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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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Plaintiff-Petitioners,

v.

Christopher J. LAROSE, Senior Warden, Otay Mesa Detention Center,

Steven C. STAFFORD, United States Marshal for the Southern District of California,

Donald W. WASHINGTON, Director of the United States Marshals Service.
Defendant-Respondents.

Case No. 3:20-cv-00782-DMS-AHG

REPLY IN SUPPORT OF PLAINTIFF-PETITIONERS' MOTION FOR PRELIMINARY INJUNCTION AND PROVISIONAL CLASS CERTIFICATION

Hon. Dana M. Sabraw
DATE: May 29, 2020
TIME: 10:00 a.m.

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INTRODUCTION[1]

People are getting sick and dying at Otay Mesa. Respondents do not dispute this. Nor do Respondents dispute that requiring the Medically Vulnerable Subclasses to remain at Otay Mesa violates their Fifth and/or Eighth Amendment rights. Instead, Respondents rely exclusively on purported pleading defects and procedural challenges to contest the Petitioners' right to relief from continuing exposure to a disease that could kill them.

Respondents' primary argument is a game of semantics. The Medically Vulnerable Subclasses seek release from Otay Mesa because the conditions there—including immutable conditions—unreasonably threaten their health and their lives. Respondents rely on out-of-context statements with the word "conditions" to suggest Petitioners challenge the conditions at Otay Mesa and not the fact of their confinement there. That is simply false: the Medically Vulnerable Subclasses seek to get out of Otay Mesa because they otherwise will likely get sick, and may die.

The *only* difference between this case and the ICE Case where the Court ordered Respondents to release the most medically vulnerable from Otay Mesa is the reason for Petitioners' confinement. In light of the imminent risk to their health, this distinction is not dispositive. No judge has, or could, sentence any Petitioner to play Russian roulette. Confinement in Otay Mesa during this pandemic amounts to the same. This Court has jurisdiction to save lives, and—consistent with courts elsewhere—should do so.[2]

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[1] Defined terms have the same meaning as set forth in Petitioners' opening brief (ECF No. 61-1).

[2] *See Cameron v. Bouchard*, No. CV 20-10949, 2020 WL 2569868 (E.D. Mich. May 21, 2020); *Wilson v. Williams*, No. 4:20-cv-00794-JG, 2020 WL 1940882 (N.D. Ohio Apr. 22, 2020).

ARGUMENT

I. This Court Has the Jurisdiction and Authority to Grant Petitioners' Request for Relief.

A. The PLRA Does Not Apply to the Medically Vulnerable Subclasses' Habeas Petition.

"Given the existing outbreak of COVID-19 at the facility and the availability of alternatives to confinement, [Petitioners'] continued [] detention lacks a reasonable relationship to any legitimate governmental purpose" and "is excessive in relation to [its] goals." ECF No. 1 ("Pet.") at ¶ 74. For this reason—*i.e.*, because the fact of their confinement has become unconstitutional—Petitioners moved for an emergency order "directing Defendants to immediately identify and release all members of the Pretrial and Post-Conviction Medically Vulnerable Subclasses from OMDC." ECF No. 2 at 2; ECF No. 2-1 at 3; *see also* ECF No. 2-2 at 1 (seeking immediate release of Medically Vulnerable Subclasses); *id.* at 4 (same); *id.* at 13–14 (explaining why rapid release of persons with heightened vulnerability to COVID-19 is critical). Where "prisoners would [be] entitled to release from prison [if successful], habeas [i]s the exclusive remedy for their claims." *Nettles v. Grounds*, 830 F.3d 922, 927 (9th Cir. 2016). Because the Petitioners seek—and have always only sought—release, their claims properly sound in habeas. *See Wilson v. Williams*, No. 20-3447, at *6 (6th Cir. May 4, 2020); *Cameron v. Bouchard*, No. CV 20-10949, 2020 WL 2569868 (E.D. Mich. May 21, 2020).

The cases Respondents cite only reinforce this point: none of the plaintiffs in those cases sought release (and none were federal prisoners). In fact, *Wilkinson v. Dotson*, 544 U.S. 74 (2005), a central case on which Respondents rely, directly supports Petitioners' position: the Supreme Court there found that a lawsuit under 42 U.S.C. § 1983 was appropriate *because neither plaintiff sought an order*

directing their release from confinement.[3] Rather than support Respondents' position, these cases provide further authority for Petitioners' contention that habeas *is* the appropriate vehicle when the relief sought is release, and the challenge concerns "particulars affecting [the] duration [of confinement]." *Muhammad v. Close*, 540 U.S. 749, 750 (2004). *See also Dada v. Witte*, Case No. 1:20-cv-00458, at *9–10 (W. D. La. Apr. 30, 2020), ECF No. 17, *adopted by* 1:20-cv-00458 (W.D. La. May 22, 2020), ECF No. 24 (explaining two critical distinctions between fact of confinement and conditions cases: first, in conditions cases, "the conditions are the targeted harm," whereas in fact cases, "conditions are indicators of the targeted harm: the confinement itself"; second, "the remedy for conditions claims is generally corrective" while "[t]he remedy for fact claims . . . generally terminates the detention altogether, or alters it such that a new form of custody or control is imposed"). For the same reasons, habeas is an appropriate vehicle for the relief the Medically Vulnerable Subclasses seek.

B. Even if the PLRA Were Applicable, This Court Could Order the Relief Petitioners Seek.

Even if the Medically Vulnerable Subclasses' claims were conditions claims, which they are not, the Court could still order transfer to home confinement or other forms of modified custody that would ensure the medically vulnerable do not remain at Otay Mesa. *See Reaves v. Dep't of Corr.*, 404 F. Supp. 3d 520, 522–23 (D. Mass. 2019) (affirming legal distinction between transfer and release in PLRA

[3] The remaining cases Respondents cite are similarly inapposite or support Petitioners' position. In *Nelson v. Campbell*, 541 U.S. 637 (2004), the plaintiff sought an injunction against a specific prison practice, and not release; for this reason, the Court found his action appropriate under 42 U.S.C. § 1983. *Miller v. French*, 530 U.S. 327 (2000), dealt with a constitutional challenge to the automatic stay provision of the PLRA, and the plaintiffs in that case had sought only modifications to the conditions of their confinement, and not release. *McCarthy v. Bronson*, 500 U.S. 136 (1991), concerned a habeas petition brought under § 2254 and not § 2241, and exclusively addressed the propriety of a hearing by a magistrate judge without consent in a *pro se* prisoner suit.

context); *Plata v. Brown*, 427 F. Supp. 3d 1211, 1222 (N.D. Cal. 2013) (transfer of prisoners from a facility because of valley fever, rather than overcrowding, is not a "prisoner release order" subject to the PLRA three-judge requirement); *see also* ECF No. 61-1 at 10–13; ECF No. 37 at 9–11.[4] Moreover, for the Medically Vulnerable Subclasses, release is the narrowest form of relief available that would remedy their constitutional injury. Thus, regardless of whether the PLRA applies, this Court may order Petitioners out of Otay Mesa.

C. The BRA Does Not Preclude the Relief the Medically Vulnerable Subclasses Seek.

Contrary to Respondents' contention, *see* ECF No. 68 ("Opp.") at 13, the BRA does not bar Petitioners from obtaining the relief they seek and is not the exclusive legal remedy for their claims. The BRA, which addresses whether an individual is released or detained before trial or sentencing, is narrowly focused on two goals: preventing flight and danger to the community. 18 U.S.C. §§ 3142, 3143. By contrast, the common question presented in Petitioners' habeas action is whether their continued confinement at Otay Mesa violates their *constitutional rights* to due process or to be free from cruel and unusual punishment. On its face, the BRA directs judicial officers to consider factors to determine whether an individual is likely to flee or pose a danger to the community if released pretrial, *see* 18 U.S.C. § 3142(g), or presentencing, *id.* § 3143.[5] None of these factors

[4] Respondents do not argue in their opposition that the PLRA precludes relief because of a failure to exhaust. In any event, because there are no administrative procedures that can provide the relief sought herein, any administrative exhaustion requirements are inapplicable.

[5] Respondents argue that the BRA provides that judicial officers "may consider" a pretrial defendant's "physical or mental condition." Opp. at 13 (citing 18 U.S.C. § 3142(g)(3)(A)). Yet the BRA is clear that these factors are relevant only to "determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. § 3142.

involve consideration of the constitutional implications of a deadly and highly contagious viral outbreak within a detention facility.[6]

D. Petitioners' Immediate Custodians are the Proper Respondents.

It is well-established that the proper respondent in a federal habeas corpus action is the petitioner's immediate custodian, or the person who has day-to-day control over the petitioner. *Brittingham v. United States*, 982 F.2d 378, 379 (9th Cir. 1992); *see also Rumsfeld v. Padilla*, 542 U.S. 426, 435 (2004) ("[T]he default rule is that the immediate custodian is the warden of the facility where the [petitioner] is being held."). As Respondents concede, they "are the immediate custodians of Petitioners." Opp. at 16. Respondents' arguments that they do not "control" which inmates are released from detention is therefore a red herring. *See Stile v. Stafford Cnty. Dep't of Corr.*, No. 13-cv-71-PB, 2013 WL 5728107, at *1 n.1 (D.N.H. Oct. 21, 2013) (United States Marshal and superintendent of correctional facility are the proper respondents in a § 2241 habeas action).

E. Inter-Court Comity Does Not Apply.

Respondents argue this Court should not overrule decisions of sister courts on principles of inter-court comity, but no court has sentenced any Petitioner to death by COVID-19 and no court has addressed the constitutional claims raised in

[6] The Medically Vulnerable Subclasses are entitled to have a court determine whether their confinement is unconstitutional, and Respondents' reliance on three antiquated cases does not suggest otherwise. Opp. at 13. Both *Fay v. Noia*, 372 U.S. 391 (1963), and *Riggins v. United States*, 199 U.S. 547 (1905) are inapposite—each addresses a completely distinguishable procedural reality. *Fay*, 372 at 417–20 (addressing whether *state* courts can sufficiently safeguard constitutional rights such that *federal* courts need not step in on habeas petitions); *Riggins*, 199 U.S. at 550–51 (discussing propriety of habeas relief when an arrest warrant is "issued on an indictment returned in the district court and removed to the circuit court"). Finally, *Jones v. Perkins* states "in the absence of exceptional circumstances in criminal cases[,] the regular judicial procedure should be followed and habeas corpus should not be granted in advance of a trial." 245 U.S. 390, 391–92 (1918). Even leaving aside the more nuanced development of habeas jurisprudence over the last 100 plus years, the record before this Court establishes truly "exceptional circumstances"—an unprecedented pandemic.

this emergency petition. Tellingly, the cases Respondents cite are not habeas petitions: *Applied Med. Distrib. Corp v. Surgical Co. BV*, 587 F.3d 909, 913, 920 (9th Cir. 2009), considered a motion seeking an anti-suit injunction concerning a forum selection clause, and *Bergh v. State of Washington*, 535 F.2d 505, 506 (9th Cir. 1976), addressed whether a federal judge can be enjoined from ordering a state to promulgate a regulation. Neither is relevant here.

II. Petitioners Meet the Standard for a Preliminary Injunction.

Respondents argue the Preliminary Injunction should be denied because the TRO was denied. *See* Opp. at 1. Yet Respondents took the exact opposite position in the ICE Case where the Court granted a TRO and Respondents opposed the preliminary injunction for the same reasons they opposed the TRO. *See* ICE Case, ECF No. 69; ICE Case, ECF No. 70.

A. Petitioners are Likely to Succeed on the Merits.

Respondents do not contest that, if the Court rejects their procedural defenses, which are addressed in Section I above, Petitioners are likely to succeed on the merits of their constitutional claims.

B. Absent Release, the Medically Vulnerable Subclasses Will Suffer Irreparable Harm.

Respondents do not meaningfully rebut the irreparable harm present here.

First, Respondents do not challenge that Petitioners' Fifth and, alternatively, Eighth Amendment rights are being violated or that the deprivation of constitutional rights constitutes *per se* irreparable harm. *Hernandez v. Sessions*, 872 F.3d 976, 994 (9th Cir. 2017).

Second, Respondents concede the obvious point that heightened risk of injury or death constitutes irreparable harm, but argue that Petitioners "offer no proof that their release from OMDC . . . will reduce the risks associated with COVID-19." Opp. at 14. This is both false and nonsensical. As an initial matter, the

CDC says social distancing is the best way to avoid being exposed to COVID-19 and that "social distancing is especially important for people who are at higher risk for severe illness from COVID-19."[7] It is undisputed that social distancing is not possible for the Medically Vulnerable Subclasses at Otay Mesa and that it is possible if they are released. Medical experts have repeatedly confirmed that a facility's capacity is not a good indicator of whether social distancing is possible. *See* Cohen Decl. ¶¶ 9, 10 (ECF No. 44-2) ("The risks of COVID-19 in correctional settings are particularly severe because social distancing is typically impossible . . . A facility operating at less than full capacity does not mean that social distancing is possible. . . even if it is operating at only one third capacity."). In addition, as set forth extensively in Petitioners' prior submissions, medically vulnerable individuals have not been identified or segregated from the general population; individuals still share cells and use common facilities, and Otay Mesa staff still come in and out of the facility without sufficient precautions. Pet. at ¶ 17, 20–22, 24–27, 58.

In addition, at least five medical experts, whose credentials and opinions are unrebutted, testified that allowing the medically vulnerable to leave Otay Mesa reduces their risk of illness and death. *See* Goldenson Decl. ¶ 29 (ECF No. 1-2) ("It is my public health recommendation that everyone who is medically-vulnerable . . . be released from Otay Mesa Detention Center."); Amon Decl. ¶ 50 (ECF No. 1-3) ("In detention facilities, the release of [medically vulnerable] individuals . . . is a key part of risk mitigation strategy."); Cohen Decl. ¶¶ 9, 10 (ECF No. 44-2); Proposed Brief of Public Health Experts, at 1 (ECF No. 47-2) ("releasing [medically vulnerable detained persons] not only will protect Plaintiffs and others who are detained, but also detention facility staff, visitors and the public at large.").

[7] *Coronavirus Disease 2019 (COVID-19), Prevent Getting Sick, Social Distancing*, Ctrs. Disease Control and Prevention (May 6, 2020), https://tinyurl.com/sxhar75.

Respondents' argument that medical care at Otay Mesa is better than what is available to some unspecified members of the "general public," Opp. at 14, is unsupported by citation to any fact or expert declaration or by any evidence at all. In other words, nobody was willing to swear to this absurd claim. Whether or not the medical care at Otay Mesa is generally sufficient (and there is ample evidence that it is not),[8] it is indisputable that the facility has not prevented the spread of COVID-19, which is the risk Petitioners seek to abate. Indeed, from April 23 to May 21, the number of positive cases at Otay Mesa increased from 97 to 230.[9]

C. The Balance of Equities and Public Interest Favor a Preliminary Injunction.

Respondents argue that the balance of equities and public interest weigh in their favor for two reasons. Neither is persuasive.

First, Respondents argue that the requested injunction will intrude on Respondents' operation of "the prison system." Opp. at 15. But the government "cannot suffer harm from an injunction that merely ends an unlawful practice or reads a statute as required to avoid constitutional concerns." *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013) (citing *Zepeda v. I.N.S.*, 753 F.2d 719, 727 (9th Cir. 1983)). Any such intrusion would "merely represent the burdens of complying . . . [with] the constitution," and would not justify a failure to take steps necessary to protect medically vulnerable individuals. *Id.* at 1146. Further, the relief Petitioners seek would in no way intrude on the operation of "the prison system"—to the contrary, by seeking an orderly process to effectuate their release

[8] *See* Amon Decl. ¶¶ 43, 44 (ECF No. 1-3) ("There are indications that COVID-19 has put a severe strain on [Otay Mesa's] already strained [medical care] system.")

[9] Kate Morrissey, *Immigration detainee tests positive for coronavirus at Imperial detention facility*, San Diego Union Tribune, May 22, 2020, https://tinyurl.com/y9jv32r3; Kate Morrissey (@bgirledukate), Twitter (Apr. 23, 2020, 10:50 PM), https://tinyurl.com/ya5j3zzn.

from one facility with an exceptionally virulent outbreak, Petitioners minimize the burden on such operations and ask for the least intrusive form of relief available.

Second, Respondents argue that the public interest is not served by releasing detained persons who "lack viable housing outside of" Otay Mesa. Opp. at 15. But Respondents ignore that each Medically Vulnerable Petitioner has provided a declaration attesting to their housing plan.[10] Moreover, the Court can address this concern by conditioning release of subclass members on identification of a viable housing option. *See, e.g.*, April 30 Order ¶ 4(e), ICE Case, ECF No. 38.

In any event, these administrative concerns do not outweigh the public health expert consensus that "releasing [medically vulnerable detained persons] not only will protect Plaintiffs and others who are detained, but also detention facility staff, visitors and the public at large." ECF No. 47-2 at 1.

III. Provisional Class Certification is Appropriate.

Respondents argue, without citation to a single case, that provisional class certification is precluded because implementation of a class-wide release order may require some level of individualized consideration. That is not the law.

Class certification is appropriate when there are questions of law or fact common to the class, Fed. R. Civ. P. 23(a)(2), which there are here. Courts in this circuit regularly certify classes on both a provisional and final basis even where there may be some individualized consideration required to implement the requested relief. *See, e.g., Parsons v. Ryan*, 754 F.3d 657, 678 (9th Cir. 2014) (affirming class certification for an Eighth Amendment challenge to medical care policies, explaining that "although a presently existing risk may ultimately result in different future harm for different inmates—ranging from no harm at all

[10] *See* Alvarez Decl. ¶ 16 (ECF No. 1-7); Crespo-Venegas Decl. ¶ 16 (ECF No. 1-11); Doe Decl. ¶ 25 (ECF No. 1-5); Gonzalez-Soto Decl. ¶ 21 (ECF No. 1-12); Ridley Decl. ¶ 1 (ECF No. 1-4); Smith Decl. ¶ 3 (ECF No. 1-10); Szurgot Decl. ¶ 17 (ECF No. 1-6).

to death—every inmate suffers exactly the same constitutional injury when he is exposed to a single statewide [department of corrections] policy or practice that creates a substantial risk of serious harm"); *Rodriguez v. Robbins*, 715 F.3d 1127, 1130–31 (9th Cir. 2013) (upholding injunction requiring individual bond hearings for certified class); *Rodriguez v. Hayes*, 591 F.3d 1105, 1122 (9th Cir. 2010) (class certification is proper where "the constitutional issue at the heart of each class member's claim for relief is common" even though there will be individualized determination of "whether class members are entitled to relief"); May 1 Order, ICE Case, ECF No. 41 (provisionally certifying class of medically vulnerable persons notwithstanding "Defendants' continued ability to exercise their discretion to determine who is to be released and under what conditions"); *Ms. L. v. U.S. Immigration and Customs Enforcement*, 331 F.R.D. 529, 536–39 (S.D. Cal. 2018) (certifying class of parents detained in immigration custody and separated from their children, rejecting defendants' argument that individual circumstances surrounding parent-child separation defeated commonality, and reasoning that "'[c]ommonality only requires a single significant question of law or fact'" (quoting *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 589 (9th Cir. 2012))).[11]

CONCLUSION

For the foregoing reasons, this Court should grant the Medically Vulnerable Subclasses' Motion for a Preliminary Injunction.

[11] Respondents observe in a footnote that Petitioner Ramcharan has been released but has not voluntarily dismissed her claim. Opp. at 5 n.2. First, Ms. Ramcharan is not a Medically Vulnerable Petitioner so her status has no relevance to the instant motion. Second, Respondents are simply wrong about what the law requires for a class representative of an inherently transient class (*i.e.*, people in the short temporal period after conviction and before sentencing). *See Gerstein v. Pugh*, 420 U.S. 103 (1975) (holding that a class representative's claim does not become moot on release from detention if they are part of a class suffering from a violation that is "capable of repetition, yet evading review" because of the transient nature of the members of the class).

Respectfully submitted,

ROPES & GRAY LLP

DATED: May 27, 2020

s/ Joan McPhee

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