UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

KANAT UMARBAEV,	)	
	)	Case No. 3:20-CV-1279-B-BN
Petitioner,	)	
	)	
v.	)	(Consolidated with: 3:20-CV-1291-B-BN;
	)	3:20-CV-1292-B-BN; 3:20-CV-1294-B-BN;
MARC J. MOORE, et al.,	)	3:20-CV-1295-B-BN; 3:20-CV-1296-B-BN;
	)	3:20-CV-1298-B-BN; and 3:20-CV-1299-B-
Respondents.	)	BN)
	)	

PETITIONERS' REPLY IN SUPPORT OF THEIR MOTION FOR TEMPORARY RESTRAINING ORDER

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INTRODUCTION

Petitioners Kanat Umarbaev, Jane Doe, Lee Espinoza Urbina, Kirk Golding, Juan Portillo Hernandez, Edgar Haro Osuna, Enmanuel Figueroa Ramos, and Patricia Esteban Ramon have established that Respondents cannot keep them safe at the Prairieland Detention Center ("PDC") while the global COVD-19 pandemic continues. The Constitution mandates their release, and this Court has the authority to order their release by issuing a writ of habeas corpus. Respondents do not meaningfully answer Petitioners' Complaint. Rather, they rely on inapplicable case law to argue that this Court lacks the authority to remedy Petitioners' constitutional violations. They also point to certain minimal steps they are taking in response to the COVID-19 pandemic, which are insufficient to protect Petitioners.

According to Respondents, there is no check on the Executive Branch's authority to hold civil detainees in custody, even if that detention amounts to unconstitutional punishment or otherwise violates the Fifth Amendment, so long as the unconstitutional conduct occurs during a time when the government has some authority to hold the detainee. That is not the law. It is a basic and uncontroversial principle of constitutional law that the Judiciary acts as a check on the Executive Branch when it illegally detains people, and that includes when the Executive Branch illegally fails to protect detainees from a once-in-a generation global pandemic.

Many courts in this jurisdiction and elsewhere have given this issue careful consideration and reached that same conclusion: individuals who are challenging their continued detention at ICE facilities during the COVID-19 pandemic are challenging the fact of their confinement, and this Court has jurisdiction to order their release. That conclusion is correct, and this Court should order Petitioners' release.[1]

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[1] Petitioners Alfredo Hechavarria Fonteboa, Behzad Jalili, and Osita Nwolisi have already been

ARGUMENT

The parties agree on the basic substantive legal framework that applies to Petitioners' claims. As civil detainees, Petitioners have the right to be detained in a manner that does not amount to punishment, the right to have access to adequate medical care during their detention, and the right to have access to counsel. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (establishing a due process right for detainees to be free from punishment prior to the adjudication of guilt); *DeShaney v. Winnebago County Department of Soc. Serv*., 489 U.S. 189, 200 (1989) (finding that under the Due Process Clause the Government owes a duty of care to detainees including providing adequate medical care); *Barthold v. U.S. Immigration & Naturalization Serv.*, 517 F.2d 689, 690 (5th Cir. 1975) (holding that the Fifth Amendment guarantees a statutory right to counsel in deportation proceedings).

It also appears that the parties agree that injunctive relief is appropriate when the moving party shows: "(1) a substantial likelihood that Petitioner will prevail on the merits, (2) a substantial threat that Petitioner will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to Petitioner outweighs the threatened harm the injunction may do to defendant, and (4) that granting the preliminary injunction will not disserve the public interest." *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974).

The parties diverge on whether this Court has the authority to release Petitioners, and on whether Petitioners have shown that there are entitled to release. As described in detail below, the answer to both questions is yes. This Court has the authority to order Respondents to release Petitioners, and it should do so.

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released, and they have voluntarily dismissed their claims. *See* Dkt. 20. Although these Petitioners have been dismissed, their declarations remain part of the record.

I. Petitioners Have A Cognizable Habeas Claim.

A. Petitioners are challenging the "fact" of their confinement, and habeas corpus is the proper vehicle for such a challenge.

Petitioners are challenging the fact of their confinement during the COVID-19 pandemic, and they seek immediate release. This is a cognizable habeas challenge. Indeed, as another district court in the Fifth Circuit held one week ago, "numerous district courts throughout the country have had the opportunity to examine cases in which immigrant detainees seek release from ICE detention because of their susceptibility to contracting COVID-19," and "[i]n each of these cases, the courts determined that detainees were attacking the fact of their confinement." *Dada v. Witte*, 1:20-CV-00458, 2020 WL 2614616, at *1 (W.D. La. May 22, 2020) (citing *Vazquez Barrera v. Wolf*, No. 4:20-cv-1241, 2020 WL 1904497, at *4 (S.D. Tex. Apr. 17, 2020); *Bent v. Barr*, 2020 WL 1812850 (N.D. Cal. Apr. 9, 2020); *Juan E.M. v. Decker*, 20 WL 2214586 (D. N.J. May 7, 2020); *Malam v. Adducci*, 2020 WL 1672662 (E.D. Mich. Apr. 6, 2020); *Basank v. Decker*, 2020 WL 1481503 (S.D.N.Y. Mar. 26, 2020); and *Thakker v. Doll*, 2020 WL 2025384 (M.D. Penn. Apr. 27, 2020). Thus, Respondents are wrong when they assert that this Court may not grant Petitioners' request for release because, in their view, the Petitioners are not challenging the "fact" of their confinement. Dkt. 14-1 at 10-26.

As the Fifth Circuit recently explained, "the instructive principle" for determining whether a challenge should be brought by habeas or some other mechanism is that "challenges to the fact or duration of confinement are properly brought under habeas." *Poree v. Collins*, 866 F.3d 235, 243 (5th Cir. 2017). At bottom, when a petitioner "challenges the fact of his confinement at" a detention center, that is a claim "for which habeas relief may be sought."

Poree, 866 F.3d at 243. That is exactly what the Petitioners in this case are doing by challenging their continued detention at PDC.[2]

Three judges in this district have recently conducted a careful analysis of this issue, and all came to the same conclusion: civil detainees held by ICE may bring a habeas action to secure their release during the COVID-19 pandemic. *See* Reply App'x at 1-50 (Report and Recommendation in *Dada v. White*, Case No. 1:20-CV-00458, Apr. 30, 2020, W.D.L.A.) (ordering release of ICE detainees who brought habeas action); *Dada v. Witte*, 1:20-CV-00458, 2020 WL 2614616, at *1 (W.D. La. May 22, 2020) (adopting in relevant part the April 30 Report and Recommendation after *de novo* review); *see also Vazquez Barrera v. Wolf*, 2020 WL 1904497, at *4 (S.D. Tex. Apr. 17, 2020) (ordering release of ICE detainees who brought habeas action)).

The *Dada* Report and Recommendation is particularly instructive. In that case, 16 petitioners sought release from ICE detention centers because of the COVID-19 pandemic. Reply App'x at 2 (Report and Recommendation in *Dada v. White* at 2). Before engaging in a thorough analysis of the relevant law, the court noted that the petitioners were not challenging "their underlying immigration or removal proceedings" through their habeas petition, and they were also not seeking "corrective relief for the specific conditions of their confinement." *Id*. at 6. Rather, they were seeking "immediate relief given their individual circumstances." *Id*.

The *Dada* court then went on to address the two main differences between fact-based habeas claims and more general conditions-of-confinement claims. *See id*. at 8-16. First, in

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[2] The Fifth Circuit has also acknowledged that "the line between claims which must initially be pressed by writ of habeas corpus and those cognizable under § 1983 is a blurry one.'" *Id*., quoting *Cook v. Tex. Dep't of Criminal Justice Transitional Planning Dep't*, 37 F.3d 166, 168 (5th Cir. 1994).

traditional conditions of confinement cases, "*the conditions are the targeted harm.*" *Id*. at 9 (emphasis in original). By contrast, in fact-based habeas cases that touch on conditions of confinement, the "*conditions are indicators of the targeted harm: the confinement itself*." *Id*. (emphasis in original). Second, in a traditional conditions case, the remedy "is generally corrective," meaning that the conditions must be improved. *See id*. On the other hand, in a fact-based habeas case, the remedy "generally terminates the detentions altogether, or alters it such that a new form of custody or control is imposed." *Id*. The "mere mention of a 'condition'" does not transform a habeas petition seeking release from custody into a civil action for damages. *Id*. at 10. Rather, courts must look at "(1) the nature of the claim; and (2) the remedy requested" to determine whether an action is properly brought as a habeas petition or is actually a traditional conditions of confinement claim. *Id*. at 10-11. The court further explained those two factors as follows:

> As to the first characteristic, by nature, a fact claim challenges the detention itself. Conversely, by nature, a conditions claim attacks circumstances associated with the detention. As to the second characteristic, if a petitioner seeks immediate release or similar relief, the petitioner must do so through a fact claim. But if a petitioner seeks correction of a circumstance or event associated with detention, the petitioner must do so through a conditions claim. *See Coleman v. Dretke*, 409 F.3d 665, 669 (5th Cir. 2005) ("[I]t is well established that release from physical confinement in prison constitutes release from custody for habeas purposes, even though the state retains a level of control over the releasee.").

Id. at 11.

Using the above-described framework, the magistrate judge in *Dada* correctly held that when civil detainees at ICE detention centers challenge their continued detention because of COVID-19, they are challenging the fact of their detention, making habeas the appropriate vehicle. *Id*. at 12-16.

The *Dada* court's analysis is plainly correct. Petitioners in *Dada*, here, and elsewhere are seeking release during the COVID-19 pandemic. They satisfy the first factor because they are

challenging the fact of their detention at PDC during a pandemic rather than the conditions created by Respondents at the detention center. Indeed, release is appropriate, in part, precisely because Respondents cannot change the conditions in a way that will keep Petitioners safe.[3] As in *Dada*, the "Petitioners reference 'conditions' associated with their detention only to establish that the fact of detention is no longer 'reasonably related to a legitimate government objective' – in other words, to establish that their detention is 'punitive' under the circumstances, and therefore, unconstitutional." *Id*. at 12. And Petitioners satisfy the second factor because they "seek relief available traditionally, if not only, through habeas corpus: release." *Id*. As the district court judge explained, "numerous district courts throughout the country" have reached this same conclusion when looking at the very same claims. *Dada*, 2020 WL 2614616, at *1.

Judge Ellison recently added to the consensus view in a case brought in the Southern District of Texas. *See generally Vazquez Barrera*, 2020 WL 1904497. In *Vazquez Barrera*, two individuals filed a habeas petition seeking immediate release from another ICE detention center in Texas where COVID-19 had been detected. *See id*. at *1-2. After describing how neither the Supreme Court nor the Fifth Circuit has limited habeas cases to actions challenging the fact or duration of confinement, the court quickly concluded that he did not need to decide whether a petitioner could bring a traditional conditions of confinement case as a habeas petition. *See id*. at *3-4. As *Vazquez Barrera* explained, "[b]ecause Plaintiffs are challenging the fact of their detention as unconstitutional and seek relief in the form of immediate release, their claims fall

[3] The *Dada* court explained that its conclusion was bolstered by the fact that "the Supreme Court has clearly found jurisdiction under § 2241 in statutory and constitutional challenges to post-final order-of-removal detention," and refusing to consider immigrant-detainee habeas petitions in the current circumstances "would contravene that general premise." *Id*. at 10 (internal quotation omitted).

squarely in the realm of habeas corpus." *Id*. at 4. That analysis did not change merely because "Plaintiffs' constitutional challenge requires discussion of conditions in immigration detention," given that the plaintiffs in *Vazquez Barrera* argued that *no* conditions could keep them safe rather than arguing that the respondents should put different conditions in place. *Id*. As this Court aptly explained, although most cases involving "unconstitutional conditions of confinement can be remedied through injunctions that require abusive practices be changed," that is not true for the unprecedented COVID-19 pandemic. *Id*. Thus, habeas was the appropriate method for the release of medically vulnerable individuals held at ICE detention centers. *See id*.[4]

Although Respondents attempt to distinguish *Vazquez Barrera*, their effort to do so is not persuasive. Namely, Respondents assert that the case was filed at an earlier stage in the pandemic, and that the detention center at issue was not yet offering even basic sanitation measures. *See* Dkt. 14-1 at 23-24. That is true, but the opinion did not turn on either of those facts. Indeed, in the time since *Vazquez Barrera* was filed, the number of people who have been infected and who have died has increased exponentially, and those numbers keep going up. Moreover, although PDC has implemented some basic protective measures that were not in place in *Vazquez Barrera*, the evidence shows that those measures are not sufficient to keep Petitioners safe. Namely, Petitioners' experts have opined that social distancing, the only known measure to prevent the spread of COVID-19, is not possible in detention centers, and Petitioners themselves

[4] Respondents note that other district courts have reached different conclusions in the COVID-19 context. Dkt. 14-1 at 19-21. But the two cases that Respondents discuss in particular are distinguishable. *Livas v. Myers*, No. 2:20-CV-422, 2020 WL 1939583 (W.D. La. Apr. 22, 2020) involved people who were being held at federal prisons because they had been convicted of crimes, and so their claims arose under the Eighth Amendment. Dkt. 14-1 at 20. And *Sacal-Micha v. Longoria*, No. 1:20-CV-37, 2020 WL 1815691 (S.D. Tex. Apr. 9, 2020) involved a facility that, unlike PDC, did not have any confirmed cases of COVID-19.

have provided declarations showing that social distancing is not being observed. *See* Dkt. 1-2 (Petitioners' App'x at 24, 30, 59, 63-64, 68, 81-82, 85-86, 94).

Respondents make much of the fact that PDC is not currently holding the maximum number of detainees that it can hold, but they do not even attempt to refute Petitioners' evidence that social distancing is neither practical nor practiced at PDC. That PDC has 200 people instead of 500 or 700 is meaningless if the 200 people are still crammed into spaces that do not allow for adequate social distancing. Respondents provide no evidence to support their claim that they have successfully contained COVID-19 at PDC, a claim which is belied by the fact that ICE's own statistics show that almost a quarter of the detainee population at PDC has been infected. *See* Dkt. 14-1 at 24 (making statement that outbreak is contained without record citation). Nor could Respondents point to any such evidence, given the lack of testing at the facility and the fact that there is strong and growing evidence that asymptomatic individuals spread COVID-19. And finally, this Court should give little weight to Respondents contention that they are doing all they can to ensure the safety of Petitioners in light of the fact that ICE caused or substantially increased the risk of the outbreak in the first place by transferring sick detainees to PDC without taking any safety measures.

B. Respondents advance an overly restrictive view of habeas case law when they argue that Petitioners are not challenging the "fact" of their detention.

Respondents cannot persuasively refute the above-described analysis that a growing number of courts have used to provide civil detainees with habeas relief. Nor can they point to a single Supreme Court or Fifth Circuit case that outlaws the type of relief that Petitioners seek here. Instead, Respondents dedicate approximately 12 pages of their brief to a discussion of the historical roots of habeas corpus actions and give examples of how habeas has been invoked in past cases. Dkt. 14-1 at 10-22. Most relevant here, Respondents offer the conclusory assertion

that fact-based "challenges inquire into whether the prisoner or detainee should have ever been confined at all because the underlying conviction or immigration charge is invalid." *Id*. at 13.[5]

Respondents are incorrect, and the cases upon which they rely do not support that sweeping statement. To the contrary, Respondents acknowledge that they have merely cited "examples of permissible fact-based challenges to the cause of detention." *Id*. at 12. The fact existence of many examples of individuals bringing fact-based habeas cases to challenge their underlying convictions (or the original reason for their detention), however, says nothing about whether fact-based challenges are also available to petitioners who are not challenging their convictions. Notably, Respondents do not argue otherwise, and the many cases providing habeas relief in the COVID-19 context shows that they are wrong.[6]

Respondents then cite three cases for the proposition that certain challenges to prison conditions should be brought as civil rights claims rather than through habeas petitions. *See* Dkt. 14-1 at 14-15, citing *Magoon v. Figueroa*, 70 F.3d 1267, 1995 WL 696795 (5th Cir. 1995); *Nubine v. Thaler*, 395 F. App'x 109 (5th Cir. 2010); and *Serio v. Members of La. State Bd. of Pardons*, 821 F.2d 1112 (5th Cir. 1987). According to Respondents, those three decisions show that cases that address conditions of confinement in any way cannot be brought as habeas petitions. They are wrong. *Magoon*, an unpublished opinion, addressed the conditions of confinement claim in two sentences, merely stating that a complaint about refusal of medical

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[5] Respondents also address duration-based claims, but Petitioners have not argued that they have a duration-based habeas claim.

[6] This Court should ignore Respondents' hyperbolic statement that if this Court releases these medically vulnerable civil detainees during the worst global pandemic in more than 100 years, it and other courts will have to do the same thing next time a convicted prisoner complains "that excessive temperatures are experienced in the summertime due to a lack of air conditioning or other structural inadequacies at a facility." Dkt. 14-1 at 16. Those concerns, if they are legitimate, can presumably be cured by correcting the conditions, unlike in Petitioners' case.

care and being required to work too much in prison should be brought as a §1983 claim. Petitioners here do not base their request for relief on the fact that they may have been refused medical care, which is a classic conditions case that can be cured by requiring the needed medical care. *Nubine*, another unpublished decision involving a *pro se* plaintiff, in relevant part involved "complaints about the temperature in the area he was being confined and the food he was being served." *Nubine*, 395 F. App'x at 110. Again, complaints regarding the temperature at which a facility is kept and the type of food being served are a far cry from arguments that release is required because detention is inherently unsafe due to a global pandemic. Finally, the court in *Serio* noted that "when a petition combines claims that should be asserted in habeas with claims that properly may be pursued as an initial matter under § `98, and the claims can be separated, federal courts should do so, entertaining the § 1983 claims." *Serio*, 821 F.2d at 1119. *Serio* is inapplicable for two reasons. First, the court did not purport to explain the bounds of habeas and § 1983 claims. Rather, it merely noted that there can be distinct claims regarding confinement. Second, the court was concerned with allowing § 1983 claims that were in reality a backdoor challenge to state-level decisions that should be challenged through habeas petitions. That concern is not relevant here, with federal detainees who seek only their release from detention.[7]

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[7] Respondents also cite to *Zolicoffer v. U.S. Dep't of Justice*, 315 F.3d 538, 540 (5th Cir. 2003), for the proposition that courts do not have jurisdiction if a habeas petitioner is not challenging the underlying reason for detention. But *Zolicoffer* does not support that proposition. Rather, the court in *Zolicoffer* held that a court does not have jurisdiction to entertain a habeas petition brought by someone who is not in custody *at all*. *Id*. at 541. That plainly is not applicable here. Respondents also hint at an argument that Petitioners need to exhaust administrative remedies before pursuing a habeas claim. But that is not the case either. Petitioners assert constitutional substantive due process claims that are beyond the jurisdiction of the immigration court and Board of Immigration Appeals (BIA), and so exhaustion is not required. *See Lopez De Jesus v. I.N.S.*, 312 F.3d 155, 162 (5th Cir. 2002) ("when a petitioner's due process claim does not assert

C. **Even if this Court determines that Petitioners are bringing a traditional conditions of confinement claim, that claim would still be cognizable as a habeas claim.**

Relying principally on *Schipke v. Van Buren*, 239 F. App'x 85 (5th Cir. 2007), an unpublished case brought by a *pro se* plaintiff, Respondents assert that "Fifth Circuit precedent does not authorize conditions-of-confinement claims in the habeas context." Dkt. 14-1 at 17. Not so. The plaintiff in *Schipke* "raised numerous claims pertaining to perceived injustices regarding her medical treatment and the conditions of her detention and sought an order for injunctive relief modifying the conditions of her detention." 239 F. App'x at 1. Because she challenged only the conditions of her confinement and did not seek to be released on the grounds that her detention was unconstitutional, the Fifth Circuit declined to consider the claim as a habeas petition. *See id*. By contrast, the Petitioners in this case do challenge the fact of their detention and they do seek immediate release from custody.[8]

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a procedural error correctable by the BIA, it is not subject to an exhaustion requirement").

[8] None of the other cases that Respondents cite for this same proposition offer any additional support for their position. *See* Dkt. 14-1 at 18-19. Unlike the present case, all of the cases upon which Respondents rely (other than those involving the recent COVID-19 pandemic) involve claims where the proper remedy would be to cure the allegedly unconstitutional conditions. For example, *Mora v. Warden* involved a challenge to conditions that could be cured through a civil rights lawsuit (failure to provide medical care and to meet dietary needs). 480 F. App'x 779 (5th Cir. 2012). And in affirming the dismissal of a habeas petition because it was moot, *Cook v. Hanberry* noted in passing that the remedy for the alleged unconstitutional mistreatment in that case would be an order to stop those practices. 596 F.2d 658, 660 (5th Cir.1979). The court did not hold that such a claim could not sound in habeas. Rather, it stated that if a plaintiff wanted to recover damages for such a claim, he would need to bring a separate damages action. *Id*. at 660 n.1. And in the unpublished decision in *Spencer v. Bragg*, 310 Fed. App'x. 678, 679 (5th Cir. 2009), the court noted that challenges to conditions of confinement should be brought as "a civil rights action *if a determination in the prisoner's favor will not automatically result in his accelerated release*." (emphasis added). In this case, a finding in Petitioners' favor would result in their accelerated release.

The Fifth Circuit itself has acknowledged that **"**the Supreme Court has not foreclosed the use of habeas for" claims other than those challenging the fact or duration of detention, and the Fifth Circuit has not clearly done so either. *Poree*, 866 F.3d at 243; *see also Vazquez Barrera*, 2020 WL 1904497, at *3 (same). In fact, the Fifth Circuit rejected Respondents' position in *Coleman v. Dretke*, when, in disagreeing with dissenting judges who wanted to rehear the case en banc, the court rejected the view "that § 1983 is the exclusive avenue by which to attack conditions of confinement," explaining that:

> While the Supreme Court has held that certain claims must be brought under the habeas statute rather than § 1983, neither the Supreme Court nor this court has held that certain claims must be brought under § 1983 rather than habeas.

Coleman v. Dretke, 409 F.3d 665, 670 (5th Cir. 2005). Respondents assert that "neither *Poree* nor *Coleman* overruled the Fifth Circuit's existing precedents that prohibit conditions-of-confinement claims from serving as grounds for habeas relief," Dkt. 14-1 at 26, and that statement may be true, but only because there is no such precedent. As noted above, the Fifth Circuit expressly recognizes that there is no blanket rule against using habeas proceedings to address unconstitutional conditions of confinement.

II. This Court Has Broad Equitable Powers To Order Injunctive Relief, Separate From Its Authority To Grant A Habeas Petition.

Independent of its ability to grant habeas relief to Petitioners, this Court has the power to order their release. Petitioners have a well-recognized "right to sue directly under the constitution to enjoin . . . federal officials from violating [their] constitutional rights." *Porter v. Califano*, 592 F.2d 770, 781 (5th Cir. 1979). And federal courts have a long history of granting prospective injunctive relief in such direct causes of action. *See Bell v. Wolfish*, 441 U.S. 520, 526 n.6, 544-545 (1979); *Anibowei v. Sessions*, No. 3:16-CV-3495-D, 2018 WL 1477242, at *2 (N.D. Tex. Mar. 27, 2018) (collecting cases); *Garcia v. United States*, 538 F. Supp. 814, 816 (S.D. Tex. 1982).

Courts have specifically granted prospective injunctive relief in direct causes of action to prevent the violation of Fifth Amendment rights of detained immigrants. *See, e.g.*, *Nunez v. Boldin*, 537 F. Supp. 578, 587 (S.D. Tex. 1982); *Innovation Law Lab v. Nielsen*, 310 F. Supp. 3d 1150, 1162 (D. Or. 2018). Because Petitioners seek prospective injunctive relief to prevent the continued violation of their Fifth Amendment rights, this Court has the power to grant that relief regardless of the success or failure of their habeas petitions.

III. Petitioners Are Likely To Prevail On Their Fifth Amendment Claim.

A. Petitioners have shown that their continued detention constitutes punishment.

Respondents argue that Petitioners have failed to show that their continued detention at PDC constitutes unconstitutional punishment. Dkt. 14-1. at 28. They are wrong.

Petitioners may prove that their confinement constitutes impermissible punishment by demonstrating that a particular condition, rule, restriction, practice, or pervasive or extended acts or omissions of pretrial detention are not reasonably related to a legitimate governmental objective. *See Duvall v. Dallas Cty., Tex.*, 631 F.3d 203, 206-207 (5th Cir. 2011) (citing *Bell v. Wolfish*, 441 U.S. 520 (1979)). "[I]f a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted on detainees *qua* detainees." *Bell*, 441 U.S. at 539; *see also Shepherd v. Dallas Cty.*, 591 F.3d 445, 454 (5th Cir. 2009) (intent to punish may be presumed where a policy is otherwise senseless); *Duvall*, 631 F.3d at 207 (highlighting that intent to subject detainees to unsafe conditions or practices can be presumed when the government knows such conditions exist).

Petitioners have identified pervasive practices and omissions that are not reasonably related to a legitimate governmental goal:

Failure to practice social distancing. Social distancing is one of the most, if not the most, important ways to stop or reduce the spread of COVID-19. Dkt. 1-2 (Petitioners' App'x at 31, ¶51). Social distancing is generally not possible in detention settings, and Petitioners have shown that it is not possible in PDC either. *Id.* at 24, 30, 59, 63-64, 68, 81-82, 85-86, 94. The *Vazquez Barrera* court appropriately relied heavily on the fact that social distancing is not possible in detention settings when it ordered the release of detainees at another ICE center. 2020 WL 1904497, at *5 ("Here, the Court finds that detention of Plaintiffs, who are at high risk of serious illness or death if they contract COVID-19, in MPC, where social distancing and proper hygiene are impossible, does not reasonably relate to a legitimate governmental purpose.")

Although Respondents assert that they have reduced PDC's population to 32% of its approved capacity, Dkt. 14-1 at 4, that is a meaningless figure if the remaining detainees cannot practice social distancing. Importantly, Respondents do not dispute any of the evidence that Petitioners put forth showing that social distancing in PDC is not possible. In short, detainees are housed in dorms that in some instances contain 60 or more people, sleeping on bunk beds that are about two to three feet apart. Dkt. 1-2 (Petitioners' App'x at 59, 63, 81-82, 85, 94) When detainees have to wait in line for food, they stand only a foot away from one another, or eat meals close to other detainees. *Id.* at 86, 94. Respondents do not dispute any of this evidence, and these practices directly contradict the CDC and ICE protocols recommending that social distancing strategies be maintained at all times.[9] Although Respondents suggest that social

[9] *Social Distancing*, Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html (last updated May 6, 2020); *COVID-19 Pandemic Response Requirements*, U.S. Immigration and Custom Enf't, 4 (Apr. 10, 2020), https://www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities.pdf

distancing is now possible in the cafeteria, Dkt. 15-1 (Respondents' App'x at 782, ¶13), it is far from clear that this is correct, and even if it is, being able to social distance during meal times in the cafeteria does not protect Petitioners from COVID-19 when for hours before and after meals detainees are forced to exist in close proximity to one another.

Lack of meaningful access to personal protective equipment ("PPE"). Respondents have not provided meaningful access to PPE, equipment that experts agree is important to help protect Petitioners from viral transmission. ICE's protocols advise that detainees should have access to face coverings to help slow the spread of COVID-19.[10] Respondents represent that each detainee has been issued surgical masks and washable cloth masks, and were instructed on the proper way to use the masks. Dkt. 15-1 (Respondents' App'x at 782-83, ¶¶16-17). Respondents do not provide any information regarding how many masks were provided to each detainee, the frequency with which masks are provided, or any details about the instructions detainees received about proper mask use.

In contrast to Respondents' vague statements regarding PPE, Petitioners provided specific, detailed evidence showing that they are being provided only one mask to wear for weeks at a time, and have received limited or no instructions about how to use the masks. Dkt. 1-2 (Petitioners' App'x at 64, 68, 82, 85). Even with the addition of a cloth mask, PDC detainees still lack the PPE necessary to protect them. For mask wearing to be effective, individuals must know the proper procedure for putting on, wearing, and changing their masks – a procedure that requires diligent hand washing/alcohol based hand rubs, properly fitted masks, and frequent

[10] *COVID-19 Pandemic Response Requirements*, U.S. Immigration and Custom Enf't, 9 (Apr. 10, 2020), https://www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities.pdf

replacements and/or ability to clean the mask as soon as it becomes damp.[11] Where Petitioners have to cycle for days or weeks between a single use surgical mask that becomes ineffective after one use and cloth masks that needs to be washed and dried multiple times a day for continued, effective use, the result is minimal to no protection.

Failure to frequently sanitize high touch areas. PDC is not abiding by the CDC's recommendations to frequently clean high touch areas. Petitioners provided sworn statements showing that despite the frequent use of the communal bathrooms, the bathrooms areas are typically cleaned only once a day. Dkt. 1-2 (Petitioners' App'x at 59, 64, 82). Respondents do not contradict this, and instead only vaguely state that PDC has increased how often the dorms and other spaces are cleaned. Dkt. 15-1 (Respondents' App'x at 784, ¶27). A vague statement about increased frequency is a fry cry from demonstrating compliance with the CDC's recommendation that high touch areas be cleaned "several times per day."[12] Furthermore, though Respondents indicate that the dorms have access to bleach-based solutions to clean surfaces or personal space, there is no information about whether this supply is adequate or how frequently it is used. *See id*. Put simply, Respondents did not refute Petitioners' ample evidence that PDC is not properly cleaned.

Insufficient education about proper hygiene practices. Respondents have failed to demonstrate that they can effectively educate detainees about proper hygiene practices – an

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[11] *Coronavirus disease (COVID-19) advice for the public: When and how to use mask*, World Health Organization, https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public/when-and-how-to-use-masks

[12] *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf (Mar. 27, 2020)

essential intervention for reducing the spread of COVID-19.[13] By Respondents' own admission, "posters about proper hygiene are posted in the dormitories in English, Spanish, and French." Dkt. 15-1 (Respondents' App'x at 784, ¶30). Respondents, however, do not make any representation that these languages are sufficient to communicate with most of the detainees, particularly in light of the fact that PDC has detainees who speak languages other than English, Spanish, and French, or may be illiterate. *See e.g.* Dkt. 1-2 (Petitioners' App'x at 98). Respondents also do not say whether its staff has the requisite language skills to effectively instruct and/or correct detainees about proper hygiene techniques. *See* Dkt. 15-1 (Respondents' App'x at 783, ¶28). This lack of ability to communicate is especially problematic when PDC has set up a system whereby detainees must ask officers for permission to access solutions to clean surfaces. *See id*. at 784, ¶27.

In short, as described in their Motion for Temporary Restraining Order and above, Petitioners demonstrated that Respondents cannot and are not keeping them safe, and thus their confinement amounts to unconstitutional punishment. Respondents cite to *Shepard v. Dallas County*, 591 F.3d 445 (5th Cir. 2009) and *Duvall v. Dallas County*, 631 F.3d 203 (5th Cir. 2011) to support their argument that Petitioners' confinement is not impermissible punishment, but this reliance is misplaced. Dkt. 14-1 at 28-31. Much like the plaintiff in *Shepard*, Petitioners have identified pervasive practices and omissions that violate their constitutional right not to be detained as punishment.

Respondents imply that Petitioners need years of evidence of PDC's shortcomings to prevail on their claim, but this not the standard. *Id*. Rather, it is enough that their continued

[13] *See supra* note 3.

detention in an unsafe environment while the COVID-19 pandemic continues serves no legitimate governmental purpose. *See, e.g.*, *Vazquez Barrera*, 2020 WL 1904497, at *6 ("Requiring medically vulnerable individuals to remain in a detention facility where they cannot properly protect themselves from transmission of a highly contagious virus with no known cure is not rationally related to a legitimate government objective."). Moreover, Petitioners have submitted thirteen declarations from individuals with firsthand knowledge that detail the ways Respondents have failed to implement the CDC's recommendations – recommendations vital to keeping Petitioners safe. Additionally, Petitioners rely on two unrebutted expert declarations explaining that the protocols in place at PDC are insufficient to stop the spread of COVID-19. The evidence meets the standard set forth in *Shepard* by demonstrating pervasive practices and omissions that threaten Petitioners' lives. *See Shepard*, 591 F.3d at 455 (noting that to show a practice is not reasonably related to a legitimate governmental objective one can point to omissions "sufficiently extended or pervasive to prove an intended condition or practice").

The court's findings in *Duvall* also favor Petitioners' position. 631 F.3d 203. In *Duvall*, the plaintiff demonstrated that his confinement violated the constitution by showing a pervasive pattern of serious deficiencies, including by showing that a significant number of inmates were diagnosed with an infectious disease (and more so than at other facilities). *See id*. at 208. The court found that the high incident rate of the infectious disease established the county's awareness of the unconstitutional conditions, and the county's failure to implement methods proven to control the outbreak and reduce the spread of the infection was sufficient to prove serious and extensive deficiencies. *Id.* at 208-09. So too here. Respondents are obviously aware of the presence of COVID-19 in the facility and increased the risk that the virus would spread by knowingly transferred detainees who had been exposed to COVID-19 into the facility. Dkt. 1-2

(Petitioners' App'x at 57-58, 67, 93-94). Additionally, methods proven to stop or reduce the spread of COVID-19 are not being practiced or meaningfully implemented at PDC. As described above, Respondents' actions fall below the basic and minimal recommendations set by ICE and the CDC, and thus, constitute punishment. Furthermore, Respondents' argument that their actions are the reason why there is not a higher a rate of COVID-19 infections at PDC confuses correlation with causation. Dkt. 14 at 31. There is no proof that Respondents' half measures have controlled the spread, and due to Respondents' lack of widespread testing, Respondents cannot even accurately represent the number of COVID-19 cases at PDC.[14]

Petitioners have provided ample evidence that their continued detention during the COVID-19 pandemic is not reasonably related to a legitimate governmental objective, as there is no legitimate government interest in creating or allowing for conditions that facilitate the spread of COVID-19. *See, e.g.*, *Vazquez Barrera*, 2020 WL 1904497, at *6. As such, Petitioners are likely to prevail on their Fifth Amendment claim that their continued detention unconstitutionally punishes them.

B. Petitioners have shown that the conditions of their continued detention amount to deliberate indifference.

To establish a Fifth Amendment violation for failing to meet a detainee's basic needs, a plaintiff must prove that a defendant acted with deliberate indifference, which means the plaintiff must satisfy both the objective and subjective tests. To meet the objective standard, the plaintiff must establish that he is incarcerated under conditions that pose a substantial risk of harm. *Hare v. City of Corinth, Miss.*, 74 F.3d 633, 648 (5th Cir. 1996). As for the subjective test, the plaintiff

[14] *Duvall* was a §1983 case against state actors, but as described above, this case is appropriately brought as a habeas action.

must show (1) that the defendant had subjective knowledge of a substantial and serious risk that the pretrial detainee may be seriously harmed and (2) the defendant, with this knowledge, still disregarded the risk. *See Hare*, 74 F.3d at 639*; see also Shepard v. Hansford Cty.*, 110 F. Supp. 3d 696, 708 (N.D. Tex. 2015). The court can conclude that a defendant had subjective knowledge of the substantial risk by showing actual knowledge or that "the very fact of the risk was obvious." *Shepard*, 110 F.Supp. 3d. at 709 (citing *Herrin v. Treon*, 459 F.Supp. 2d 525, 538 (N.D. Tex. 2006)). "Deliberate indifference does not require an actual intent to cause harm – it is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." *Id*. (internal quotation marks omitted) (citing *Farmer v. Brennan*, 511 U.S. 825, 835 (1994)).

Petitioners have shown that they are incarcerated under conditions that pose a substantial risk of harm. Here, Respondents do not dispute the presence of COVID-19 in PDC. Further, Respondents do not dispute that most of the Petitioners have medical vulnerabilities that expose them to a high risk of severe illness or death if they contract the virus.[15] *See* Dkt. 15-1 (Respondents' App'x at 784-90). As Respondents have failed to properly implement measures proven to protect individuals from contracting COVID-19, Petitioners continued detention put them at substantial risk of harm. *See supra* Section I.

Petitioners have also demonstrated that Respondents have subjective knowledge that Petitioners are at substantial risk of serious harm and have nonetheless disregarded the risk.

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[15] To the extent Respondents argue that Petitioners Golding and Figueroa Ramos do not have asthma, this dispute is properly resolved at an evidentiary hearing. The medical records for both Petitioners show they reported to medical staff that they have had asthma since they were very young. *See* Dkt. 15-1 (Respondents' App'x at 321) (Golding noting that he has had asthma since he was 10 years old); *id.* at 581 (Figueroa Ramos stating that he has had asthma since he was three years old).

Respondents attempt to deflect their reckless behavior by claiming that PDC management is both unaware of actions, restrictions, rules or policies the increase the risk of infection from COVID-19, and is making an effort to reduce the risk of infection. But Respondents have made multiple decisions that demonstrate that this representation is false.

First, the decision to transfer detainees from Pike County Correctional Facility and Batavia[16] to PDC without taking even minimal safety precautions after a documented COVID-19 outbreak shows that Respondents have not only failed to decrease the risks of COVID-19, but they actually substantially increased those risks. Dkt. 1-2 (Petitioners' App'x at 57-60, 67, 93-94). Respondents' effort to recast this action as somehow decreasing the risk to Petitioners by taking at least some of them out of another facility with an outbreak fails, especially given that the likelihood that Pike County detainees contributed to the spread of COVID-19 in PDC. *See* Dkt. 14-1 at n.18. Moreover, Respondents do not dispute that new detainees continue to be introduced into the facility. Although they appear to have limited new detainees, they do not state whether they put a policy in place prohibiting new detainees, or explain how long any such policy might last. Dkt. 15-1 (Respondents' App'x at 781, ¶9). This is problematic for two reasons: (1) given COVID-19's pervasive presence in the United States, it is impossible to guarantee that outside persons have not been exposed to the virus Dkt. 1-2 (Petitioners' App'x at 30, ¶49); and (2) the fact that asymptomatic individuals can spread the disease means that PDC's practice of only testing symptomatic detainees will fail to identify which detainees need to be

[16] Batavia Detention Center reported four confirmed cases of COVID-19 on April 11, 2020. Ten days later, the number has increased to 45. Phil Fairbanks, *Forty-five cases of Covid-19 confirmed at Batavia detention center*, The Buffalo News, https://buffalonews.com/2020/04/21/thirty-two-cases-of-covid-19-at-batavia-detention-center/ (Apr. 21, 2020). Notably, detainee Behzad Jalili was transferred from Batavia to PDC on April 11, 2020. Dkt. 1-2 (Petitioners' App'x at 77, ¶8).

placed in medical isolation. Dkt. 15-1 (Respondents' App'x at 781, ¶9), *see also* Dkt. 1-2 (Petitioners' App'x at 30, ¶48).

Second, Respondents have delayed implementation of precautionary measures. On April 21, 2020, it was reported that PDC had 28 confirmed cases of coronavirus[17], and yet over a month and almost 20 new cases later, Respondents have only recently begun providing detainees with cloth masks, and still have not taken the steps necessary to protect Petitioners. *See supra* Section I.

Third, Respondents are not properly quarantining detainees. Respondents do not dispute that detainees who are suspected of having COVID-19 are forced to share a cell with individuals before the staff has had an opportunity to confirm whether either person has COVID-19. Dkt. 1-2 (Petitioners' App'x at 68, ¶¶9-10). This practice risks increasing the spread of the disease and does not conform to the CDC's medical isolation protocols. *See* Dkt. 1-2 (Petitioners' App'x at 25, ¶¶25, 27).

Finally, Respondents have not conducted widespread testing of detainees, which means that this Court cannot rely on Respondents' representation that there are only seven detainees who currently have COVID-19 and that none of the female detainees have COVID-19. *See* Dkt. 14-1 at 8. Given the highly contagious nature of this virus and the fact that it can be spread by people who are asymptomatic, it is likely that more than seven detainees are infected.[18] Where

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[17] Lourdes Vazquez, *ICE detention center went from 3 to 28 confirmed cases of coronavirus in one day*, WFFA News, https://www.wfaa.com/article/news/local/alvarado-ice-detention-center-28-confirmed-cases-coronavirus/287-60e91494-ee92-4d2a-917b-2b7c3bffac41 (Apr. 21, 2020).

[18] Cary Aspinwall & Joseph Neff, *These Prisons are Doing Mass Testing for COVID-19—And Finding Mass Infections*, The Marshall Project, https://www.themarshallproject.org/2020/04/24/these-prisons-are-doing-mass-testing-for-covid-19-and-finding-mass-infections (Apr. 24, 2020) (noting that Marion Correctional Institution has 2,000 prisoners and 160 staffers who have tested positive for the virus; Pickaway Correctional

Respondents willfully choose not to obtain the information necessary to identify carriers of the virus, it follows that Respondents cannot protect Petitioners from substantial harm.[19]

Relying on *Valentine v. Collier*, Respondents incorrectly characterize Petitioners' claim of deliberate indifference as a mere disagreement with PDC's response to the COVID-19 outbreak. 956 F.3d 797 (5th Cir. 2020). *Valentine*, however, does not support Respondents' position. In *Valentine*, the Fifth Circuit stayed an injunction requiring the Texas Department of Criminal Justice ("TDCJ") to take certain specific steps in response to COVID-19, for two reasons that are relevant to Respondents' argument: (1) "after accounting for the protective measures [the jail] ha[d] taken, plaintiffs [did] not show a substantial risk of harm"; and (2) there was no evidence the jail subjectively believed the measures – "informed by guidance from the CDC and medical professionals" were inadequate. *Id.* at 801-02. That is not the case here.

Respondents are not properly following the baseline recommendations described in the CDC and ICE's guidance, in contrast to the Fifth Circuit's finding regarding the TDCJ in *Valentine*. *See supra* Section I. To the extent certain minimal protective measures have been put in place, they are insufficient and do not offer meaningful protection. Unlike the plaintiffs in *Valentine*, Petitioners do not have access to gloves, a sufficient number of masks, CDC compliant cleaning schedules, proper signage and education, CDC compliant quarantine of new prisoners, or consistent social distancing. *See Valentine*, 956 F.3d at 801-02. Respondents claim

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Institution has more than 1,500 prisoners and 79 staffers who have tested positive for the virus; Lakeland prison's test results found that 73% of the first 535 inmates were positive for COVID-19; Neuse Correctional Institution found 65% of its prisoners have the virus, 98% of whom were asymptomatic).

[19] In addition, the fact that many detainees at Prairieland may have recovered from COVID-19 says nothing about the risk to other detainees or about Respondents' response to the pandemic. There is no dispute that although the vast majority of people who become sick will recover, many people will not, including medically vulnerable individuals such as the Petitioners.

that Petitioners demand perfection or a full guarantee of safety, when in fact, Petitioners merely want to live in a space that does not expose them to a high risk of severe illness and/or death. Respondents have shown that they knew of the harm and Petitioners' vulnerabilities, and have nevertheless taken steps to increase the risk. This amounts to deliberate indifference in violation of Petitioners' Fifth Amendment rights.

IV. Petitioners Are Likely to Prevail on Their Access to Counsel Claim.

As Respondents acknowledge, Petitioners Umarbaev, Espinoza Urbina, and Golding allege that they are deprived of access to counsel not just in removal proceedings, but with regard to this litigation as well. This Court therefore has jurisdiction to consider Petitioners' access to counsel claim. *See East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1258 (9th Cir. 2020) (concluding that claims to asylum and other "'[c]laims that are independent of or collateral to the removal process' are not actions taken to 'remove an alien from the United States' and therefore are not subject to jurisdictional limitations under 8 U.S.C. § 1252(b)(9)) (quoting *J.E.F.M v. Lynch*, 837 F.3d 1026, 1032 (9th Cir. 2016))); *Innovation Law Lab*, 310 F. Supp. 3d at 1160-61 (same). Respondents do not dispute this.

Instead, they contend that Petitioners have failed to allege a deprivation of their right to counsel because they were able to retain undersigned counsel and submit declarations in this matter. Respondents identify no authority to explain how these facts undermine Petitioners claims that they have been denied access to counsel because they are unable to communicate *confidentially* with their attorneys. Nor can they. The law is clear that Petitioners' right to counsel includes the right to engage in private and privileged communications with that counsel. *Martin v. Lauer*, 686 F.2d 24, 32 (D.C. Cir. 1982) ("Restrictions on speech between attorneys and their clients directly undermine the ability of attorneys to offer sound legal advice. As the

common law has long recognized, the right to confer with counsel would hollow if those consulting counsel could not speak freely about their legal problems.").

Respondents argue that Petitioners "cannot have it both ways" by asking to be kept safe and also to have access to confidential communications with counsel. Dkt. 14-1 at 42. In other words, they argue that Petitioners cannot ask this Court to enforce both their due process rights and their right to counsel. That argument lacks merit. Respondents may not justify their violation of one constitutional right by arguing that their actions were necessary to avoid violating another. Respondents' unsupported contention that they cannot protect Petitioners from unreasonable risk without violating their right to counsel only supports Petitioners' fundamental argument—the very fact of their detention during the COVID-19 pandemic is unconstitutional, and the only viable remedy is release.

V. Petitioners' Backgrounds Weigh in Favor of Release.

Respondents' have failed to make credible arguments explaining why Petitioners should not be released from conditions that place them at risk of severe illness and death. *See* Dkt. 14-1 at 35-41. Instead, Respondents ignore the many methods ICE has to surveil detainees who are out of custody, and, with one exception, do not propose any alternatives to continued detention. *Id.* They also improperly attempt to construe dismissed charges as evidence of dangerousness. *Id.* Furthermore, Respondents do not even address Petitioners' ties to the community or give any weight to pending immigration proceedings. *Id.*

Moreover, the entirety of their discussion about each individual Petitioners' background is based on a declaration by someone who does not even purport to have personal knowledge of the facts on which he opines. Dkt. 15-1 (Respondents' App'x at 784-90). Thus, the declaration is impermissible hearsay and should be disregarded. *See, e.g., Burton v. Banta Glob. Turnkey Ltd.*, 170 F. App'x. 918, 923 (5th Cir. 2006) ("A district court cannot consider inadmissible evidence

contained in affidavits," including hearsay statements not based on personal knowledge). Nonetheless, in the event that this Court is inclined to consider Respondents' position, Petitioners address Respondents' assertions below.

- **Kanat Umarbaev –** Respondents assert that Petitioner Umarbaev is a flight risk because he refused to board a plane for his extradition, but they fail to acknowledge that ICE attempted to deport Petitioner Umarbaev on the same day the Second Circuit granted his stay of removal. Dkt. 14-1 at 36-37; Dkt. 1-2 (Petitioners' App'x at 92-93, ¶9). As such, his resistance is not indicative of a person who is not compliant with court orders. Reply App'x at 51-54 (Michael S. Henry Decl.). Although on May 29, 2020, the Second Circuit vacated the stay of removal in Petitioner Umarbaev's case, he still has other potential avenues of relief to pursue. *Id.* at 51. Release would permit Petitioner Umarbaev an opportunity to safely litigate his final order of removal.
- **Jane Doe –** Petitioner Doe's lack of violent criminal convictions and extensive support network in the United States argue in favor of release. Furthermore, the fact that Respondents still have not conducted any bloodwork for Petitioner Doe in two months, further demonstrates her inability to receive adequate medical care while at PDC. *See* Dkt. 15-1 (Respondents' App'x at 112); *see also* Dkt. 1-2 (Petitioners' App'x at 81, ¶ 5). There are no indications that Petitioner Doe would not comply with this Court's orders to appear for immigration hearings.
- **Lee Alejandro Espinoza Urbina –** In their summary, Respondents gloss over the fact that Petitioner Espinoza Urbina has not had contact with criminal courts in over 12 years. Dkt. 14-1 at 37-38. Further, Petitioner Espinoza Urbina disputes

any allegations of gang affiliation. There are no indications that Petitioner Espinoza Urbina would not comply with this Court's orders to appear for immigration hearings. Release would permit Petitioner Espinoza Urbina to safely await a final decision from the immigration court.

- **Kirk Golding –** Petitioner Golding is in the process of proving his innocence for his pending criminal case, and his conviction is for a non-violent crime. He has a family that relies on him for financial support, Dkt. 1-2 (Petitioners' App'x at 69, ¶22), and thus, has a vested interest in resolving his criminal cases as well as awaiting a final decision from the immigration court. Release is proper in his case.
- **Juan Francisco Portillo Hernandez –** Petitioner Portillo Hernandez has no convictions for any violent crimes, and denies any gang affiliation. Respondents do not point to any evidence that demonstrates Petitioner Portillo Hernandez would fail to comply with this Court's order to appear for immigration hearings. Dkt. 14-1 at 38.
- **Edgar Haro Osuna –** Petitioner Haro Osuna has strong ties the community, Dkt. 1-2 (Petitioners' App'x at 99, ¶1) and Respondents do not point to any evidence that indicates that Petitioner Haro Osuna would fail appear for immigration hearings on his appeal. *Id*.
- **Enmanuel Figueora Ramos –** Petitioner Figueroa Ramos has strong ties to the community as most of his family resides in the United States, Dkt. 1-2 (Petitioners' App'x at 89, ¶¶1-2), and he has never been convicted of a violent crime. Dkt. 14-1 at 40. He is invested in the resolution of his immigration

proceedings and there is no evidence he would fail to appear for all immigration hearings.

- **Patricia Esteban Ramon –** Petitioner Esteban Ramon has strong ties to the community and has only one misdemeanor conviction. Dkt. 1-2 (Petitioners' App'x at 71, ¶2); Dkt. 14-1 at 40. Respondents do not point to any evidence that demonstrates Petitioner Esteban Ramon would fail to comply with this Court's order to appear for immigration hearings. Dkt. 14-1 at 40.

Release is appropriate for all Petitioners release in light of their medical vulnerabilities and Respondents failure to adequately implement protective measures. To the extent this Court believes conditions must be placed on Petitioners' release, this Court has the power to set the appropriate conditions.[20] *See* Fed. R. Civ. P. 65.

VI. Petitioners' High Risk of Severe Illness and Death Entitles Them to Extraordinary Relief.

Respondents' arguments against this Court issuing injunctive relief in the form of release is divorced from reality – it ignores the fact that there is a once-in-a-generation pandemic sweeping nation that has claimed over 100,000 lives in less than four months,[21] and attempts to minimize the immediate danger COVID-19 poses to Petitioners. In this urgent and dire situation, a mandatory injunction is appropriate because maintaining the status quo will only serve to prolong Petitioners' detention in life threatening conditions, in violation of their constitutional

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[20] If there are factual dispute regarding the Petitioners' background and suitability for release, these issues are properly resolved at an evidentiary hearing.

[21] Laura King & Jackie Calmes, *U.S. coronavirus deaths pass 100,000 mark in under four months, leading the world*, LOS ANGELES TIMES, May 27, 2020, https://www.latimes.com/politics/story/2020-05-27/us-coronavirus-death-toll-passes-100000-mark.

rights. *See Exhibitors Poster Exch., Inc. v. Nat'l Screen Serv. Corp*., 441 F.2d 560, 561 (5th Cir. 1971) ("The purpose of a preliminary injunction is to preserve the status quo and thus prevent irreparable harm until the respective rights of the parties can be ascertained during a trial on the merits."). Petitioners have met their burden and have shown that the facts and the law are clearly in their favor. As such, this Court can properly find that a mandatory injunction is warranted in this extraordinary circumstance. *Id.* (finding that relief for a mandatory injunction should only be granted in rare instances where the facts and law are clearly in favor of the moving party).

CONCLUSION

For the reasons discussed in Petitioners' motion for injunctive relief and above, the Court should order the immediate release of the Petitioners.

Dated: May 29, 2020

Respectfully submitted by

/s/ Scott Rauscher
Scott Rauscher*
Renee Spence*
Megan Pierce**
Loevy & Loevy
311 N. Aberdeen, 3rd Floor
Chicago, IL 60607
(312) 243-5900
scott@loevy.com
spence@loevy.com
megan@loevy.com
*Admitted Pro Hac Vice
**Motion for Admission Pro Hac Vice Pending

Fatma Marouf, CA Bar No. 222732
Sehla Ashai,* IL Bar No. 6291199
Texas A&M School of Law Immigrant Rights Clinic
307 W. 7th St. Suite LL50
Fort Worth, TX 76102
817-212-4123 (phone)
817-212-4124 (fax)
fatma.marouf@law.tamu.edu
ashai@law.tamu.edu
*Admitted Pro Hac Vice

Manoj Govindaiah,* TX Bar No. 24094384
Refugee and Immigrant Center for Education and Legal Services
802 Kentucky Avenue
San Antonio, TX 78201
(210) 787-3745
manoj.govindaiah@raicestexas.org
*Admitted Pro Hac Vice

Certificate of Service

On May 29, 2020, I electronically filed the foregoing using the Court's electronic filing system, which caused the foregoing to be served on all parties.

/s/ Scott Rauscher
Scott Rauscher
One of the Attorney for Petitioners