there are holding cells—referred to as "the tanks"—with no bunks at all. Ex. D ("Lee Decl.") ¶¶ 18-19; J. Cameron Decl. ¶ 9. Inmates sleep on the concrete floor in close proximity, "essentially [being] forced to cuddle." J. Cameron Decl. ¶ 9. People in the tanks can reach through the bars in front of their cell and into the next cell, where COVID-19 patients are housed in similarly dungeon-like circumstances. Lee Decl. ¶ 21; J. Cameron Decl. ¶9.

2. Defendants do not properly screen or quarantine.

In the tanks, people are shuffled from cell to cell with no consideration for who is symptomatic and who is not. Cells with people in quarantine for COVID-19

are next to cells with presumptively healthy individuals. Lee Decl. ¶ 23. One cell under quarantine was emptied, and the healthy people in the next cell were immediately moved into it without it having been cleaned first. Lee Decl. ¶ 23. Hair was still on the floor, and the toilet had not been cleaned. Lee Decl. ¶ 23.

Defendants are not properly monitoring or testing inmates for COVID-19. Jason Arsineau, a detainee and a paramedic, watched officers incorrectly performing basic tasks, such as taking people's temperatures by testing right after meals and by contaminating the thermometer without cleaning it. Arsineau Decl. ¶ 6. Some officers do not even read the thermometer. Lee Decl. ¶ 5. And, because COVID-19 carriers can be asymptomatic for 2 to 14 days, Compl. ¶ 27, screening for symptoms alone is woefully insufficient to prevent spread within the Jail.

And symptomatic people are not properly isolated. Inmates who work as kitchen trustees[4] have been required to prepare and serve communal food, despite exhibiting symptoms of COVID-19, risking spread to everyone who received food from them. Ex. F ("Kucharski Decl.") ¶ 5. For example, around the end of March 2020, Arsineau had most of the symptoms of COVID-19 and told a deputy he was feeling sick and should not be serving food. Arsineau Decl. ¶5. The deputy responded, "Motherfucker, you do what I tell you to do, and you are going to serve

[4] Trustees are detained people who are tasked with responsibilities like food service, laundry, and cleaning. Saunders Decl. ¶ 6; Arsineau Decl. ¶ 5.

food." Arsineau continued to serve food to others while sick for four days until he could not get out of bed, leading a deputy to physically assault him. *Id*. And when Matthew Saunders became sick with suspected COVID-19 and a fever of 103 degrees, he was quarantined in the medical ward for only four days, and then returned to his dorm without being tested for COVID-19. Saunders Decl. ¶¶ 3, 5.

People who are sniffling and coughing are in the same cells as asymptomatic people, and the Jail is not testing any of them. Lee Decl. ¶ 20; Ex. E ("M. Cameron Decl.") ¶ 6. On April 11, 2020, one person in a quarantined cell died from suspected COVID-19. Lee Decl. ¶ 23. Two of the deceased's cellmates were then moved to a cell with presumptively healthy prisoners. *Id*.

3. Defendants do not provide adequate or timely health care.

Those who have been exposed to the virus or exhibit symptoms are not properly treated. David Kucharski, who also suffers from asthma, told a nurse about his symptoms on April 4, 2020. Kucharski Decl. ¶ 8. The nurse told him to let her know if his symptoms got worse, and gave everyone in his cell some Tamiflu, with instructions to take it if they had COVID-19 symptoms. *Id*.; Saunders Decl. ¶ 9. The nurses have not been back since. Kucharski Decl. ¶ 8; Saunders Decl. ¶ 9. Kucharski tried to ask a guard for medical attention, but was told that he would have to wait for a nurse. When Kucharski told the guard that the nurses were not coming, the guard said he could not help. Kucharski Decl. ¶ 10.

When Richard Briggs began to feel shortness of breath and loss of smell and taste, two nurses told him that he did not have COVID-19 and would not be tested. Briggs Decl. ¶ 8. One of the nurses suggested that he could not have shortness of breath, since he was able to speak to her. *Id*. After this, many of the others in his cell became sick with the same symptoms. Briggs Decl. ¶ 9.

During the four days that Saunders was quarantined in the medical unit, he would go hours without anyone coming to check on him. Saunders Decl. ¶ 4. His meals were placed just inside his door, but he was too sick to retrieve them, and guards removed the meals without him eating. *Id*.

The medical staff do not make rounds at all in certain parts of the jail. In fact, many people who take prescription drugs were dispensed a thirty-day supply, with instruction to take it on their own. J. Cameron Decl. ¶ 16; Lee Decl. ¶ 4. People have been advised that doctors will not return until May. J. Cameron Decl. ¶ 16.

4. Defendants maintain dangerous conditions and fail to provide even basic hygiene supplies to the people confined at the Jail.

The Jail does not supply enough soap for people to regularly wash their hands. Briggs Decl. ¶6; Kucharski Decl. ¶15. Some have not received soap in over a week. Kucharski Decl. ¶15; Saunders Decl. ¶11. The commissary has been closed for two weeks, so there is no way to purchase more soap or any other hygiene products. Arsineau Decl. ¶ 11; Briggs Decl. ¶ 6. No one in the Jail has access to hand sanitizer or tissues. *E.g.*, Arsineau Decl. ¶ 13–14. Jail residents are given inadequate amounts

of toilet paper, sometimes sharing one roll among six toilets, spreading germs to each person who touches the role. J. Cameron Decl. ¶ 18. There is no sanitary way for inmates to dry their hands after they have been washed. J. Cameron Decl. ¶ 20.

Most people get a change of uniform and linens only once a week. Kucharski Decl. ¶ 19. Some cells have a dirty communal bucket that is never replaced in which to wash their clothes and underwear during the week. Briggs Decl. ¶ 3. Recently, laundry service stopped entirely for over two weeks. Briggs Decl. ¶ 15.

Although there is access to showers, the showers are filthy with scum, mold, clumps of hair, and insects; there is no way to clean them. J. Cameron Decl. ¶17; Briggs Decl. ¶ 5; Kucharski Decl. ¶ 17. In some areas of the Jail, bottles of highly diluted DMQ (a floor cleaner) is the only disinfectant available. J. Cameron Decl. ¶ 13. But, lacking any cleaning equipment they have no way to clean their bunks and other commonly touched surfaces in the quarter. *Id*. In other parts of the Jail, inmates do not have access to adequate cleaning supplies to clean the communal showers in the bathrooms. Kucharski Decl. ¶17. They rely on an unidentified pink liquid meant to clean toilets, to clean everything. *Id*.

Common surfaces and items that are touched frequently are not cleaned regularly. M. Cameron Decl. ¶ 8. There are no rags or cleaning supplies to clean shared surfaces. Briggs Decl. ¶ 4. The rails on the staircase are cleaned every other day and a shared water cooler is not sanitized between uses. M. Cameron Decl. ¶ 8.

Trustees tasked with cleaning receive one pair of gloves that they must reuse every time they clean. M. Cameron Decl. ¶ 7. Some are not given masks. M. Cameron Decl. ¶ 7. Some were made to clean a van that transported an inmate with suspected COVID-19 to the hospital with only cloth face masks as protection. Saunders Decl. ¶ 6. Food service trustees were made to work for days with COVID-19 symptoms. Arsineau Decl. ¶ 5; Kucharski Decl. ¶ 5. Kitchen trustees must handle the same carts and plastic trays that ungloved jail workers do. J. Cameron Decl. ¶ 4. Some food trustees are only given a pair of gloves and no mask when distributing food to others. J. Cameron Decl. ¶¶ 4-7. Laundry trustees are afraid to work with some of the laundry, which comes in biohazard bags. Bates Decl. ¶ 11-12. Several laundry trustees quit because they felt the job was unsafe. J. Cameron Decl. ¶ 25.

5. Defendants fail to provide information about COVID-19 and its spread.

While the Jail has done little to educate those detained about COVID-19, Bates Decl. ¶ 10; Briggs Decl. ¶ 7; M. Cameron Decl. ¶ 4, the guards are well aware of its spread in the jail and use it as a threat with which to terrorize inmates. J. Cameron Decl. ¶¶ 8–10. They threaten and punish people who do not want to perform dangerous work with further exposure. *Id*. One officer threatened Raj Lee with relocation from the jail annex building to the main building as a punishment, telling Lee that he would not want to go to the main building because there was an outbreak there. Lee Decl. ¶ 9. Lee wrote a grievance about the threat, which a guard

handed to the officer, who promptly transferred Lee to the Tank where social distancing is least possible and quarantined people are kept. Lee Decl. ¶¶10-16. Jamaal Cameron was similarly punished for raising health concerns about food distribution. J. Cameron Decl. ¶¶ 8-9. Laundry trustees are similarly threatened. Bates Decl. ¶ 12.

ARGUMENT

PLAINTIFFS ARE ENTITLED TO A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION.

Plaintiffs and class members are at imminent risk of death or serious injury. If this litigation is decided in the ordinary course, many class members will become seriously ill and die before final judgment. Numerous others will suffer severe pain or organ damage. Plaintiffs seek two forms of immediate relief.

First, on behalf of the class as a whole, Plaintiffs seek an order requiring Defendants to follow procedures, recommended by medical professionals and the CDC Guidance on the management of COVID-19 in jails and correctional settings, that ensure those detained at the Jail: 1) have access to adequate and timely medical treatment to screen, test, and treat symptoms; 2) can practice social distancing; 3) can maintain necessary hygiene; and 4) are educated about COVID-19.

Second, medically vulnerable Plaintiffs, on behalf of a subclass composed of similarly vulnerable detainees, seek immediate release from the chaotic, infectious jail environment, because there are no measures that Defendants can take within the

facility to protect them from a high risk of death or serious bodily harm. Their lives literally depend on how quickly they are released. This relief is appropriate either through 28 U.S.C. § 2241 or, in the alternative, through 42 U.S.C. § 1983.

Plaintiffs easily meet the legal requirements for the Court to grant them a temporary restraining order and preliminary injunction requiring Defendants to change their practices at the Jail to conform to medically accepted means of preventing and mitigating the spread of COVID-19 in the Jail and release members of the medically vulnerable subclass. As explained below, (1) they are likely to succeed on the merits of their claims; (2) they are likely to suffer irreparable harm in the absence of relief; (3) the balance of equities weighs in their favor; and (4) an injunction is in the public interest. *See Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 20 (2008); *Ohio Republican Party v. Brunner*, 543 F.3d 357, 361 (6th Cir. 2008). The court must balance each of the four factors and "no single factor is dispositive." *City of Dearborn v. Comcast of Mich.*, 558 F. Supp. 2d 750, 754 (E.D. Mich. 2008). Where, as here, plaintiffs demonstrate "irreparable harm which decidedly outweighs any potential harm to the defendant," the "degree of likelihood of success required" is less, and a plaintiff need only show "serious questions going to the merits." *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985).

A. Plaintiffs are likely to succeed on the merits because Defendants are violating their Eighth and Fourteenth Amendment rights.

Plaintiffs and class members are highly likely to succeed on their claims because Defendants are deliberately disregarding the risk that Plaintiffs will contract COVID-19 within the current conditions at the Jail, in violation of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment. Defendants' failure to implement the basic steps recommended by health experts, the CDC, and Governor Gretchen Whitmer[5]—including access to basic medical screening and treatment protocols for infectious disease, providing soap and water so that those detained can wash their hands after touching objects or other people, giving people sufficient space to stay at least six feet away from others at all times, the ability to clean and disinfect all surfaces touched by multiple people at least once per day, and access to information about COVID-19—constitutes deliberate indifference.

The government has a constitutional duty to protect those it detains from "a substantial risk of serious harm." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). This right arises under the Eighth Amendment for after conviction, *see id.*; *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), and under the Fourteenth Amendment's Due Process Clause pre-conviction, *see City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983); *Richko v. Wayne Cty., Mich.,* 819 F.3d 907, 915 (6th Cir. 2016).

[5] Compl. Exhibit 11, Executive Order 2020-29 (March 29, 2020).

To demonstrate a violation of the Eighth Amendment, convicted prisoners must show both an objectively substantial risk of serious harm and that prison officials subjectively "acted with 'deliberate indifference'" towards the hazardous condition in question. *Brown v. Bargery*, 207 F.3d 863, 867 (6th Cir. 2000). While the Sixth Circuit traditionally analyzed Fourteenth Amendment pretrial detainee claims and Eighth Amendment prisoner claims "under the same rubric," *Richmond v. Huq*, 885 F.3d 928, 937 (6th Cir. 2018), the Supreme Court's decision in *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), "calls into serious doubt" whether pre-trial detainees need to satisfy the subjective prong of the inquiry. *Richmond*, 885 F.3d at 938 n.3.[6] Accordingly, the Pre-Trial Subclass can prove a Fourteenth Amendment claim by demonstrating solely that they face a substantial risk of serious harm. In any event, both the Eighth and Fourteenth Amendment standards are satisfied here.

1. Objective Risk of Harm

Plaintiffs confined at the Jail are at a substantial risk of serious harm from COVID-19. The risk of exposure to a deadly infectious disease constitutes a serious risk to health. A "condition of confinement that is sure or very likely to cause serious illness and needless suffering" to someone detained, which includes "exposure of

[6] *See also, e.g.*, *Gordon v. Cty. of Orange*, 888 F.3d 1118, 1124–25 (9th Cir. 2018), *cert. denied sub nom. Cty. of Orange, Cal. v. Gordon*, 139 S. Ct. 794, 202 L. Ed. 2d 571 (2019); *Darnell v. Pineiro*, 849 F.3d 17, 34–35 (2d Cir. 2017); *Miranda v. Cty. of Lake*, 900 F.3d 335, 352 (7th Cir. 2018).

inmates to a serious, communicable disease" is precisely the type of serious harm that the Constitution protects against. *Helling v. McKinney*, 509 U.S. 25, 33 (1993).

COVID-19 is exactly that. It is a disease with no vaccine, effective treatment, or cure. It can cause severe pain in even mild and moderate cases, can feel like "having glass in your lungs" or "drowning in your own blood," and leaves patients choking and struggling to breathe. Compl. ¶ 25. And it can cause permanent lung damage. Compl. ¶ 24. In critical cases, patients may need to spend weeks attached to a ventilator and blood oxygenation machine. Compl. ¶ 26. Finally, COVID-19 has a fatality rate ten times higher than influenza. Compl. ¶ 27.

The risk of contracting COVID-19 in the Jail is extreme and unreasonable. Lauring Decl. ¶ 27. Across the country, governments have issued "shelter in place" orders closing public schools and non-essential businesses, banning people from eating in restaurants or even congregating in small groups, and requiring individuals to stay in their homes unless it is absolutely necessary to leave. Even when they leave, people are advised to stay at least six feet from others, wear masks, avoid touching their faces, and wash their hands immediately upon returning home. The message is clear and unprecedented: the risk of contracting COVID-19 is objectively unacceptable. So too for Plaintiffs who are detained, where the risk of contracting the virus is even greater than in the general population. Lauring Decl. ¶¶ 28-30.

This risk is even more extreme and unreasonable for the medically vulnerable subclass. They all have conditions rendering them exceptionally vulnerable to death or serious harm if exposed to COVID-19. Because of their medical vulnerability, there is no practicable way to ensure that they can avoid infection and no practicable way to ensure that, if infected, they receive prompt and reasonable medical treatment within the Jail. Serious illness is substantially likely, and older people and those with underlying medical conditions, such as lung disease, heart disease, or diabetes, are more likely to develop serious illness. Lauring Decl. ¶ 22. Therefore, their continued detention is a grave risk to their lives and violates the Constitution.

2. Subjective Indifference

This Court need not consider the subjective prong of the deliberate indifference standard with respect to members of the Pre-Trial Subclass. Yet even under the Eighth Amendment's more exacting standard, immediate injunctive relief is clearly appropriate. That is because Defendants have certainly known of and disregarded an excessive risk to inmate health or safety. *Richmond*, 885 F.3d at 939.

Here, in the midst of this global pandemic, it cannot be seriously disputed that any government officials, including Defendants, are subjectively aware of the risks posed by the coronavirus. Through government orders,[7] CDC guidance aimed at

[7] Michigan Executive Order 2020-42, Whitehouse.gov (Apr. 9, 2020), https://www.michigan.gov/whitmer/0,9309,7-387-90499_90640-525173--,00.html.

jails, *see* Compl. Ex. 6, letters sent to Defendants,[8] and nationwide publications,[9] Defendants have been made well aware of the risks to incarcerated people. The County's and Jail's own communications and announcements emphasize this awareness.[10] Similarly, the widespread public discussion and CDC guidance regarding the heightened risk to medically vulnerable people leaves no question that Defendants are aware of the mortal peril that Jail conditions pose to such individuals.

Defendants are disregarding the grave risk posed by the coronoavirus by failing to implement the steps urged by health experts, including the CDC, to stop the spread of the virus. An official demonstrates disregard of a risk by "failing to take reasonable measures to abate it." *Farmer*, 511 U.S. at 847. Here, the list of reasonable measures to prevent the spread of COVID-19 is well delineated and publicized: "[s]ocial distancing and proper hygiene are the only effective means by which we can stop the spread of COVID-19." *Thakker v. Doll*, __ F. Supp. 3d __,

[8] Compl. Exs 12, 13, ACLU Letters to Chief Judges and Sheriffs.

[9] David Mills & Emily Galvin-Almanza, *As many as 100,000 incarcerated people in our prisons will die from the coronavirus, unless the US acts now*, Bus. Insider (Apr. 2, 2020), https://www.businessinsider.com/failure-to-release-prisoners-is-condemning-thousands-to-death-2020-4; Anna Flagg & Joseph Neff, *Why Jails Are So Important in the Fight Against Coronavirus*, N.Y. Times (Mar. 31, 2020), https://nyti.ms/3aIBHjv; Timothy Williams et al., *'Jails Are Petri Dishes': Inmates Freed as the Virus Spreads Behind Bars*, N.Y. Times (Mar. 30, 2020), https://nyti.ms/2Jmnf4z.

[10] Oakland County Jail, Visitation, https://www.oakgov.com/sheriff/Corrections-Courts/jail/Pages/visitation.aspx (last visited Apr. 15, 2020).

No. 20-cv-480, 2020 WL 1671563 (M.D. Pa. Mar. 31, 2020). The CDC has also recommended similar measures within jails and prisons, calling social distancing of at least six feet at all times the "cornerstone of reducing transmission" of COVID-19 within detention facilities, pushing facilities to "[p]rovide a no-cost supply of soap to incarcerated/detained persons, sufficient to allow frequent hand washing," and advising that facilities must, "[s]everal times a day, clean and disinfect surfaces and objects that are frequently touched, especially in common areas." Compl. ¶ 36.

Despite these clear directives, Defendants have not provided Plaintiffs with the space, antibacterial soap, sanitizer, and cleaning supplies necessary to allow staff and inmates to remain safe. Nor have they provided timely and adequate medical care to identify, isolate, and treat people who develop symptoms. As a result, the entire class has a substantial risk of contracting COVID-19, and the medically vulnerable subclass faces a very realistic threat of death and/or permanent organ damage. Defendants' failure to act puts them out of step with many other jails and prisons around the country, who are implementing medical guidance.

Although courts give some latitude to jail and prison officials to decide what actions are "reasonable" to deal with safety within facilities, COVID-19 is a threat to inmates' health and safety of a magnitude unseen in recent history. At this moment, there is only one way to minimize the risk of COVID-19: prevent its spread. By failing to take the necessary steps to do so in the Jail, Defendants are knowingly

exposing Plaintiffs, guards and staff, and the public at large, to a risk of a painful and lethal disease. That risk is unacceptable and unconstitutional.

Officials' indifference to the significant risk of permanent damage and death to the medically vulnerable subclass is even more culpable. It is well-documented that these individuals face a risk of death or permanent organ damage far in excess of the rest of the population. Stern Decl. ¶ 11; Lauring Decl. ¶ 14. This risk is well-evident in the COVID-19 death toll to date—for instance, in New York state, just over 86% of reported COVID-19 deaths involved at least one comorbidity, according to the state's department of health.[11] Defendants' refusal or inability to provide circumstances that would limit the subclass's exposure to the virus constitutes deliberate indifference. At this point, only release will sufficiently protect the medically vulnerable from risk of death. *Malam v. Adducci*, __ F. Supp. 3d __, No. 20-cv-10829, 2020 WL 1672662 (E.D. Mich. Apr. 6, 2020).

Plaintiffs have shown that they are likely to succeed on their claims' merits.

B. Plaintiffs Will Suffer Irreparable Harm.

Plaintiffs allege injuries that are irreparable and, therefore, are not suitable for resolution in the ordinary course of litigation. Nor can these injuries be redressed through money damages. There is no injury that is more irreparable than death, and

[11] COVID-19 tracker New York State Department of Health, https://covid19tracker.health.ny.gov/ (last visited Apr. 15, 2020).

Plaintiffs face a heightened risk of contracting a deadly virus. This risk is not speculative: in one Louisiana prison where COVID-19 has been allowed to spread, five people have died in less than a week.[12]

Moreover, Plaintiffs seek relief from violations of their constitutional rights. "[W]hen reviewing a motion for a preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated." *ACLU of Ky. v. McCreary Cty., Ky.*, 354 F.3d 438, 445 (6th Cir. 2003) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). An injunction is appropriate to prevent a substantial risk of deprivation of constitutional rights, as well as death or permanent, debilitating injury. Being compelled to endure a substantially increased risk of serious illness and death will always constitute irreparable injury. *See, e.g.*, *Helling v. McKinney*, 509 U.S. 25, 33 (1993) ("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.").

The risk of permanent harm to Plaintiffs applies with greater force to the medically vulnerable subclass, for whom continued detention is even more likely to cause injury and death. *See Wilson v. Gordon*, 822 F.3d 934, 958 (6th Cir. 2016) (upholding preliminary injunction "where the alleged irreparable harm involves

[12] *ACLU Sues Louisiana Prison After 5 COVID-19 Deaths Reported*, Democracy Now (Apr. 7, 2020) https://www.democracynow.org/2020/4/7/headlines/aclu_sues_louisiana_prison_after_5_covid_19_deaths_reported.

delay in or inability to obtain medical services"). With 23 confirmed COVID-19 cases in the Jail, the risk of death and devastation to subclass members is an absolute certainty that cannot be ignored.

Courts across the country have recognized that risk of exposure to the coronavirus constitutes an irreparable harm and in turn granted immediate release to people who are exposed to coronavirus.[13] This groundswell reflects the emerging judicial consensus that people cannot be safely detained when they are exposed to a serious risk of contracting COVID-19. Here, COVID-19 is already in the Jail. Every possible step must be taken to ameliorate the risk to those who remain detained. Plaintiffs have shown irreparable harm.

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

The substantial risk to Plaintiffs of contracting a deadly disease considerably outweighs any potential harm to Defendants. As discussed above, Plaintiffs will

[13] *See* Ex. H (providing decisions from seven district courts); *see also Zhang v. Barr*, 20 Civ. 331, 2020 WL 1502607 (C.D. Cal. Mar. 27, 2020) (granting an immediate bond hearing in light of the "global pandemic by which delay in determining Petitioner's release exposes him to unnecessary risk"); *United States v. Garlock*, No. 18 Cr. 00418, 2020 WL 1439980, at *1 (N.D. Cal. Mar. 25, 2020) (ordering, sua sponte, extension of convicted defendant's surrender date and noting "[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"); *Castillo v. Barr*, __ F. Supp. 3d __, 20 Civ. 605, 2020 WL 1502864 (C.D. Cal. Mar. 27, 2020) (noting "the risk of infection in immigration detention facilities – and jails – is particularly high").

suffer significant harm if forced to endure the conditions currently prevailing in the Jail. The only potential harm Defendants face if ordered to bring their Jail into compliance with CDC guidelines is economic: Jail staff may have to expend additional time, and the County may have to expend additional money, to provide the information, hygiene products, cleaning agents, and medical treatment necessary to kill the virus. But the possibility that Defendants will have to spend money to reduce the substantial risk that Plaintiffs will be exposed to a deadly disease does not tip the balance in their favor because "it is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994). Immediately implementing CDC's medically advised hygiene, social distancing, screening and testing measures for the whole Class is the only way to make the Jail safer for those who remain and will also promote Defendants' interests in ensuring the safety of the staff at the Jail, and the community at large. Accordingly, the public interest would be served by issuance of a preliminary injunction requiring Defendants to implement constitutionally adequate measures to prevent the spread of COVID-19 in the Jail.

Additionally, the balance of equities and public interest favor release of the medically vulnerable subclass members who, as a practical matter, cannot be constitutionally held in the Jail. Release of these individuals will save the Jail money and reduce the demands on jail staff, including guards and nurses. And releasing

medically vulnerable individuals is the only way to eliminate the unacceptable risk to their health and the concomitant demand on public health resources that will result when they become infected in jail. The constitution, and the public interest, demands no less. *See Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 222 (6th Cir. 2016) (protection of constitutional rights is "always in the public interest").

A worsened outbreak at the Jail would create a "tinderbox scenario" with dire consequences for detainees and workers at the Jail as well as the Southeast Michigan metropolitan area, which would be drained of limited medical resources, including intensive care unit beds and ventilators. In Michigan, the COVID-19 outbreak has already resulted in unprecedented public health measures and has strained the local health care system. Further, COVID-19 is already devastating Michigan's carceral system. In one Michigan prison alone, 10% of all incarcerated people have tested positive for COVID-19, and 9 prisoners have already died statewide.[14] Releasing vulnerable individuals is the only way to save lives and reduce the burden on the community and health infrastructure and is clearly in the public interest.

CONCLUSION

For these reasons, Plaintiffs ask this Court to issue a temporary restraining order and preliminary injunction ordering the relief requested in their motion.

[14] *See* Compl. ¶ 41 (and source cited therein).

Respectfully submitted,

/s/ Krithika Santhanam
Krithika Santhanam (DC Bar No. 1632807)*
Thomas B. Harvey (MBE #61734MO)*
Advancement Project National Office
1220 L Street, N.W., Suite 850
Washington, DC 20005
Tel: (202) 728-9557
Ksanthanam@advancementproject.org
Tharvey@advancementproject.org

/s/ Cary S. McGehee
Cary S. McGehee (P42318)
Kevin M. Carlson (P67704)
Pitt, McGehee, Palmer,
Bonanni & Rivers, PC
117 W. Fourth Street, Suite 200
Royal Oak, MI 48067
248-398-9800
cmcgehee@pittlawpc.com
kcarlson@pittlawpc.com

/s/ Philip Mayor
Philip Mayor (P81691)
Daniel S. Korobkin (P72842)
American Civil Liberties Union
Fund of Michigan
2966 Woodward Ave.
Detroit, MI 48201
(313) 578-6803
pmayor@aclumich.org
dkorobkin@aclumich.org

/s/ Allison L. Kriger
Allison L. Kriger (P76364)
LaRene & Kriger, PLC
645 Griswold, Suite 1717
Detroit, MI 48226
(313) 967-0100
Allison.kriger@gmail.com

/s/ Alexandria Twinem
Alexandria Twinem (D.C. Bar No. 1644851)*
Civil Rights Corps
1601 Connecticut Ave NW, Suite 800
Washington, DC 20009
Tel: 202-894-6126 Fax: 202-609-8030
alexandria@civilrightscorps.org

Attorneys for Plaintiffs/Petitioners

*Applications for admission forthcoming

Dated: April 17, 2020

CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2020, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to all counsel of record. I further certify that I emailed the foregoing document to: Oakland County Corporation Counsel Joellen Shortley at shortleyj@oakgov.com, the Oakland County Clerk at clerk@oakgov.com, and the Oakland County Sheriff's Office at ocso@oakgov.com. The foregoing document will also be served on Defendants by a process server along with the complaint and summons at the following addresses:

Sheriff Michael Bouchard
Oakland County Sheriff's Office
1200 N. Telegraph Road
Pontiac, MI 48341

Joellen Shortley
Oakland County Corporation Counsel's Office
1200 N. Telegraph Road
Pontiac, MI 48341

Lisa Brown
Oakland County Clerk/Register of Deeds
1200 N. Telegraph Road
Pontiac, MI 48341

Curtis D. Childs
Oakland County Sheriff's Office
1200 N. Telegraph Road
Pontiac, MI 48341

/s/ Cary S. McGehee
Cary S. McGehee (P42318)

INDEX OF EXHIBITS

Exhibit A: Cook County Jail Coronavirus Tracker

Exhibit B: Declaration of Jamaal Cameron

Exhibit C: Declaration of Richard Briggs

Exhibit D: Declaration of Raj Lee

Exhibit E: Declaration of Michael Cameron

Exhibit F: Declaration of David Kucharski

Exhibit G: Declaration of Matthew Saunders

Exhibit H: Declaration of Jason Arsineau

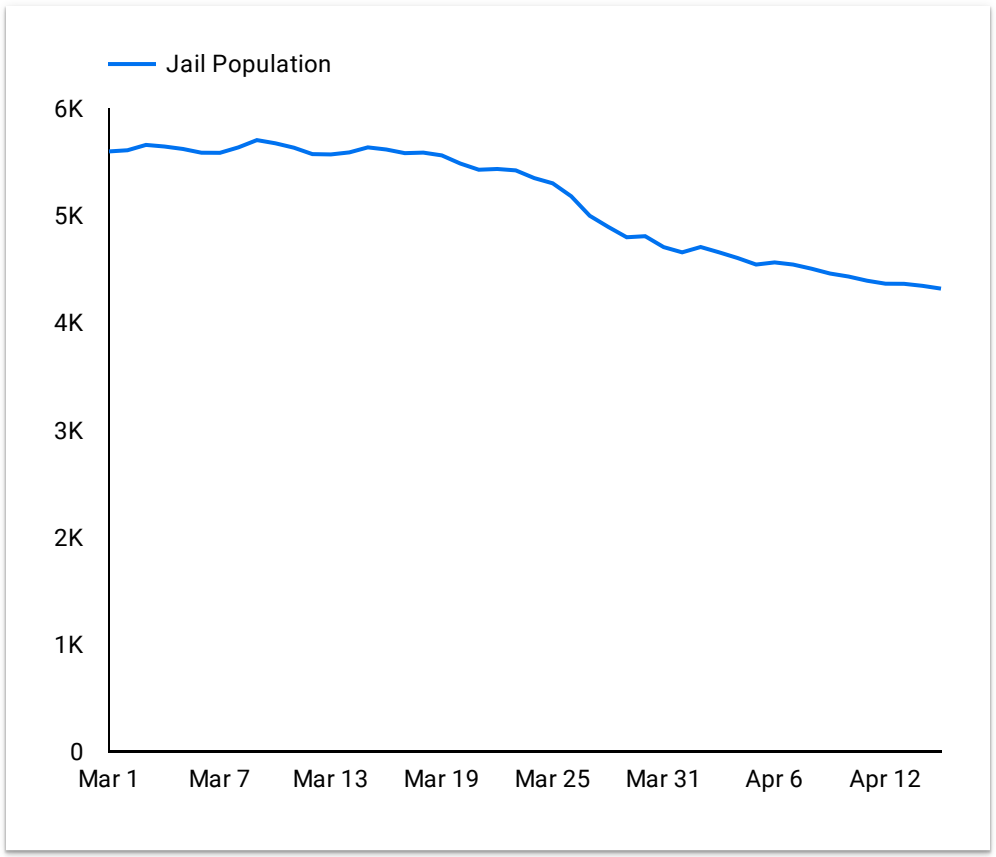
Exhibit I: Declaration of Michael Bates

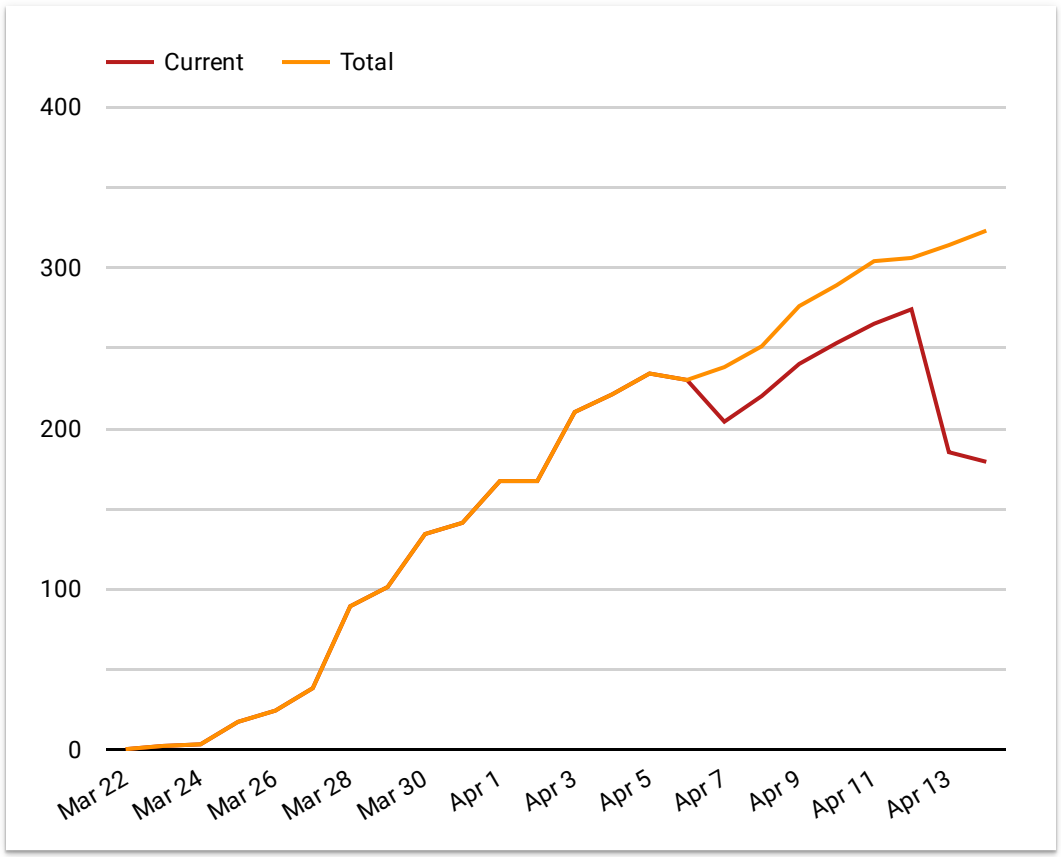
Exhibit J: Federal Court Orders Cited at Footnote 13 of Plaintiffs' Brief

Exhibit A

Last Updated:
Wednesday, April 15, 12:30 p.m.

Cook County Jail population and COVID-19 tracker





See details

Source: *Cook County Sheriff's Office*.
Notes: Population data is not updated on the weekend. Population data is typically updated in the mornings and COVID-19 data in the afternoons. Detainees with COVID-19 represents those currently in custody who are infected, not the cumulative total, so it may fluctuate due to releases or deaths. Data is only as accurate as that provided by the Sheriff's office.

InjusticeWatch

Exhibit B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAMAAL CAMERON; RICHARD BRIGGS; RAJ LEE; MICHAEL CAMERON; MATTHEW SAUNDERS, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

MICHAEL BOUCHARD, in his official capacity as Sheriff of Oakland County; CURTIS D. CHILDS, in his official capacity as Commander of Corrective Services; OAKLAND COUNTY, MICHIGAN,

Defendants.

Case No.

DECLARATION OF JAMAAL CAMERON

I, Jamaal Cameron, declare:

I make this declaration based upon my own personal knowledge, and if called to testify, I could and would do so competently.

1. I am currently serving a sentence in Oakland County Jail ("the Jail"). I have been here since March 11, 2020. My release date is August 28, 2020.

2. I suffer from bronchitis and have for much of my life. I have also been diagnosed with hypertension since coming to the Jail. I also have sleep apnea, which was diagnosed shortly before I came to the Jail. Because of my sleep apnea, I sometimes do not breathe at night for a period of 15-30 seconds. I am supposed to have a c-pac machine to sleep with to alleviate the apnea, but before the COVID-19 crisis started, I was told by a nurse that the jail does not have a machine and I would not be given one. Because of my medical conditions, I am terrified that if I am exposed to coronavirus I might die as a result. No one deserves that.

3. Until yesterday, I was a food trustee and was housed in the annex building. The annex is one of two jail buildings and is divided into an eastern and western portion. I was housed in the western portion. The other building is the main building. Everyone in the jail knows that there has been a coronavirus outbreak in the main building, and someone in the eastern section of the annex was recently moved to the main building as well based on suspicion of exposure.

4. As a food trustee, my job was to finalize the preparation of food and pass it out to people in the annex. Most of the food is pre-prepared in the main kitchen, which is located in the main building. Everyone knows that a kitchen trustee in the main building was diagnosed with the coronavirus. In addition, a cousin of mine worked for Aramark, the outside contractor that provides food services in the main building kitchen. She was diagnosed with coronavirus less than two weeks ago, and is now hospitalized and fighting for her life. The food that I had to work with was carried over from the main building by Aramark employees in plastic carts and containers. Sometimes the Aramark employees had on gloves, sometimes they did not.

5. Yesterday, we just received news that we would have to do more of the food preparation work in the annex because of the outbreak in the main building. However, the food still comes from the main building's kitchen and some of the processing (like slicing of meat) occurs there in the infected kitchen space. I was worried both because infected supplies from the main building pose a fatal risk to me and other trustees, and because if any of us are infected, we will be passing it on to everyone else through the food preparation process.

6. Because I was worried for my safety, I asked to be transferred to an alternate trustee duty, such as cleaning bathrooms or something like that. My request was denied.

7. As a trustee, I was given a single flimsy pair of plastic gloves to wear when I did my work. I was not given a mask. No one detained in the annex has a mask. Accordingly, I passed out food every day to the other people detained in the annex without proper protective equipment.

8. As a medically vulnerable food trustee, I feared for my life from having to handle food that is brought over from the main kitchen and handled there first. When I raised concerns about continuing to do this work in light of the risks to me with Mr. Ketterwell, the supervisor in charge of food distribution, he

told me there was no coronavirus in the main kitchen and I had nothing to worry about. When I told him I knew that wasn't true, he threatened to send me to the main building—where, again, there is known to be an outbreak—if I kept asking questions or requesting protection.

9. This morning, I told the jailors that I was not willing to do the food preparation because I was afraid of getting sick. I was punished by being moved to the main jail building and put into the worst cell, which people call "the Tank." The tank has no beds. There are ten of us in the cell, and we have to sleep on a concrete floor with a thin blanket that is not enough to keep anyone warm. We are all extremely close to each other and are essentially forced to cuddle. We are in Cell R4. The cell immediately next to ours is Cell R5, and that is where people with coronavirus are being held. I could reach out my hand from my cell and reach into cell R5. Everyone in my cell shares one toilet and one sink. There is a bar of soap at the sink, but no way to wash the toilet or sink. When I have to sit on the toilet, I will be sitting on the same dirty, steel toilet as everyone else. When I was placed in this cell, I was not given a mask. We've asked for masks, but haven't received any yet. While I was on the phone with my attorney, a cell mate of mine asked for a grievance form because of the unhygienic conditions here. The guard refused to give him a form and walked away.

10. It is common for the guards in the annex to threaten us with being moved to the main building where the coronavirus outbreak is located. This is particularly common when people ask for facts about the coronavirus. One person who I saw ask a guard for a mask for his own protection was told by a guard that he was being a smart ass and was told to go sit on a shared bench. There are no signs anywhere in the annex providing us with information about coronavirus and we are not able to ask the guards for information because they threaten us when we do.

11. Even the guards in the annex frequently do not have masks and gloves. A few do, but most do not. Mostly, they only use gloves when checking our temperatures. Once a week, the guards conduct "changeout," meaning that our sheets and things are replaced. During changeout, guards search our room. They are not wearing gloves and masks during changeout.

12. I lived in a room called a "quarter," which is basically a barracks-style room. It has 32 beds, approximately 25 of which were occupied. There are four quarters, two on each of two floors, in the western section of the annex. In

my quarter, I had a bunkmate, whose bunk was approximately 3 feet below mine; basically the same as a normal kids' bunk bed. The bunk across from mine was much less than six feet away as well. I could reach out and easily touch the person across from me if they reach out as well. It is impossible to maintain six feet of separation when lying in my bunk and even more impossible during the day when people are up and moving around.

13. Our quarter was not cleaned or disinfected in any way, except a weekly vacuuming. Everyone was responsible for their own bunk area. I tried to keep my area clean, but several guys in my quarter left food lying around or are otherwise dirty. The only disinfectant available in our section of the jail is called DMQ and there are a couple of bottles in the bathroom. We are not allowed to have any in our quarter. So we have no way to clean our bunks, the shared door to our quarter, and other commonly touched surfaces in the quarter. Even the DMQ in the bathroom is highly diluted. I can tell because before the coronavirus hit, the DMQ was a deep yellow color. Now the bottles are nearly clear. A guard told us that DMQ will not kill the coronavirus anyhow. We do not have access to bleach or Clorox to clean any shared spaces or in the bathroom.

14. We request medical attention by completing "kites," which are distributed by the nurses themselves every morning.

15. However, since last week, the nurses stopped making daily rounds to distribute kites in the annex. We then had no way to request medical attention. Luckily, none of the other guys in my quarter had showed symptoms of COVID-19 yet, but if they had, I do not know how we could have gotten treatment. The only way any of us were checked medically is that they took our temperature a few times a day. Before they stopped coming by, a nurse told me that the doctor will not return to the Jail until May.

16. When the nurses stopped coming, a meeting was held in the day room for everyone in our four quarters who regularly receives medication. The nurses provided a 30-day supply of medication to each person and told them to keep track of it themselves. I was keeping my medicine in my locker and hoping it didn't get stolen. I will have no way to replace it if it does. At this meeting, there were approximately 40 people, all of whom had medical conditions that forced us to rely on medication, packed into the day room. If I had put my arms out and spun in a circle, I probably would have hit 4 or 5 other guys.

17. In the western portion of the annex, each floor (so, two quarters) shares a single bathroom. The bathrooms are nasty. Whenever I enter the shower it is filled with clumps of hair, dirt, and dead insects. I try to push this disgusting mess around with a squeegee, but it is impossible to really clean, and the only cleaning fluid available anyway is the diluted DMQ I described above. There are six showerheads, but only two work, and they are right next to each other. There is no privacy between showers and the two that work are closer than 6 feet.

18. There are six toilets in the bathroom. Sometimes there is only one roll of toilet paper for all six toilets, meaning that it has to be passed from toilet to toilet. The only way to clean the toilet is to wipe with DMQ, and there is nothing to use to wipe other than the limited toilet paper.

19. I am lucky when it comes to soap because I had pre-purchased a supply that may last me through the month from the commissary before it closed last week. But now the commissary is now closed. For people who did not pre-purchase soap, the only access they have to soap are shared bars of non-anti-bacterial motel-style soap that are provided in the bathroom. Most of the other guys in my quarter did not have their own supply of soap.

20. After washing your hands in the bathroom, there are no paper towels or other way to dry your hand. Many people shake their hands to dry them, spreading water and germs all over the place.

21. We are not given access to hand sanitizer of any kind.

22. We are not given access to Kleenex.

23. The ventilation in the annex building is awful. I woke up every day with a dry mouth and often with bloody boogers. My bunkmate had a bloody nose every morning. I once saw a guy touch one of the air vents and knock down a solid block of dust that was blocking the vents.

24. Laundry came once a week in the annex. That is when inmates get a uniform change and blankets. However, as a kitchen trustee, I was lucky and got a new uniform every day.

25. Everyone in my quarter was a trustee, so I understand a lot about the trustee system and their duties. The laundry trustees in the annex also do laundry that

comes from the main building, meaning that laundry trustees have had to handle infected dirty linens. Several laundry trustees quit as a result. If a trustee says they want to quit because of the dangers of the job, they are moved to the main building where the coronavirus outbreak is.

26. A guy I know filed a grievance about being forced to work in the kitchen in unsafe conditions. He was told that if he filed a grievance he'd be moved to the tank and his good time credits would be taken away. He filed a grievance anyhow, and was moved to the tank. Now that I, too, have been moved to the tank he is my cellmate.

Under 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

April 10, 2020

/s/Jamaal Cameron
Jamaal Cameron

*consent for signing given telephonically

Due to the COVID-19 crisis, it was not possible to obtain a written signature on the above declaration. I am an attorney admitted to the Eastern District of Michigan. On April 10, 2020, I personally spoke with Jamaal Cameron and read this declaration to him. Mr. Cameron told me that the information in the above declaration is true, and gave me verbal consent to sign on his behalf.

I declare under penalty of perjury, under 28 U.S.C. § 1746, that the foregoing is true and correct.

/s/Philip Mayor
Philip Mayor

Exhibit C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAMAAL CAMERON; RICHARD BRIGGS; RAJ LEE; MICHAEL CAMERON; MATTHEW SAUNDERS, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

MICHAEL BOUCHARD, in his official capacity as Sheriff of Oakland County; CURTIS D. CHILDS, in his official capacity as Commander of Corrective Services; OAKLAND COUNTY, MICHIGAN,

Defendants.

Case No.

DECLARATION OF RICHARD BRIGGS

I, Richard Briggs, declare:

I make this declaration based upon my own personal knowledge, and if called to testify, I could and would do so competently.

1. I am currently being held in Oakland County Jail ("the Jail") pretrial on a $35,000 bond. I have been at the Oakland County Jail since around November 9, except for a period of time around March when I was in the Wayne County Jail under a writ. I am still in jail because I cannot afford to pay my bond. I believe that I contracted the COVID-19 virus during my stay in the Wayne County Jail and then brought it to the Oakland County Jail, where I then infected people in my cell. The conditions in both jails are horrible and do nothing to protect people like me.

2. I am being held in the main building at the Jail in cell B4B. My cell can house 10 people. Eight people sleep in bunks that are lined along each wall, and two sleep in "boats" in the middle of the cell between the two rows of bunks. Boats are plastic cots that they put on the floor. There is no more than five feet between one person and the person in the next bunk. My cell is one of three

cells that form a "block." The three cells in our block are all lined up right next to each other along an aisle. In order to get our meals, we have to leave our cell and walk past the other cells on our block, no more than two or three feet from the people being held in the other cells. Aside from going to get meals or going to video appointments with our attorney or a court, we are not allowed to leave our cell.

3. No one from the jail cleans or disinfects our cell in any way. Our cell has one toilet and one shower. We also have one bucket where we have to wash our clothes, including our dirty underwear. The bucket has not been changed out since I moved into the cell last November.

4. The guards bring around DMQ once a day, which is the only cleaning supply we have for the cell. I can tell that the DMQ has been diluted since the coronavirus hit the jail because it is nearly clear and does not even form suds when you use it to scrub something. We have a brush we can use to clean the sink, and the guards tell us that if we lose it we will not get a new one. We have no way to clean the toilet. The only way I can think of to clean the toilet seat (because we do not want to contaminate the sink brush by using it on the toilet) would be to pour some diluted DMQ on the seat. There is literally no way to use the DMQ to clean surfaces like the door to our cell or our bunks or the phone that we share in our cell. The only way I could imagine doing so is to tear up the one towel we are given for drying after our showers and use it to scrub the surfaces inside the cell, but then we would be penalized for destroying jail property and would not get a new towel.

5. The shower in our cell is filthy. The only way to clean it is to push some DMQ around the floor with a squeegee. The shower curtain is moldy and covered in scum. There is no way to clean it.

6. We are given two or three small motel-size bars of soap per person each week. These bars of soap have to be used both to wash our hands and for showers. It is nowhere near enough to wash our hands frequently. Instead, we have to carefully hoard the soap by only washing our hands a few times a day. We have no way to get more soap, and the commissary has been closed. Many of the guys have strong reactions to this soap because of its high lye content and have to choose between staying clean or suffering serious skin reactions. Previously, guys like this got better soap from the commissary.

7. The guards do not provide us any information about the symptoms of COVID-19. We learn everything we know from channel 7 news or from talking to relatives on the outside.

8. Somewhere around March 28th, I began to feel extremely ill. I was suffering from nausea, loss of smell and taste, and had difficulties breathing. I asked a guard to send a nurse and when the nurse came she took my temperature and did not otherwise examine me in any way. Because my temperature was below 100 degrees, she put me back in the cell and told me I was not suffering from COVID-19 and would not be tested. I asked a guard to send the nurse again when my condition got worse. Another nurse came and told me the same thing. When I told the nurse I was suffering from shortness of breath, the response was "If you are short of breath, how can you be here talking to me?" I asked the guard to give me a grievance form to complain about the lack of sufficient medical care, and the guard refused and asked me if I wanted to be sent down to "the Tank." The Tank is a crowded cell with a concrete floor where they do not even have beds. Because the guard would not give me a grievance form and because I feared being sent to the tank, I did not file a grievance. My condition continued to worsen, and I experienced terrible night chills, diarrhea, and loss of appetite. I never received any treatment other than having my temperature taken.

9. At the time that I got sick, my cell was full with 10 people. Since I got sick, many of the other guys in the cell have also developed a similar illness with similar symptoms. The nurses removed one guy from my cell whose temperature was over 100 degrees. I am finally beginning to feel better, but the rest of my cellmates have had to suffer through their illness without any treatment. To my knowledge, none of us has been given a test for COVID-19. Three other guys have been removed from my cell because they finished their sentence or were otherwise ordered out by a court. Even with 6 people in the cell, it is impossible to keep 6 feet from the other guys because of the proximity of the bunks and the small size of the cell, and because we share a toilet and shower. My bunk, in particular, is right next to the toilet.

10. As I mentioned earlier, the only reason we are allowed to leave our cells other than a video attorney visit or court appointment is to get our food three times a day, and this requires us to pass closely by people detained in other nearby cells. Our food is handed to us by trustees. Up until April 9th, the trustees did not even have masks or gloves. Now they do. I can tell by looking at the masks and gloves that they are not new each day.

11. The nurses in our section pass by three times a day. They do not provide us with any treatment other than checking our temperatures. Once they brought thera-flu to the guys in the cell next to ours, but they did not give us any, even though we are only a few feet away from them and have to pass them every day when we collect our food.

12. We are not given access to hand sanitizer of any kind. When we go to get our meals, I can see into the guard station and see that they have hand sanitizer. I assume they don't give us any because no one thinks inmates deserve the same protections as guards.

13. We are not given access to Kleenex.

14. The ventilation in the annex building is awful. There are three vents in my cell, but none works very well and they are often covered with laundry that people are trying to dry anyhow because our laundry is not changed often enough.

15. Laundry used to be done once a week. However, during the COVID-19 crisis, the guards have sometimes refused to bring us new linens and uniforms on the grounds that there are not enough biobags to put our old ones in. We have had to go well more than two weeks without a change of uniform, linens, or underwear, meaning that we are literally living in our own filth. The only other way to clean our clothes or linens is to scrub them in the shared bucket that we have, which is never replaced and which is also dirty. The only way to clean the bucket is to swirl some diluted DMQ in it.

16. The next hearing in my case does not occur until April 28, and I do not know if my case will go forward at that point either. Many people's hearings have been delayed because of the coronavirus.

Under 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

April 12, 2020

/s/ Richard Briggs
Richard Briggs

*consent for signing given telephonically

Due to the COVID-19 crisis, it was not possible to obtain a written signature on the above declaration. I am an attorney admitted to the Eastern District of Michigan. On April 12, 2020, I personally spoke with Richard Briggs and read this declaration to him. Mr. Briggs told me that the information in the above declaration is true, and gave me verbal consent to sign on his behalf.

I declare under penalty of perjury, under 28 U.S.C. § 1746, that the foregoing is true and correct.

/s/Philip Mayor
Philip Mayor

Exhibit D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAMAAL CAMERON; RICHARD BRIGGS; RAJ LEE; MICHAEL CAMERON; MATTHEW SAUNDERS, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

MICHAEL BOUCHARD, in his official capacity as Sheriff of Oakland County; CURTIS D. CHILDS, in his official capacity as Commander of Corrective Services; OAKLAND COUNTY, MICHIGAN,

Defendants.

Case No.

DECLARATION OF RAJ LEE

I, Raj Lee, declare:

I make this declaration based upon my own personal knowledge, and if called to testify, I could and would do so competently.

1) I am also known as Dylon Lee.

2) I am serving a nine-month sentence in Oakland County Jail. I have been here since November 18, 2019.

3) I was originally housed in the Oakland County Jail Annex. I was a trustee, and was on the west side of the annex in the trustee dorm in the tan zone. There were seventeen people in my zone.

4) Earlier this week, the nurses gave all the inmates who take prescription medication their entire supply of medications for the month. The nurses told the inmates that they were not going to return, and so the inmates were solely responsible for taking their medications on their prescribed dosage schedules. As a result, inmates have thirty days of medication in their possession.

5) In the Annex, there was no testing for COVID-19. Guards walked around with thermometers and held them up to our foreheads. I have observed guards not even reading the thermometers after they do this.

6) It was impossible to practice social distancing in the Annex, because the bunks are approximately two to three feet away from each other. Even if we were able to do so, people would not practice social distancing. Other inmates sit around tables playing cards, and food service employees and deputies are inches away from our food.

7) All the people in the Annex use the same shower. The trustees who clean the showers get one pair of yellow gloves that they must continue to reuse.

8) In the Annex, linen exchange comes once a week. That is the only time that I received a new uniform and new blankets.

9) On April 9, 2020, I was informed that the kitchen in the main jail building was no longer fully operational, due to a COVID-19 outbreak. Supervisor Kettlewell, an officer at Oakland County Jail, called me into the hallway and told me that I now had to help prepare food for the entire jail population. He told me that if I did not comply, I would be sent to the main jail building "with more than a spanking." He further warned that I would not want to go to the main building because of the COVID-19 outbreak there. I believe that he was threatening to deliberately expose me to the virus by moving me to the main jail building.

10) Later that evening, I requested a grievance form from Deputy Carr. Deputy Carr gave me a grievance form, where I described Supervisor Kettlewell's threat to send me to the main jail building, where there was a COVID-19 outbreak, with more than a spanking. I also wrote that social distancing was not being practiced in the Annex. I placed the grievance in my bunk until I could find someone to give it to.

11) On the morning of April 10, 2020, there was a misunderstanding with another deputy regarding kitchen duty. The deputy placed me on twenty-four hour bunk restriction. This meant that I was not permitted to leave my bunk for twenty-four hours. At that time, I asked the deputy who I could give my grievance to.

12) The deputy walked away for approximately five minutes, returned, and told me to "pack [my] shit." At the time, I thought I was being sent to the other side of the Annex.

13) After I had packed, I saw Deputy Campbell sitting at the desk in the bubble, and I handed him my grievance.

14) Deputy Campbell looked at my grievance and then told me to sit on the bench. The bench is where inmates sit when they are being sent to the main jail building.

15) As I was walking to the bench, Deputy Campbell handed my grievance to Supervisor Kettlewell and said, "Here, this has your name on it." Supervisor Kettlewell laughed and walked away for a few minutes.

16) When Supervisor Kettlewell returned, I attempted to explain that I had simply been waiting for a kitchen uniform when the other deputy had accused me of not working. Supervisor Kettlewell would not let me speak, and instead said, "Shut the fuck up. I'm not here to negotiate with you. Take your souvenir and get the fuck out of my jail."

17) The "souvenir" was a ticket that Supervisor Kettlewell handed me while he was talking. It stated that I refused to make sandwiches to supply the jail and east annex. Because of the ticket, I am no longer a trustee. I was then taken to the main jail building.

18) I am now housed in the main jail building in the tanks, which are only meant to be holding cells. As I approached my new cell, I heard the entire cell request a grievance from the deputy, who refused to give it to them.

19) The cell that I was placed into is approximately twelve feet by fifteen feet. There are ten people in it. There are no bunks, and there is no room to sleep. It is even more impossible to practice social distancing in that cell. We receive our meals in the cell, and everyone eats right next to each other. Everyone sleeps on the concrete floor with two blankets. There are rats and bugs on the floor. We have one and a half rolls of toilet paper for ten people. Only a few people have soap.

20) Two people in my cell are coughing and sniffling badly. Nobody is taking their temperatures. There is still no COVID-19 testing.

21) While the cell is separated from the next cell by glass, the only barrier on the fronts of the cells are bars. So, all the inmates in these cells are breathing the same air. This is particularly disturbing to me because the inmates in the cell next to mine were quarantined due to the COVID-19 outbreak. Yet, I could reach my had out of my cell through the bars and into the next cell.

22) The conditions in the next cell were identical to the ones in my cell. Although the inmates were supposed to be quarantined due to potential COVID-19, they were still sleeping on the floor with two blankets. There are ants and bugs on the floor.

23) On April 11, 2020, the inmates in the cell next to mine were moved. Everyone from my cell was immediately moved into that cell without it having been cleaned at all. I know that the cell was not cleaned before we moved into it because I did not see anyone come to clean it, and there is still hair from the previous inmates in it, the floor is wet, and it is apparent that the toilets have not been cleaned. Given the fact that the prior inmates were presumed to have been exposed to COVID-19, I felt that my life was placed at risk.

24) Today, on April 12, 2020, two more inmates were placed into my cell. They informed me that they were previously upstairs in a cell that was quarantined for presumed COVID-19 and that one of the individuals they were quarantined with died last night.

25) Nothing is being done to limit contact between these individuals and others in my cell. I feel that my life is even more at risk now.

26) I have two small children and I am worried about what will happen if I am exposed to COVID-19. I fear that I may die in here.

SIGNATURES FOLLOW ON THE NEXT PAGE

Under 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

April 12, 2020

/s/ Raj Lee
Raj Lee

*consent for signing given telephonically

Due to the COVID-19 crisis, it was not possible to obtain a written signature on the above declaration. I am an attorney admitted to the Eastern District of Michigan. On April 12, 2020, I personally spoke with Raj Lee and read this declaration to him. Raj Lee told me that the information in the above declaration is true, and gave me verbal consent to sign on his behalf.

I declare under penalty of perjury, under 28 U.S.C. § 1746, that the foregoing is true and correct.

/s/ Syeda F. Davidson
Syeda F. Davidson

Exhibit E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAMAAL CAMERON; RICHARD BRIGGS; RAJ LEE; MICHAEL CAMERON; MATTHEW SAUNDERS, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

MICHAEL BOUCHARD, in his official capacity as Sheriff of Oakland County; CURTIS D. CHILDS, in his official capacity as Commander of Corrective Services; OAKLAND COUNTY, MICHIGAN,

Defendants.

Case No.

DECLARATION OF MICHAEL CAMERON

I, Michael Cameron, declare:

I make this declaration based upon my own personal knowledge, and if called to testify, I could and would do so competently.

1) I am 42 years old. I am currently serving my sentence at the Oakland County Jail ("the Jail"). I have been at the Jail since January 23, 2020. I am housed in the Annex.

2) I suffer from hypertension, cardiac disease, and obesity. I had a mild heart attack in 2015, and I still experience chest pains from time to time. I am terrified that if I catch the Coronavirus, I will not be able to fight it off. I worry about dying in the hospital with no family around me. I worry about who will protect my son.

3) There are currently no doctors available to us inside the Jail. The nurses are no longer coming by to do rounds. They made their last round on April 7, 2020 to pass out a 30 day supply of medication to inmates. It is dangerous for many inmates to have 30 days worth of medication in their possession.

4) There are no signs posted about the Coronavirus or how to protect ourselves from getting it, anywhere in the Annex. They haven't made any announcements. The deputies have only told us to wash our hands. But we do not have access to liquid soap or hand sanitizer. Since commissary is closed, we are unable to purchase soap, paper towels, or personal hygiene products. Those who don't have their own soap have to share the non-anti-bacterial small bar soaps that are provided in the bathroom. They want us to wash our hands but everyone is sharing the same bar of soap.

5) My girlfriend told me that she saw on the news that there are 22 confirmed cases of COVID-19 in the main jail building. But when we ask the deputies, they won't give us any information about how many people have been quarantined in the main jail building or how many people are showing symptoms.

6) In my dormitory it is impossible to practice social distancing. Anywhere you go, it's hard not to be next to another person. There are 60 people in my dorm and our bunk beds are spread out roughly three feet apart. There are four zones in the dorm and 16 bunk beds in each zone. There is an older gentleman in the bunk behind me who has been coughing and sneezing the past few days, and I am scared that he may have the virus.

7) Inmates on the cleaning detail clean the dorms in my section of the Annex. They are only given one pair of yellow rubber gloves that they have to reuse. They are not given any masks to wear when they clean. They use a cleaning solution called DMQ that is heavily diluted with water. It's the only thing available to wipe down the floors, tables, and bunks but I don't think it's strong enough to kill any germs. We don't have any access to bleach.

8) There are so many things around us that could transmit infection, because they are constantly touched by other people in here, like the phones, the button to get water from the water cooler, and the stair rails. The phones are only wiped down once a night. The stair rails are only cleaned once every other day. I have not seen the water cooler being sanitized between uses.

9) They shut down hot meal service about a week ago. There were rumors that one of the food service workers employed by Aramark, the outside contractor that provides food services in the main building kitchen, tested positive for COVID-19. I heard from an inmate in the Annex who used to be a kitchen trustee in the main jail building that there were originally 22 kitchen trustees working with the food service

workers in the main kitchen but 11 of them were quarantined after the Aramark employee tested positive for COVID-19.

10) The kitchen in the main jail building has been largely shut down. There are no more hot meals being served. We only get peanut butter jelly, bologna, or salami sandwiches. I'm 6'1 and weigh 311 pounds, I am hungry all the time. I wake up hungry and go to sleep hungry.

11) The meat for the sandwiches is still being delivered to the kitchen in the main jail and sliced there even though that area is infected. The meat is then brought over to the Annex where it's left exposed in the open on non-stainless steel surfaces to be wrapped up in sandwiches.

12) Last night, one of the inmates was taken out of the Annex because he had a high temperature. The deputies gave him a mask and then sent him back to the dorm to take out his stuff. He used to be on the laundry detail and had to handle the laundry from the main jail that was being delivered in biohazard bags. He was worried about handling laundry that he believed was contaminated with COVID-19. When he told the guards that he didn't want to be on the laundry detail anymore, he got threatened that he would be sent back to the main jail if he refused to work the detail. He's now back in the main jail under quarantine because of his high fever.

13) I feel that I should be tested for COVID-19 because of my underlying health conditions and especially after last night since the inmate in the Annex who was removed likely has COVID-19. But I have not been provided with testing.

14) I wish I could be released on tether. I have no way of protecting myself from this fatal virus inside the Jail.

15) In order to file a grievance to protest the conditions inside the Oakland County Jail, I must obtain a grievance form from a guard. I am aware that people around me have been retaliated against for turning in a grievance form. I have seen guards retaliate by putting inmates in the hole, placing them on bunk restriction, or taking away inmates' phone privileges.

Under 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

SIGNATURE FOLLOWS ON THE NEXT PAGE

April 12, 2020

/s/ Michael Cameron
Michael Cameron

*consent for signing given telephonically

Due to the COVID-19 crisis, it was not possible to obtain a written signature on the above declaration. I am an attorney admitted to the District of Columbia. On April 11, 2020, I personally spoke with Michael Cameron and read this declaration to him. Michael Cameron told me that the information in the above declaration is true, and gave me verbal consent to sign on his behalf.

I declare under penalty of perjury, under 28 U.S.C. § 1746, that the foregoing is true and correct.

/s/ Krithika Santhanam
Krithika Santhanam

Exhibit F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAMAAL CAMERON; RICHARD BRIGGS; RAJ LEE; MICHAEL CAMERON; MATTHEW SAUNDERS, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

MICHAEL BOUCHARD, in his official capacity as Sheriff of Oakland County; CURTIS D. CHILDS, in his official capacity as Commander of Corrective Services; OAKLAND COUNTY, MICHIGAN,

Defendants.

Case No.

DECLARATION OF DAVID KUCHARSKI

I, David Kucharski, declare:

I make this declaration based upon my own personal knowledge, and if called to testify, I could and would do so competently.

1) I am currently being held in Oakland County Jail on a 90-day sentence. I have been here since February 11, 2020. My release date would be Friday, April 17, 2020. However, I am also awaiting sentencing on a different charge. My sentencing date was originally scheduled for April 15, 2020, but it has been adjourned to April 29, 2020.

2) I anticipate that my sentencing date will be adjourned again, as I am still waiting for my interview with the probation department. I continue to be held in Oakland County Jail as I await sentencing.

3) I am a laundry trustee and am housed in a trustee dorm, located in the main jail building. The dorm is a ten-person cell. There is no way to practice social distancing in my cell. The bunks in my cell are approximately three feet away from

each other. If an inmate is in his bed, there is no way for him to stay six feet away from another inmate.

4) Inmates request medical attention by completing "kites," which are distributed by the nurses themselves every morning.

5) On or around March 31, 2020, an individual in my cell requested medical attention because he had symptoms of COVID-19. A nurse did not respond to his request, and in the interim, that individual continued to work as a kitchen trustee. On or around April 1, 2020, an officer in the kitchen noted that the individual looked ill. As a result, a nurse came to our cell on April 3, 2020.

6) As a result of the nurse's visit on April 3, 2020, the individual who initially requested a nurse was presumed positive for COVID-19 and was removed from the cell. On April 4, 2020, another individual was removed from the cell because he had a high fever.

7) After the two individuals were removed from the cell, I and the other remaining inmates were moved to the cell that we are currently housed in. There are now a total of four trustees in the cell.

8) I suffer from asthma. During the above-referenced time period, I had shortness of breath, fever, chills, and a dry, sore throat. I told the nurse about my symptoms when she came on Saturday, April 4, 2020. She told me to tell her if my symptoms get worse. She then gave each of the remaining trustees a 7-day supply of Tamiflu and instructed us to take it if we had COVID-19 symptoms. That was the last time that any of us saw a nurse.

9) The nurses are not even making rounds to distribute kites so that we can request medical attention.

10) I told a guard that I am continuing to experience shortness of breath and a sore, dry throat. He told me that I have to wait for a nurse. I responded that the nurses had stopped making rounds. The guard told me there was nothing he could do to help me.

11) I feel that I should be tested for COVID-19 because of my exposure, my symptoms, and my asthma. I have not been provided with testing.

12) I have witnessed other inmates being seen by the nurse and then being placed back into the general population.

13) When inmates leave their cells, they are subjected to physical searches upon return. Although the guards wear gloves to conduct the searches, they do not change gloves between inmates.

14) We are not given access to hand sanitizer of any kind.

15) Soap and toilet paper are to be distributed every Sunday. The soap is a single-use bar that is supposed to last each inmate until the following Sunday. However, the bar never lasts that long, because it is meant for one-time use. On Sunday, April 5, 2020, we were given toilet paper, but no soap. We have not received soap since Sunday, March 29, 2020.

16) Inmates can ordinarily purchase additional soap from the commissary for $1.79. However, the commissary is closed.

17) There is a shower in our cell, but we do not have access to supplies to clean it. We have one spray bottle of an unlabeled pink solution that we are supposed to use to clean the toilet, but we use it to clean everything. We do not know what the solution is.

18) The guards have stopped making as many rounds. They make two rounds in an eight hour shift now.

19) Laundry comes once a week. That is when inmates get a uniform change and blankets.

20) The heat was turned off on or around April 6, 2020. We do not know why.

21) Our meals are sandwiches three times a day. They are brought to us in our cell by other inmates. The other inmates do not have gloves or masks. We know that workers in the kitchen have tested positive for COVID-19.

22) In order to file a grievance for Oakland County Jail's failure to provide me with medical attention, I must obtain a grievance form from a guard. When I asked a guard for a form, he wanted to know why I was filing a grievance. I told him that it was to protest the jail ignoring my COVID-19 related hygiene and medical needs. He then refused to give me a form to file a grievance.

Under 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

SIGNATURE FOLLOWS ON THE NEXT PAGE

April 10, 2020

/s/ David Kucharski
David Kucharski

*consent for signing given telephonically

Due to the COVID-19 crisis, it was not possible to obtain a written signature on the above declaration. I am an attorney admitted to the Eastern District of Michigan. On April 10, 2020, I personally spoke with David Kucharski and read this declaration to him. David Kucharski told me that the information in the above declaration is true, and gave me verbal consent to sign on his behalf.

I declare under penalty of perjury, under 28 U.S.C. § 1746, that the foregoing is true and correct.

/s/ Syeda F. Davidson
Syeda F. Davidson

Exhibit G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAMAAL CAMERON; RICHARD BRIGGS; RAJ LEE; MICHAEL CAMERON; MATTHEW SAUNDERS, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

MICHAEL BOUCHARD, in his official capacity as Sheriff of Oakland County; CURTIS D. CHILDS, in his official capacity as Commander of Corrective Services; OAKLAND COUNTY, MICHIGAN,

Defendants.

Case No.

DECLARATION OF MATTHEW SAUNDERS

I, Matthew Saunders, declare:

I make this declaration based upon my own personal knowledge, and if called to testify, I could and would do so competently.

1) I am currently being held in Oakland County Jail awaiting trial. My trial was scheduled for March 18, 2020, but it has been adjourned. I do not know when it will be rescheduled. I have been here since October 3, 2019.

2) I am housed in a trustee dorm in the main jail building. It is a cell with two bunks on one side and three on the other. The bunks are twelve inches apart, and the top bunk is three feet away from the bottom bunk.

3) Approximately one month ago, I was sick with suspected COVID-19 symptoms. I had body aches, a high fever, and a very sore throat. I told an officer on the midnight shift that I needed to go the medical unit immediately. The officer took me to the medical unit, where my temperature was found to be 103 degrees.

4) I remained in the medical unit, quarantined for only four days in a single-man cell. Nobody would check on me for eight to twelve hours at a time. When they

brought my food, they placed it at the door. I was too sick to move to get it. Instead of bringing it to me, they simply returned and took it away.

5) After the four days, I was returned to my regular cell. I have no access to my account statement, so I do not know whether I was charged for any medical attention that I received.

6) As a trustee, I am tasked with cleaning in the jail. Trustees are being asked to clean items that have been exposed to COVID-19 without appropriate protection. For example, approximately two weeks ago, an inmate with suspected COVID-19 was transported to the hospital in a van. We were made to clean the van, but we were given inappropriate face coverings to do so, as the masks we received were only cloth.

7) On or around March 31, 2020, an individual in my cell requested medical attention because he had symptoms of COVID-19. A nurse came to our cell for the first time on or around April 3, 2020.

8) As a result of the nurse's visit on or around April 3, 2020, the individual who initially requested a nurse was presumed positive for COVID-19 and was removed from the cell. On April 4, 2020, another individual was removed from the cell because he had a high fever.

9) After the two individuals were removed from the cell, I and the other remaining inmates were moved to the cell that we are currently housed in. There are now a total of four trustees in the cell. The nurse gave each of us a 7-day supply of Tamiflu and instructed us to take it if we had COVID-19 symptoms. That was the last time that I saw a nurse.

10) Ordinarily, the nurses distribute "kites" for us to complete so that we can request medical attention. However, I have not even seen a nurse to request a kite, in the event that I should need medical attention.

11) We are not provided with hand sanitizer of any kind. There is a shower in our dorm, but the water does not get hot. Further, we are provided with one bar of soap that is not antibacterial. It is approximately half the size of a hotel bar of soap that we get once a week. It is a single-use bar of soap, so it does not last for an entire week. The last time that we were scheduled to receive soap, we did not. The commissary is closed, so I cannot purchase any. I have not had any soap for approximately one week.

Under 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

April 11, 2020

/s/ Matthew Saunders
Matthew Saunders

*consent for signing given telephonically

Due to the COVID-19 crisis, it was not possible to obtain a written signature on the above declaration. I am an attorney admitted to the Eastern District of Michigan. On April 11, 2020, I personally spoke with Matthew Saunders and read this declaration to him. Matthew Saunders told me that the information in the above declaration is true, and gave me verbal consent to sign on his behalf.

I declare under penalty of perjury, under 28 U.S.C. § 1746, that the foregoing is true and correct.

/s/Syeda F. Davidson
Syeda F. Davidson

Exhibit H

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAMAAL CAMERON; RICHARD BRIGGS; RAJ LEE; MICHAEL CAMERON; MATTHEW SAUNDERS, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

MICHAEL BOUCHARD, in his official capacity as Sheriff of Oakland County; CURTIS D. CHILDS, in his official capacity as Commander of Corrective Services; OAKLAND COUNTY, MICHIGAN,

Defendants.

Case No.

DECLARATION OF JASON ARSINEAU

I, Jason Arsineau, declare:

I make this declaration based upon my own personal knowledge, and if called to testify, I could and would do so competently.

1. I am currently being held in Oakland County Jail ("the Jail") on a short sentence. I have been incarcerated at the Jail since March 16 and am scheduled to be released on April 19. I am a licensed paramedic and am appalled by what I've seen in terms of the Jail's handling of the COVID-19 crisis. We are packed into the Jail like sardines, and the virus has spread like wildfire. I served as a marine for 14 years, so I have lived in some tough conditions. And I have spent short spans of time in other jails too. But what I've seen here is by far the worst I've ever experienced. I would not wish these conditions on my worst enemies. If people could see the way we are being forced to live, they would understand how cruel this is.

2. I am being held in the main building in a cell that can house ten people, using four bunk beds on each side of the room and two plastic beds called "boats" in the middle. When I came to the cell there were 9 of us, but now there are

only 6, because three people have since been removed when they developed fevers. But even with 6 people, it is impossible to maintain six feet of separation. When I sleep, the nearest person is about 3 feet away, and in the daytime there is also no way to keep social distancing. Maybe 4 people could do it in our cell by each keeping in one corner and never moving, but even then it wouldn't be possible when people had to use the shower or toilet.

3. We are not allowed to leave our cell for any reason except to collect our food or go for an attorney visit. In order to get our meals, we have to leave our cell and walk past the other cells on our block. When we do that, we are only one or two feet from the person on each side of us in line, and we pass within 2 or 3 feet of the people in the other cells in the block.

4. We do our best to keep our cell clean and have the cleanest cell on the block as a result. But no one cleans for us, and we do not have any way to keep our cell as clean as it needs to be for us to be safe. The only cleaning agent they give us is DMQ. But we have nothing to use to actually clean the surfaces. There is one toilet brush that is shared by all the cells in our section (dozens of cells), and there is nothing we can use to clean the toilet seat, the phone, and other shared surfaces. The best we can try to do is to rub things a little bit with some DMQ and soggy toilet paper. We have a single sponge that is completely disgusting and filled with mold so is no good for cleaning. We've asked to have it replaced repeatedly and no one will bring us a new one. As a paramedic, I know this exposes us to all sorts of diseases, especially when it comes to the toilet, which could be a source for transmitting things like hepatitis in addition to coronavirus. Also, our shower curtain is filthy with mold and mildew and there is black mold on the ceiling of our shower.

5. Around the end of March, I became ill with what I believe was the coronavirus. My temperature was not particularly high, but I had all of the other symptoms like swollen lymph nodes, body aches and chills, sneezing, coughing, trouble breathing, and loss of taste and smell. At the time I was working as a kitchen trustee in the main building in order to shave a few days off my sentence. I told the main deputy that I was feeling sick and should not be serving food and asked to be moved to a different trustee duty. He told me he would, but the next day I was back on kitchen duty. When I asked to be moved again, he told me "motherfucker, you do what I tell you to do, and you are going to serve food." As a result, I had to serve food to other people in the jail while feeling extremely sick for about four days. We had hairnets and gloves at the time, but no masks. I was sneezing and coughing while serving

and the deputies were yelling at me for it, but I couldn't help it. Finally, after four days, I couldn't even get up out of bed. The deputy dragged me out of my bunk and down the hall and punished me for not "cooperating" by ultimately removing me from trustee duty.

6. When I was serving as a food trustee, they did take our temperature, but as a paramedic, I know that they were doing it wrong. First of all, they checked our temperature right after we had eaten, and it is a basic rule that you have to wait 30 minutes after someone eats to get an accurate temperature reading. Second, they were using a type of temperature probe that is supposed to work by being held close to the patient but not contacting them. However, possibly because the deputies were scared to get close to us, they would just hand the probe to us and many people would stick it on their body or in their mouth, and then it would be reused on another person without being sanitized, turning the temperature probe into a transmission vector.

7. I am finally feeling better after about two weeks of suffering, but have now developed a case of gout. I believe it is because of the diet in here. Every single day, we get a peanut butter and jelly sandwich for breakfast and a sandwich with disgusting bologna or salami for both lunch and dinner. The only remotely nutritious thing we get is two apples a day. I believe the low-quality processed meat to be responsible for my gout; I never have this problem on the outside when I can eat right. So now I am treating myself by drinking lots of water and avoiding the sandwiches—in other words, I am almost starving myself in order to survive for the next week until I get out. I don't believe there is any point in trying to get medical help because the nurses here are useless and won't help even if you can get one's attention which is not easy.

8. Other people in my cell have also gotten sick with COVID-19-like symptoms, probably because they caught it from me. Just like me, they are not removed from the cell unless they have particularly high temperatures, even though everything else suggests they have COVID-19. The conditions in our cell make it hard to get better. For example, several nights last week the temperatures felt like they were in the 50s all night and we were all shivering all night. Some of my cellmates who had seemed like they were recovering got worse after that, probably because their immune system was further compromised by the cold.

9. The toilet in one of the neighboring cells overflowed just a couple of nights ago. The guys in the cell had to use their own blankets to soak up the water to prevent it from flowing into other cells, including ours. Those guys were given a broom and a mop to clean up the water and some DMQ but no special supplies to clean up and no one came to fix the toilet, even though it has overflowed multiple times.

10. There are mice in our cell block too. The other night, someone in the neighboring cell killed a mouse and put it in the corridor. When the deputies came by in the morning, they saw the mouse, commented on it, and then proceeded to hand out our food right next to it. They did not clean up the mouse or call a trustee to clean it up before serving food.

11. The commissary has been closed for about two weeks now, so we have no way to get hygiene products other than the small bars of soap that are sometimes distributed. I ran out of toothpaste and had to beg guards multiple times to get some more. When they finally brought me some, it was a tiny container big enough for about two days. When it ran out, I had to beg again for more, and I went over three days before anyone brought me more toothpaste.

12. About four days ago they started offering incarcerated people facemasks for the first time. However, the facemasks are breathable masks designed to keep out particulate matter, not medical masks. They will not protect anyone from getting coronavirus, although they do block sneezes and coughs. In any event, two days later they stopped offering us facemasks anymore.

13. We are not given access to hand sanitizer of any kind.

14. We are not given access to Kleenex.

15. We are not given access to Clorox or any other kind of bleach for cleaning.

16. In our cell there is no daylight and we are not allowed outside. It is hard to know what time of day it is, and it is like being locked in a closet. I think this is cruel and unusual, and more like torture. I've never seen conditions like this before. Some of us may have done things wrong to get here, but no one should ever be treated like this. I wish people on the outside understood what we are going through in here. I am suffering so much, but am just trying to get through, knowing that I will get out in one more week. As soon as I get

out, I will be going back to my job as a paramedic where my job is waiting for me. I can't wait get into the fight against the coronavirus along with my colleagues in the healthcare industry and helping others instead of rotting in this terrible place.

Under 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

April 13, 2020

/s/Jason Arsineau
Jason Arsineau

*consent for signing given telephonically

Due to the COVID-19 crisis, it was not possible to obtain a written signature on the above declaration. I am an attorney admitted to the Eastern District of Michigan. On April 13, 2020, I personally spoke with Jason Arsineau and read this declaration to him. Mr. Arsineau told me that the information in the above declaration is true, and gave me verbal consent to sign on his behalf.

I declare under penalty of perjury, under 28 U.S.C. § 1746, that the foregoing is true and correct.

/s/Philip Mayor
Philip Mayor

Exhibit I

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAMAAL CAMERON; RICHARD BRIGGS; RAJ LEE; MICHAEL CAMERON; MATTHEW SAUNDERS, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

MICHAEL BOUCHARD, in his official capacity as Sheriff of Oakland County; CURTIS D. CHILDS, in his official capacity as Commander of Corrective Services; OAKLAND COUNTY, MICHIGAN,

Defendants.

Case No.

DECLARATION OF MICHAEL BATES

I, Michael Bates, declare:

I make this declaration based upon my own personal knowledge, and if called to testify, I could and would do so competently.

1) I am currently incarcerated at the Oakland County Jail ("the Jail"). I have been in Jail since October 30, 2019.

2) When I first arrived at the Jail, I was housed in the Annex. I was moved to the main jail building on March 9, 2020. I was housed in the main jail building from March 9, 2020 until early April when I was moved back to the Annex.

3) In the main jail building, I was housed in cellblock H2, which has 32 cell pods with two inmates per cell. The first two confirmed cases of COVID-19 at the Jail were in the main jail building on my cellblock.

4) The first inmate who contracted COVID-19 was housed one cell down from me. On March 23, 2020, he and I were sitting side by side in the visitation room. The visitation room has two television kiosks with two chairs roughly a foot apart

from one another. Shortly after we left the visitation room, he asked a deputy if he could see a nurse because he had been feeling unwell for a few days. He was taken to the medical ward and did not return. At that time, I had no idea that he had later tested positive for COVID-19.

5) On March 24, 2020, cellbock H2 went on lockdown for 24 hours. At first I thought they may have locked us down because a fight had broken out or some other issue. The next day in the afternoon, the deputies told us lockdown would be extended for 48 hours. The deputies did not explain why we were being placed on lockdown.

6) After the 48 hours, we continued being on lockdown for approximately 10 days. During lockdown, we started seeing some of the guards wear masks, teachers stopped coming in for classes, the Jail shut down personal visits, food trays started being delivered directly to our cells, and commissary got shut down. But no one shared any information with us. We kept asking the guards why we were on lockdown if the virus wasn't in the Jail. It felt like they were trying to keep us from finding out that there were in fact confirmed cases of COVID-19 in the Jail.

7) The second inmate who contracted COVID-19 was housed in the pod across from my cell. I could see into his cell during lockdown, and it was clear that he was unwell. At first I thought that he was experiencing drug withdrawals. He was wrapped up in his blanket inside his cell and shivering. He looked sluggish and weak. He was eventually taken to the medical ward and did not return. We later found out that he had also tested positive for COVID-19.

8) We started seeing reports about the Coronavirus on channel 7 news, but when we asked the deputies if anyone in the Jail had tested positive for Coronavirus they told us there were no confirmed cases in the Jail.

9) I am very worried about getting the Coronavirus because we were all exposed to both inmates before they were sent to the medical ward. I have no idea how long either of them had been experiencing symptoms. We all share showers, toilets, and sinks in the cellblock. Common surfaces in the cellblock are touched by every inmate. We were eating meals together with these two inmates in the dayroom where tables are set up only a few feet apart from one another, and food is always being passed around and shared among people.

10) There are no warning signs posted about COVID-19 or how we should be protecting ourselves, anywhere I have seen in the Jail. We don't have cleaning supplies to disinfect our cells. We do not have access to bleach. We are not provided with antibacterial soap or hand sanitizer.

11) I was moved back to the Annex on April 5, 2020. I work as a trustee and am on laundry detail. All of the laundry comes to us from the main jail where there are confirmed cases of COVID-19.

12) Some of the laundry now comes in biohazard bags. We Inmates on the laundry detail are scared to work with these bags, but anyone who refuses to work with these bags is threatened to be sent back to the main jail. They have no warning signs posted about the Coronavirus but they do have signs posted saying that if you deny detail you will be sent back to the main jail where everyone knows there are confirmed cases of Covid-19.

13) In order to file a grievance to protest the conditions inside the Oakland County Jail, I must obtain a grievance form from a guard. I am worried about retaliation if I ask for a grievance form from a guard. I have seen guards retaliate when inmates try to obtain a grievance form, by putting inmates in the hole, placing them on bunk restriction, or taking away inmates phone privileges.

Under 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

SIGNATURE FOLLOWS ON THE NEXT PAGE

April 12, 2020

/s/ Michael Bates
Michael Bates

*consent for signing given telephonically

Due to the COVID-19 crisis, it was not possible to obtain a written signature on the above declaration. I am an attorney admitted to the District of Columbia. On April 12, 2020, I personally spoke with Michael Bates and read this declaration to him.

Michael Bates told me that the information in the above declaration is true, and gave me verbal consent to sign on his behalf.

I declare under penalty of perjury, under 28 U.S.C. § 1746, that the foregoing is true and correct.

/s/ Krithika Santhanam
Krithika Santhanam

Exhibit J

2020 WL 1547459
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

Gaspar AVENDAÑO HERNANDEZ, Petitioner,
v.
Thomas DECKER et al., Respondents.

20-CV-1589 (JPO)
|
Signed April 1, 2020
|
Filed 03/31/2020

Attorneys and Law Firms

Alina Das, Washington Square Legal Services, Inc., New York, NY, Hannah McCrea, Brooklyn Defender Services, Paige Austin, Make the Road New York, Brooklyn, NY, for Petitioner.

Michael James Byars, U.S. Attorney's Office, New York, NY, for Respondents.

OPINION AND ORDER

J. PAUL OETKEN, District Judge:

***1** In this action, a petition for a writ of habeas corpus under 28 U.S.C. § 2241, Gaspar Avendaño Hernandez seeks relief from his detention by U.S. Immigration and Customs Enforcement. Avendaño Hernandez has filed a letter motion to compel Respondents to release him pursuant to *Mapp v. Reno*, 241 F.3d 221 (2d Cir. 2001). (Dkt. No. 9.) For the reasons that follow, the motion is granted.

I. Background

The following facts are taken from the petition for writ of habeas corpus, as amended, and are essentially undisputed for purposes of this motion. (*See* Dkt. No. 12 ("Pet.").)

Petitioner Gaspar Avendaño Hernandez is a resident of Brooklyn, New York. (Pet. ¶ 1.) On February 6, 2020, he was arrested by U.S. Immigration and Customs Enforcement, or ICE, and detained at the Hudson County Correction Facility. (Pet. ¶¶ 15, 45.) On February 24, 2020, Petitioner filed a habeas petition asserting four claims — including, most relevantly, a claim that he is being denied adequate medical care. (Dkt. No. 1 ¶ 110–15.) On March 30, 2020, Petitioner filed an amended habeas petition asserting the same claim in the renewed context of the COVID-19 epidemic. (*See* Pet. ¶¶ 119–26)

Petitioner suffers from several severe medical conditions. During Petitioner's arrest, ICE officers tased Petitioner between fifteen and twenty times in the legs and back. (Pet. ¶¶ 18–19.) He subsequently received medical treatment at Maimonides Medical Center, at which he was diagnosed with a right bundle branch block, or "an interruption or alteration of the electrical conduction of the heart." (Pet. ¶ 33.) He was also diagnosed with rhabdomyolysis, "a condition in which breakdown of muscle fiber release[s] protein into the blood," potentially resulting in "damage to the kidneys, dangerous electrolyte abnormalities, [or] death." (Pet. ¶ 34.) Petitioner was instructed to obtain "follow-up care with a cardiac specialist," including "an echocardiogram and electrocardiogram." (Pet. ¶ 121.) Petitioner has not yet received this follow-up care during his detention at Hudson County Correction Facility. (Pet. ¶ 122.)

On March 22, 2020, the first case of COVID-19 was reported at Hudson County Correction Facility. (Pet. ¶ 90.) Petitioner faces an increased risk of death from COVID-19 due to his underlying medical conditions. (Pet. ¶¶ 94, 97.) Hudson County Correction Facility has implemented some measures to slow the spread of COVID-19 in the facility (Dkt. No. 11 at 4); however, "[s]ocial distancing is impossible." (Pet. ¶ 92.)

On March 23, 2020, Petitioner filed a motion seeking interim release pending disposition of the habeas petition under *Mapp v. Reno*, 241 F.3d 221 (2d Cir. 2001). The motion argues that Petitioner is "particularly vulnerable to COVID-19" and that the Hudson County Correction Facility cannot "respond adequately" to the health risks posed by the disease. (Dkt. No. 9 at 1–3.)

II. Legal Standard

"[T]he federal courts have inherent authority to admit to

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

bail individuals properly within their jurisdiction." *Mapp v. Reno*, 241 F.3d 221, 226 (2d Cir. 2001). This power "is a limited one, to be exercised in special cases only." *Id.* To obtain relief, "[t]he petitioner must demonstrate that the habeas petition raise[s] substantial claims and that extraordinary circumstances exist[ ] that make the grant of bail necessary to make the habeas remedy effective." *Id.* (second alteration in original) (quoting *Grune v. Coughlin*, 913 F.2d 41, 44 (2d Cir. 1990)).

III. Discussion

***2** To obtain interim release under *Mapp v. Reno*, Petitioner must demonstrate both that his petition raises "substantial" claims and that "extraordinary circumstances" exist. Each requirement is discussed in turn.

A. Substantial Claims

Among other claims, the petition for a writ of habeas corpus asserts a claim of deliberate indifferent to Petitioner's medical needs while in detention. (Pet. ¶¶ 119–26.) Civil detainees enjoy the right to be free from deliberate indifference to their serious medical needs. *See Charles v. Orange County*, 925 F.3d 73, 85–86 (2d Cir. 2019). For federal detainees, the relevant guarantee is the Fifth Amendment's Due Process Clause. *See id.* That guarantee encompasses the rights of Petitioner, as the Due Process Clause 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).

Deliberate indifference requires a two-part showing. First, Petitioner must establish that he has a serious, unmet medical need. *See Charles*, 925 F.3d at 86. Second, Petitioner must establish that Respondents acted with deliberate indifference to that need.

Here, the first requirement is easily established. A serious medical need is one that "may produce death, degeneration, or extreme pain." *Id.* (quoting *Hathaway v. Coughlin*, 99 F.3d 550, 553 (2d Cir. 1996)). Petitioner's rhabdomyolysis, if left untreated, "can lead to kidney damage and death." (Pet. ¶ 121.) Relatedly, Petitioner was also diagnosed with an abnormality in his cardiac electrical conduction. (*Id.*) Standing alone, these conditions already present a risk of "death, degeneration, or extreme pain." *Charles*, 925 F.3d at 86 (quoting *Hathaway*, 99 F.3d at 553). But in the context of the COVID-19 epidemic, these conditions render Petitioner peculiarly at risk of serious injury or death in the event he contracts COVID-19. (Pet. ¶ 97; *see also* Dkt. No. 12-2 at 16 (enumerating "high-risk" categories for COVID-19).) Notably, Respondents do not appear to dispute that Petitioner's medical conditions place him in a high-risk category for experiencing serious injury or death from COVID-19. (Dkt. No. 11 at 4.)

Furthermore, Petitioner's medical need remains unmet. The record indicates that Respondents have not taken any action to address the particular risks that COVID-19 poses to high-risk individuals like Petitioner. Rather, Respondents cite only generalized "proactive measures to prevent detainees within its care from contracting and spreading the virus," including

> modifying the intake process for all incoming detainees and pre-screening of all newly admitted detainees prior to admission to the facility ...; suspending all contact and non-contact visits at the jail; dramatically increasing sanitation frequency in housing units at the jail; and screening of all employees and vendors who enter the jail.

(Dkt. No. 11 at 4.) These measures, however, are unresponsive to Petitioner's specific medical need — the risk posed by COVID-19 to high-risk individuals in particular. *See, e.g.*, *Coronel v. Decker*, No. 20-CV-2472, 2020 WL 1487274, at *5 (S.D.N.Y. Mar. 27, 2020) ("[The government] has not isolated these high-risk individuals. It has not created special safety or hygiene protocols for them or for staff interacting with them to follow.... And of course, it has not released [Petitioner], even though doing so is within the agency's sound discretion."). Thus, Petitioner has met the first requirement to state a claim for deliberate indifference.

***3** The second requirement is also met. To establish that Respondents acted with deliberate indifference, Petitioner "can allege either that [they] *knew*" or that they "*should have known*" that failing to provide the complained of medical treatment would pose a substantial risk to his health." *Charles*, 925 F.3d at 87. As an initial matter, Petitioner has established that Respondents had actual knowledge of his serious, unmet medical condition. On

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

March 24, 2020, Petitioner submitted a letter to ICE detailing his medical needs and asserting, in particular, his heightened risk for serious harm or death from COVID-19 due to his underlying heart conditions. (Dkt. No. 12-2 at 59.) Respondents are therefore aware of Petitioner's medical condition and the particularized risk posed to them by COVID-19.

Despite this knowledge, Respondents "can point to *no specific action* that [they have taken] in direct response to this serious, unmet medical need." *Coronel*, 2020 WL 1487274, at *5. Respondents cite "proactive measures" like modification of the intake process and increasing sanitation frequency. (Dkt. No. 11 at 4.) But even if such measures sufficed to meet the medical needs of ordinary detainees, those measures "do nothing to alleviate the *specific, serious,* and *unmet* medical needs of ... high-risk [detainees]." *Coronel*, 2020 WL 1487274, at *5; *see Johnson v. Wright*, 412 F.3d 398, 404 (2d Cir. 2005) (holding that even if a policy were "generally justifiable ... the application of the policy in [a particular] case could ... amount[ ] to deliberate indifference"). Nor is it clear that these measures are "generally justifiable." As courts in this Circuit have concluded, such measures are "patently insufficient" to protect *any* detainees from infection absent "enforcement of requisite social distancing." *Basank v. Decker*, No. 20-CV-2518, 2020 WL 1481503, at *5 (S.D.N.Y. Mar. 26, 2020); *see also Coronel*, 2020 WL 1487274, at *5 (noting that "[n]one of these steps are adequate to mitigate the transmission of the virus when there's already documented community-based transmission, and spread of coronavirus from staff, vendors, or contractors" (alteration in original)).

In short, Respondents had actual knowledge of Petitioner's serious, unmet medical need and did nothing in response. The Court concludes that such facts state a substantial claim for deliberate indifference. *See Coronel*, 2020 WL 1487274, at *6 (concluding petitioners were likely to succeed on deliberate-indifference claim because the government failed to "introduce[ ] any evidence of actions it took in response to the particular risk COVID-19 poses to high-risk individuals like the Petitioners"); *Basank*, 2020 WL 1481503, at *5 (concluding petitioners were likely to succeed on deliberate-indifference-claim because the government "could [not] provide the Court with any information about steps taken to protect high-risk detainees like Petitioners").

B. Extraordinary Circumstances

Release under *Mapp* is appropriate only if "extraordinary circumstances ... make [immediately release] necessary to make the habeas remedy effective." *Mapp*, 241 F.3d at 230 (quoting *Iuteri v. Nardoza*, 662 F.2d 159, 161 (2d Cir. 1981)). "Severe health issues" are "the prototypical ... case of extraordinary circumstances that justify release pending adjudication of habeas." *Coronel*, 2020 WL 1487274, at *9. Such is the case here. Petitioner argues that he is being subject to unconstitutional conditions of confinement — specifically, continued risk of exposure to COVID-19 — and he seeks release so that he can avoid infection. "If Petitioner[ ] were to remain detained, [he] would face a significant risk that [he] would contract COVID-19 — the very outcome [he] seek[s] to avoid." *Id.* Accordingly, immediate release is necessary to "make the habeas remedy effective." *Mapp*, 241 F.3d at 230 (quoting *Iuteri*, 662 F.2d at 161).

IV. Conclusion

***4** For the foregoing reasons, Petitioner's motion to compel immediate release pending resolution of his habeas petition is GRANTED. The Court hereby orders Respondents to immediately release Petitioner on reasonable conditions. The parties are ordered to meet and confer and to propose reasonable bond conditions no later than April 1, 2020, at 1:00 p.m.

The Clerk of Court is directed to close the motion at Docket Number 9.

SO ORDERED.

All Citations

Slip Copy, 2020 WL 1547459

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
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.

20 Civ. 2518 (AT)

MEMORANDUM AND ORDER

ANALISA TORRES, District Judge:

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

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 Envtl. 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

United States District Court
Central District of California
Western Division

ENRIQUE FRANCISCO HERNANDEZ, Petitioner, v. CHAD T. WOLF, *et al.*, Respondents.	ED CV 20-00617 TJH (KSx) **Temporary Restraining Order and Order to Show Cause** [2]

The Court has considered Petitioner Enrique Francisco Hernandez's application for a temporary restraining order, together with the moving and opposing papers.

Hernandez, now 43-years-old, suffers from multiple medical ailments, including hypertension and other cardiovascular issues. Hernandez is, currently, being detained at the Adelanto Detention Center ["Adelanto"], in San Bernardino County. San Bernardino County is within the Central District of California.

Hernandez filed this case as a petition for a writ of *habeas corpus*. Hernandez is a civil detainee, having been arrested by officers from the United States Department of Homeland Security's ["DHS"] Bureau of Immigration and Customs Enforcement

["BICE"] on May 23, 2019, and, then placed into removal proceedings, with the service of a Notice to Appear at the time of his arrest. Hernandez's removal proceedings are pursuant to the Immigration and Nationality Act ["INA"] § 212(a)(6)(A)(i)(I), for being an alien present in the United States without being admitted or paroled.

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

Hernandez, a citizen of Mexico, has, apparently, resided in the United States for almost thirty years. His life partner is Maria Victoria de Ortiz, a lawful permanent resident of the United States who resides in Altadena, California. Together, they have a 12-year-old daughter, who is a United States citizen.

Hernandez has a history of various criminal charges and convictions. Of significant note is that all of Hernandez's convictions were for infractions or misdemeanors. He has never been convicted of a felony. Hernandez has been convicted of the following:

Date	Offense	Sentence
1997	Hit and Run with Property Damage, Cal. Veh. Code § 20002(a)	40 days in jail and 36 months probation
2014	Theft, Cal. Penal Code § 484(a)	1 day in jail and 36 months probation
2016	Driving Without a Valid License, Cal. Veh. Code § 12500(a)	Fine
2017	Possession of a Controlled Substance, Cal. Health and Safety Code § 11377	Probation extension

2017	Petty Theft, Cal. Penal Code § 490.2	60 days in jail and 36 months probation
2017	Trespassing, Cal. Penal Code § 602(m)	4 days in jail and 36 months probation
2018	Possession of a Controlled Substance, Cal. Health and Safety Code § 11377	30 days in jail and 36 months probation
2019	Possession of Burglary Tools, Cal. Penal Code § 466; Shoplifting, Cal. Penal Code § 602(m)459.5; and Driving Without a License, Cal. Veh. Code § 12500(a)	36 months probation

In response to Hernandez's May 15, 2019, convictions in Glendale, California, BICE officers arrested him on May 23, 2019. Around June 12, 2019, Hernandez had his first bond hearing, where bond was denied after an immigration judge found that he was a flight risk due to his "multiple failures to appear in the Superior Court of California and his lack of ties to the community. The immigration judge, also, found that Hernandez was a mandatory detainee under INA § 236(c), which is codified as 8 U.S.C. § 1226(c).

In reviewing Hernandez's rap sheet, provided by the Government, this Court noted that Hernandez was, indeed, charged on four separate occasions – in 1997, 2003, 2006 and 2017 – with failing to appear in violation of Cal. Veh. Code § 40508(A). But, the Court, also, noted that each of those four charges were, indeed, dismissed, with one dismissed, specifically, in the furtherance of justice. So, it is noteworthy that immigration judges considered dismissed charges as a basis for the conclusion that Hernandez was a flight risk. It is, also, noteworthy that an immigration judge concluded that Hernandez had a lack of ties to the community even though his life partner and daughter reside in Altadena, California. But, those issues are not directly before this Court.

Regardless, on November 27, 2019, an immigration judge denied Hernandez's

applications for asylum, withholding of removal and protection under the Convention against Torture. On December 2, 2019, Hernandez had a *Rodriguez* bond hearing, at which bond was denied because the immigration judge lacked jurisdiction. On December 20, 2019, Hernandez filed an appeal with the Board of Immigration Appeals ["BIA"]. On January 14, 2020, an immigration judge denied Hernandez's request for a change in custody, finding that he was a flight risk who had a removal order, and, also, finding that Hernandez had multiple failures to appear. Hernandez's appeal with the BIA remains pending.

On March 4, 2020, the State of California declared a state of emergency in response to the coronavirus and the resulting COVID-19 disease, which attacks the respiratory system, thereby making Hernandez particularly vulnerable given his history of asthma. On March 10, 2020, San Bernardino County followed suit and declared a state of emergency. On March 11, 2020, the World Health Organization ["WHO"] declared COVID-19 to be a global pandemic. On March 13, 2020, President Donald J. Trump formally acknowledged and declared a national emergency in response to WHO's pandemic declaration.

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

According to the United States Centers for Disease Control and Prevention, the coronavirus is spread mainly through person-to-person contact. More specifically, the coronavirus is spread between people who are in close contact – within about 6 feet –

with one another through respiratory droplets produced when an infected person coughs or sneezes. The droplets can land in the mouths or noses, or can be inhaled into the lungs, of people who are within about 6 feet of the infected person. Moreover, studies have established that the coronavirus can survive up to three days on various surfaces.

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

Because of the highly contagious nature of the coronavirus and the, relatively high, mortality rate of COVID-19, the disease can spread uncontrollably with devastating results in a crowded, closed facility, such as an immigration detention center.

The Court will take judicial notice of the following facts, as set forth in the temporary retraining order issued by this Court on March 27, 2020, in *Castillo v. Barr*, CV 20-00605 TJH. At Adelanto, a holding area can contain 60 to 70 detainees, with a large common area and dormitory-type sleeping rooms housing four or six detainees with shared sinks, toilets and showers. Guards regularly rotate through the various holding areas several times a day. At meal times – three times a day – the 60 to 70 detainees in each holding area line up together, sometimes only inches apart, in the cafeteria. The guards, detainees and cafeteria workers do not regularly wear gloves or masks to prevent the spread of the coronavirus. While detainees have access to gloves, there is no requirement that they wear them. Detainees do not have access to masks or hand sanitizer – though thorough hand washing could be more effective than hand

sanitizers at preventing the spread of the coronavirus.

Last week, the first BICE detainee was confirmed to have been infected with COVID-19 in New Jersey at the Bergin County Jail, a BICE detention facility. The week before last, a correctional officer at the Bergin County Jail was, also, confirmed to have been infected. As of the date of this order, two additional ICE detainees at the Bergin County Jail were confirmed to have been infected.

On March 26, 2020, Judge Analisa Torres of the United States District Court for the Southern District of New York issued an order releasing certain immigration detainees, stating the following:

> 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 diseases 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 County, 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).

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

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

On March 23, 2020, Hernandez filed a petition for a writ of *habeas corpus*, pursuant to 28 U.S.C. § 2241. Hernandez's petition sets forth one claim – in light of the recent COVID-19 pandemic, the conditions of his confinement are, now, unconstitutional.

Hernandez's *habeas* petition and the relief it seeks from this Court are not barred by the fact that he might be subject to mandatory detention pursuant to INA § 236(c). *See Singh v. Holder*, 638 F.3d 1196, 1202 (9th Cir. 2011). While the INA does restrict jurisdiction in federal courts for certain claims, it does not restrict *habeas* jurisdiction for petitions that raise constitutional claims. *See Singh*, 638 F.3d at 1202.

Hernandez, now, moves for a temporary restraining order for his immediate release from Adelanto.

Hernandez is entitled to a temporary restraining order if he shows: (1) A likelihood of success on the merits; (2) That he is likely to suffer irreparable harm in the absence of relief; (3) The balance of equities tip in his favor; and (4) An injunction is in the public's interest. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Under the Ninth Circuit's sliding scale approach, a stronger showing of one

element may offset a weaker showing of another. *See Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012). Accordingly, Hernandez is entitled to a temporary restraining order if "serious questions going to the merits [are] raised and the balance of hardships tips sharply in [his] favor." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

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

When the Government takes a person into custody and detains him against his will, the Constitution imposes upon the Government a duty to assume responsibility for that detainee's safety and general well being. *See Helling v. McKinney*, 509 U.S. 25, 32 (1993). Under the Eighth Amendment, the Government must provide criminal detainees with basic human needs, including reasonable safety. *Helling*, 509 U.S. at 32. The Government violates the Eighth Amendment if it confines a criminal detainee in unsafe conditions. *See Helling*, 509 U.S. at 33. Moreover, the Government may not "ignore a condition of confinement that is sure or very likely to cause serious illness." *See Helling*, 509 U.S. at 32.

A civil detainee's constitutional rights are violated if a condition of his confinement places him at substantial risk of suffering serious harm, such as the harm caused by a pandemic. *See Smith v, Wash.*, 781 F. App'x. 595, 588 (9th Cir. 2019). At a minimum, here, the Government owes a duty to Hernandez, as a civil immigration detainee, to reasonably abate known risks. *See Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016). Inadequate health and safety measures at a detention center

cause cognizable harm to every detainee at that center. *See Parsons v. Ryan*, 754 F.3d 657, 679 (9th Cir. 2014).

Here, Hernandez argued that the conditions at Adelanto expose him to a substantial risk of suffering serious harm – increasing his exposure to or contracting COVID-19. When the Government detains a person, thereby taking custody of that person, it creates a special relationship wherein the Government assumes responsibility for that detainee's safety and well-being. *See, e.g., Henry A. v. Willden*, 678 F.3d 991, 998 (9th Cir. 2012). If the Government fails to provide for a detainee's basic human needs, including medical care and reasonable safety, the Due Process Clause is violated. *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989). Indeed, the Due Process Clause mandates that civil immigration detainees are entitled to more than minimal human necessities. *See Jones v. Blanas*, 393 F.3d 918, 931 (9th Cir. 2004). At a minimum, here, the Government owes a duty to Hernandez, as a civil immigration detainee, to reasonably abate known risks. *See Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016). Inadequate health and safety measures at a detention center cause cognizable harm to every detainee at that center. *See Parsons v. Ryan*, 754 F.3d 657, 679 (9th Cir. 2014).

In its opposition brief, the Government set forth the United States Attorney General's discretionary right to detain an alien in removal proceedings prior to a final order of removal. *See* 8 U.S.C. § 1226. 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, a BICE officer must assesses 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." 8 C.F.R. § 236.1(c)(8). If the BICE officer determines that release, with or without bond, is not appropriate, then the person may appeal to an Immigration Judge. 8 C.F.R. §§ 236.1(d)(1), 1003.19, 1236.1(d)(1). The Immigration Judge's decision, then, would be appealable to the

Board of Immigration Appeals. 8 C.F.R. §§ 1003.1(b)(7), 1003.19(f), 1003.38.

However, because Hernandez, here, has asserted a claim for violations of his Fifth Amendment substantive due process rights, and those claims exceed the jurisdictional limits of the Immigration Court and the Board of Immigration Appeals, he need not first exhaust his administrative remedies. *Garcia-Ramirez v. Gonzales*, 423 F.3d 935, 938 (9th Cir. 2005).

The Government argued that Hernandez lacks standing because he cannot establish that he would suffer a concrete, non-hypothetical injury absent a temporary restraining order in that his likelihood of contracting COVID-19 is speculative. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

However, it is clear that "[a] remedy for unsafe conditions need not await a tragic event." *Helling*, 509 U.S. at 33. The Government cannot be "deliberately indifferent to the exposure of [prisoners] to a serious, communicable disease on the ground that the complaining [prisoner] shows no serious current symptoms." *Helling*, 509 U.S. at 33. "That the Eighth Amendment protects against future harm to inmates is not a novel proposition." *Helling*, 509 U.S. at 33. The Supreme Court clearly stated that "… the Eighth Amendment protects [prisoners] against sufficiently imminent dangers as well as current unnecessary and wanton infliction of pain and suffering…" *Helling*, 509 U.S. at 33. Indeed, the Court concluded that where prisoners in punitive isolation were crowded into cells and some of them had infectious maladies, "… 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." *Helling*, 509 U.S. at 33. Civil detainees are entitled to greater liberty protections than individuals detained under criminal processes. *See Jones*, 393 F.3d at 932.

In its *amicus* brief filed in *Helling*, the Government stated that it "… recognizes that there may be situations in which exposure to toxic or similar substances would present a risk of sufficient likelihood or magnitude – and in which there is a sufficiently

broad consensus that exposure of *anyone* to the substance should therefore be prevented – that the [Eighth] [A]mendment's protection would be available even though the effects of exposure might not be manifested for some time." *Helling*, 509 U.S. at 34. The Government, here, cannot say, with any degree of certainty, that no one – staff or detainee – at Adelanto has not been, or will not be, infected with the coronavirus. The science is well established – infected, asymptomatic carriers of the coronavirus are highly contagious. Moreover, Hernandez, presently, is suffering from a condition of confinement that takes away, *inter alia*, his ability to socially distance. The Government cannot be deliberately indifferent to Hernandez's potential exposure to a serious, communicable disease on the ground that he is not, now, infected or showing current symptoms. *See Helling*, 509 U.S. at 32.

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

Under the Due Process Clause, a civil detainee cannot be subject to the current conditions of confinement at Adelanto. The Supreme Court has acknowledged that it has "… great difficulty agreeing that prison authorities may not be deliberately indifferent to an inmate's current health problems but may 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." *Helling*, 509 U.S. at 33

The Government, here, argued that Hernandez may not challenge the conditions of his confinement through a *habeas* petition. Rather, according to the Government, he may proceed only by way of a civil claim under 42 U.S.C. § 1983, and that the only appropriate remedies under § 1983 are a judicially mandated change to the conditions of confinement and money damages. The Government's argument is misplaced.

In discussing the relationship between a *habeas* petition and a § 1983 claim, the Supreme Court explained that a *habeas* petition is the appropriate avenue for a detainee to attack the validity of the fact, or length, of confinement, with a potential remedy of immediate release; whereas, a § 1983 claim is the appropriate avenue for a detainee to attack something other than the fact, or length, of confinement, with a potential remedy of a policy change and/or money damages. *See Prieser v. Rodriguez*, 441 U.S. 475, 494 (1973). Typically, conditions of confinement claims are raised by criminal detainees while serving their criminal sentences. Consequently, immediate release based on the conditions of confinement would not be appropriate, as that would circumvent their criminal sentences. But, Hernandez is a civil detainee. Thus, it is appropriate for him to proceed by way of a *habeas* petition because he challenges the validity of his confinement and seeks his immediate release.

As the Court writes this order, the number of confirmed COVID-19 cases in the United States has already exceeded the number of confirmed cases in every other country on this planet. Indeed, all of the experts and political leaders agree that the number of confirmed cases in the United States will only increase in the days and weeks ahead. The number of cases in the United States has yet to peak. In San Bernardino County, the number of confirmed cases, there, has more than tripled over the past week.

The risk that Hernandez will flee is minimal given the current global pandemic, his ties to the community, and his pending appeal before the BIA. Further, Hernandez should be aware that if he is ordered released and, then, flees or violates any federal,

state or local criminal law, it will have a dire impact on his pending BIA appeal and all further proceedings in this case.

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

Accordingly, Hernandez has established that there is more than a mere likelihood of his success on the merits for his first claim, which is based on his Due Process rights. *See Winter*, 555 U.S. at 20.

Hernandez has established that he is likely to suffer irreparable harm in the absence of relief. *See Winter*, 555 U.S. at 20. It is well established that the deprivation of constitutional rights unquestionably constitutes irreparable injury. *See Hernanez v. Session*, 872 F.3d 976, 994 (9th Cir. 2017).

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

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

This is an unprecedented time in our nation's history, filled with uncertainty, fear, and anxiety. But in the time of a crisis, our response to those at particularly high

risk must be with compassion and not apathy. The Government cannot act with a callous disregard for the safety of our fellow human beings.

Accordingly,

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

It is further Ordered that Respondents shall, by 5:00 p.m. on April 2, 2020, release Petitioner Enrique Francisco Hernandez from custody pending further order of this Court, and subject to the following conditions of release:

1. Petitioner shall reside, and shelter in place, at the residence of Maria Victoria de Ortiz, 2765 Bula Court, Altadena, California 91001 ["the Residence"];
2. Petitioner shall be transported from the Adelanto Detention Center directly to the Residence by Maria Victoria de Ortiz;
3. Petitioner shall not leave the Residence, pending further order of the Court, except to obtain medical care;
4. Petitioner shall not violate any federal, state or local laws;
5. Petitioner shall not use or posses illegal drugs; and
6. At the discretion of DHS and/or BICE, to enforce the above restrictions, Petitioner's whereabouts may be monitored by telephonic and/or electronic and/or GPS monitoring and/or a location verification system and/or an automated identification system. If necessary to comply with the permitted monitoring, Petitioner shall ensure the presence of a residential telephone line without devices and/or services which may interrupt operation of any monitoring equipment.

It is further Ordered that Respondents shall show cause, if they have any, as to why the Court should not issue a preliminary injunction in this case. Respondents' response, if any, to this order to show cause shall be filed by Noon on April 6, 2020. Hernandez's reply, if any, to Respondents' response shall be filed by Noon on April 9, 2020. The matter will then stand submitted.

Date: April 1, 2020

Terry J. Hatter, Jr.
Senior United States District Judge

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

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

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 pandemic[3] 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.

Case 2:20-cv-00562-JEJ ECF Document 11 Filed 04/17/20 Page 15 of 15 Page 49 of 95

s/ John E. Jones III

John E. Jones III
United States District Judge

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: MAR 26 2020

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RONAL UMANA JOVEL,

Petitioner,

-against-

THOMAS DECKER, et al.

Respondents.

MEMORANDUM DECISION AND ORDER

20 Civ. 308 (GBD) (SN)

GEORGE B. DANIELS, United States District Judge:

Petitioner Ronal Umana Jovel seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2241, ordering Respondents to provide him with a recorded, individualized hearing before a neutral arbiter. (Pet. for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241, ECF No. 1, at 33.) This case was referred to Magistrate Judge Sarah Netburn for Habeas Corpus on January 16, 2020. (Order of Reference to a Magistrate Judge, ECF No. 5.) Magistrate Judge Netburn issued a Report and Recommendation, (the "Report," ECF No. 26), on March 24, 2020, recommending that Petitioner's petition be granted. (*See* Report at 20.) Magistrate Judge Netburn advised the parties that failure to file timely objections to the Report would constitute a waiver of those objections on appeal, and that in light of the "exigencies of the circumstances," objections to the Report are due by March 31, 2020. (*Id.*) The parties have not yet filed any objections.

In the meantime, on March 13, 2020, Petitioner filed a letter requesting that the Court order his immediate release "while his petition pends before this Court and while the Coronavirus ('COVID-19') public health crisis continues," pursuant to *Mapp v. Reno*, 241 F.3d 221 (2d Cir. 2001). (Emergency Letter, ECF No. 18.) Magistrate Judge Netburn also included in the Report her recommendation that Petitioner's emergency request be granted. (*See* Report at 20.) Upon

conducting an independent analysis of Petitioner's separate application for immediate relief, this Court reaches an independent conclusion that Petitioner's emergency request should be GRANTED.

This Court disagrees with the Government's claim that *Mapp* does not apply in § 1226(c) mandatory detention cases, such as the present. (*See* The Government's Resp. to the Pet'r's Letter of March 13, 2020, Seeking Immediate Interim Relief, and in Further Opp'n to the Pet. for a Writ of Habeas Corpus, ECF No. 20, at 4–5.) The Court in *Mapp* did not consider whether its decision was limited with regard to individuals held under § 1226(c). When a habeas corpus petition raises concerns under *Mapp*, this Court must consider whether the "petition raise[s] substantial claims and [whether] extraordinary circumstances exist[] that make the grant of bail necessary to make the habeas remedy effective." *Mapp*, 241 F.3d at 230 (alterations in original) (citations omitted). In other words, to succeed on a claim under *Mapp*, a petitioner must demonstrate that: (1) he or she has set forth substantial claims in the petition; (2) he or she has a likelihood of success on the merits of the petition; and (3) extraordinary circumstances exist, which would require release so that a writ of habeas corpus may be effective. *See Boddie v. N.Y. State Div. of Parole*, No. 8 Civ. 9287 (LAP) (DF), 2009 WL 1531595, at *1 (S.D.N.Y. May 28, 2009).

The petition sets forth substantial claims, and demonstrates that Petitioner is likely to succeed on the merits. Additionally, in light of the considerable—and growing—concern surrounding the COVID-19 health crisis, including limited access to medical supplies, treatment, and attention, as well as Petitioner's separate personal medical issues, this Court finds that Petitioner has adequately demonstrated extraordinary circumstances requiring his release.

Although this Court finds that Petitioner has met the requirements of the *Boddie* analysis in demonstrating he is entitled to relief under *Mapp*, this Court has not yet fully reviewed the

Report for error in its recommendation that complete habeas relief be granted, and will refrain from doing so until any objections are filed. Indeed, the parties are still granted the right to file prompt objections to Magistrate Judge Netburn's Report and Recommendation that Petitioner's habeas petition be granted, and any failure to file objections by the March 31, 2020 deadline will constitute waiver of those objections on appeal.

Therefore, for the reasons stated herein, Petitioner's emergency application, (ECF No. 18), is GRANTED, pursuant to *Mapp v. Reno*. Petitioner shall be released on his own recognizance by April 3, 2020, while his removal proceedings are pending, unless Respondents provide Petitioner with a bond hearing by that date.

Dated: New York, New York
March 26, 2020

SO ORDERED.

George B. Daniels

GEORGE B. DANIELS
United States District Judge

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

RAFAEL L.O., et al., Petitioner, v. JOHN TSOUKARIS, et al., Respondent.	Civil Action No. 20-3481 (JMV) **OPINION**

VAZQUEZ, District Judge:

This matter originated with a Verified Petition for Writ of Habeas Corpus and Complaint. D.E. 1. Presently pending before the Court is the motion of Petitioners' Rafael L.O.,[1] Adrian E. G.G., and Javier S.M., ("Petitioners") for a temporary restraining order ("TRO"), immediate release, and/or order to show cause. D.E. No. 5. For the reasons detailed below, the Court will grant the TRO and order Petitioners' release subject to specific conditions. The filing initially included two additional Petitioners, Victor M.L. and Michaell A.G., who have since been released by the Department of Homeland Security, Immigration and Customs Enforcement ("DHS/ICE"). Because those two Petitioners have been released, their motion is dismissed without prejudice.

1 Petitioners are identified herein only by their first name and the first initials of their surnames in order to address certain privacy concerns associated with § 2241 immigration cases. This manner of identification comports with recommendations made by the Judicial Conference of the United States' Committee on Court Administration and Case Management.

I. Background

Petitioners are immigration detainees being held by ICE at the Essex County Correctional Facility ("ECCF") in Newark, New Jersey. The instant motion was filed in the wake of the ongoing COVID-19 pandemic,[2] that has been reported to have been contracted by both ECCF personnel and inmates.[3]

Each Petitioner submits that he is living with a medical condition that puts him in danger of severe illness or death should he contract COVID-19. Rafael L.O., who is twenty-seven years old, submits that he has asthma and bi-polar disorder. D.E. No. 1 at 23. Adrian E. G.G., who is forty-six years old, submits that he lives with schizophrenia, diabetes, high cholesterol, and high blood pressure. *Id.* at 25. Finally, Javier S.M., who is fifty-one years old, indicates that he has high blood pressure, high cholesterol, signs of early congestive heart failure, untreated obstructive sleep apnea, and pre-diabetes. *Id.* at 29.

Respondents do not contest Petitioners' medical conditions. Instead, Respondents argue that ECCF has taken reasonable precautions and that Petitioners' criminal histories and/or pending criminal charges countenance against release. D.E. 17 at 7-10. Respondents indicate that Rafael L.O. has a 2019 conviction for felony drug offenses and possession of weapon (an air pistol) as

---

2 Covid-19 is an abbreviation of the coronavirus disease 2019, a respiratory illness that can spread from person to person, that was declared a pandemic by the World Health Organization ("W.H.O.") on March 11, 2020. *See* Centers for Disease Control and Prevention *Coronavirus Disease 2019 Frequently Asked Questions*, https://www.cdc.gov/coronavirus/2019-ncov/faq.html#covid19-basics (last visited Apr. 7, 2020); *see also* William Wan, *WHO declares a pandemic of coronavirus disease covid-19*, Washington Post, https://www.washingtonpost.com/health/2020/03/11/who-declares-pandemic-coronavirus-disease-covid-19/ (last visited April 7, 2020).

3 Monsy Alvarado, *Second ICE detainee in New Jersey tests positive for coronavirus*, Northjersey.com, https://www.northjersey.com/story/news/new-jersey/2020/03/26/coronavirus-nj-second-ice-detainee-tests-positive-covid-19/2916525001/ (last visited April 7, 2020).

well as pending felony drug charges from 2018. *Id.* at 7. Javier S.M., Respondents note, has pending state felony drug charges for criminal sexual contact and endangering/sexual contact. *Id.* at 8. It appears that Javier S.M. was released on his own recognizance by the state criminal court, although Respondents indicate that the state judge may have known that Javier S.M. was to be taken into ICE custody. Adrien E. G.G. has the longest criminal history. Respondents point to numerous convictions between 2013 and 2017 for illegal re-entry into the United States. *Id.* at 9-10. Adrien E. G.G. also has two convictions for drug possession and a 2008 conviction for assault. *Id.*

A. COVID-19

The COVID-19 pandemic is at the heart of this case. Judge John E. Jones III, in a thoughtful opinion, described the situation as follows:

> In a matter of weeks, the novel coronavirus COVID-19 has rampaged across the globe, altering the landscape of everyday American life in ways previously unimaginable. 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. Indeed, we now live our lives by terms we had never heard of a month ago—we are "social distancing" and "flattening the curve" to combat a global pandemic that has, as of the date of this writing, infected 719,700 people worldwide and killed more than 33,673. Each day these statistics move exponentially higher.

Thakker v. Doll, Civ. Docket No. 20-cv-480, 2020 WL 1671563, *2, __ F. Supp. 3d __ (M.D. Pa. March 31, 2020) (footnotes omitted). Judge Jones accurately pointed to the swift growth of cases. From the date of his opinion (March 31, 2020) to April 7, 2020, the number of worldwide cases and deaths had risen from 719,700 and 33,673 to 1,282,931 and 72,774.4

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

New Jersey has been particularly hard hit, with the northern part of the state bearing the initial brunt. As of April 7, 2020, New Jersey had 44,416 cases and 1,232 deaths. *COVID-19 Information Hub*, STATE OF NEW JERSEY, https://covid19.nj.gov/ (last visited April 7, 2020). The total number of cases and deaths for Bergen County, Essex County, and Hudson County, respectively, were 7,533/263, 5,078/232, and 4,949/95 deaths. *Id.* New Jersey has taken numerous steps, such as the Governor's stay-at-home order on March 21, 2020, to combat the virus. In addition, New Jersey has closed schools indefinitely and closed beaches, state parks, and county parks.[5]

COVID-19 is a type of highly contagious novel coronavirus that is thought to be "spreading easily and sustainably between people." *How Coronavirus Spreads*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/prepare/transmission.html ("*How Coronavirus Spreads*") (last visited April 8, 2020). The National Institutes of Health reports that the virus "is stable for several hours to days in aerosols and on surfaces[.]"[6] COVID-19 is "spread mainly from person-to-person." *How Coronavirus Spreads*. This person-to-person spread can occur (1) between persons who are in close contact, meaning within six feet, and (2) by respiratory droplets when an infected person sneezes, coughs, or talks. *Id.* The virus can also be spread by infected persons who are not showing symptoms. *Id.*

---

5 *New Jersey closes state parks, state forests and county parks as more than 200 new COVID-19 deaths reported*, 6abc, https://6abc.com/covid19-cases-us-coronavirus-symptoms/6083512/ (last visited April 7, 2020).

6 *New Coronavirus Stable for Hours on Surfaces*, NATIONAL INSTITUTE OF HEALTH, https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces (last visited April 8, 2020)

Symptoms of COVID-19 can be mild. However, the effects of COVID-19 can be drastically more severe in older individuals or those with certain medical conditions, including persons with asthma, lung disease, heart diseases, diabetes, chronic kidney disease, liver disease or those who are immunocompromised.[7] Besides death, COVID-19 can cause serious, potentially permanent, damage to lung tissue, and can require extensive use of a ventilator. Early evidence suggests that the virus "can damage lung tissue causing a 20 to 30 percent decrease in lung function[.]" D.E. 1 at ¶ 29 (citation omitted). In addition, complications from the virus can manifest rapidly. *Id.* (citation omitted). There is currently no vaccine for COVID-19, nor are there known, clinically-tested therapeutic treatments. *Id.* at ¶ 30. To combat the virus, health officials have emphasized education, social distancing (*i.e.* staying at least 6 feet apart), and improved hygiene. *Id.* (citation omitted).

B. ECCF

County jails were not designed with pandemics in mind. To the contrary, they were made to house persons in relatively close contact. In a densely populated area, like Essex County, New Jersey, jails are constructed to handle more persons, whether they be detainees or inmates. The CDC has warned that the risk of exposure may increase in crowded, closed-in settings with little air circulation if the crowd contains persons who are infected. D.E. 1 at ¶ 32 (citation omitted). COVID-19 represents a threat to detainees, inmates, officers, officials, staff, and all others who enter the jail, such as vendors.

Petitioners cite extensively to a March 19, 2020, letter from two qualified physicians to

---

7 *People Who Are at Higher Risk of Severe Illness*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html (last accessed April 8, 2020).

members of Congress. D.E. 1-14. Both physicians had "expertise in medical care in detention settings," and both served as medical subject matter experts for the Department of Homeland Security's Office of Civil Rights and Civil Liberties." *Id.* at 1-2. The letter addressed the "imminent risk to the health and safety of immigrant detainees[.]" *Id.* at 3. The physicians stated that "social distancing is essential to slow the spread of the coronavirus to minimize the risk of infection." *Id.* at 4. The doctors stressed that doing so critically reduces the risk of overwhelming treatment facilities.[8] *Id.* As an example, the physicians pointed out that local hospitals have limited ventilators, and as the hospitals treat more COVID-19 patients, they run the real risk of running short of the life-saving equipment – not only for other virus patients but also for patients with other critical illnesses, such as heart attacks. *Id.* The physicians indicated that three areas of actions were needed: (1) procedures for screening, testing, isolation, and quarantine; (2) limiting the transport and transfer of immigration detainees; and (3) using alternatives to detention to enable as much social distancing as possible. *Id.* at 5. To this end, the doctors emphasized that "*it is essential to consider releasing all detainees who do not pose an immediate risk to public safety.*" *Id.* (emphasis in original). At a minimum, the doctors added, ICE should consider releasing all detainees in high risk medical groups. *Id.* at 5-6.

In response to the pandemic, ICE has taken affirmative steps to lessen the risk of exposure. *ICE Guidance on COVID-19*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, https://www.ice.gov/coronavirus (last visited on April 8, 2020). For example, ICE temporarily suspended all social visitation at detention facilities. *Id.* ICE also released approximately 160

8 Petitioners point out that New Jersey officials have projected a potential shortage of 123,000 hospital beds in the coming weeks. D.E. 1 at ¶ 27 (citation omitted).

individuals who were over the age of 60 or pregnant. *Id.* ICE further instituted screening guidance for new detainees and indicates that it is testing detainees for COVID-19 as per CDC guidance. *Id.*

As of the filing of Petitioner's case, four employees and one ICE detainee had contracted COVID-19. D.E. 1 at ¶ 2. Given the incubation period, Petitioners indicate that it is likely that the ICE detainee contracted the virus while at the ECCF. *Id.* at ¶ 38. Prior to the current pandemic, Petitioners noted that DHS's Office of Inspector General ("OIG") "identified serious issues relating safety, security, and environmental health" at ECCF. *Id.* at 41 (citation omitted). The OIG concluded that based on the conditions observed, "ICE cannot ensure detainee health at the [ECCF]." *Id.* at 41.

Petitioners also provide their view of current conditions at the ECCF, relying on a declaration of Rosa Santana, a Program Director at First Friends of New Jersey and New York. D.E. 1-9. Santana indicates, based on her personal experience, that in the "dorms" area of ECCF, "approximately 70 detainees sleep, eat, and spend the vast majority of their time . . . in one room together[.] . . . They all share one bathroom with just a few toilets, sinks and showers." *Id.* at ¶ 7. In the "pods" area of ECCF, two detainees share a room to sleep, but "approximately 125 detainees share a single common space" where they eat and socialize. *Id.* at ¶ 8. Santana adds that these detainees share a bathroom with four showers, but often one or two of the showers are not working. *Id.* Santana and her organization hear constant complaints about the "lack of access to medical care and the quality of care that is received," that medical treatment is denied, or that detainees wait an inordinate amount of time in response to medical requests. *Id.* at ¶¶ 9, 12. Santana is also aware of "unsanitary and unhygienic conditions at the ECCF," such as maggots in the sink or broken boilers. *Id.* at ¶ 10. Detainees also report that they lack sufficient soap, hand sanitizer,

and cleaning supplies; if they run out of money, the detainees cannot buy new soap from the commissary. *Id.* at ¶ 13. As for a detainee who tested positive for COVID-19, Santana knows that the detainee was in a setting with approximately 40-50 other detainees. *Id.* at ¶ 17. Santana has also been receiving recent calls from detainees who are worried that others housed with them are infected as they have sore throats, coughs, and fevers. *Id.* at 20.

Respondents submitted a declaration from Alfaro Ortiz, the Director of the ECCF. D.E. 17-1. On the date of Ortiz's declaration, April 6, 2020, two ICE detainees had tested positive for COVID-19 as had seven inmates in a different building, ten members of the ECCF correctional staff, and one nurse. *Id.* at ¶ 22. Ortiz details the efforts of ECCF to deal with the virus. Ortiz reports that ECCF is currently at seventy-five percent of its capacity and that dorms that were designed to hold sixty detainees now house a maximum of forty-eight. *Id.* at ¶¶ 4-5. He states that ECCF has provide informational hand-outs as to COVID-19 and that detainees have space to "sit at least six feet apart." *Id.* at ¶ 6. Health care at ECCF is administered by CFG Health Systems, with a physician on-site for sixteen hours a day (and available twenty-four hours) as well as nurse practitioner and two RNs and LPNs at all times. *Id.* at 9-10. New detainees are "screened for disabilities upon admission and their temperatures are checked." *Id.* at ¶ 8. ECCF is able to re-circulate air within the facility every four hours. *Id.* at ¶ 13. Among other measures instituted in response to COVID-19, ECCF educates detainees as to the "importance of hand washing and best practices to prevent the spread of COVID-19" and provides detainees daily access to sick call. *Id.* at ¶ 15. ECCF also sanitizes its kitchen hourly, hired additional cleaning staff, and implemented health screening for officers. *Id.* New detainees are quarantined for 14 days. *Id.* If a detainee exhibits COVID-19 symptoms, he or she is medically evaluated and provided a surgical mask. *Id.* at ¶ 17. Detainees with moderate to severe symptoms are

immediately taken to University Hospital, while those with mild symptoms are quarantined. *Id.* at ¶ 18. As of April 6, ECCF had 85 inmates and detainees in quarantine. *Id.* at 19. Detainees who have had a known exposure to COVID-19 but who are asymptomatic are "cohorted," meaning that they are placed with other similar individuals for fourteen days. *Id.* at ¶ 20.

Petitioners assert numerous counts. D.E. 1. As pertinent here, Petitioners assert a violation of substantive due process for failure to reasonable provide safety and protect from harm. *Id.* at 38.

II. LEGAL STANDARD

The standard for granting a temporary restraining order is the same as that for a preliminary injunction. Injunctions and restraining orders are governed by Federal Rule of Civil Procedure 65 and Local Civil Rule 65.1. Injunctive relief may only be granted when a party demonstrates that he has a reasonable probability of success on the merits, he will suffer immediate and irreparable harm if the injunction does not issue, the grant of preliminary relief will not result in greater harm to the nonmoving party, and the injunctive relief is in the public interest. *New Jersey Retail Merchants Ass'n v. Sidamon-Eristoff*, 669 F.3d 374, 385-86 (3d Cir. 2012) (citing *Crissman v. Dower Down Entm't Inc.*, 239 F. 3d 357, 364 (3d Cir. 2001).

As to the Court's authority to grant release on a writ of habeas corpus, Petitioner's rely extensively on the Third Circuit's decision in *Lucas v. Hadden*, 790 F.2d 365 (3d Cir. 1986). *Lucas* concerned a state prisoner's petition pursuant to 28 U.S.C. § 2254 rather than a civil immigration detainee matter. *Id.* at 365-66. The court in *Lucas* determined that the "extraordinary circumstances" standard controlled in determining whether "bail may be granted to a habeas petitioner prior to a ruling on the merits of the petition." *Id.* at 367. As an example of such circumstances, the *Lucas* court pointed to *Johnston v. Marsh*, 227 F.2d 528 (3d Cir. 1955),

in which the district judge had ordered a state inmate released to enter a hospital because the inmate was extremely ill. *Id.* at 366-67. Yet, the court in *Lucas* court continued, it was not suggesting that a petitioner's poor health would be the only situation that would meet the extraordinary circumstances standard. *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 Fed. App'x 134, 135-36 (3d Cir. 2017).

III. DISCUSSION

The Court finds that Petitioners have established a reasonable likelihood of success on the merits and similarly met the extraordinary circumstances standard. This determination also addresses Respondents' threshold argument that Petitioners lack standing. D.E. 17 at 24. Respondents argue that "Petitioners do not allege that they have contracted COVID-19, have been exposed to anyone with COVID-19 or that they have suffered any adverse outcomes from the spread of COVID-19." *Id.*

"Article III of the Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies.'" *Lance v. Coffman*, 549 U.S. 437, 439 (2007). Standing to sue is a "[c]omponent of the case-or-controversy" requirement. *Id.* Thus, a court must dismiss a case for lack of subject matter jurisdiction if a plaintiff lacks Article III standing. *Finkelman v. Nat'l Football League*, 810 F.3d 187, 195 (3d Cir. 2016). To establish Article III standing, a plaintiff

"must demonstrate '(1) an injury-in-fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision."' *Id.* at 193 (quoting *Neale v. Volvo Cars of N. Am., LLC,* 794 F.3d 353, 358–59 (3d Cir. 2015) (internal quotation marks omitted and punctuation modified)). The first element, an injury-in-fact, requires that a plaintiff show " 'the invasion of a concrete and particularized legally protected interest' resulting in harm 'that is actual or imminent, not conjectural or hypothetical.' " *Id.* (quoting *Blunt v. Lower Merion Sch. Dist.,* 767 F.3d 247, 278 (3d Cir. 2014)). Moreover, a plaintiff "must clearly and specifically set forth facts sufficient to satisfy . . .standing" as "a federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).

The Court finds that Petitioners have standing in light of the Supreme Court's decision in *Helling v. McKinney*, 509 U.S. 25 (1993). In *Helling*, a prisoner alleged that his Eighth Amendment rights had been violated because he had been exposed to environmental tobacco smoke in prison. *Id.* at 28. The Supreme Court ruled as follows:

> We have great difficulty agreeing that prison authorities may not be deliberately indifferent to an inmate's current health problems but may 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.* In *Hutto v. Finney*, 437 U.S. 678, 682, 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.*

> That the Eighth Amendment *protects against future harm* to inmates is not a novel proposition. The Amendment, as we have said, requires that inmates be furnished with the basic human needs, one of which is "reasonable safety." *DeShaney*[*v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 200 (1989)]. It is "cruel and unusual punishment to hold convicted criminals in unsafe conditions." *Youngberg v. Romeo*, 457 U.S. 307, 315–316 (1982). *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. The Courts of Appeals have plainly recognized that a remedy for unsafe conditions need not await a tragic event.* Two of them were cited with approval in *Rhodes v. Chapman*, 452 U.S. 337, 352, n. 17 (1981). *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974), held that inmates were entitled to relief under the Eighth Amendment when they proved threats to personal safety from exposed electrical wiring, deficient firefighting measures, and *the mingling of inmates with serious contagious diseases with other prison inmates*. *Ramos v. Lamm*, 639 F.2d 559, 572 (10th Cir. 1980), stated that a prisoner need not wait until he is actually assaulted before obtaining relief. . . . We thus reject petitioners' central thesis that only deliberate indifference to current serious health problems of inmates is actionable under the Eighth Amendment.

Id. at 33-34 (emphases added). Although decided in the context of an Eighth Amendment claim, the quoted language applies with equal force here. Petitioners do not need to actually show that they have COVID-19 to establish standing.

To succeed on a Fifth Amendment due process claim, Petitioners must show that their conditions of confinement "amount to punishment of the detainee." *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). The Third Circuit has articulated the following relevant standards:

> 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 229, 232 (3d Cir. 2008)). As a result, the Court must ascertain whether the confinement conditions serve a legitimate purpose and whether the conditions are rationally related to that legitimate purpose. *Hubbard* 538 F.3d at 232.

District Courts have reached different conclusions when conducting this inquiry in the context of the current pandemic. In *Dawson v. Asher*, Case No. C20-0409, 2020 WL 1304557 (W.D. Wash. March 19, 2020), Judge James L. Robart found that the immigration detainees did not face improper punishment. *Id.* at *2. Judge Robart explained that the petitioner's detention was reasonably related to a legitimate governmental objective because there was no evidence that the respondents intended to punish the petitioners, respondents had a legitimate governmental objective in preventing detained aliens from absconding and ensuring their appearance at removal proceedings, and the petitioners' confinement did not appear excessive in relation to the legitimate objective. *Id.*

Judge Jones in *Thakker* reached a different conclusion. *Thakker*, 2020 WL 1671563, *8. Judge Jones noted that an express intent to punish was not necessary and then found that the detention in question did not bear a rational relationship to a legitimate government objective. *Id.* Judge Jones reasoned that housing immigration detainees in close proximity and in unsanitary conditions, in light of the pandemic, did not meet a legitimate governmental objective. *Id.* Judge Jones indicated that preventing aliens from absconding would constitute a legitimate governmental aim but this objective was deeply weakened in light of COVID-19, particularly when ICE had many other options to monitor civil detainees. *Id.*

The Court agrees with the analysis in *Thakker*. The Court does not find that Respondents have an express intent to punish Petitioners, but also finds that such intent is not a necessary

prerequisite. In addition, the Court would – in normal circumstances – agree with the legitimate governmental objective analysis espoused in *Dawson*. But these are not normal times, and context (or factual reality) is important. To use an extreme hypothetical, consider if civil detainees were being housed in a facility that was in the direct path of a hurricane and that the facility was unlikely to withstand the force of the storm. The government would still have a legitimate governmental interest in ensuring that the detainees appeared for immigration court – but the government would not have a legitimate interest in housing the detainees in that particular facility during the hurricane. COVID-19, and its associated risks, is the difference maker – it changes the equation in evaluating the government's legitimate objectives. *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.").

Petitioners' medical maladies put them in a vulnerable population as to COVID-19. If they do become infected, not only will they be in greater physical jeopardy but they also would put greater pressure on limited medical resources. If the Court credits Rosa Santana's declaration, ECCF is clearly an unsafe environment. But even viewing Director Ortiz's statements, obvious gaps exist. ICE detainees are still housed together, up to forty-eight in a room. While Director Ortiz indicates that ECCF has increased its cleaning capability, notably absent from his declaration are critical areas. Detainees may be advised of the risks of COVID-19, but what are they provided to prevent infection? Director Ortiz does not speak to actual personal hygiene items – such as soap – that are provided to detainees and how often detainees can actually wash. In this regard,

Santana's comments about lack of soap and basic hygiene items, along with mass use of limited bathroom and shower facilities, goes unchallenged. While cleaning may be increased, how often are the surfaces, to which the detainees are regularly exposed, properly disinfected?

The Court is not criticizing ECCF or ICE. Both have taken affirmative steps to address the pandemic for which they should be commended. However, there are certain realities that neither ECCF or ICE can overcome. As noted, jails were not designed to fight pandemics, and, unfortunately, such facilities can become perfect vessels for virus transmission. When this case was filed, on April 1, 2020, Petitioners were aware of five cases of COVID-19 in ECCF. Five days later, when Director Ortiz signed his declaration, that number had grown to twenty persons. Petitioners have shown a reasonable likelihood of success on the merits.

Next, the Court assesses whether the irreparable harm necessary for the grant of the injunction exists. "In order to demonstrate irreparable harm the plaintiff must demonstrate potential harm which cannot be redressed by a legal or an equitable remedy following a trial. The preliminary injunction must be the only way of protecting the plaintiff from harm." *Instant Air Freight Co. v. C. F. Air Freight, Inc.*, 882 F.2d 797, 801 (3d Cir. 1989) (internal citations omitted). When analyzing whether irreparable harm exists, "[t]he possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *See id.*, quoting *Sampson v. Murray*, 415 U.S. 61, 90 (1964).

The Court has already explained the seriousness of the Covid-19 pandemic and its rapid proliferation in this nation. Nonetheless, the Court will provide these sobering nationwide and county-wide confirmed case and death rates as a reminder. As of April 8, 2020, the United States has 425,000 confirmed cases and more than 14,000 deaths.[9] And in what is New Jersey's second-most afflicted county, Essex, there are 5,078 confirmed cases and 232 deaths.[10] Even more concerning, the state's projected peak is likely still weeks away.[11]

As noted earlier in this opinion, in addition to the volume of ECCF detainees confined to inherently limited living and sleeping quarters, they also appear to have limited access to hygiene products and must share bathroom facilities with a large number of persons. Moreover, given the timing of the first confirmed case at ECCF, it appears the detainee contracted the virus while in ECCF's jurisdiction.

The previously described conditions of confinement raise serious concerns about the ability to stop transmission of the virus. With the conditions as currently described, at-risk detainees – including Petitioners -- cannot practically adhere to social 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. Against this backdrop, Petitioners have demonstrated irreparable harm should they remain in confinement. *See Thakker*, 2020 WL 1671563 at *7 ("[C]atastrophic results may ensue,

---

9 *US coronavirus predictions are shifting. Here's why*, CNN, https://www.cnn.com/2020/04/08/politics/what-matters-april-8/index.html (last accessed Apr. 8, 2020, 11:57 p.m.).

10 *New Jersey coronavirus death toll now at 1,232. Total cases rise to 44, 416 with 3K new positive tests*, NJ.com, https://www.nj.com/coronavirus/2020/04/new-jersey-coronavirus-toll-now-at-1232-total-cases-rise-to-44416-with-3k-new-positive-tests.html (last accessed Apr. 9, 2020, 12:15 a.m.).

11 *Id.*

both to Petitioners and to the communities surrounding the Facilities."); *see also Hope v. Doll*, Civ. No. 1:20-562 J.E.J. (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.") The Court therefore finds that Petitioners have demonstrated irreparable harm should they remain in ECCF.

The Court is also satisfied that the balance of harms would weigh in favor of Petitioners given their underlying health conditions. "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-Merch Consumer Pharm. Co.*, 290 F.3d 578, 596 (3d Cir. 2002) (internal citation omitted). Here, the potential injury to the Petitioners is grave in light of their health conditions. This Court has already provided a glimpse of the rate at which the virus has spread thus far, even throughout the segment of the state's population that is at liberty- the living conditions of those detained creates a more untenable situation. Yet, ICE undoubtedly has a legitimate interest in ensuring that the petitioners do not flee and in protecting the public. However, the Court believes that it can address those very important interests in fashioning appropriate conditions of release for each Petitioner.

When considering whether the specific action taken by the court serves the public interest, the guiding principle is assessing whether "not that justice be done, but that specific acts presumptively benefitting the public not be halted until the merits could be reached and a determination made as to what justice required." *Continental Group, Inc., v. Amoco Chemicals Corp.*, 614 F.2d 351, 358 (3d Cir. 1980). Clearly the public has an interest in preventing the further spread of COVID-19. Prevention, among other things, preserves critical medical

resources necessary to combat the pandemic. Here, the possibility of a widespread outbreak within ECCF would only increase the onus on the state and country's already-overburdened healthcare system. Indeed, as of April 6, 2020, ECCF already had twenty-reported cases. The public has an interest that limited health care resources are available as necessary – which means preventing as many COVID-19 cases as possible – but particularly those necessary for vulnerable persons.

At the same time, the public also has an interest in ensuring that Petitioners do not commit any offenses while on release. Both Rafael L.O. and Adrian E. G.G. have felony convictions, although neither have convictions for offenses of which violence is an element, save Adrian E. G.G.'s conviction twelve years ago. Javier S.M. does not have any felony conviction, but he is facing serious charges in New Jersey. Yet, this Court must acknowledge that the state court released Javier S.M. on his own recognizance. To this end, the Court considers the government's requests completely reasonable, with certain modifications. D.E. 22. Petitioners argue that these limitations are too severe. Yet, the Court notes that the critical argument on which Petitioners rely is that they are unusually vulnerable to COVID-19. In line with that argument, the Court's conditions of release not only protect the public but also protect the Petitioners.

IV. Conclusion

For the foregoing reasons, the Court will grants Petitioner's motion for a TRO (D.E. No. 5), and order Petitioners' released subject to the conditions as ordered. An appropriate Order accompanies this Opinion.

Dated: 4/9/2020

JOHN MICHAEL VAZQUEZ
United States District Judge

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

BHARATKUMAR G. THAKKER, *et al.*, Petitioners-Plaintiffs,	:	1:20-cv-480
v.	:	Hon. John E. Jones III
CLAIR DOLL, *in his official capacity as Warden of York County Prison, et al.*, Respondents-Defendants.	:	

MEMORANDUM AND ORDER

March 31, 2020

Pending before the Court is the Motion for Temporary Restraining Order and/or Preliminary Injunction filed by Petitioners-Plaintiffs Bharatkumar G. Thakker, Abedodun Adebomi Idowu, Courtney Stubbs, Rigoberto Gomez Hernandez, Rodolfo Augustin Juarez Juarez, Meiling Lin, Henry Pratt, Jean HErdy Christy Augustin, Mayowa Abayomi Oyediran, Agus Prajoga, Mansyur, Catalino Domingo Gomez Lopez and Dexter Anthony Hillocks (collectively "Petitioners").[1] (Doc. 7). The Motion has been briefed by the parties. (Docs. 12; 35; 46). The Court has received an *amicus* brief from a group of public health officials and human

[1] Petitioners' counsel advised that Mayansur and Agus Prajoga were released from immigration detention on March 27, 2020. (Doc. 33). Accordingly, their request for release from custody is moot.

rights experts, (Doc. 36), as well as a factual update and supplemental authority filed by Petitioners. (Docs. 33 and 34). Thus, this matter is ripe for our review.

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, Clinton County Correctional Facility 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. Thakker is 65 years old and suffers from high blood pressure and cholesterol and has kidney failure. Further, he is currently suffering from symptoms similar to those of COVID-19. (Doc. 2, Ex. 3). Idowu, 57, had type II diabetes as well as high blood pressure and cholesterol. He is also currently sick. (Doc. 2, Ex. 4). Stubbs is 52 years old and is immunocompromised due to a kidney transplant he received 6 years ago. He has a heart stent and also suffers from type II diabetes and blood clots. (Doc. 2, Ex. 5). Hernandez, 52, suffers from diabetes, dental problems and an

ulcer. (Doc. 2, Ex. 7). Juarez, 21, suffers from diabetes and is currently sick with COVID-19 type symptoms, including trouble breathing. (Doc. 2, Ex. 8). Lin is 45 years old and suffers from chronic pain due to a forced sterilization, as well as chronic hepatitis B and liver disease. (Doc. 2, Ex. 9). Pratt, age 50, suffers from diabetes and high blood pressure. (Doc. 2, Ex. 10). Augustin, 34 years old, suffers from multiple conditions including diabetes, high blood pressure, nerve pain, limited mobility and pain from a prior bladder and intestine reconstruction, anemia, PTSD and depression. (Doc. 2, Ex. 11). Oyediran is a 40-year-old asthmatic suffering from high blood pressure and cholesterol. (Doc. 2, Ex. 12). Lopez, age 51, has contracted the flu four times while in ICE custody since November of 2018 and is concerned that he is especially susceptible to contracting COVID-19. (Doc. 2, Ex. 15). Finally, Hillocks, age 54, has been diagnosed with leukemia. He also suffers from diabetes, anemia, high blood pressure and cholesterol. (Doc. 2, Ex. 16).

Several Petitioners have reported symptoms similar to those of COVID-19. None have been quarantined, isolated, or treated. (Doc. 2 Exs. 3; 4; 8).

Named as Respondents are: Clair Doll, Warden of York County Prison; Angela Hoover, Warden of Clinton County Correctional Facility; 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

In a matter of weeks, the novel coronavirus COVID-19 has rampaged across the globe, altering the landscape of everyday American life in ways previously unimaginable. 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. Indeed, we now live our lives by terms we had never heard of a month ago—we are "social distancing" and "flattening the curve" to combat a global pandemic[2] that has, as of the date of this writing, infected 719,700 people worldwide and killed more than 33,673.[3] Each day these statistics move exponentially higher. It is against this increasingly grim backdrop that we now consider the Petitioners' claims for habeas relief.

---

[2] 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.

[3] *See Coronavirus Disease (COVID-19) Pandemic*, WORLD HEALTH ORGANIZATION, https://www.who.int/emergencies/diseases/novel-coronavirus-2019 (last accessed March 31, 2020).

A. Threshold Questions: Standing and the Propriety of a Habeas Petition

Respondents raise two threshold challenges to the Petitioners' Motion. First, Respondents contend that Petitioners lack standing because they have not alleged an injury in fact. Next, Respondents submit that Petitioners cannot challenge their conditions of confinement through a habeas petition. Taking the latter challenge first, we note that federal courts, 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); *see also Ali v. Gibson*, 572 F.2d 971, 975 n.8 (3d Cir. 1978). Accordingly, we find that Petitioners have appropriately invoked this court's jurisdiction through a 28 U.S.C. § 2241 petition for writ of habeas corpus.

Respondents' standing challenge can also be easily resolved. Respondents essentially contend that because the Petitioners themselves do not have COVID-19 and their likelihood of contracting the illness is speculative, Petitioners cannot establish that they would suffer a concrete, non-hypothetical injury absent a temporary restraining order. However, as the Supreme Court observed in *Helling v. McKinney*, 509 U.S. 25, 33 (1993), "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." The COVID-19 pandemic is moving rapidly and expansively throughout Pennsylvania. Vast regions of the

Commonwealth are now under stay-at-home orders, and social distancing the norm to prevent the spread of this deadly virus. And yet, Respondents would have us offer no substantial relief to Petitioners until the pandemic erupts in our prisons. We reject this notion. Since "[a] remedy for unsafe conditions need not await a tragic event," it is evident that the Petitioners have standing in this matter. *Id.*

B. Temporary Restraining Order

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 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

To succeed on their Motion, Petitioners "must demonstrate. . .the probability of irreparable harm if relief is not granted." *Frank's GMC Truck Center, Inc. v. General Motors Corp.*, 847 F.2d 100, 102 (3d Cir. 1988) (internal quotations omitted). "In order to demonstrate irreparable harm the plaintiff must demonstrate potential harm which cannot be redressed by a legal or an equitable remedy following a trial". . .the temporary restraining order. . ."must be the only way of protecting the plaintiff from harm." *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 801 (3d Cir. 1989). The moving party must demonstrate that it is likely to suffer "actual or imminent harm which cannot otherwise be compensated by money damages," or it "fail[s] to sustain its substantial burden of showing irreparable harm." *Frank's GMC*, 847 F.2d at 103. The mere risk of injury is insufficient. The moving party must establish that the harm is imminent and

probable. *Anderson v. Davila*, 125 F.3d 148, 164 (3d Cir. 1997). Additionally, "a showing of irreparable harm is insufficient if the harm will occur only in the indefinite future. Rather, the moving party must make a clear showing of immediate irreparable harm." *Campbell Soup Co. v. ConAgra, Inc.*, 977 F.2d 86, 91 (3d Cir. 1992).

The Petitioners' claim is rooted in imminent, irreparable harm. Petitioners face the inexorable progression of a global pandemic creeping across our nation—a pandemic to which they are particularly vulnerable due to age and underlying medical conditions. At this point, it is not a matter of *if* COVID-19 will enter Pennsylvania prisons, but *when* it is finally detected therein. It is not unlikely that COVID-19 is already present in some county prisons—we have before us declarations that portions of the Facilities have been put under ineffective quarantines due to the presence of symptoms similar to COVID-19 among the inmate population.[4] Indeed, we also have reports that a correctional officer at Pike has already tested positive for COVID-19. (Doc. 33 at 1).

Public health officials now acknowledge that there is little that can be done to stop the spread of COVID-19 absent effective quarantines and social distancing procedures. But Petitioners are unable to keep socially distant while detained by

[4] We also have allegations that prison guards have shown symptoms while interacting with inmates.

ICE and cannot keep the detention facilities sufficiently clean to combat the spread of the virus. Based upon the nature of the virus, the allegations of current conditions in the prisons, and Petitioners' specific medical concerns, detailed below, we therefore find that Petitioners face a very real risk of serious, lasting illness or death. There can be no injury more irreparable.

a. Seriousness of the virus

COVID-19 is a type of highly contagious novel coronavirus that is thought to be "spreading easily and sustainably in the community."[5] Experts believe that it can live on some surfaces for up to 72 hours after contact with an infected person.[6] A simple sneeze or brush of the face without washing your hands is now known to easily spread the virus, which generally causes fever, cough, and shortness of breath. (*How Coronavirus Spreads*, CENTERS FOR DISEASE CONTROL; Doc. 12 at 15).

In most people, these symptoms are relatively mild. (Doc. 12 at 15). However, the effects of COVID-19 can be drastically more severe in older individuals or those with medical conditions. (Doc.2, Ex. 2). In some cases, COVID-19 can cause serious, potentially permanent, damage to lung tissue, and

---

5 *How Coronavirus Spreads*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/prepare/transmission.html (last accessed March 31, 2020).

6 *New Coronavirus Stable for Hours on Surfaces*, NATIONAL INSTITUTE OF HEALTH (March 17, 2020), https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces.

can require extensive use of a ventilator. (*Id*.). The virus can also place greater strain on the heart muscle and can cause damage to the immune system and kidneys. (*Id.*). These long-term consequences and the likelihood of fatality increase in those of advanced age and those with other medical conditions, like the Petitioners here. (*Id.*). For those in high-risk categories, the fatality rate is thought to be approximately fifteen percent. (*Id*.).

There is currently no vaccine for COVID-19, nor are there known, clinically-tested therapeutic treatments. (*Id*.). As a result, public health officials have touted the importance of maintaining physical separation of at least six feet between individuals, now commonly known as "social distancing." (*Id.*). Experts have also emphasized that proper hand hygiene with soap and water is vital to stop the spread. (*Id*.). Beyond these measures, health professionals can do little to combat this highly infectious disease. (*Id*.).

b. Prevalence of the virus

The United States now records more confirmed cases of COVID-19 than any other country in the world.[7] As of the date of this writing, there were in excess of

[7] Nicole Chavez, Holly Yan, and Madeline Holcombe, *US has more Known Cases of Coronavirus than any Other Country*, CNN, https://www.cnn.com/2020/03/26/health/coronavirus-thousand-deaths-thursday/index.html (last accessed March 31, 2020).

164,458 cases of the virus in America, with 3,167 fatalities.[8] This represented an increase of 2,651 cases in only *twenty-four hours*. (*Id*).

Indeed, Pennsylvania currently reports 4,087 confirmed cases of COVID-19, with 48 fatalities.[9] Troublingly, that number represents nearly double the confirmed cases reported a mere four days ago—on March 27, 2020, Pennsylvania reported a total of 2,218 cases, with 22 deaths. *Id.* The three counties which house the Facilities are located in York County, Pike County, and Clinton County. They currently report a total of 93 cases: 54 in York County and 39 in Pike County.[10] Clinton County has not yet reported any confirmed cases of COVID-19. *Id.* As of March 27, 2020, the Governor of Pennsylvania placed both York County and Pike County under a stay-at-home order in an attempt to slow the spread of the virus.[11]

---

[8] Niko Kommenda, Pablo Gutiérrez, and Juweek Adolphe, *Coronavirus Map of the US: Latest Cases State by State*, THE GUARDIAN, https://www.theguardian.com/world/ng-interactive/2020/mar/27/coronavirus-map-of-the-us-latest-cases-state-by-state (last accessed March 31, 2020).

[9] *Coronavirus (COVID-19): Pennsylvania Overview*, PENNSYLVANIA DEPARTMENT OF HEALTH, https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx (last accessed March 31, 2020).

[10] *Coronavirus (COVID-19): Pennsylvania Overview*, PENNSYLVANIA DEPARTMENT OF HEALTH, https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx (last accessed March 31, 2020).

[11] *Governor Wolf and Health Secretary Expand 'Stay at Home' Order to Nine More Counties to Mitigate Spread of COVID-19, Counties Now Total 19*, WEBSITE OF THE GOVERNOR OF PENNSYLVANIA, https://www.governor.pa.gov/newsroom/governor-wolf-and-health-secretary-expand-stay-at-home-order-to-nine-more-counties-to-mitigate-spread-of-covid-19-counties-now-total-19/ (last accessed March 31, 2020).

Average Pennsylvanians in these counties can no longer leave their homes for anything but essential trips to gather supplies, medications, or to perform work essential to our national infrastructure—COVID-19 spreads so easily and rapidly that public health officials have determined that social isolation is necessary to keep our hospital systems from becoming overwhelmed. *Id.* The same rationale applies, perhaps even more so, to immigration detention facilities housing high-risk populations.

c. Unique nature of detention facilities

Various public health officials have warned that the nature of ICE detention facilities makes them uniquely vulnerable to the rapid spread of highly contagious diseases like COVID-19. COVID-19 is transmitted primarily through "close contact via respiratory droplets produced when an infected person coughs or sneezes." (Doc. 12 at 18; Doc. 2, Ex. 1). Immigration detention facilities are particularly at risk for such close contact because they are considered "congregate settings, or places where people live or sleep in close proximity." (Doc. 2, Ex. 1). Such conditions provide "ideal incubation conditions" for COVID-19. (*Id.*).

Within the past few weeks, two medical experts for the Department of Homeland Security authored a letter to Congress warning of the unique dangers COVID-19 poses to ICE detention facilities. Specifically, they described the current ICE detention environment as a "tinderbox" in which:

> [a]s local hospital systems become overwhelmed by the patient flow from detention center outbreaks, precious health resources will be less available for people in the community. . .To be more explicit, a detention center with a rapid outbreak could result in multiple detainees — five, ten or more — being sent to the local community hospital where there may only be six or eight ventilators over a very short period. . .As [hospitals] fill up and overwhelm the ventilator resources, those ventilators are unavailable when the infection inevitably is carried by staff to the community and are also unavailable for all the usual critical illnesses (heart attacks, trauma, etc).[12]

The experts contrasted this scenario with a situation in which ICE detainees were released from "high risk congregate settings," allowing the "volume of patients sent to community hospitals to level out," which they believed would provide much more favorable outcomes, both for the detainees and the surrounding communities. *Id*. "At a minimum," these health experts urged, the government "should consider releasing all detainees in high risk medical groups such as older people and those with chronic diseases." *Id.* ICE detention facilities, they warned, are so poorly equipped to allow safe social distancing practices and are unlikely to have the ability to provide adequate medical care in the case of a COVID-19 outbreak. *Id.* The consequences, they maintain, could be disastrous. *Id*.

[12] Catherine E. Shoichet, *Doctors warn of 'tinderbox scenario' if coronavirus spreads in ICE detention*, CNN, https://www.cnn.com/2020/03/20/health/doctors-ice-detention-coronavirus/ (last accessed March 28, 2020).

Indeed, we have before us declarations stating that such high-risk conditions are present in the detention facilities at issue in this case. Both Petitioners and lawyers familiar with the ICE facilities at issue here have attested to overcrowding that makes social distancing impossible at all three facilities. At the York facility, for example, inmates are housed in dormitory-style conditions, in which 60 people reside in each housing block. (Doc. 2, Ex. 18). That space is used for both eating and sleeping. (*Id.*). Petitioners report that not even the medical staff wear gloves when in contact with inmates. (Doc. 2, Ex. 11). Detainees must eat their meals four-to-a-table, with approximately three feet of space between individuals. (*Id.*).

At Clinton, inmate bunks are often less than two feet apart, and inmate declarations show that it is difficult to keep more than a two feet distance between inmates, let alone the recommended six feet. (Doc. 2, Ex. 10). The laundry facilities at Clinton are also reported to be chronically broken, preventing detainees from keeping their clothes and bedding clean. (*Id.*). Indeed, for a total of 72 men, Clinton provides only four sets of sinks and showers. (*Id.*). The Facility is also reported to have bugs mice, and rats, which add to the unsanitary conditions experienced by detainees. (*Id.*).

At Pike, detainees share eight-by-ten or twelve foot cells with two other men. (Doc. 2, Ex. 13). Those cells also contain a sink and a shower. (*Id*). Some men at Pike report being forced to share cells with other individuals currently exhibiting

COVID-19 symptoms or report exhibiting symptoms themselves while housed with other inmates. (Doc. 2, Exs. 3; 4; 8). Inmates at Pike are also usually forced to remain within two feet of other individuals, even while in the common areas of the facility. (Doc. 2, Ex. 4). They are also required to buy their own soap, are not given hand sanitizer, and are forced to share cleaning supplies with an entire block of cells. (Doc. 2, Exs. 3; 13).

ICE guidance states that these types of risks are mitigated by quarantining detainees with symptoms and by housing those with a higher risk of exposure separately from the rest of the detainee population. (Doc. 2, Ex. 1). The Respondents further proffer that the Facilities are practicing "cohorting," an "infection prevention strategy which involves housing detainees together who were exposed to a person with an infectious organism but are asymptomatic." (Doc. 35 at 12). This practice is meant to last for fourteen days, the duration of the virus's incubation period. The Petitioner's declarations, however, show that these practices are not being followed. At least two Petitioners aver that they are experiencing symptoms and have not been isolated from other individuals. (Doc. 2, Exs. 3; 4; 8). Furthermore, all Petitioners have a higher risk of exposure, and none have been moved to separate housing. Indeed, it does not even seem that ICE is providing detainees with proper information on how they can combat the virus on their own. (Doc. 2, Ex. 3). Troublingly, some facilities seem to have shut off detainee access to news outlets,

thereby preventing the detention facility's population from informing themselves on best practices to prevent transmission. (Doc. 2, Ex. 5).

d. Petitioners are at uniquely high risk for contracting COVID-19

Not only are the Facilities themselves uniquely suited to rapidly spread COVID-19, but also Petitioners themselves are members of high-risk groups that are likely to feel the effects of the virus more keenly than the average individual.[13] Each of the Petitioners before us has an underlying medical condition that heightens their risk of serious COVID-19 effects, among them asthma, diabetes, heart conditions, hepatitis, and immunocompromising conditions such as leukemia and organ transplants.

e. The threat to high-risk individuals posed by COVID-19 constitutes irreparable injury

Various courts across the nation have found that COVID-19, coupled with the lack of hygiene and overcrowding present in detention facilities, will pose a greatly heightened risk to inmates. *See Xochihua-Jaimes v. Barr*, No. 18-71460 (9th Cir.

---

[13] *People at Risk for Serious Illness from COVID-19*, CENTERS FOR DISEASE CONTROL AND PREVENTION, (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 AND PREVENTION, (Mar. 22, 2020), https://www.cdc.gov/coronavirus/2019-ncov/hcp/underlying-conditions.html (stating that "moderate to severe asthma," "heart disease," "obesity," and "diabetes" are conditions that trigger higher risk of severe illness from COVID-19).

Mar. 23, 2020) ("[I]n 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 Petitioner be immediately released from detention and that removal of Petitioner be stayed pending final disposition by this court."); *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."); *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. Notably, 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)).

Courts have also acknowledged the particular risks facing older inmates and those with underlying medical conditions. *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 the pandemic poses to his health. *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.").

Indeed, courts have even specifically held that COVID-19 constitutes an irreparable harm that supports the grant of a TRO. *See Vasif "Vincent" Basank, et al v. Decker*, 2020 WL 1481503 at *4-5 (S.D.N.Y. March 26, 2020) ("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"); *Castillo v.*

Barr, CV-20-00605-TJH (C.D. Cal. 2020) (granting a TRO to immigration detainees due to the COVID-19 pandemic); *see also Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 332 (2d Cir. 1995) (finding irreparable harm "premised ... upon [the district court's] finding that [Petitioner] 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.").

The painful new reality is that we are constantly at risk of contracting a deadly virus and are experiencing previously unimagined safety measures to stop its spread. This virus spares no demographic or race and is ruthless in its assault. The precautions being adopted to stop it should apply equally, if not more so, to the most vulnerable among us. Petitioners have shown that adequate measures are not in place and cannot be taken to protect them from COVID-19 in the detention facilities, and that catastrophic results may ensue, both to Petitioners and to the communities surrounding the Facilities. We therefore find that the likely irreparable injury to Petitioners, as high-risk individuals, satisfies the first element of our TRO analysis.

iii. Likelihood of Success on the Merits

Petitioners argue that their continued incarceration in ICE detention facilities exposes them to serious risks associated with COVID-19 which violate their due

process rights. (Doc. 2 at 27). We find that Petitioners are likely to succeed on the merits of their claim.[14]

To bring a Fifth Amendment due process claim, Petitioners must show that their conditions of confinement "amount[ed] 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 229, 232 (3d Cir. 2008)). In other words, we must ascertain whether the conditions serve a legitimate purpose and whether the conditions are rationally related to that legitimate purpose. *Hubbard* 538 F.3d at 232.

Considering the Facility conditions previously discussed, we can see no rational relationship between a legitimate government objective and keeping Petitioners detained in unsanitary, tightly-packed environments—doing so would

[14] The Respondents argue that Petitioners do not have a legitimate due process claim because they have no "liberty or property interest" in a purely "discretionary grant of humanitarian parole." (Doc. 35 at 28). We disagree. "Unsanitary, unsafe, or otherwise inadequate conditions" are sufficient to state a Due Process Claim and we shall thus proceed with our analysis. *Petty v. Nutter*, No. 15-3430, 2016 WL 7018538, at *2 (E.D. Pa. Nov. 30, 2016); *Grohs v. Lanigan*, No. 16-7083, 2019 WL 1500621, at *11 (D.N.J. Apr. 5, 2019) ("extreme heat combined with lack of potable water, as well as generally unsanitary conditions" are sufficient to state a conditions-of-confinement claim).

constitute a punishment to Petitioners. Despite the Respondents' protests to the contrary, we need not find that the Facilities had the "express intent" to punish Petitioners with the conditions alleged. (Doc. 35 at 37). Instead we ask whether the conditions are rationally related to a legitimate government objective. *Hubbard* 538 F.3d at 232. Here, they are not.

The Respondents maintain that "preventing detained aliens from absconding and ensuring that they appear for removal proceedings is a legitimate governmental objective." (Doc. 35 at 38). They cite a great deal of authority supporting this point, and we do not disagree. (*Id*.). However, we cannot find that unsanitary conditions, which include overcrowding and a high risk of COVID-19 transmission, are rationally related to that legitimate government objective.

Social distancing and proper hygiene are the *only* effective means by which we can stop the spread of COVID-19. Petitioners have shown that, despite their best efforts, they cannot practice these effective preventative measures in the Facilities. 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.

The global COVID-19 pandemic and the ensuing public health crisis now faced by American society have forced us all to find new ways of operating that prevent virus transmission to the greatest extent possible. We expect no less of ICE.

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.[15]

We therefore find that Petitioners are likely to succeed on the merits of their due process claim that their conditions of confinement expose them "to serious risks associated with COVID-19." (Doc. 2 at 35).

---

[15] Moreover, not only have Petitioners established a likelihood of success on the merits on their Fifth Amendment claim, but, in fact, they have also demonstrated that their claim is likely to be successful under the more exacting Eighth Amendment standards as well. To succeed in proving that conditions of confinement violate the Eighth Amendment, a plaintiff 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." Furthermore, the Supreme Court has recognized authorities can be "deliberately indifferent to an inmate's current health problems" where 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. Instead, if Petitioners can show that the conditions "pose an unreasonable risk of serious damage to their future health," they may succeed on their claim. *Helling*, 509 U.S.at 35) (alteration omitted). The current measures undertaken by ICE, including "cohorting" detainees, are patently ineffective in preventing the spread of COVID-19. Indeed, we now have reports of a positive test amongst the employees at Pike County prison, thereby greatly increasing the likelihood that COVID-19 is present in the prison population.

iv. Balancing of the Equities and Public Interest

The equities at issue and public interest weigh heavily in Petitioners' favor. First, and as described, Petitioners face irreparable harm to both their constitutional rights and their health. Second, we find that the potential harm to the Respondents is limited. While we understand and agree that preventing Petitioners from absconding and ensuring their presence at immigration proceedings 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.

Finally, the public interest favors 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." *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). 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.

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.

Respondents' Facilities are plainly not equipped to protect Petitioners from a potentially fatal exposure to COVID-19. While this deficiency is neither intentional nor malicious, should we fail to afford relief to Petitioners we will be a party to an unconscionable and possibly barbaric result. Our Constitution and laws apply equally to the most vulnerable among us, particularly when matters of public health are at issue. This is true even for those who have lost a measure of their freedom. If we are to remain the civilized society we hold ourselves out to be, it would be heartless and inhumane not to recognize Petitioners' plight. And so we will act.

Based on the foregoing, we shall grant the requested temporary restraining order. Respondents, and the York County Prison, Clinton County Correctional Facility 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. 7), is **GRANTED**.
2. Respondents, and the York County Prison, Clinton County Correctional Facility and Pike County Correctional Facility **SHALL IMMEDIATELY RELEASE** the Petitioners **TODAY** on their own recognizance.
3. This TRO will expire on April 13, 2020 at 5:00 p.m.
4. No later than noon on April 7, 2020, the Respondents shall **SHOW CAUSE** why the TRO should not be converted into a preliminary injunction.
5. The Petitioners may file a response before the opening of business on April 10, 2020.

s/ John E. Jones III

John E. Jones III
United States District Judge