UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BHARATKUMAR G. THAKKER, *et al.*, Plaintiffs, v. CLAIR DOLL, in his official capacity as Warden of York County Prison, *et al.*, Respondents.	Case No. 1:20-cv-00480 **Hon. John E. Jones III**

RESPONDENTS' RESPONSE TO THE COURT'S ORDER TO SHOW CAUSE, ISSUED MARCH 31, 2020 AND OPPOSITION TO THE COURT'S TEMPORARY RESTRAINING ORDER

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INTRODUCTION

Petitioners are thirteen aliens previously housed as immigration detainees in the Middle District of Pennsylvania at either York, Pike, or Clinton County. Petitioners allege that their many pre-existing medical conditions render them at increased risk for serious illness or death if they contract COVID-19. On March 24, 2020, Petitioners initiated this action with the filing of a "Petition for Writ of Habeas Corpus / Complaint" followed, on March 25, 2020, by a Motion for Temporary Restraining Order and supporting brief. Doc. 1 (Compl./Pet.); Doc. 7 (Mot.); Doc. 12 (Br. In Support). Petitioners claimed a constitutional violation necessitating their immediate release from custody because they suffer from medical conditions that make them more susceptible to COVID-19 and they were exposed to a "heightened risk" of contracting the virus if they were to remain in detention. *Id.* On March 25, 2020, this Court ordered Respondents to file a response to the Motion for Temporary Restraining Order "before the opening of business" March 30, 2020. Doc. 14 (Order.) Between March 25, 2020, and March 29, 2020, Petitioners filed two Notices of Supplemental Authority and a "factual update" containing numerous declarations. (Docs. 27, 33, 34.) Also, the Amici Curiae Public Health and Human Rights Experts requested, and were granted, the ability to file a brief. (Doc. 29, 36.)

On March 29, 2020, Respondents filed a combined opposition to the restraining order and response to the habeas petition. Doc. 35 (Br. In Opp'n.) On

March 30, 2020, Petitioners filed a Reply Brief. Doc 46 (Reply Br.) Less than 24 hours later, and without a hearing, this Court granted Petitioners' request for a temporary restraining order and directed the immediate release of ten criminal aliens without any individualized assessment into their level of danger or flight risk and without weighing any potential impact on healthcare, housing, or the general health and safety of the communities into which they were released. Doc. 47 (Order.) Further, the Court ordered Respondents to show cause before noon April 7, 2020, why the temporary restraining order should not be converted into a preliminary injunction. *Id.*

Respondents hereby oppose Petitioners' Motion for Permanent Injunction. Without authority, Petitioners' sought, and were granted, immediate release from detention due to the worldwide presence of COVID-19. As this Court recently noted in its decision granting the Temporary Restraining Order, COVID-19 is a viral global pandemic that has temporarily changed the way people interact, work, and go to school. Doc. 47 (Order). It cannot be disputed that federal public health officials have opined that a way to stop the spread of COVID-19 is to practice social distancing. *See id.* at 8. The Court also noted that Pennsylvania has issued stay at home orders and has emphasized this notion of social distancing. *See id.*

The Government is sympathetic to the fear that this unprecedented pandemic has instilled in Petitioners. The rules of law, however, have not broken down. We as

a nation still follow the United States Constitution, federal law, and precedent; and must balance individual concerns with the threats that aliens like Petitioners pose to society as a whole and ICE's obligation to detain aliens until they are removed.

Accordingly, this opposition brief asks the Court to review the following: First, Petitioners' temporary relief is pendent on the scope of the pandemic. They have not provided this Court with any authority how it could order an immediate temporary release under 28 U.S.C. § 2241. Section 2241 involves a challenge that "ultimately attacks the 'core of habeas'—the validity of the continued conviction or the fact or length of the sentence." *Quero v. Hufford*, No. 3:11-cv-00238, 2011 WL 2414327, at *3 (M.D. Pa. May 18, 2011), R & R, *adopted by* 2011 WL 2357509 (M.D. Pa. June 10, 2011) (*quoting Leamer v. Fauver*, 288 F.3d 532, 542 (3d Cir.2002)). "'Conversely, when the challenge is to a condition of confinement such that a finding in plaintiff's favor would not alter his sentence or undo his conviction" a civil rights action is appropriate. *Id.*

Second, temporary *or* preliminary relief has to relate to the initial complaint filed in the matter so that the Court can decide the merits of the claim, based on the Complaint, to determine if permanent relief should be granted. *James v. Varno*, 1:14-cv-01951, 2012 WL 895569, at *3 (M.D. Pa. Mar. 7, 2017) (*citing Ball v. Famiglio*, 396 F. App'x 836, 837 (3d Cir. 2010). Petitioners' request for injunctive relief is only tangential to their initial petition –they should have filed a complaint asserting

a constitutional claim.

Third, to the extent this Court continues to exercise jurisdiction over this matter, other than stating release into COVID-19 ravaged communities is the *only* way to protect them from COVID-19, it has not been demonstrated that the Clinton or Pike County Correctional Facilities or York County Prison pose a risk to their safety or that ICE has violated their constitutional rights. Rather, the evidence demonstrates that the Government has taken steps to protect the Petitioners' safety and the safety of other detainees from prevention, uncontrollable spread, diagnoses, and treatment of COVID-19.

Fourth, this Court must then balance the equities and public interest of allowing detainees such as Petitioners, who are either subject to mandatory detention, or not appropriate for release due to their criminal or immigration backgrounds, to continue inhabiting communities without any means to safeguard the communities they have been released into. Re-detaining the Petitioners at the expiration of the temporary relief previously granted fulfills the purpose of facilitating deportation and protecting against flight or dangerousness. ICE was lawfully detaining Petitioners for removal proceedings because their criminal record placed them within the ambit of 8 U.S.C. § 1226(c) or because their previous lawless actions while in the community had rendered them unsuitable for release back into the communities within the United States from which they came.

Finally and alternatively, to the extent this Court is inclined to grant permanent relief, the Government requests that the order be limited to April 30, 2020, the end of the thirty-day period that the CDC has asked for social distancing or until such time as Petitioners can be removed from the United States –whichever occurs first.[1] In addition, any potential order granting this motion, should remand the matter to ICE to set conditions of release, those conditions would include: a) the detainee be ordered to comply with national, state, and local guidance regarding staying at home, sheltering in place, and social distancing, and b) until returned to ICE detention, the detainee be placed on home detention, and requirement that Petitioners' counsel file a status notice every seven days on the whereabouts of each released petitioner.

UPDATED FACTUAL BACKGROUND

A. Inmate Population.

The York County Prison has the capacity to house 2,245 inmates and has historically often operated near capacity. *See* Declaration of Joseph Dunn (Ex. 1) ¶ 5. As of the morning of April 3, 2020, however, there are only 1,376 combined male and female inmates and detainees housed at the facility. *Id.* The Clinton County

[1] It is obviously not certain that April 30, 2020, is the last day the CDC will recommend social distancing. https://www.coronavirus.gov. This Court's potential order in this case, however, should be limited in time in the event CDC guidance changes.

Correctional Facility has the capacity to house 298 inmates and has historically often operated near capacity. *Id.* ¶ 6. As of the morning of April 3, 2020, however, there are only 155 combined inmates and detainees housed at the facility. *Id.* The Pike County Correctional Facility has the capacity to house 375 detainees and has historically often operated near capacity. *Id.* ¶ 7. As of the morning of April 3, 2020, however, there are only 250 combined inmates and detainees housed at the facility. *Id.*

B. Individual Criminal and Immigration History.

Bharatkumar G. Thakker is a native and citizen of India who was admitted to the United States as an NP1 – Lawful Permanent Resident (child of a person in the United States on an employment visa) on March 13, 1973. *Id.* ¶ 9. Thakker filed an application for naturalization that was denied due to poor moral character. *Id.* To wit, Thakker has nine convictions for theft related offenses: June 17, 2003, November 4, 2004, January 22, 2009, August 23, 2007, and September 9, 2008 convictions for retail theft; a January 15, 2010 conviction for shoplifting; a September 27, 2011 conviction for possessing instruments of crime; and a May 6, 2014 conviction for retail theft. *Id.* On June 7, 2017, Thakker was arrested for the ninth time for a theft related offense. *Id.* On March 4, 2020, Thakker received a bond hearing and the IJ found that he remains a significant risk and danger to the community and property and denied bond. *Id.* In addition, ICE reviewed Thakker

for discretionary release and determined that although he is on the chronic care list for, among other issues, GERD and situational high blood pressure, continued detention was determined given his criminality. *Id.*

Adebodun Adebomi Idowu is a native and citizen of Nigeria. *Id.* ¶ 10. Idowu adjusted status to conditional lawful permanent resident; however, USCIS denied his Petition to Remove Conditions on Residence because he failed to establish his marriage was entered into in good faith. *Id.* He has been without legal status for almost three years. *Id.* He was subsequently convicted for Conspiracy to Launder Monetary Instruments and sentenced to 16 months imprisonment. *Id.* The monetary loss exceeded $10,000. *Id.* After Idowu entered withholding only proceedings, the immigration judge denied all forms of relief finding that Idowu's criminal coconspirators were members of Boko Haram, a designated terrorist organization. *Id.* On appeal the Board of Immigration Appeals affirmed that decision. *Id.* In December 2019, Idowu was reviewed for bond. *Id.* The immigration judge denied him as a danger to the community because Idowu's criminal contact involved a high level of fraud and deception. *Id.* Idowu's victims were individuals who suffered significant harm when their money was taken from them, and while the offense was not violent, it was still dangerous to the community and was recent. *Id.* The immigration judge also found that because Idowu had very little

avenues for relief from removal, if she had reached the issue of flight risk, Idowu would have been found to be one.[2] *Id.*

Courtney Stubbs is a native and citizen of Jamaica. On March 27, 2003, he was convicted of Conspiracy to Possess with Intent to Distribute Marijuana and sentenced to 46 months imprisonment. *Id.* ¶ 11. The Third Circuit Court of Appeals dismissed his Petition for Review and denied his Motion to Stay Removal on December 20, 2019. *Id.* He was denied bond on January 13, 2020 because his removal was imminent. *Id.*

Rigoberto Gomez-Hernandez is a native and citizen of Mexico. *Id.* ¶ 12. He was considered for bond on October 21, 2019, but denied as a danger to the community due to a 2011 DUI, a 2013 conviction for Disorderly Conduct, and a 2019 conviction for Simple Assault where he was arrested for domestic violence when he assaulted his wife in front of their children. *Id.* In addition, ICE reviewed Gomez-Hernandez for discretionary and determined that although he is on the chronic care list for, among other issues, GERD and constipation, continued detention was determined given his criminality. *Id.*

[2] For this reason, the "temporary restraining order" is likely "temporary" in name only. Respondents have serious reason to doubt that beneficiaries of the Court's order, such as Mr. Idowu, will return to custody for removal, or that Respondents will be able to locate Mr. Idowu now that the Court has ordered his unconditional release.

Rodolfo Augustin Juarez-Juarez is a native and citizen of El Salvador. *Id.* ¶ 13. On October 28, 2018, he was released on $5,000 bond; however, while on bond he was placed on ARD for DUI and attempted to purchase a firearm, indicating on the application that he was a United States Citizen. *Id.* Therefore, his bond was revoked. *Id.*

Henry Pratt has a final order of removal and the only impediment to his removal was that he will not cooperate in obtaining a travel document for his removal to Liberia and, had he not been released, would have been placed in Failure to Comply status. *Id.* ¶ 14. In addition, he was previously denied bond on several occasions as the immigration judge found him to be a danger to the community and a flight risk. *Id.* Specifically, he was arrested in 2000, 2002, 2003, 2007, 2010, 2011, 2014, and 2015 for various types of offenses. *Id.* He has five convictions stemming from these arrests. *Id.* He has been found guilty of Criminal Attempt-Theft by Deception-False Impression and sentenced to 11 ½ to 23 months' confinement and 4 years' probation; Fraud-False Insurance Claim and sentenced to 6 to 12 months' confinement and four years' probation; Access Device Fraud and was sentenced to 2 years' probation; Forgery-Alter Writing and was sentenced to 2 years' probation; and Unauthorized Use of Motor Vehicles and sentenced to 2 years' probation. *Id.*

Jean H.C. Augustin is a native and citizen of Haiti. *Id.* ¶ 15. He had his appeal challenging his removal order dismissed by the Board of Immigration Appeals on

March 17, 2020. *Id.* Thus, he is subject to the 90-day removal period set forth in 8 U.S.C. § 1231(a)(1) and prior to release, ICE had only 13 days to attempt to effectuate his removal from the United States. *Id.* On April 25, 2017, he was convicted for heroin trafficking for selling a "bundle" of heroin that consisted of thirteen bags containing heroin and one bag containing a combination of cocaine and fentanyl as well as unlicensed possession of firearms. *Id.* Between 2017 through 2019, confirmed overdoses claimed at least 13,631 lives in Pennsylvania alone.[3]

Mayowa Abayomi Oyerdiran is a native and citizen of Nigeria. *Id.* ¶ 16. On September 7, 2013, he was refused entry into the United States for fraud. *Id.* He has filed 14 nonimmigrant visa applications (B-1/2 or F1 applications to attend flight school) with different United States Embassies that were all previously denied. *Id.* He admitted to misrepresenting material facts on applications for entry into the United States. *Id.* When he arrived in the United States on November 7, 2019, he presented a French Passport with an alias before being positively identified via his FBI number. *Id.*

Catalino Domingo Gomez-Lopez is a native and citizen of Guatemala. *Id.* ¶ 17. On February 20, 2020, he was denied bond as a danger to the community given his past convictions and law enforcement contacts. *Id.* He had attempted entry into

[3] Opioid Data Dashboard, THE COMMONWEALTH OF PENNSYLVANIA (last visited April 6, 2020), https://data.pa.gov/stories/s/9q45-nckt/. This number is likely much higher, as a number of counties in this district failed to report data.

the United States at least three times using aliases before finally entering illegally without inspection. *Id.* He also has two DUI convictions and convictions or arrests for Leaving the Scene of a Property Collision, multiple traffics offenses, and nine misdemeanor convictions in the state of Delaware. *Id.*

Dexter Anthony Hillocks is a native and citizen of Trinidad and Tobago. *Id.* ¶ 18. He has a 2015 conviction for criminal use of a communication facility involving heroin trafficking and 2002 conviction for possession of marijuana. *Id.* He was granted bond ($18,000) but has failed to post that bond. *Id.* ICE reviewed Hillocks for discretionary release and determined that although he is on the chronic care list for, among other issues, anemia and hypothyroid, continued detention was determined given his criminality. *Id.* However, had he posted the bond previously issued, he would have been released. *Id.*[4]

C. Facility Conditions.

As of the morning of April 3, 2020, the Philadelphia Field Office (ERO) has the following information: at the Clinton County Prison there have been zero

[4] Meiling Lin is a native and citizen of China. *Id.* ¶ 19. ICE reviewed Lin for discretionary release and released her from the York County Prison on March 30, 2020. *Id.* Agus Prajoga is a native and citizen of Indonesia. *Id.* ¶ 20. ICE reviewed Prajoga for discretionary release and released him from Pike County Correctional Facility on March 27, 2020. *Id.* Fnu Mansyur is a native and citizen of Indonesia. *Id.* ¶ 21. ICE reviewed Mansyur for discretionary release and released him from Pike County Correctional Facility on March 27, 2020. *Id.*

confirmed cases of COVID-19. *Id.* ¶ 22. At the York County Prison one ICE detainee has tested positive for COVID-19. *Id.* She is currently in quarantine under medical observation. *Id.* At the Pike County Prison one ICE detainee and one county inmate have tested positive for COVID-19. *Id.* Both are in quarantine under medical observation. *Id.* Five correctional officers have tested positive for COVID-19. *Id.* They are under self-quarantine. *Id.*

As of the morning of April 3, 2020, the Philadelphia Field Office (ERO) has the following information regarding recent procedural changes in response to COVID-19 since Captain Jennifer Moon's March 27, 2020 declaration: in response to COVID-19, the Clinton County Prison now requires that transport and intake officers be properly fitted for and wear N95 masks. *Id.* ¶ 23. Employees in intake and accompanying inmates outside the facility are required to wear goggles or safety glasses. *Id.* Upon removal of their masks, employees are required to immediately wash their hands. *Id.*

In response to COVID-19, the York County Prison now requires all staff working within CERT activation, medical transport, mail processing; admissions and intake, temperature monitors, cohorted housing units, working directly with detainees on isolation status, and all medical staff be fitted for and wear an N95 mask. *Id.* All kitchen staff are now assigned surgical masks. *Id.* Detainees who work in the kitchen are required to wear surgical masks. *Id.* Detainees on isolation

status are required to wear an N-95 mask when they leave a cohorted housing unit. *Id.* Additionally, any detainees being transported to a hospital or outside medical appointment or as directed by PrimeCare medical staff, will be required to wear a surgical mask. *Id.*

In response to COVID-19, the Pike County Prison has instituted a modified lockdown schedule. *Id.* Movement throughout the facility is restricted. *Id.* Detainees ability to leave their cells is staggered in order to promote social distancing. *Id.* All detainees must maintain social distancing when not housed within the same cell. *Id.* Meals are now served to detainees within their cells. *Id.* All staff are now required to wear masks within the facility. *Id.* Daily temperature checks and screening for influenza like illness (ILI) symptoms have been implemented for all detainees. *Id.* If any detainee displays ILI symptoms, they along with any cell mates, are placed in quarantine. *Id.* Staff has increased the frequency of cleaning and disinfecting, including often used touch surfaces. *Id.*

Pertaining to detainee access to news related content or programming, the Philadelphia Field Office (ERO) has the following information: at the Clinton County Prison all detainees have access to various media outlets, including news outlets, via television. *Id.* ¶ 24. At the York County Prison all detainees have access to various media outlets, including news outlets, via television. *Id.* At the Pike County Prison all detainees have access to various media outlets, including news

outlets, via television. *Id.*

LEGAL STANDARD

Preliminary injunctions are an extraordinary remedy and are never awarded as of right. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, (2008); *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008). Their purpose is to preserve the status quo and relative positions of the parties until the case is decided on the merits. *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981); *Anderson v. Davila*, 125 F.3d 148, 156 (3d Cir. 1997).

In order to obtain the injunctive relief he seeks, the moving party must demonstrate "(1) that he is likely to suffer irreparable injury in the absence of injunctive relief; [and] (2) that he is likely to prevail on the merits." *Anderson*, 125 F.3d at 159 (citing *Schulz v. U.A. Boxing Ass'n*, 105 F.3d 127, 131 n.6 (3d Cir. 1997)); *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 157 (3d Cir. 2002) (same). If he succeeds in demonstrating the first two requirements, the court should then consider, when relevant, "(3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest." *Acierno v. New Castle County*, 40 F.3d 645, 653 (3d Cir. 1994) (quoting *Del. River Port Auth. v. Transamerican Trailer Transp., Inc.*, 501 F.2d 917, 919-20 (3d Cir. 1974) (additional citation omitted)).

The Third Circuit has "repeatedly insisted that the use of judicial power to

arrange relationships prior to a full determination on the merits is a weighty matter, and the preliminary injunction device should not be exercised unless the moving party shows that it specifically and personally risks irreparable harm." *Adams v. Freedom Forge Corp*., 204 F.3d 475, 487 (3d Cir. 2000) (citing *Campbell Soup Co. v. ConAgra Inc*., 977 F.2d 86, 91 (3d Cir. 1992)). "The dramatic and drastic power of injunctive force may be unleashed only against conditions generating a presently existing actual threat." *Holiday Inns of Am., Inc. v. B & B Corp*., 409 F.2d 614, 618 (3d Cir. 1969) (additional citations omitted). The Supreme Court has instructed that "the tool of the preliminary injunction should be reserved for 'extraordinary situations.'" *Id.* (citing *Sampson v. Murray*, 415 U.S. 61, 88 (1974)). The Third Circuit has also "insisted that the risk of irreparable harm must not be speculative." *Adams v. Freedom Forge Corp.*, 204 F.3d at 488 (citing *Acierno v. New Castle Cty*, 40 F.3d 645, 653 (3d Cir. 1994)). "Generally preliminary injunctions are granted to maintain the status quo." *Sovereign Water v. Messineo*, 572 F. Supp. 983 (E.D. Pa. 1983) (citation omitted). Further, where the movant's "request for immediate relief in his motion for preliminary injunction necessarily seeks resolution of one of the ultimate issues presented... [the movant] cannot demonstrate that [s]he will suffer irreparable harm if he is not granted a preliminary injunction, because the ultimate issue presented will be decided either by this Court, upon consideration of [Respondent's Response to the Petition, or at an evidentiary hearing]." *Millhouse v.*

Samuals, No. 1:15-CV-1644, 2016 WL 3436432, at *4 (M.D. Pa. Apr. 29, 2016), *report and recommendation adopted sub nom. Millhouse v. Samuals*, No. 1:15-CV-1644, 2016 WL 3457173 (M.D. Pa. June 20, 2016) (internal citations omitted).

Where, as here, the requested injunction is "mandatory" in nature, and the grant of injunctive relief would alter the status quo, additional scrutiny is applied. *Communist Party of Ind. v. Whitcomb*, 409 U.S. 1235, 1235, 93 S. Ct. 16, 34 L. Ed. 2d 40 (1972) (noting that a mandatory injunction is an "extraordinary remedy [to] be employed only in the most unusual case."); *United States v. Spectro Foods Corp.*, 544 F.2d 1175, 1181 (3d Cir. 1976) ("The power to issue a preliminary injunction, especially a mandatory one, should be sparingly exercised."). "[W]hen mandatory injunctive relief is sought, 'the burden on the moving party is particularly heavy.'" *Trinity Indus. v. Chi. Bridge & Iron Co.*, 735 F.3d 131, 139 (3d Cir. 2013) (quoting *Punnett v. Carter*, 621 F.2d 578, 582 (3d Cir. 1980)). The moving party's "right to relief must be indisputably clear." *Communist Party*, 409 U.S. at 1235.

ARGUMENT

I. Petitioners are entitled to seek a change to the conditions of their confinement via a civil rights action, not release via a habeas petition.

A. Petitioners are challenging the conditions of their confinement.

Petitioners are in no way challenging the authority of the government *per se* to detain them, i.e. the fact of their confinement. Rather, they are challenging the conditions under which they are being confined given the context of the current

pandemic. *See Jenkins v. Haubert*, 179 F.3d 19, 28 (2d Cir. 1999) ("'Conditions of confinement' is not a term of art; it has a plain meaning. It quite simply encompasses all conditions under which a prisoner is confined for his term of imprisonment."). They admit as much throughout their filings. *See* Doc. 46 (Pet'rs' Reply Br) p. 11 (alleging that their "confinement during this pandemic in less than-hygienic conditions that preclude social distancing" violates their rights); *see also* Compl. (Doc. 1) p. 4 (complaining that "[c]urrent conditions and procedures" in place at ICE facilities pose a health risk); *Id.* at 19 ("The conditions in Pennsylvania's immigrant detention facilities contravene all medical and public health directives for risk mitigation. People live in close quarters and cannot achieve the 'social distancing' needed to effectively prevent the spread of COVID-19."); Doc. 12 (Br. In Support) at 19 ("The conditions of immigration detention facilities pose a heightened public health risk for the spread of COVID-19 . . . ."). That is also why their filings are full of facts concerning their health and living conditions rather than facts pertaining to how and why they came to be detained.

B. A civil rights action is the appropriate vehicle for bringing a conditions of confinement claim.

A habeas petition is appropriate when individuals attack "the validity of the fact or length of their confinement." *Preiser v. Rodriguez*, 411 U.S. 475, 490 (1973); see also *Leamer v. Fauver*, 288 F.3d 532, 542 (3d Cir. 2002) (summarizing Supreme Court jurisprudence as prescribing habeas relief where the challenge is to "the

validity of the continued conviction or the fact or length of the sentence"). On the other hand, where individuals, like Petitioners, are challenging the conditions of their confinement, a civil rights action is the appropriate vehicle. *See Preiser*, 411 U.S. 490 ("[A] 1983 action is a proper remedy for a state prisoner who is making a constitutional challenge to the conditions of his prison life."); *Leamer*, 288 F.3d 543 ("[T]he challenge by Leamer is aimed at a condition of his confinement, and is a challenge properly brought under § 1983."); *see also Rhodes v. Chapman*, 452 U.S. 337, 348 (1981) (reviewing allegations of overcrowding in a state prison in the context of a civil rights action and finding no constitutional violation).

That is not to say that either the Supreme Court or the Third Circuit has absolutely ruled out the possibility of challenging conditions of confinement via a habeas petition. *See Preiser*, 411 U.S. 499 ("When a prisoner is put under additional and unconstitutional restraints during his lawful custody, it is arguable that habeas corpus will lie to remove the restraints making the custody illegal."); *United States v. Doe*, 810 F.3d 132, 149 (3d Cir. 2015) ("A *habeas* court may lack jurisdiction over a claim that does not challenge the fact, duration, or conditions of confinement."). But the Supreme Court has not yet allowed it. *See Muhammad v. Close*, 540 U.S. 749, 751 n. 1 (2004) (observing that the Court has never followed the speculation in *Preiser* described above). And the Third Circuit has done so only under exceptional factual and legal circumstances. *See Ali v. Gibson*, 631 F.2d 1126,

1128 (3d Cir. 1980) (considering prisoner's conditions of confinement claim in context of Virgin Islands habeas law because § 2241 was not applicable); *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235, 241-243 (3d Cir. 2005) (finding prisoner's challenge to BOP regulation curtailing the portion of his sentence that could be spent in community confinement to be cognizable under habeas as a challenge to the execution of his sentence). The traditional division of labor remains good law. *See Doe v. Pa. Bd. of Probation & Parole*, 513 F.3d 95, 100 n.3 (3d Cir. 2008) (internal citations omitted) ("[T]he difference between a civil rights action and a collateral attack is easy to describe. Challenges to conditions of confinement fall under § 1983. Attacks on the fact or duration of the confinement come under [habeas]."); *see also Wilkinson v. Dotson*, 544 U.S. 74, 86 (2005) (Scalia, J., concurring) (noting that conditions of confinement claims in habeas would "utterly sever the writ from its common-law roots");

Accordingly, district courts in this circuit routinely dismiss habeas petitions challenging conditions of confinement for lack of jurisdiction. *See, e.g., Stanko v. Obama*, 393 Fed. Appx. 849, 851 (3d Cir.2010) (holding that district court properly dismissed prisoner's claims of cruel and unusual punishment and constitutional violations resulting from the seizure of his papers because those claims "clearly fall outside the realm of challenges brought in habeas"); *Leslie v. Atty. General of U.S.*, 363 Fed. Appx. 955, 958 (3d Cir. 2010) ("To the extent that Leslie attempts to

challenge the conditions of his confinement, we agree with the District Court that this habeas corpus petition was not the proper vehicle to raise his claims."); *Johnson v. Warden Canaan USP*, 699 F. App'x 125, 126 (3d Cir. 2017) ("The Court correctly reasoned that Johnson was challenging the conditions of his confinement rather than the execution of his sentence, and thus that habeas corpus was not an available remedy.").

This practice is in line with the law in other circuits. *See Robinson v. Sherrod*, 631 F.3d 839, 841 (7th Cir. 2011) ("[W]e'll adhere to our long-standing view that habeas corpus is not a permissible route for challenging prison conditions."); *Nettles v. Grounds*, 830 F.3d 922, 927 (9th Cir. 2016) (en banc) ("[W]e now adopt the correlative rule that a § 1983 action is the exclusive vehicle for claims brought by state prisoners that are not within the core of habeas corpus."); *Palma-Salazar v. Davis*, 677 F.3d 1031, 1035 (10th Cir. 2012) ("[A] prisoner who challenges the conditions of his confinement must do so through a civil rights action."); *Hutcherson v. Riley*, 468 F.3d 750, 754 (11th Cir. 2006) ("When an inmate challenges the 'circumstances of his confinement' but not the validity of his conviction and/or sentence, then the claim is properly raised in a civil rights action under § 1983.").

II. Petitioners were not Entitled to a Preliminary Injunction

A. Plaintiffs have not shown a likelihood of success on the merits.

1. Due Process Standards[5]

Both the Eighth Amendment and the Fifth Amendment apply to the conditions of confinement. The rights guaranteed by the Eighth Amendment to convicted prisoners subject to penal incarceration also apply under the Fifth Amendment to non-penal incarceration or confinement, including pre-trial and civil detainees. *Reynolds v. Wagner*, 128 F.3d 166, 173 (3d Cir. 1997). The difference between the two is that the Eighth Amendment prevents "cruel and unusual punishment,"

[5] Because the Eighth Amendment is inapplicable in this case beyond supplying the base substantive rights, Respondents will not belabor footnote 15. However, Respondents note that the Court cites *Thomas v. Tice*, 948 F.3d 133 (3d Cir. 2020), which explicitly held that unsanitariness alone was insufficient to establish an Eighth Amendment violation. *Tice*, 948 F.3d at 139 ("administrative confinement in a dry cell is unpleasant and often unsanitary, so long as the conditions of that confinement are not foul or inhuman, and are supported by some penological justification, they will not violate the Eighth Amendment.").

Moreover, even if the Court had evidence to find that cohorting is "ineffective," this is insufficient under the Fifth Amendment, much less under the Eighth Amendment, to find a constitutional violation. The Supreme Court in *Farmer* made clear that subjective intent is required: "a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). "[S]ubjective recklessness as used in the criminal law is a familiar and workable standard that is consistent with the Cruel and Unusual Punishments Clause as interpreted in our cases, and we adopt it as the test for 'deliberate indifference' under the Eighth Amendment." *Id.* at 839-40; *contra* Doc. 47 at 24 ("… this deficiency is neither intentional nor malicious…"). The Court does not explain how the existence of a pandemic frees the Court from binding authority to reach a finding that alleged deficiencies that are "neither intentional nor malicious" violate the constitution.

whereas "pre-trial detainees cannot be punished at all under the Due Process Clause." *Hubbard v. Taylor*, 399 F.3d 150, 166 (3d Cir. 2005).

As it relates to medical claims, the Third Circuit "has set forth the elements of a Due Process Clause violation based on the government's duty to provide pretrial detainees with appropriate medical care: Such a violation requires 'acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.'" *Kost v. Kozakiewicz*, 1 F.3d 176, 185 (3d Cir. 1993) (quoting *Boring v. Kozakiewicz*, 833 F.2d 468, 471 (3d Cir. 1987), *cert. denied*, 485 U.S. 991 (1988)). When it comes to medical care and medical conditions, the "deliberate indifference" standard applies in both the due process and Eighth Amendment contexts. *See Kost*, 1 F.3d at 185; *see also Castro v. County of Los Angeles*, 833 F.3d 1060, 1068-71 (9th Cir. 2016) (*en banc*) ("[There is] a single 'deliberate indifference' test for plaintiffs who bring a constitutional claim—whether under the Eighth Amendment or the Fourteenth Amendment."). Under that standard, "[a] plaintiff must prove that prison officials acted with deliberate indifference and that he or she suffered a deprivation of the 'the minimal civilized measure of life's necessities.'" *Kost v. Kozakiewicz*, 1 F.3d at 188 (quoting *Wilson v. Seiter*, 501 U.S. 294, 304 (1991)).

2. Failure to Protect and Inadequate Treatment

To establish deliberate indifference as to preventive medicine and medical treatment in this Circuit, there are four essential elements: (1) the case must involve

a "serious" medical condition; (2) government must have "notice of [the] condition"; (3) there must be an intentional or reckless act of omission after notice, and (4) a causal relationship between the omission and the resulting condition. *Kost v. Kozakiewicz*, 1 F.3d 176, 189 (3d Cir. 1993) ("A prison's dispensing of vermin infested bedding, which causes that detainee's personal infestation, may establish a violation of a pretrial detainee's due process rights"); *id.* ("Heatstroke is considered a serious medical condition that requires treatment. The complaint alleged that jail and county officials were given notice of his condition and did nothing.").[6] These four basic elements apply to both medical treatment and precautionary health/safety measures. The Third Circuit has "found deliberate indifference in a variety of contexts[,]" including "where (1) prison authorities deny reasonable requests for medical treatment, (2) knowledge of the need for medical care is accompanied by the intentional refusal to provide it, (3) necessary medical treatment is delayed for non-medical reasons, and (4) prison authorities prevent an inmate from receiving

[6] *See also*, *Gordon v. Cty. of Orange*, 888 F.3d 1118, 1125 (9th Cir. 2018). Based thereon, the elements of a pretrial detainee's medical care claim against an individual defendant under the due process clause of the Fourteenth Amendment are: (i) the defendant made an intentional decision with respect to the conditions under which the plaintiff was confined; (ii) those conditions put the plaintiff at substantial risk of suffering serious harm; (iii) the defendant did not take reasonable available measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious; and (iv) by not taking such measures, the defendant caused the plaintiff's injuries.

recommended treatment for serious medical needs." *Pearson v. Prison Health Serv.*, 850 F.3d 526, 538 (3d Cir. 2017).

Because COVID-19 is a serious condition and the government is aware of COVID-19, the first two elements are established. However, the third and fourth elements are not.

Respondents, working in coordination with the detention facilities, have taken numerous measures to prevent and contain any potential outbreak. Ex. 1 (Dunn Decl.) ¶¶ 24-25. The fact that Respondents have taken proactive measures—such as cohorting and modified lockdowns, social distancing, increased sanitation measures—indicates that Respondents were not deliberately indifferent to the risk of infection. When preventive or medical treatment has been rendered, there is a presumption against deliberate indifference. *Moore v. Luffey*, 767 F. App'x 335, 341 (3d Cir. 2019); *Pearson v. Prison Health Serv.*, 850 F.3d 526, 535 (3d Cir. 2017) ("when medical care is provided, we presume that the treatment of a prisoner is proper absent evidence that it violates professional standards of care."). This presumption is not easily surmountable, as even malpractice does not rise to deliberate indifference - "deliberate indifference describes a state of mind more blameworthy than negligence." *Farmer v. Brennan*, 511 U.S. 825, 835 (1994).

At the very most, Petitioners and their declarations cite to a preference for release as the best preventive medicine practice. Respondents, on the other hand,

have issued guidance and have worked to develop best practices for the health and safety of detainees while maintaining custody. Release, viewed as a preference for one form of preventive medicine over another, does not become a constitutional right merely because Petitioners believe release to be the better preventive medicine regimen. *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996) ("a plaintiff's showing of nothing more than 'a difference of medical opinion' as to the need to pursue one course of treatment over another was insufficient, as a matter of law, to establish deliberate indifference."). As a detainee, Petitioners have no constitutional right to the course of preventive medicine of their choice, which in this case is release. *Monmouth Cty. Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 337 (3d Cir. 1987) ("…the Constitution does not require prison officials to adopt the best method of accommodation…"). As noted by the Third Circuit, "the deliberate indifference standard 'affords considerable latitude to prison medical authorities in the diagnosis and treatment of the medical problems of inmate patients,' we must 'disavow any attempt to second-guess the propriety or adequacy of [their] particular course of treatment' so long as it 'remains a question of sound professional judgment.'" *Pearson v. Prison Health Serv.*, 850 F.3d 526, 538 (3d Cir. 2017) (quoting *Inmates of Allegheny Cty. Jail v. Pierce*, 612 F.2d 754, 762 (3d Cir. 1979)).

As to the fourth element, there must be causation between the act of "reckless disregard" and the serious condition. *Gordon v. Cty. of Orange*, 888 F.3d 1118,

1125 (9th Cir. 2018) ("If the serious injury or illness were to occur regardless of Respondents' reasonable efforts to prevent it, no due process violation has occurred. *Sacal-Micha v. Longoria*, No. 1:20-CV-37, 2020 U.S. Dist. LEXIS 53474, at *15 (S.D. Tex. Mar. 27, 2020) ("the fact that ICE may be unable to implement the measures that would be required to fully guarantee Sacal's safety does not amount to a violation of his constitutional rights and does not warrant his release"). Indeed, to find otherwise would be to impose strict liability and render the deliberate indifference standard utterly meaningless. *Steading v. Thompson*, 941 F.2d 498, 499 (7th Cir. 1991) ("neither negligence nor strict liability is the appropriate inquiry in prison-conditions cases."). Where a pandemic, such as this one, poses a threat to everyone without discrimination, Petitioners do not gain a right of release by merely citing to the pandemic. *See also Carroll v. DeTella*, 255 F.3d 470, 472 (7th Cir. 2001) ("Many Americans live under conditions of exposure to various contaminants. The [Constitution] does not require prisons to provide prisoners with more salubrious air, healthier food, or cleaner water than are enjoyed by substantial numbers of free Americans.").

In short, there is no precedent for the suggestion that if the government cannot guarantee a clean bill of health for those in custody, then it cannot maintain custody at all. Indeed, the very *existence* of a "deliberate indifference" standard demonstrates the Supreme Court's understanding and acceptance of the fact that the

detention setting carries a degree of inherent and legally permissible risk, *even in non-penal confinement*. The Supreme Court expressly held as much in *Wolfish*, stating that due process permits civil and pre-trial detainees to be exposed to "inherent incidents of confinement." *Bell v. Wolfish*, 441 U.S. 520, 537 (1979). The Supreme Court has since reiterated this principle time and again. *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015) (civil detainee may be subjected to use of force when it is objectively reasonable without violating due process); *Farmer*, 511 U.S. at 834 ("not… every injury suffered by one prisoner at the hands of another that translates into constitutional liability for prison officials responsible for the victim's safety."); *Deshaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 199 (1989) ("the Fourteenth Amendment's Due Process Clause requires the State to … ensure their *reasonable* safety…" (emphasis added, internal marks omitted)). Even if preventive measures should fail, the failure of preventive measures does not *ipso facto* mean that such measures were deliberately indifferent. *Sacal-Micha v. Longoria*, No. 1:20-CV-37, 2020 U.S. Dist. LEXIS 53474, at *11-12 (S.D. Tex. Mar. 27, 2020) ("… the record reflects that ICE has provided constant medical attention to Sacal, and has implemented preventative measures to reduce the risk of Sacal contracting COVID-19. Those measures may ultimately prove insufficient. But the implementation of those measures preclude a finding that ICE has refused

to care for Sacal or otherwise exhibited wanton disregard for his serious medical needs.").

Courts should avoid the temptation to rush to disregard longstanding, well-established legal principles. This Court's order, which unconditionally released Boko Haram contacts, drug traffickers, drunk drivers, and fraudsters is unsupported by the cases upon which it relies. The Court cited *Helling v. McKinney*, 509 U.S. 25, 33 (1993) for standing purposes, but ignored the central facts of that case. In *Helling*, the Supreme Court found that "McKinney state[d] a cause of action under the Eighth Amendment by alleging that petitioners have, with deliberate indifference, exposed him to levels of [secondhand smoke] that pose an unreasonable risk of serious damage to his future health." *Helling*, 509 U.S. at 35. Important to the Supreme Court's holding in *Helling* were two critical facts: (1) the government *created* McKinney's exposure to secondhand smoke by placing him with a chain-smoking cellmate, and (2) the government took *no* steps to reduce McKinney's risk when it had the power to just give McKinney a different cellmate. Here, the government did not create COVID-19, nor has the government placed Petitioners with COVID-19 positive cellmates. In fact, the record demonstrates that Respondents have taken measures to ensure Petitioners' well-being and have taken reasonable steps to prevent their exposure to COVID-19. Ex. 1 (Dunn Decl.) ¶¶ 23-24. These critical facts make *Helling* distinguishable, if not inapplicable entirely.

See, e.g., *Sacal-Micha v. Longoria*, 2020 U.S. Dist. LEXIS 53474 at *11; *Dawson v. Asher*, No. C20-0409JLR-MAT, 2020 U.S. Dist. LEXIS 47891, at *6 (W.D. Wash. Mar. 19, 2020). It is unlikely that the Supreme Court would have found a constitutional violation if McKinney's exposure to secondhand smoke was no greater than anyone else's and the government had installed air filters in the facility. The Court cites to no precedent that states that despite reasonable efforts to prevent disease, deliberate indifference may still be found where there is a chance that such efforts may be futile. As previously stated, this imposition of strict liability has never been recognized and has been repeatedly rejected. Moreover, it is alarming and disturbing that the Court determined that the declarations of convicted drug traffickers, domestic abusers, and fraudsters—all of whom had a personal interest in dishonest testimony—were entitled to a great degree of credibility and weight, while the declarations of United States employees were discarded.

The Court acknowledged, but ultimately dismissed as unimportant Respondents' interests in maintaining custody to ensure that immigration law is enforced. As the Court acknowledged, those in Respondents' custody are civil detainees, who are treated the same as pre-trial detainees under the Fifth Amendment.

Akin to the INA's provisions which permit detention pending removal, the Bail Reform Act permits the courts to make custody determinations to ensure that

pre-trial detainees attend their criminal proceedings. A "judicial officer may, by subsequent order, permit the temporary release of the person, in the custody of a United States marshal or another appropriate person, to the extent that the judicial officer determines such release to be necessary for preparation of the person's defense or for another compelling reason." 18 U.S.C. § 3142(i).

Many courts, including courts in this district, have found that pre-trial detainees have not shown the lesser "compelling reason" showing under § 3142(i) by simply citing to COVID-19, much less the higher showing for a Fifth Amendment violation. "We [] recognize that public health officials have strenuously encouraged the public to practice 'social distancing,' to hand-wash and/or sanitize frequently, and to avoid close contact with others—all of which presents challenges in detention facilities. … However, a defendant should not be entitled to temporary release under § 3142(i) based solely on generalized COVID-19 fears and speculation." *United States v. Mendoza*, No. 5:20-mj-00011, 2020 U.S. Dist. LEXIS 58880, at *7 (M.D. Pa. Apr. 3, 2020); *United States v. Moran*, No. SAG-19-0585, 2020 U.S. Dist. LEXIS 58574, at *4 (D. Md. Apr. 3, 2020) ("The outbreak of COVID-19 does not however relieve the Court of its responsibilities to ensure the presence of the Defendant at trial and more importantly, the safety of the community.").

When looking to whether temporary release is appropriate or legally required under 18 U.S.C. § 3142(i), courts have been far more reluctant to release pre-trial

detainees. In fact, the courts of this circuit have uniformly denied *every single* § 3142(i) petition based on COVID-19, even where there are heightened risk factors:

- "While Defendant indicates that he suffers from hypertension, sleep apnea and asthma, and it is true that individuals with respiratory issues are at higher risk for COVID-19, his present health conditions are not sufficient to establish a compelling reason for release given the danger to the community if he is released and the efforts being undertaken at the ACJ to combat the spread of the virus." *United States v. Jones*, No. 2:19-CR-00249-DWA, 2020 U.S. Dist. LEXIS 54267, at *8 (W.D. Pa. Mar. 29, 2020).

- "While the Court is sympathetic to Simpson's medical concerns and claims regarding possible complications caused by the COVID-19 virus, such speculation concerning possible future conditions does not constitute a 'compelling reason' for temporary release." *United States v. Simpson*, No. 19-197, 2020 U.S. Dist. LEXIS 54006, at *4 (W.D. Pa. Mar. 27, 2020).

- "Defendant invites me to speculate that COVID-19 is present or imminent in the ACJ and, therefore, that his asthma requires the extreme measure of temporary release to home confinement pending trial. I do not agree that such a release is warranted by the facts of this case, or the actual circumstances at the jail." *United States v. Pritchett*, No. 19-280, 2020 U.S. Dist. LEXIS 57862, at *7 (W.D. Pa. Apr. 2, 2020).

- "While the Court is sympathetic to Defendants' claims regarding the complications caused by COVID-19, those concerns are not a sufficient basis for temporary release… the safety of the community would be placed in peril by release…. Mr. Penney has had several violations while on supervised release following his sentence from a prior conviction, including picking up 'new criminal charges for drug trafficking and gun crimes.'" *United States v. Penney*, No. 2:19-cr-8-NR, 2020 U.S. Dist. LEXIS 55278, at *7 (W.D. Pa. Mar. 18, 2020).

- "Defendant contends that as an inmate at the Allegheny County Jail, he is at much graver risk of contracting COVID-19 than if released to home confinement and that he is particularly vulnerable because he has a documented history of seasonal bronchitis and acute ulcerative colitis….

> The Court recognizes the potential for Defendant's exposure to the COVID-19 virus at the Allegheny County Jail. Unfortunately, that potential exists anywhere in the community… While the Court is sympathetic to Defendant's medical concerns and claims regarding possible complications caused by the COVID-19 virus, such speculation concerning possible future conditions does not constitute a 'compelling reason' for temporary release." *United States v. Thomas*, No. 19-176, 2020 U.S. Dist. LEXIS 55680, at *3 (W.D. Pa. Mar. 31, 2020).

- "[T]here is no indication that Green's medical needs are not being addressed at the ACJ; in fact, he is seemingly receiving appropriate medical care. While the Court is sympathetic to Green's medical concerns and claims regarding possible complications caused by the COVID-19 virus, such speculation concerning possible future conditions does not constitute a "compelling reason" for temporary release." *United States v. Green*, No. 19-85, 2020 U.S. Dist. LEXIS 53440, at *4-5 (W.D. Pa. Mar. 27, 2020).

- "Defendant specifies no compelling reason for release, such that he suffers from a serious health condition which places him at higher risk for contracting the COVID-19 virus, and only argues that the virus poses a risk to him and to other inmates and his ability to meet and communicate with his counsel has been thwarted by this pandemic." *United States v. Bastianelli*, No. 17-305, 2020 U.S. Dist. LEXIS 53441, at *3 (W.D. Pa. Mar. 27, 2020).

As stated above, the detention of pre-trial detainees and immigration detainees is governed by the Fifth Amendment. The Court does not reconcile how detaining immigration detainees—many of whom have no right to remain in the country and many of whom have already been convicted of serious crimes—is "heartless and inhumane" while detaining pre-trial detainees, who are presumed innocent, have shown no "compelling reason" for release when making identical claims. Indeed,

the "compelling reason" showing is far less than that required to show a constitutional violation.

B. The Balance of Interests Does not Favor Release

It is well-settled that the public interest in enforcement of United States immigration laws is significant. *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-58 (1976); *Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d 1211, 1221 (D.C. Cir. 1981) ("The Supreme Court has recognized that the public interest in enforcement of the immigration laws is significant."); *see also Nken v. Holder*, 556 U.S. 418, 435 (2009) ("There is always a public interest in prompt execution of removal orders: The continued presence of an alien lawfully deemed removable undermines the streamlined removal proceedings IIRIRA established, and permit[s] and prolong[s] a continuing violation of United States law." (internal marks omitted)).

Notably, Petitioners dismiss any discussion of the legitimate governmental objective in securing their removal. *See, e.g.*, *Demore v. Kim*, 538 U.S. 510, 513 (2003). Respondents have a substantial interest in enforcing immigration law, protecting the community (including, sometimes, protecting detainees from themselves) and preventing them from absconding. *Id.* at 515. As far as the balance of equities are concerned, if Respondents provide cost-free care to Petitioners while they remains in custody, the interests of both Petitioners and Respondents are served.

Conversely, when Petitioners are released, the fully-funded medical care from Respondents discontinued, and Respondents' interests in ensuring compliance with the immigration laws—the laws that many Petitioners have repeatedly violated—are frustrated.

The public is also served by maintaining Petitioners in custody, and disserved by their release. Their claim that the "public interest" is served by their release warrants scrutiny. Doc. 12 (Br. In Support) at 7-8. The criminal histories of many of these Petitioners says otherwise, and the Court does not explain how release into public community centers or public hospitals will not "suffocate the public health system" or prevent putting "large swaths of the public at risk." *Id.* Though Petitioners claim generally that they will receive better care outside of the facilities, they do not explain how they will obtain such care. To the extent Petitioners expect local hospitals to swallow the costs of potential treatment, the Court does not explain how this result is in the public interest.

C. The Court failed to Engage in Any Measured Analysis

In its uncontrolled release order, the Court released convicted drug traffickers, fraudsters, domestic abusers, and those with contacts affiliated with designated terrorist organizations to the public, finding that the "public interest heavily favor[ed]" release and that there was no risk of absconding because "failure to appear at future immigration proceedings would carry grave consequences of which

Petitioners are surely aware." Doc. 47 (Order) at 23. This analysis ignores the fact that many of these individuals have committed unlawful acts without regard to the "grave consequences" of their actions, including those that sound in immigration.

Unless the Fifth Amendment affords citizens in pre-trial detention less rights than it does to unlawful criminal aliens, the Court has no principled basis for issuing *en masse* release orders to criminal aliens when pre-trial citizens have not been released. In considering § 3142(i) petitions, the courts have engaged in a measured, case-by-case analysis. "While the generalized risks of COVID-19 cannot be disputed, courts evaluating whether pretrial release is necessary must evaluate the particularized risks posed to an individual defendant." *United States v. Bell*, No. 17-cr-20183-1, 2020 U.S. Dist. LEXIS 58850, at *17 (E.D. Mich. Apr. 3, 2020), *contra* Doc. 47.

In § 3142(i) petitions, courts have denied temporary release for a number of different reasons. Courts have denied release where there was a "likelihood the defendant's proposed release plan would increase COVID-19 risks to others, particularly if the defendant is likely to violate conditions of release, as Defendant has in the past." *United States v. Boatwright*, No. 2:19-cr-00301-GMN-DJA, 2020 U.S. Dist. LEXIS 58538, at *22 (D. Nev. Apr. 2, 2020). Courts have also denied release where, "[petitioner] offers nothing more than speculation that home detention would be less risky than living in close quarters with others at CoreCivic,

which at least has screening practices and other reasonable COVID-19 precautions in place." *United States v. Clark*, No. 19-40068-01-HLT, 2020 U.S. Dist. LEXIS 51390, at *21 (D. Kan. Mar. 25, 2020). Courts have further denied § 3142(i) petitions where the petitioner does not "address the risk of exposure to federal employees charged to monitor him if released or the health care system's capacity to provide him with adequate treatment if he were to contract the virus." *United States v. Lunnie*, No. 4:19-cr-00180 KGB, 2020 U.S. Dist. LEXIS 57764, at *12 (E.D. Ark. Apr. 2, 2020).

The Court's order contains none of this case-by-case analysis. It does not analyze whether any of these individuals would pose a danger to the community, whether they are in fact safer by virtue of release, whether they are likely to return to custody for removal, or whether their release plan posed any tangible benefit to society. Citizens petitioning for release pending trial must make these showings, yet under the Court's order, due process guarantees release for criminal aliens pending removal.

III. Release is Improper Relief.

Though citing the conditions of their detention as the problem, Petitioners nevertheless demand release, concluding it is the only possible solution. *See* Doc. 12 (Br. In Support) at 23 (emphasis in original) ("Release from detention is the ***only*** option to protect vulnerable adults from COVID-19 because of the above-described

conditions at the ICE Facilities."); Doc. 1 (Compl.) p. 5 (arguing that release is "the only viable public health strategy available" to address their claims). Petitioners' demand is both legally inappropriate and factually unwarranted.

The appropriate remedy for a successful conditions of confinement challenge is a change to the violative conditions. *See Tillery v. Owens*, 907 F.2d 418, 429 (3d Cir. 1990) (emphasis in original) (internal citation omitted) (quoting *Milliken v. Bradley (Milliken II)*, 433 U.S. 267, 280 (1977)) (noting that the nature of the "remedy is to be determined by the nature and scope of the constitutional violation" and thus must be "related to 'the *condition*' alleged to offend the Constitution"). This is certainly true if the challenge was brought properly as a civil rights action. *See supra* Section I; *Tillery*, 907 F.2d at 429 (upholding district court's prohibition on double-celling of inmates in response to Eighth Amendment challenge to overcrowded conditions in state prison). It should also be true if the challenge is allowed to proceed via a habeas petition. *See Preiser*, 411 U.S. 499 (emphasis added) ("When a prisoner is put under additional and unconstitutional restraints during his lawful custody, it is arguable that habeas corpus will lie to *remove the restraints* making the custody illegal.").

Release, on the other hand, is not appropriate. "The appropriate remedy for such constitutional violations… [is] not release from confinement." *Crawford*, 599 F.2d at 892; *Mutschler v. Commonwealth*, No. 3:12-CV-0004, 2012 U.S. Dist.

LEXIS 78838, at *6 (M.D. Pa. June 6, 2012) ("we… will dismiss the petition because it seeks release from confinement under 28 U.S.C. § 2254 as a remedy for allegedly unconstitutional conditions of confinement and because such relief is not available to him through a habeas corpus petition."). Simply put, "there is no constitutional right to be released from an otherwise legitimate sentence solely because the conditions of the confinement during that legitimate sentence" are allegedly unconstitutional." *Davis v. Pa. Dep't of Corr.*, No. CIV.A. 15-587, 2015 WL 5918909, at *4 (W.D. Pa. Oct. 7, 2015) (quoting *Crawford v. Bell*, 599 F.2d 890, 891–92 (9th Cir.1979)) ("The appropriate remedy for such constitutional violations, if proven, would be a judicially mandated change in conditions and/or an award of damages, but not release from confinement."). If it is found that a constitutional violation has occurred, "[t]he function of a court is limited to determining whether a constitutional violation has occurred, and to fashioning a remedy that does no more and no less than correct that particular constitutional violation." *Hoptowit v. Ray*, 682 F.2d 1237, 1246 (9th Cir. 1982) (citing *Rhodes v. Chapman*, 452 U.S. 337, 352 (1981) and *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971)).

In any event, release is not necessary to address Petitioners' concerns. The detention facilities at issue have taken numerous steps to address the pandemic. Ex. 1 (Dunn Decl.) ¶¶ 24-25. Where the claim relates to medical care in detention, the

proper remedy is to order improvements in medical care, *not* release – which would put an end to Petitioner's medical care, and which would not improve conditions. *See Deshaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989) ("when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs -- *e. g.*, food, clothing, shelter, medical care, and reasonable safety -- it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause."). If the detaining authority is failing in its obligations under *DeShaney*, the remedy is to order that those unconstitutional deficiencies be brought to the constitutional minimum.

"[I]t is axiomatic that the remedial power of a district court is coterminous with the scope of the constitutional violation found to exist." *Newman v. Alabama*, 503 F.2d 1320, 1332-33 (5th Cir. 1974) (cited by *Inmates of Allegheny Cty. Jail v. Pierce*, 612 F.2d 754, 762 (3d Cir. 1979)). The constitutional remedy should mirror the constitutional violation; otherwise, the Court would grant to Petitioner that to which he has no entitlement, while permitting an allegedly unconstitutional deficiency to continue. *See Pierce*, 612 F.2d at 762 ("Systemic deficiencies in staffing which effectively deny inmates access to qualified medical personnel for diagnosis and treatment of serious health problems have been held to violate constitutional requirements… [and] court[s have] ordered the hiring of additional

medical staff, both physicians and nurses, to bring the level of medical care up to the constitutional minimum." (citing *Gates v. Collier*, 349 F. Supp. 881 (N.D. Miss. 1972) with approval)). Where, as here, the complaints are that Petitioners reside in an environment lacking "CDC mandated social distancing, "unhygienic conditions", are forced to share a "small daily soap ration", and clean without protective gear, (Doc 12, Br. In Support) releasing Petitioners does nothing to remedy those complaints. Their requested relief will not remedy the conditions of which they complain, but rather grants them release to which they are not lawfully entitled.

IV. Even if this Court Holds that Criminal Aliens have Greater Constitutional Rights to Release than Pre-trial Citizens, the TRO Cannot Stand in its Current Form

"[I]njunctive relief should be 'no more burdensome to the defendant than necessary to provide complete relief to plaintiffs.' " *City of Philadelphia v. Attorney Gen. of United States*, 916 F.3d 276, 292 (3d Cir. 2019), reh'g denied (June 24, 2019) (internal citations omitted); *see also Waldman Publ'g Corp. v. Landoll, Inc.*, 43 F.3d 775, 785 (2d. Cir. 1994) ("Injunctive relief should be narrowly tailored to fit specific legal violations."); *Hayes v. N. State Law Enf't Officers Ass'n*, 10 F.3d 207, 217 (4th Cir. 1993) ("An injunction should be tailored to restrain no more than what is reasonably required to accomplish its ends."). Also, it is improper for preliminary injunctions to exceed the scope of relief that could ultimately be obtained by prevailing on the merits. *Cf. United States v. City of New York*, 717 F.3d 72, 95 (2d

Cir. 2013) ("We think that in some respects the injunction contains provisions that go beyond what would be appropriate to remedy only the disparate impact liability, and, because we have vacated the ruling granting summary judgment for the Intervenors on the disparate treatment claim, we will uphold only those provisions of the injunction that are appropriate as relief for the City's liability on the Government's disparate impact claim.").

By ordering release without conditions, the Court has given Petitioners the ability to abscond and prevented Respondents from re-arresting. This order is unlawful, but to the extent the Court maintains it, the Government respectfully requests that any further injunction that issues: (1) automatically expire on April 30, 2020, unless renewed by Petitioners upon showing that COVID-19 continues to bar immigration detention of Petitioners; (2) that any injunction expires when any Petitioner absconds; (3) not prevent the government from taking Petitioners back into custody should they commit any further crimes or otherwise violate the terms of their release; (4) order Petitioners to comply with national, state, and local guidance regarding staying at home, sheltering in place, and social distancing, and, until returned to ICE detention, the detainee should be placed on home detention; (5) order that Petitioners' counsel report each Petitioner's whereabouts every 7 days, and to notify Respondents and the Court immediately when a Petitioner absconds.

CONCLUSION

Because Petitioners have improperly brought their conditions of confinement claims in a habeas petition and cannot satisfy the requirements for preliminary relief, Respondents respectfully request the Court decline to convert the TRO into a Preliminary Injunction.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BHARATKUMAR G. THAKKER, et al.,	:	**NO. 1:CV-20-0480**
Petitioner-Plaintiffs	:	
	:	**(Jones, J.)**
v.	:	
	:	
CLAIR DOLL, in his official Capacity as Warden of York County Prison, et al.,	:	
Respondents-Defendants	:	**(Filed Electronically)**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Middle District of Pennsylvania and is a person of such age and discretion as to be competent to serve papers.

That on April 7, 2020, she served a copy of the attached

RESPONDENTS' RESPONSE TO THE COURT'S ORDER TO SHOW CAUSE, ISSUED MARCH 31, 2020 AND OPPOSITION TO THE COURT'S TEMPORARY RESTRAINING ORDER

by electronic service pursuant to Local Rule 5.7 and Standing Order 04-6, ¶12.2 to the following individual(s):

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