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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ANGEL DE JESUS ZEPEDA RIVAS, *et al.*, Plaintiffs, v. DAVID JENNINGS, *et al.*, Defendants.	CASE NO. 3:20-cv-02731-VC **FEDERAL DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR ORDER CONFIRMING THAT TEMPORARY RESTRAINING ORDER HAS EXPIRED, ENDING BAIL PROCESS, AND VACATING BAIL ORDERS AND OBJECTION TO PLAINTIFFS' DECLARATION** Date: June 2, 2020 Time: 10:00 a.m.

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INTRODUCTION

"At root, this lawsuit is not about whether any particular person should be released; it is about the conditions of confinement at the facilities." *Zepeda Rivas v. Jennings*, __ F. Supp. 3d __, No. 20-cv-02731-VC, 2020 WL 2059848, at *1 (N.D. Cal. Apr. 29, 2020). The en banc Ninth Circuit has held that challenges to conditions of confinement are not cognizable in habeas. *Nettles v. Grounds*, 830 F.3d 922, 933 (9th Cir. 2016) (en banc). Plaintiffs ignore the en banc Ninth Circuit altogether, not citing *Nettles* once in their filings. But Plaintiffs cannot erase *Nettles*, transform this case into a habeas case, or alter the fact that the Court does not have authority to order class members release on bail under "inherent authority." Plaintiffs' arguments to the contrary fail. Not only does no statute allow for a court to order immigration detainees released on bail in a pending litigation, the statutory Immigration and Nationality Act (INA) prohibits such release. And even assuming Plaintiffs could wish away Congress's statutes, the mass-bail process cannot be reconciled with Ninth Circuit precedent, which has (1) never recognized a court's authority to order release on bail in a pending civil litigation in *any* context and (2) held that a court "clearly err[s]" if orders bail outside of the context of an "extraordinary case." *Roe v. U.S. Dist. Ct. (In re Roe)*, 257 F.3d 1077, 1080 (9th Cir. 2001).

ARGUMENT

I. Plaintiffs Wholly Ignore the En Banc Ninth Circuit's Holding That Conditions-of-Confinement Cases (Like This Case) Are Not Cognizable in Habeas, and That Courts Do Not Have the Authority to Order Release on Bail in a Non-Habeas Case

The en banc Ninth Circuit was clear: detainees "may not challenge mere conditions of confinement in habeas corpus." *Nettles*, 830 F.3d at 933. Plaintiffs pretend that this en banc precedent does not exist, not citing it once in either their opening brief or their reply. But it does exist, and it is controlling.[1] This conditions-of-confinement case is not cognizable in habeas.[2]

[1] Plaintiffs claim that the Supreme Court suggested that detainees may challenge conditions of confinement through habeas. Pls. Reply 10 (citing *Ziglar v. Abbasi*, 137 S. Ct 1843, 1863 (2017)). The Supreme Court did not so hold. *Ziglar*, 137 S. Ct at 1862–63 ("[T]he Court need not determine the scope of availability of the habeas corpus remedy, a question that is not before the Court and has not been briefed or argued."). *Nettles*'s holding that conditions-of-confinement cases are not cognizable in habeas remains binding. *See Close v. Sotheby's, Inc.*, 894 F.3d 1061, 1072–73 (9th Cir. 2018) (precedent remains binding unless it is "clearly irreconcilable" with intervening authority).

[2] Plaintiffs claim that habeas jurisdiction exists here because there is a link between their claims and the "prospect of release" generally. Pls. Reply 10. What Plaintiffs overlook is that a detainee cannot bring a habeas claim seeking *other* detainees' release; he can bring a habeas claim (if at all) only for his *own*

In a conditions-of-confinement case, even one that alleges "constitutional violations," release from confinement is not an appropriate remedy, even were a plaintiff to win a final judgment. *Crawford v. Bell*, 599 F.2d 890, 892 (9th Cir. 1979). And a court may not order a remedy, such as release, on a preliminary basis that it cannot order in a final judgment. *Pac. Radiation Oncology, LLC v. Queen's Med. Ctr.*, 810 F.3d 631, 636 (9th Cir. 2015) (unless preliminary relief is "of the same character as that which may be granted finally. . . . the district court lacks authority to grant the relief requested") (citation omitted); *accord Reebok Int'l, Ltd. v. Marantech Enters., Inc.*, 970 F.2d 552, 560 (9th Cir. 1992) (cited by Pl. Reply 11) ("the authority to issue a preliminary injunction rests upon the authority to give final relief"); *see also, e.g.*, *Bolante v. Keisler*, 506 F.3d 618, 620 (7th Cir. 2007) (assuming inherent authority to grant release in a pending litigation exists at all, it arises only incident to the habeas power to order release as final relief); *Mapp v. Reno*, 241 F.3d 221, 226 (2d Cir. 2001) (tying release on bail to "the habeas remedy"). The Court thus cannot grant preliminary release on bail here.

Plaintiffs claim that *Brown v. Plata*, 563 U.S. 493 (2011) supports their theory that courts have some freestanding power to order detainees released to remedy constitutional violations. Pls. Reply 11. Not so. *Brown* involved a statutory provision that allowed release as a remedy (and then only when ordered by a three-judge panel). 18 U.S.C. § 3626(a)(3)(B), (E); *see* Fed. Defs. Cross-Mot. 19–20 n.21. Neither *Brown* nor any of Plaintiffs' other authorities support that a court has general freestanding authority, absent a statute, to order the release of detainees on bail in a pending litigation simply because the detainees may allege a constitutional claim. *Cf. Roe*, 257 F.3d at 1080 ("[T]he seriousness of the constitutional violations [detainee] alleges in his complaint does not justify [his] release on bail.").

II. No Statute Authorizes Release on Bail Here, and the Statutory INA Prohibits It

The Ninth Circuit held in *Chin Wah v. Colwell*, 187 F. 592 (9th Cir. 1911) that courts do not

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release. *Ramirez v. Galaza*, 334 F.3d 850, 854 (9th Cir. 2003) ("habeas jurisdiction is absent . . . where a successful challenge to a prison condition will not necessarily shorten the prisoner's sentence"); *cf. Coal. of Clergy, Lawyers & Professors v. Bush*, 310 F.3d 1153, 1159–60 (9th Cir. 2002) (setting out requirements for third-party habeas claim, none of which are met here). Plaintiffs disclaimed that they were seeking their own release in their pursuit of class certification, in an attempt to avoid the insuperable conflicts that would arise if each class member was seeking his own release. *See* Fed. Defs. Cross-Mot. 21 & n.23. Plaintiffs are judicially estopped from claiming that they are seeking their own release and, thus, from claiming that there is habeas jurisdiction. *See Samson v. NAMA Holdings, LLC*, 637 F.3d 915, 935 (9th Cir. 2011) (discussing judicial estoppel). Whether in a class action or individual actions, conditions-of-confinement cases are not cognizable in habeas. *Nettles*, 830 F.3d at 933.

have inherent authority to release immigration detainees on bail absent a statute authorizing them to do so. *Id.* at 594. Courts uniformly confirm that under *Chin Wah*, "there is no such inherent power in the federal courts and that they cannot admit a person to bail unless such power is expressly conferred by statute." *Mapp*, 241 F.3d at 225 (citing *Chin Wah*, 187 F. 592); *accord Ex parte Perkov*, 45 F. Supp. 864, 866–67 (S.D. Cal. 1942) (citing *Chin Wah*, 187 F. at 594); *In re Hanoff*, 39 F. Supp. 169, 172 (N.D. Cal. 1941) (citing *Chin Wah*, 187 F. at 594). No such statute exists here.

Plaintiffs cite the general habeas statute, 28 U.S.C. § 2241, Pls. Reply 12–13, but this does not authorize the Court to order release on bail. First, as discussed above, this case is not a proper habeas case, and hence § 2241 does not apply. *Nettles*, 830 F.3d at 933. Second, nothing in § 2241 authorizes a court to order release on bail in a pending litigation. Courts uniformly agree that any inherent authority that might exist to order release on bail is merely a common-law power, and none cite § 2241 as providing a statutory basis. *See Bolante*, 506 F.3d at 620 (ordering detainees released on bail "is an exercise of a court's common law powers"); *Mapp*, 241 F.3d at 225 (same).

In any event, not only does no statute authorize release on bail here, the applicable statute — the INA — prohibits it. The INA provides that certain aliens are subject to mandatory detention, 8 U.S.C. §§ 1225(b), 1226(c), 1231(a)(2), and that ICE is vested with discretion regarding the detention of certain other aliens, 8 U.S.C. §§ 1226(a), 1231(a)(6), which courts cannot set aside, 8 U.S.C. § 1226(e). *Bolante* and other courts confirm that the statutory INA bars a court from ordering an alien who is detained pursuant to these provisions to be released on bail. *See* Fed. Defs. Cross-Mot. 22–23 (citing cases).

Plaintiffs suggest that *Mapp* holds that these INA detention provisions do not limit the authority of courts to order release on bail. Pls. Reply 13–14 n.13. They misread *Mapp*. The critical fact about *Mapp* is that *none* of the INA detention provisions applied there. The petitioner there had received an order of removal from an immigration judge (IJ) that was affirmed by the Board of Immigration Appeals (BIA), and subsequently filed a habeas petition. *Mapp*, 241 F.3d at 223–24.[3] The government originally detained him pursuant to § 1226(c), which provides for mandatory detention of certain aliens who have

[3] This took place before the enactment of the REAL ID Act, which now provides that the sole and exclusive means for judicial review of an order of removal is through a petition for review with a Court of Appeals, and not a habeas petition in district court. 8 U.S.C. § 1252(a)(5).

committed certain crimes. *Id.* The government later took the position, however, that § 1226(c) applies only while administrative proceedings remain pending. *Id.* Because the petitioner's administrative proceedings (before the IJ and the BIA) were completed, § 1226(c) no longer applied. *Id.* The government might have been able to detain the petitioner under § 1231(a)(6). *Id.*[4] But the government had never exercised its discretion to detain him under § 1231(a)(6), because it had been operating under the assumption that § 1226(c) governed his detention. *Id.* at 229 n.12. As a result, none of the INA statutory detention provisions applied — which allowed the Second Circuit to hold, in the absence of any controlling INA detention statute, that a court had inherent authority to grant bail. *See id.* at 228–29. *But see Roe*, 257 F.3d at 1080 (the Ninth Circuit not agreeing with *Mapp* that courts do in fact have such authority). Critically, the Second Circuit held that "had the [government] exercised its discretion under § 1231(a)(6) and decided not to release Mapp on bail, we would be required to defer to its decision[.]" *Mapp*, 241 F.3d at 229 n.12. *Mapp* thus confirms that where an alien is validly detained pursuant to the INA's statutory detention provisions, a court cannot supersede the statute and order the alien released on bail. *Id.*; *see Cinquemani v. Ashcroft*, No. 00-CV-1460 (RJD), 2001 WL 939664, at *7–8 (E.D.N.Y. Aug. 16, 2001) (applying *Mapp* and denying bail because where "the Attorney General *has* exercised its discretion and has determined to keep [detainee] in custody. . . . this Court would be required to defer to its decision.") (emphasis in original). Here, like in *Bolante* and *Cinquemani* and unlike in *Mapp*, the statutory INA detention provisions apply, and the Court thus is barred from ordering class members released on bail, whom Congress by statute has provided to be detained. *Bolante*, 506 F.3d at 620–21.[5]

III. This Case Does Not Satisfy the "Extraordinary Case" Standard, and a District Court "Clearly Errs" If It Orders Release Outside of the Context of an "Extraordinary Case"

While the Ninth Circuit has never agreed that district courts have authority to order any releases

[4] Aliens with final orders of removal are subject to mandatory detention for a 90-day removal period, § 1231(a)(2), after which they are subject to discretionary detention, § 1231(a)(6).

[5] Plaintiffs allude to the Suspension Clause. Pls. Reply 12 n.11, 13 n.13. This argument is inapposite. First, as discussed above, this case is not a proper habeas case, and hence the Suspension Clause does not apply. *Nettles*, 830 F.3d at 933. Second, Plaintiffs confuse two separate issues: a court's power to *hear* a case versus the power to *grant bail* while litigation in that case remains ongoing. The latter is not a constitutional power. The Ninth Circuit has expressed doubt whether such a power exists at all, *Roe*, 257 F.3d at 1080, and if it does exist, it is at most a common-law power, not a constitutional one, *Bolante*, 506 F.3d at 620.

in a pending litigation in any context, it does agree that a district court "clearly err[s]" if it orders release on bail outside of the context of an "extraordinary case." *Roe*, 257 F.3d at 1080. The "extraordinary case" standard requires a demonstration that the case involves "a high probability of success" on the merits and, additionally, "special circumstances." *United States v. Dade*, __ F.3d __, No. 19-35172, 2020 WL 2570354, at *2 (9th Cir. May 22, 2020).[6] "[T]he standard for bail pending habeas litigation is a difficult one to meet," *Mapp*, 241 F.3d at 226 — and that heavy burden falls on the bail applicant to establish that his is an "extraordinary case," not on the government to rebut it, *id.* ("The *petitioner* must demonstrate that the habeas petition raises substantial claims and that extraordinary circumstances exist that make the grant of bail necessary to make the habeas remedy effective.") (emphasis added, brackets omitted). Plaintiffs and the individual bail applicants have not established a high probability of success on the merits or special circumstances, and hence the Court lacks authority to order their release on bail.

A. Plaintiffs Have Not Established a High Probability of Success on the Merits

The Southern District of California recently denied a preliminary injunction in connection with an immigration detention center with numerous confirmed COVID-19 cases, holding that the plaintiffs there had not demonstrated a likelihood of success on the merits. *Rodriguez Alcantara v. Archambeault*, __ F. Supp. 3d __, No. 20cv0567 DMS (AHG), 2020 WL 2773765 (S.D. Cal. May 26, 2020) (*Rodriguez Alcantara II*). That case is instructive and reconfirms that Plaintiffs have not shown a high probability of success on the merits here.

The immigration detention facility there, the Otay Mesa Detention Center (OMDC), has a maximum capacity of 1,970. *Id.* at *1. As of May 22, 2020, OMDC had reduced its population to 758 (489 immigration detainees and 269 criminal detainees), down from 987 three weeks earlier when the court had issued a temporary restraining order (TRO). *Id.* OMDC has 160 confirmed COVID-19 cases, the most of any immigration detention facility in the nation. *Id.* at *2. But OMDC had instituted a number of new practices to address the spread of COVID-19, and the rate of infection at the facility was

[6] *Roe* described the "extraordinary case" standard using a disjunctive — "special circumstances or a high probability of success" — but as the Ninth Circuit confirmed, the test is a conjunctive test, requiring both special circumstances and a high probability of success on the merits. *Dade*, __ F.3d __, 2020 WL 2570354, at *2; *accord, e.g.*, *Hall v. S.F. Super. Ct.*, No. C 09-5299 PJH, 2010 WL 890044, at *3 (N.D. Cal. Mar. 8, 2010) (citing cases).

decreasing. *Id.* The court found that, in light of those facts, the plaintiffs had not demonstrated a likelihood of success on the merits of their due-process claim based on their conditions of confinement at OMDC. *Id.* at *3. First, the majority (although not all) of the subclass at issue were in housing units with no positive COVID-19 cases. *Id.* Second, the subclass had "demonstrated criminal history, much of it significant," raising the government's interest in maintaining detention. *Id.* Third, the defendants had provided a list of medically vulnerable immigration detainees at OMDC, as determined by CDC's list of risk factors (CDC Risk Factors),[7] and had identified their locations. *Id.*[8] While the court had found at the TRO stage that the plaintiffs had a likelihood of success on the merits, at the preliminary-injunction stage, it reversed course and found that the plaintiffs did not have a likelihood of success on the merits:

> Given the reduction in the population and the current housing situation at OMDC, the policies and procedures instituted at OMDC to address COVID-19, and Defendants' acquisition and use of information concerning medically vulnerable individuals at OMDC, the Court finds Plaintiffs have not demonstrated a likelihood of success on their due process claim.

Id. at *4.

Like the plaintiffs there, Plaintiffs here have not shown a likelihood of success on the merits of their claims here, let alone the high probability of success needed to make this an "extraordinary case." In contrast to ODMC's 160 confirmed COVID-19 cases, there are no confirmed cases here; like the subclass there, much of the class here has demonstrated criminal history, and the government has an interest in maintaining detention; and like there, ICE has provided lists here (on a weekly basis) identifying detainees who have health conditions identified in the CDC Risk Factors.[9]

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[7] Ctrs. for Disease Control and Prevention, *People Who Are At Higher Risk* (May 14, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html (last visited June 1, 2020).

[8] The court defined "medically vulnerable" detainees as detainees age 60 or over or who have medical conditions that place them at heightened risk of severe illness or death from COVID-19 as determined by [the CDC Risk Factors]." *Rodriguez Alcantara v. Archambeault*, __ F. Supp. 3d __, No. 20cv0756 DMS (AHG), 2020 WL 2315777, at *6–7 (S.D. Cal. May 1, 2020) (*Rodriguez Alcantara I*).

[9] *Alcantara Rodriguez* joins numerous other courts that have rejected claims by plaintiffs that they have shown a likelihood of success on the merits of due-process claims related to COVID-19 where the government has taken measures to safeguard against COVID-19 (including courts that found at the TRO stage that plaintiffs had a likelihood of success on the merits and then determined at the preliminary-injunction stage that in fact plaintiffs did not in fact have a likelihood of success on the merits). *See, e.g.*, *Murai v. Adducci*, No. 20-10186, 2020 WL 2526031, at *6–7 (E.D. Mich. May 18, 2020) (recognizing "inherent limitations in mandating widespread 'social distancing' while detaining hundreds of inmates" and holding that screening new arrivals, taking their temperature, asking them about COVID-19 history,

Plaintiffs rely heavily on their experts to claim that there is an "overwhelming likelihood of a future outbreak." Pls. Reply 2. But these assertions are conclusory and belied by the facts on the ground. At the TRO stage, Plaintiffs made similar conclusory assertions that did not come to pass. For example, their chief expert, Dr. Greifinger, attested at the TRO stage that "[s]ocial distancing and scrupulous hygiene and sanitation are required to avoid infection or an outbreak. If there is inadequate social distancing, hygiene and sanitation, there will almost certainly be infection and an outbreak." Greifinger Original Decl. ¶ 31 (ECF No. 5-2). Over a month has passed, and no such infection or outbreak occurred despite the certainty of Dr. Greifinger's prediction. Plaintiffs' new expert declarations that there is an "overwhelming likelihood of a future outbreak" are similarly conclusory. When the World Health Organization first declared COVID-19 to be a global pandemic on March 11, 2020, there were 355 detainees at Mesa Verde (89% capacity) and 169 ICE detainees at Yuba (80% capacity). Now, ICE has reduced the population both Facilities by over 50% and has implemented many additional new measures and safeguards.[10] Plaintiffs and their experts do not reconcile the fact that their "tinderbox" scenario did

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restricting movement of detainees exposed to COVID-19, suspending social visits, and providing cleaning supplies to detainees, were reasonable measures, and denying detainee's due-process claim); *Aslanturk v. Hott*, No. 1:20-cv-00433 (RDA-JFA), 2020 U.S. Dist. LEXIS 85545, at *10–14, *30–34, *37–39 (E.D. Va. May 8, 2020) (generally same); *Williams v. Barr*, No. 4:20-CV-00704, 2020 U.S. Dist. LEXIS 79524, at *5–8, *12–16, *18–20 (M.D. Pa. May 6, 2020) (generally same, and finding that "although [detention facility] does not permit the type of social distancing that individuals may undertake in their homes," facility had taken steps to reduce population to 53% capacity, and holding that detainee did not state a valid due-process violation); *Betancourt Barco v. Price*, No. 2:20-cv-350-WJ-CG, 2020 U.S. Dist. LEXIS 78564, at *12–14, *24–27 (D.N.M. May 1, 2020) (generally same); *Toure v. Hott*, __ F. Supp. 3d __, No. 1:20-cv-395, 2020 WL 2092639, at *2–3, *10–13 (E.D. Va. Apr. 29, 2020) (generally same, and recognizing "the social distancing recommendation is inherently at odds with the nature of incarceration" and that facility had taken steps to reduce population to 60% capacity, and holding that plaintiffs did not have a likelihood of success on the merits); *Ulger v. Barr*, No. 20-CV-2952-LTS, 2020 WL 2061473, at *2–5 (S.D.N.Y. Apr. 29, 2020) (generally same); *Thakker v. Doll*, __ F. Supp. 3d __, No. 1:20-cv-480, 2020 WL 2025384, at *5 (M.D. Pa. Apr. 27, 2020) (generally same); *Benavides v. Gartland*, No. 5:20-cv-46, 2020 U.S. Dist. LEXIS 69182, at *14–15 (S.D. Ga. Apr. 18, 2020) (generally same); *Albino-Martinez v. Adducci*, No. 2:20-cv-10893, 2020 U.S. Dist. LEXIS 65618, at *9–11 (E.D. Mich. Apr. 14, 2020) (generally same, and finding that detainees' claims that they were housed in 100-person dormitories with bunkbeds three to four feet apart did not give rise to a significant likelihood of success on the merits); *Ramirez v. Culley*, No. 2:20-cv-00609-JAD-VCF, 2020 WL 1821305, at *2–4 (D. Nev. Apr. 9, 2020) (generally same); *Dawson v. Asher*, No. C20-0409JLR-MAT, 2020 WL 1704324, at *5–6, 11–13 (W.D. Wash. Apr. 8, 2020) (*Dawson II*) (generally same, and finding that detainees were assigned to sleep in bunk beds with four feet of space between them, but holding that detainees nonetheless had not shown a likelihood of success on the merits); *Sacal-Micha v. Longoria*, __ F. Supp. 3d __, No. 1:20-CV-37, 2020 WL 1518861, at *5–6 (S.D. Tex. Mar. 27, 2020) (generally same); *Dawson v. Asher*, No. C20-0409JLR-MAT, 2020 WL 1304557, at *2 (W.D. Wash. Mar. 19, 2020) (*Dawson I*) (generally same).

[10] Plaintiffs are correct that certain of ICE's new measures were put in place more recently, such as

not come to pass in the past two-and-a-half months, when populations were significantly higher and many of the safeguards had yet to be put in place, with their conclusion that the "tinderbox" scenario is imminent now, when the population is far lower and more safeguards are in place. *Cf. Thakker v. Doll*, __ F. Supp. 3d __, No. 1:20-cv-480, 2020 WL 2025384, at *8 (M.D. Pa. Apr. 27, 2020) (finding that "[t]he fears which we reasonably harbored of a 'tinderbox' scenario have largely failed to appear within those Facilities. This again is a credit to the staffs at those institutions" and holding that claims of a future "tinderbox" outbreak "are largely speculative"). Plaintiffs' conclusions fail to establish a high probability of success on the merits of their due-process claim that their detention constitutes "punishment" or that ICE was deliberately indifferent. *Cf. id.* at *5.[11]

Plaintiffs claim that "the absence of known COVID-19 cases is largely the result of Defendants' refusal to test." Pls. Reply 2. This misstates the situation. ICE and the Facilities follow the CDC's guidance regarding COVID-19 testing, Pham Decl. ¶ 23 (ECF No. 264-1), Fishburn Decl. ¶ 22 (ECF No. 264-2), which does not call for indiscriminate testing but instead provides that "[c]linicians should use their judgment to determine if a patient has signs and symptoms compatible with COVID-19 and whether the patient should be tested." Ctrs. for Disease Control and Prevention, *Evaluating and Testing Persons for Coronavirus Disease 2019 (COVID-19)* (May 5, 2020), https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-criteria.html (last visited June 1, 2020). In any event, even were there confirmed COVID-19 cases, to establish a likelihood of success on the merits (let alone the high probability of success they would need to show), Plaintiffs would further have to establish that ICE was incapable of managing the cases. *Cf., e.g.*, *Rodriguez Alcantara II*, 2020 WL 2773765, at *3–4 (plaintiffs failed to establish likelihood of success where government had limited COVID-19 spread); *Thakker*, 2020 WL 2025384, at *5 (same where government was "able to effectively control transmission from COVID-

staggering mealtimes at Mesa Verde and moving all ICE detainees at Yuba out of the "old" side of the facility into the newer housing units and spacing all beds at least six feet apart. *Cf.* Pls. Reply 4. This reflects ICE's continual efforts to add new measures and safeguards on an ongoing basis.

[11] Plaintiffs attempt to make much of the fact that Federal Defendants have not submitted a medical or scientific expert. *See, e.g.*, Pls. Reply 1. There is no rule that an expert can be rebutted only by another expert, or that in the absence of a rebuttal expert, an expert's conclusions are automatically accepted. *Cf., e.g.*, *Moturi v. Asher*, No. C19-2023 RSM-BAT, 2020 WL 2084915, at *4 (W.D. Wash. Apr. 30, 2020) (rejecting Dr. Greifinger's opinions as "not . . . persuasive" and "overly conclusory").

positive inmates"); *Dawson v. Asher*, No. C20-0409JLR-MAT, 2020 WL 1304557, at *3 (W.D. Wash. Mar. 19, 2020) (*Dawson I*) (same where "[t]here is no evidence of an outbreak at the detention center or that Defendants' precautionary measures are inadequate to contain such an outbreak or properly provide medical care should it occur"). Plaintiffs fail to do so.[12]

Because Plaintiffs have not established a high probability of success on the merits, they have not satisfied the "extraordinary case" standard, and the Court thus is not authorized to grant release on bail.

B. Plaintiffs Have Not Established Special Circumstances

The Ninth Circuit has rejected the argument that a risk of COVID-19 constitutes "special circumstances" warranting release. *Dade*, __ F.3d __, 2020 WL 2570354, at *2. Further, as Federal Defendants explained (and as Plaintiffs do not rebut), the "special circumstances" standard cannot be satisfied by dozens or hundreds of class members who all claim the same injury, as that would transform what is at best an extremely constrained authority by courts to order release (assuming any such authority exists at all) into a broad judicial override of the laws. *See* Fed. Defs. Cross-Mot. 23–25; *cf. South Bay United Pentecostal Church v. Newsom*, __ U.S. __, No. 19A1044, 2020 WL 2813056, at *1 (U.S. May 29, 2020) (Roberts, C.J., concurring) ("Our Constitution principally entrusts the safety and

[12] The measures and safeguards that the Facilities have implemented here are comparable to those implemented at other facilities where courts found that plaintiffs did not have a likelihood of success on the merits in light of such measures and safeguards. *See supra* note 9.

Plaintiffs' reliance on *Helling v. McKinney*, 509 U.S. 25 (1993) is misplaced. *Helling* involved a plaintiff who originally was assigned to a cell with another inmate who smoked five packs of cigarettes a day. *Id.* at 28. The plaintiff brought an Eighth Amendment claim, and the parties had a trial, but the trial court awarded a directed verdict to the prison. *Id.* at 29. The case went up on appeal on the issue of whether the plaintiff could state an Eighth Amendment claim against the prison for his exposure to cigarette smoke and, thus, whether the trial court had erred in awarding a directed verdict against him. *Id.* at 30–31. The Supreme Court held that the plaintiff had stated an Eighth Amendment claim and remanded to give him another chance to prove his claim. *Id.* at 35. The Supreme Court noted in passing that "[i]t 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." *Id.* at 33 (cited by Pls. Reply 6). But the Court also observed that the plaintiff might not in fact be able to "plainly prove" an unsafe, life-threatening condition. Among other things, the Court noted that (1) the plaintiff had been moved and was no longer housed with a five-pack-a-day smoker and (2) the prison had adopted new nonsmoking policies to minimize exposure to cigarette smoke. *Id.* at 35–36. The Court observed that "[i]t is possible that the new policy will be administered in a way that will minimize the risk to [plaintiff] and make it impossible for him to prove that he will be exposed to unreasonable risk with respect to his future health or that he is now entitled to an injunction." *Id.* at 36. Similarly, Plaintiffs here have not "plainly proved" an unsafe, life-threatening condition in the Facilities or established that the Facilities' policies and safeguards have not sufficiently minimized the risk such that Plaintiffs would be entitled to preliminary relief like release on bail while the lawsuit remains pending.

the health of the people to the politically accountable officials of the States to guard and protect. When those officials undertake to act in areas fraught with medical and scientific uncertainties, their latitude must be especially broad. Where those broad limits are not exceeded, they should not be subject to second-guessing by an unelected federal judiciary, which lacks the background, competence, and expertise to assess public health and is not accountable to the people.") (citations and quotation marks omitted). The Ninth and Third Circuits have both stayed attempts by district courts to order the mass release immigration detainees in response to COVID-19. *Hernandez Roman v. Wolf*, No. 20-55436, 2020 WL 2188048 (9th Cir. May 5, 2020), *staying Hernandez Roman Injunction* ¶¶ 2–12 (ECF No. 264-3); *Hope v. Warden York Cty. Prison*, 956 F.3d 156, 159 (3d Cir. 2020) (granting administrative stay of district-court order to release 20 detainees "within hours of the request").[13] Achieving the same mass-release result through a series of bail orders is no more authorized.[14]

IV. Federal Defendants Object to Plaintiffs' Declaration

Federal Defendants object to the declaration of Emilou MacLean (ECF No. 286-2), which Plaintiffs attach to their reply. Ms. MacLean's declaration about what unidentified medical records of unidentified detainees say is inadmissible hearsay and violates the best-evidence rule, does not provide Federal Defendants with enough detail so as to be able to intelligently respond, and should be stricken.

CONCLUSION

Federal Defendants respectfully request that the Court enter an order (1) confirming that the TRO has expired, (2) ending the ongoing bail process, and (3) vacating all bail orders.

[13] *Williams v. Wilson*, __ U.S. __, No. 19A1041, 2020 WL 2644305 (U.S. May 26, 2020) (cited by Pls. Reply 8–9) is not to the contrary. The Supreme Court denied a stay there because the original preliminary-injunction order being appealed had been superseded by a new preliminary-injunction order by the time the stay application came before the Court. Contrary to Plaintiffs' claims, the Court did not suggest that the district court's order was not overbroad. *See id.* at *1 (denying stay "without prejudice to the Government seeking a new stay if circumstances warrant").

[14] Plaintiffs claim, without citation, that it would defy logic for the "extraordinary case" standard to be more stringent as applied to immigration detainees than criminal detainees. Pls. Reply 15 n.14. The authority of the political branches is heightened in the area of immigration, and the judiciary's role more constrained. *See* Pls. Cross-Mot. 24 (citing cases); *accord Chin Wah*, 187 F. at 594 (provisions for bail in criminal cases do not give rise to bail in immigration cases). Additionally, there is no issue of "presumption" here — Plaintiffs do not dispute that the INA authorizes their detention.

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Respectfully submitted,

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