IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
VALDOSTA DIVISION

ARISTOTELES SANCHEZ MARTINEZ, *et al.*	:	
Petitioner,	:	
v.	:	**Case No. 7:20-CV-62-CDL-MSH**
	:	**28 U.S.C. § 2241**
WARDEN, Stewart County Detention Center, *et al.*	:	
Respondents.	:	

RESPONDENTS' OPPOSITION TO PETITIONERS' MOTION FOR A TEMPORARY RESTRAINING ORDER

The COVID-19 pandemic is currently threatening all individuals within the United States, to include those in custody and those in the community at large. U.S. Immigration and Customs Enforcement (ICE) is committed to reduce the risk for immigration detainees, including reducing detainee populations, increasing sanitation, adding screening, limiting visitors, providing testing, and creating isolation protocols. However, the Petitioners' fear of contracting COVID-19 while detained does not provide a legal basis for their release. The Petitioners are either subject to mandatory detention or have been found to be a danger to the community and/or a flight risk, and the current pandemic does not change that legal detention status. Moreover, this is not a situation where COVID-19 is spreading in the detention facilities, but not among the general public; COVID-19 has been rapidly spreading nationwide. In light of this pandemic, ICE has been exercising its discretion to reduce the population at the Stewart Detention Center and Irwin County Detention Center, and Petitioners have given this Court no basis to substitute their self-selection for the discretion vested in ICE by statute and regulation.

FACTUAL BACKGROUND

The facts represented below have been compiled on an extremely short timeline. Further, because of the nature of COVID-19, the circumstances are changing rapidly. As a result, the United States represents that the facts below have been compiled based on a series of communications with representatives of SDC and ICDC, and these facts are supported generally by the attached declarations submitted to the Court for review.[1]

I. The Facilities

Pursuant to contracts with ICE, SDC and ICDC both house immigration detainees, including Petitioners, and are managed by CoreCivic and LaSalle, respectively. The clinical health care services provided at SDC and ICDC are overseen by field medical coordinators who work for the ICE Health Service Corps (IHSC). IHSC provides direct medical, dental, and mental health patient care to approximately 13,500 detainees housed at 20 IHSC-staffed facilities throughout the nation. IHSC's field medical coordinators ensure that the provision of medical care by contractors to the ICE detainees within SDC and ICDC, as well as other detention facilities, meet detention standards. The field medical coordinators do not provide hands-on care or direct the care within the facilities but monitor the medical care and services provided by the contract facilities. Medical staff at the contract facilities are directly responsible for medical care at the facilities.

Since the onset of reports of Coronavirus Disease 2019 (COVID-19), ICE epidemiologists have been tracking the outbreak, regularly updating infection prevention and control protocols, and issuing guidance to field staff on screening and management of potential exposure among

[1] The declaration of Russell Washburn is submitted without signature. Respondents will file the signed copy as soon as possible.

detainees. In testing for COVID-19, IHSC is also following guidance issued by the Centers for Disease Control (CDC) to safeguard those in its custody and care.

A. Stewart Detention Center (SDC)

As of 1:00 pm on April 9, 2020, IHSC has confirmed that there are five confirmed cases of COVID-19 among ICE detainees at SDC. These five detainees have been isolated and are receiving medical treatment consistent with CDC guidelines. There are 30 additional ICE detainees who are suspected to have COVID-19, and those individuals are under medical observation per the CDC guidelines.

1. Affirmative Steps Taken at SDC in light of COVID-19

As outlined more fully below, in response to the COVID-19 pandemic, ICE has taken a number of steps to combat the spread of COVID-19 at SDC.

Identify high-risk population. ICE has proactively worked to reduce the overall number of immigration detainees at SDC by reconsidering custody determinations and parole requests, and issuing orders of supervision on release for those aliens who are not subject to mandatory custody, do not pose a danger to the community or flight risk, or there is no significant likelihood of removal in the foreseeable future. Specifically, several weeks ago, SDC medical personnel, at the request of ICE, generated a list of detainees at SDC with certain underlying medical conditions or who are over the age of 60. The list of high-risk detainees is continuing to be updated and is being reviewed on a regular basis.

Increased screening. All attorneys, as well as CoreCivic staff, facility contractors, ICE, immigration court personnel, and detainee intakes are screened for symptoms of COVID-19 prior to being permitted entrance to SDC. That includes completion of a screening questionnaire and a temperature check in accordance with the CDC Interim Guidance on Management of Coronavirus

Disease 2019 (COVID-19) in Correctional and Detention Facilities. The screening area has been set up outside of SDC. If the initial health screening is inconclusive, medical staff is responsible for making any final determination on screening. If screening shows that an individual may be at risk, they are denied entry to the facility, and instructed either to remain at home for a specified quarantine period, or to consult and obtain clearance from their medical provider before they will be admitted to the facility.

Enhanced sanitization practices. As has long been the case at SDC, staff have been educated and reminded to follow universal precautions to prevent the spread of any pathogen. Signs are posted throughout SDC advising and providing instruction on how to stop the spread of germs; handwashing practices; and what to do if you are sick. In addition, there have been several town hall meetings for the SDC detainee population, where guidance was provided on personal hygiene, as well as cleaning and disinfecting individual living areas. Flyers related to the prevention of COVID-19 have been distributed throughout the facility as a reminder of preventative measures. Detainees also have 24-hour access to sanitation supplies and materials to clean and disinfect their individual living areas, as well as to disinfect telephones or kiosks prior to use. SDC has increased its inventory of cleaning chemicals and supplies and has installed hand sanitizer units throughout the facility.

SDC is also continuing its practice of issuing hygiene products to detainees twice a week, including but not limited to soap, toothpaste, shampoo, lotion, and toilet paper. If any detainee has need for additional supplies between the scheduled distribution times, they may, consistent with past practices, ask for additional supplies. In addition, since the outbreak of COVID-19, disinfecting wipes have been made available for detainee use in each of the housing areas at SDC,

and additional disinfectants, hand sanitizer, soap, and masks are made readily available for staff and detainee use.

Additional protective measures for legal visitors. Social visits have been discontinued entirely. As to visits by legal counsel, SDC's procedures require that facility staff use personal protective equipment during all detainee escorts to reduce the risk of exposure to potential pathogens. Attorneys are now also required to bring in their own personal protective equipment and may bring sanitizing wipes for use during legal visits. Legal visitation areas are being sanitized before and after each legal visit, including wiping down chairs, tables, phones, and VTC equipment with a disinfectant. Social distancing practices are also being used with visitors.

Encouraging social distancing. SDC has taken several steps to ensure that detainees are not in groups larger than ten when outside of their housing pod. SDC has also taken steps to limit the interactions of detainees for separate housing areas by using satellite feeding in housing pods, removing contact sports like basketball and soccer from the recreation program, and eliminating crews of detainees participating in the voluntary work program. Further, SDC is at 70% of design capacity to encourage distance between detainees where possible.

2. Medical Care at SDC

SDC is equipped with the medical capabilities necessary to provide daily access to sick calls in a clinical setting for its detainees and also, when necessary, to provide access to specialty services and hospital care. With respect to medical care in the specific context of COVID-19, SDC has the capacity to effectively quarantine and medically isolate any detainee who is confirmed, presumed, or suspected positive for COVID-19. In cases of known exposure to a person with confirmed COVID-19, asymptomatic detainees are placed in cohorts with restricted movement for the duration of the most recent incubation period (*i.e.*, 14 days after most recent

exposure to an ill detainee) and are monitored daily for fever and symptoms of respiratory illness. Cohorting is an infection-prevention strategy which involves housing detainees together who were exposed to a person with an infectious organism but are asymptomatic. This practice lasts for the duration of the incubation period of 14 days. Those that show onset of fever or respiratory illness are referred to a medical provider for evaluation. Cohorting is discontinued when the 14-day incubation period completes with no new cases. SDC has identified specific housing units for the quarantine of patients who are suspected or test positive for COVID-19, consistent with the cohort policies set forth above.

In the unlikely event that cases should grow beyond the number that can safely be treated by the medical personnel at SDC, SDC has memoranda of understanding with three regional hospitals (specifically, hospitals in Cuthbert, GA; Columbus, GA; and Albany, GA). If necessary, detainees can be transported to those facilities if they require higher levels of care or monitoring than can be appropriately provided at the facility.

B. Irwin County Detention Center (ICDC)

As of 12:30 p.m. on April 9, 2020, there is one confirmed case of COVID-19 at ICDC. The one detainee with a confirmed case has been isolated and is receiving medical treatment consistent with CDC guidelines.

1. Affirmative Steps Taken at ICDC in light of COVID-19

As outlined more fully below, in response to the COVID-19 pandemic, ICE has taken a number of steps to affirmatively combat the spread of COVID-19 at ICDC.

Identify high-risk population. ICE, in conjunction with ICDC medical supervisors, maintains a current record of ICDC detainees with chronic medical conditions. Based on that list and related medical input, ICE has planned for and executed the release of a number of ICDC

inmates determined to be particularly vulnerable to serious illness or death if infected by COVID-19. ICDC houses those detainees whom it has determined to be particularly vulnerable to serious illness or death if infected by COVID-19 (but who are not eligible for release based on their offenses) in units with fewer detainees to create maximum social distancing opportunities. Moreover, ICDC unit counts overall have been reduced to facilitate social distancing.

Increased screening. ICDC has put a process in place that requires mandatory temperature checks and the successful completion of a questionnaire prior to entry into the facility by staff or visitors, including any newly arriving detainees. If any question on the questionnaire receives an affirmative response, or if a temperature of 100.4 or higher is recorded, then the visitor will be assessed by medical staff and must be cleared by the Medical Director before entering ICDC. Otherwise, access will be denied.

Enhanced sanitization practices. In addition to the standard cleaning procedures at ICDC, ICDC has ensured that there is increased access to disinfectants, and has ordered multiple cleanings of all housing units and common areas each day with disinfecting agents. Additionally, gloves are provided for cleaning detail usage, and all staff have been provided masks to wear while in the facility. Showers in group housing units are pressured washed daily and sanitized regularly. Shared equipment, like keyboards, is sanitized between uses, and transportation vehicles and equipment are likewise sanitized between each use. ICDC has provided and continues to provide education on COVID-19 to staff and detainees, including the importance of hand washing and hand hygiene, covering coughs with the elbow instead of with hands, and requesting to seek medical care if they feel ill. Hygiene products are distributed regularly to detainees.

Additional protective measures for legal visitation. While social visits have been discontinued, ICDC's legal access procedures have not been significantly modified, aside from, as

noted above, the requirement that anyone attempting to enter the ICDC facility take a required temperature check and complete a questionnaire before gaining access. As to visitation by legal counsel, specifically, ICDC has had a program in place to allow for attorney phone calls and skype, and that protocol remains in place. ICDC is presently looking into ways to further expand its skype capabilities. When visits with legal counsel must occur in person, any equipment used for attorney access (*i.e.*, monitors, iPads, phones, etc.) or meeting areas where detainees and their attorneys may meet are disinfected between uses with disinfecting wipes and spray, as well as a bulk chemical cleaner verified by the CDC on their list of approved products used to kill COVID-19. Per ICE, all visiting attorneys are required to bring their own personal protective equipment (PPE).

2. Medical Care at ICDC

If a detainee is presumed or confirmed to have COVID-19, that individual will be placed in isolation in a negative pressure cell, which is a room with a specialized ventilation system that removes air from the cell and releases it away from the rest of the unit. In the event of an outbreak, ICDC will immediately quarantine the affected unit(s). ICDC has reviewed and plans to follow established guidelines provided by the CDC, under the guidance and supervision of the medical director.

There are four hospitals within an approximate twenty-mile radius of ICDC that are equipped to handle medical emergencies. ICDC officials have been and continue to work with these facilities to establish appropriate protocols, and determine the availability of isolation rooms and any necessary equipment at these hospitals, in case a need arises. In critical situations, emergency medical technicians are stationed less than 150 yards away from ICDC and are able to transport detainees to local hospitals. Additionally, Life Flight helicopters are able to arrive and depart directly from ICDC grounds.

II. Petitioners

Petitioners are immigration detainees housed at SDC and ICDC. Each Petitioner is discussed individually in more detail below.

A. SDC Petitioners

Aristoteles Sanchez Martinez. Mr. Martinez is housed at SDC. He is a 47-year-old with a history of recent hernia surgery, Type II diabetes, hypertension, neuropathy, avascular necrosis, non-palpable pulses in his lower extremities, and venous insufficiencies. He was previously convicted of giving a false statement and aggravated identity theft. His requests for parole have been twice denied, and he has not filed a bond motion.

Michael Robinson. Mr. Robinson, who is housed at SDC, is a 53-year-old male with hypertension, asthma, cardiac murmur, high blood pressure, and benign prostatic hyperplasia. He has been in custody for 76 days pursuant to 8 U.S.C. § 1225. He was previously denied bond and has not requested parole.

Peter Owusu. Mr. Owusu is a 40-year-old male who is housed at SDC. He has no known history of pre-existing conditions. Mr. Owusu withdrew a previous bond request in April 2019, and had his parole request denied in July 2019.

B. ICDC Petitioners

Joseph Lloyd Thompson. Mr. Thompson is a 49-year-old male who is housed at ICDC with blood pressure issues, a prior aortic aneurysm, and diabetes. A cardiologist reviewed his case and determined that surgery is unnecessary to treat his aneurysm. As to allegations regarding his diabetes medication, Mr. Thompson previously kept his medication in his room, but it was discovered that he was not taking it. As a result, he was required to obtain the medication from ICE staff each day, which he has failed to do. Mr. Thompson has a prior conviction for family

violence battery in violation of O.C.G.A. § 1-5-23.1, which is an aggravated felony crime of violence and also a crime of domestic abuse, and he is detained under 8 U.S.C. § 1226(c), which requires mandatory detention of criminal aliens. Mr. Thompson applied for bond, which was denied on November 29, 2019, and submitted a parole request as recently as February 14, 2020.

Ansumana Jammeh. Mr. Jammeh is a 43-year-old male with diabetes and hemorrhoids who is housed at ICDC. He was convicted of forgery offenses including false statements, which renders him an aggravated felon. As such, he is detained under 8 U.S.C. § 1226(c), which requires mandatory detention of criminal aliens. Bond was denied for Mr. Jammeh at a hearing on May 13, 2019.

Karen Lopez. Ms. Lopez is a 42-year-old female who has a pacemaker and also has multiple sclerosis. She is housed at ICDC, where she has been in custody for 38 days. She was convicted of conspiracy to violate the Georgia Controlled Substances Act and is therefore detained under 8 U.S.C. § 1226(c), which requires mandatory detention of criminal aliens. She has not filed any bond motions or made any parole requests.

Nilson Fernando Barahona Marriaga. A 38-year-old male, Mr. Marriaga has diabetes and hypertension. He is housed at ICDC and has been in custody for 55 days. He has multiple arrests on his record, including drugs, probation violations, and a pending DUI, and he is detained under 8 U.S.C. § 1226(a). Bond was recently denied at a February 4, 2020 hearing, and a parole request was denied on March 26, 2020.

Shelley Dingus. Ms. Dingus is a 52-year-old woman housed at ICDC, who reports a medical history of asthma, chronic obstructive pulmonary disease, migraine headaches, depression, anxiety, and eczema. Ms. Dingus was convicted of distribution of a controlled substance. She has been in custody for 78 days pursuant to 8 U.S.C. § 1226(c), which requires

mandatory detention of criminal aliens. Ms. Dingus's parole request was denied based on her criminal convictions on April 7, 2020, and she has not filed a bond motion.

ARGUMENT

This Court should deny Petitioners motion for a temporary restraining order. Initially, the Court lacks jurisdiction over Petitioners' claims. If the Court finds that it has jurisdiction, Petitioners motion must still be denied because Petitioners fail to meet their heavy burden of establishing that they are entitled to a temporary restraining order.

I. This Court lacks jurisdiction over Petitioners' claims.

"Article III of the U.S. Constitution limits the judicial power of the federal courts so that they may only exercise jurisdiction over "Cases" and "Controversies." *L.M.P. ex rel. E.P. v. Sch. Bd. of Broward Cty.*, 879 F.3d 1274, 1280 (11th Cir. 2018). "Accordingly, subject matter jurisdiction requires a justiciable case or controversy within the meaning of Article III." *Id.* Article III similarly "limits the jurisdiction of the federal courts to cases and controversies of sufficient concreteness to evidence a ripeness for review. *Digital Props., Inc. v. City of Plantation*, 121 F.3d 586, 589 (11th Cir. 1997). Petitioners lack standing and present claims that have not matured. This Court thus lacks jurisdiction, the case should be dismissed, and Petitioners motion for a TRO should be denied.

A. Petitioners lack standing.

"Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy. The doctrine developed in our case law to ensure that federal courts do not exceed their authority as it has been traditionally understood." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citation omitted). The "irreducible constitutional minimum of standing contains three elements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). First, a plaintiff must

have suffered an "injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* (internal quotations omitted). Second, "the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the Court." *Id.* (internal quotation and alterations omitted). "Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 560-61 (internal quotations omitted). Petitioners do not raise a cognizable injury and the alleged injury is not redressable by this Court.

1. Petitioners lack an injury in fact.

Injury in fact is a "constitutional requirement" and is the "first and foremost of standing's three elements." *Spokeo,* 136 S. Ct. at 1547 (quotation and internal alteration omitted). To establish injury in fact, a plaintiff must show that he or she suffered "an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Id.* at 1548 (internal quotation omitted). "A concrete injury must be *de facto*; that is, it must actually exist," be "real," and not "abstract." *Id.* (internal quotation omitted). While the risk of harm may, in some circumstances, be sufficiently concrete, "imminence . . . cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending." *Lujan*, 504 U.S. at 564 n.2 (internal quotation omitted) (emphasis in original).

Petitioners assert that, because of their age and/or medical conditions, they have elevated risk of serious, adverse outcomes if they contract COVID-19. Because of their alleged high risk status, they then assume that they will *necessarily* get COVID-19 if they remain detained. This assertion is purely speculative. SDC and ICDC have implemented procedures and protocols to

protect the detainees in its care—they have introduced screening procedures, increased cleaning and sanitation, and reduced detainee and unit population to allow for social distancing. Even assuming a concentrated detainee population, crowding in and of itself does not cause COVID-19 infection.[2]

Petitioners' claims of future injury are hypothetical; they are not entitled to release from detention based on a conjectural injury that they have not suffered and are not immediately threatened with.[3] An injunction is "unavailable absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged . . .—a likelihood of substantial and immediate irreparable injury." *Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983) (internal quotation omitted).

Moreover, Petitioners cannot show that Respondents are unprepared to respond to COVID-19. ICE, CoreCivic, and LaSalle have expended extensive resources and efforts to address the very issues that Petitioners have identified, and are prepared to address the challenges posed by COVID-19. In light of the efforts ICE has made to contain and protect detainees from COVID-19, Petitioners cannot show that there is a "likelihood of substantial and immediate irreparable injury." *Lyons*, 461 U.S. at 111; *see Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013)

[2] COVID-19, however, is spreading rapidly in the communities into which Petitioners seek to be released. For example, multiple Petitioners assert that, if released, they would return to the Atlanta area, which has a much greater outbreak of COVID-19 than either Stewart or Irwin Counties. *See, e.g.*, Georgia Department of Health COVID-19 Daily Status Report, https://dph.georgia.gov/covid-19-daily-status-report (reporting four COVID-19 cases in Stewart County and eleven in Irwin County versus over 3000 cases in the direct Atlanta area as of 9:30 pm on April 8, 2020). Of more concern, two Petitioners ask for release and state that they would return to New York—specifically Queens and Long Island or Brooklyn—which contains the most severe outbreak of COVID-19 in the nation. *See* Sanchez Martinez Decl. ¶ 28, ECF No. 5-15; Robinson Decl. ¶ 28, ECF No. 5-16; CDC Coronavirus Cases in the U.S., https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (last visited Apr. 8, 2020).

[3] Although there are now confirmed cases of COVID-19 in the detainee population at SDC, there are none in the two units which Petitioners are detained. Regardless, SDC has implemented the policies discussed herein to contain and prevent COVID-19 spread.

(finding standing based on fear, even one that is reasonable, "improperly waters down the fundamental requirements of Article III").

2. Petitioners' alleged injury is not redressable by release.

Petitioners' alleged injury—that they are subject to a heightened risk of death or serious illness if they contract COVID-19—will not be redressed by ordering their release. For purposes of standing, a plaintiff's injury is redressable where there is "a substantial likelihood that the requested relief will remedy the alleged injury." *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000) (internal quotation omitted). "[I]t must be *the effect of the court's judgment on the defendant* . . . that redresses the plaintiff's injury, whether directly or indirectly." *Lewis v. Gov of Ala.*, 944 F.3d 1287, 1301 (11th Cir. 2019). Petitioners' requested relief will not ameliorate or diminish their claimed heightened risk of injury or death resulting from COVID-19, nor can a court order requiring release prevent Petitioners from contracting COVID-19.

Petitioners do not explain how release from the facilities at issue will reduce their risk of injury; it certainly cannot eliminate it. Because of their detention, Petitioners actually have greater access to medical care than many in the general public.[4] Ordering their release could leave them without their present access to health care and put them at greater risk of serious complications in the event that any of them contract COVID-19. There is little evidence in the record about Petitioners' travel plans or housing conditions if released, such as whether they also involve people living in close quarters, and living with individuals who present a risk of exposure. Given the

[4] In an apparent attempt to preemptively address this argument, Petitioners assert that SDC and ICDC are "geographically isolated from appropriate levels of medical care to treat COVID-19." Mem. in Supp. of Mot. for TRO 7. There are multiple hospitals in the areas surrounding SDC and ICDC. CoreCivic and LaSalle have relationships with those hospitals to ensure care for ICE detainees. This argument is wholly without merit.

current community spread of COVID-19, it is not unlikely that Petitioners will be exposed to COVID-19 through community transmission over the coming months if released. Indeed, it is conceivable that Defendant's risk of exposure is lower in detention, because the facilities at issue strictly control outsiders' access, and have taken extensive measures to avoid the spread of COVID-19.

B. Petitioners' claims are not ripe.

"The ripeness doctrine protects federal courts from engaging in speculation or wasting their resources through the review of potential or abstract disputes." *Digital Props.*, 121 F.3d at 589. It "seeks to avoid entangling courts in the hazards of premature adjudication." *Id.* "Ripeness analysis involves the evaluation of two factors: the hardship that a plaintiff might suffer without court redress and the fitness of the case for judicial decision." *Elend v. Basham*, 471 F.3d 1199, 1211 (11th Cir. 2006). "The fitness prong is typically concerned with questions of finality, definiteness, and the extent to which resolution of the challenge depends upon facts that may not yet be sufficiently developed." *Harrell v. The Fla. Bar*, 608 F.3d 1241, 1258 (11th Cir. 2010) (internal quotation marks and citation omitted). "The hardship prong asks about the costs to the complaining party of delaying review until conditions for deciding the controversy are idea." *Id.*

Petitioners' claims are premature. Petitioners state: "*If* Petitioners contract COVID-19," they are at high-risk for needing critical care and may face serious illness. Memo. in Supp. of Mot. for TRO 1, ECF No. 5-1 (emphasis added). Petitioners do not currently have COVID-19, nor is there evidence that they have been directly exposed to it. Other courts, in addressing requests for relief in light of the COVID-19 pandemic, have held that "[t]he 'possibility' of harm is insufficient to warrant the extraordinary relief of a TRO." *Dawson v. Asher*, No. C20-0409JLR-MAT, 2020 WL 1304557, at *3 (W.D. Wash. Mar. 19, 2020) (quoting *Winter*, 555 U.S. at 22); *Francisco v.*

Decker, Case 2:20-CV-02176-CCC at pgs. 3-4 (D.N.J. March 25, 2020) ("Although he expresses his fear of the coronavirus which is presently afflicting the United States, two cases of which have occurred at the jail in which he is housed, Petitioner himself does not allege that he has contracted or been directly exposed to the virus, and his fears of contracting it at this point are speculative."). Likewise, Petitioners here have brought this claim before any real harm exists, let alone has been suffered.[5] The Petition and TRO should therefore be denied and dismissed.

II. Assuming The Court Has Jurisdiction, Petitioners Do Not Satisfy The Requirements For a TRO.

Petitioners ask this Court to grant an emergency request for release from legal custody. In order to obtain preliminary injunctive relief, a movant must establish each of the following four factors: 1) likelihood of prevailing on the merits; 2) irreparable injury unless an injunction issues; 3) the balance of equities tips in the movant's favor; 4) an injunction is in the public interest. *Winter v. Natural Res. Defense Council*, 555 U.S. 7, 20 (2008). "The preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant 'clearly carries the burden of persuasion' as to the four prerequisites." *Zardui-Quintana v. Richard*, 768 F.2d 1213, 1216 (11th Cir. 1985) (citations omitted). "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24.

A. Petitioners are unlikely to succeed on the merits.

Petitioners are unlikely to succeed on the merits for several reasons. First, they are not entitled to habeas relief because they are legally detained. Second, Petitioners' conditions of

[5] Additionally, several of Petitioners' claims are not ripe because, as explained in the factual background section, those Petitioners failed to avail themselves of the administrative remedies available to them to obtain release—either through a request for bond or discretionary parole.

confinement claims are not cognizable in a habeas action. Third, if this Court reaches Petitioners' constitutional claim, it is likewise meritless. Finally, release from custody is not an appropriate remedy for Petitioners' claims.

1. Petitioners are legally detained.

Petitioners here are detained under several different provisions—pre-final order of removal under 8 U.S.C. § 1226(a) and § 1226(c), and post-final order of removal under § 1225(b) and § 1231. Congress has expressly prohibited release for individuals detained under §§ 1226(c) or 1231.[6] An immigration detainee held under certain detention statutes may be granted a discretionary grant of parole for "urgent humanitarian reasons or significant public benefit" under 8 U.S.C. § 1182(d)(5)(A); *see also* 8 C.F.R. §§ 212.5(b), 235.3. Additionally, detainees held under § 1226(a) can ask for a bond hearing and appeal that decision.

Petitioners do not contend that they are illegally held pursuant to any immigration statute such that they should be entitled to habeas relief. They likewise do not allege that they have all pursued bond or parole to the fullest extent and that those decisions should be reviewed or overturned. Regardless, to the extent that Petitioners have requested parole or bond, this Court is without jurisdiction to review those decision under 8 U.S.C. § 1226(e) and § 1252(a)(2)(B)(ii). The statutory provisions strip the Court of jurisdiction to review a discretionary bond or parole decision.[7] *See United States v. Velasquez Velasquez*, 524 F.3d 1248, 1252 (11th Cir. 2008) (explaining that the district court "lacked authority" to review and overturn "the IJ's decision to

[6] For aliens who have final administrative removal orders, custody is generally mandatory during the removal period under 8 U.S.C. § 1231(a)(2). Once the removal period has expired, custody becomes discretionary under 8 U.S.C. § 1231(a)(6), and release on supervision may be appropriate if there is no significant likelihood of removal in the foreseeable future.

[7] The statute refers to the Attorney General rather than the Secretary of Homeland Security. On March 1, 2003, the Department of Homeland Security assumed this responsibility, and the discretion formerly vested in the Attorney General was conferred on the Secretary of Homeland Security. See 6 U.S.C. § 271(b); 6 U.S.C. § 551(d).

release Velasquez on bond pending his immigration proceedings"). Moreover, the Eleventh Circuit has determined that there is no due process interest in immigration parole. *See, e.g., Tefel v. Reno*, 180 F.3d 1286, 1300-01 (11th Cir. 1999) (explaining that "aliens lacked a liberty interest in being paroled[]" because of the "Executive's complete discretion to make parole decisions").

2. Petitioners cannot challenge their conditions of confinement in a habeas petition.

"Petitioner[s'] § 2241 petition is not the appropriate vehicle for raising an inadequate medical care claim, as such a claim challenges the conditions of confinement, not the fact or duration of that confinement." *Vaz v. Skinner*, 634 F. App'x 778, 781 (11th Cir. 2015); *see also, e.g., Daker v. McLaughlin*, No. 5:18-cv-171, 2018 WL 5304115, at *2 (M.D. Ga. Oct. 25 2018) ("The Eleventh Circuit has since determined that habeas is not the appropriate vehicle for raising claims which challenge the conditions of a prisoner's confinement.") Although not as widely discussed in the context of a § 2241 habeas, this principle is firmly established in the Eleventh Circuit regarding habeas claims under 28 U.S.C. § 2254 and civil rights claims under § 1983. Claims where a detainee "seeks injunctive relief challenging the fact of his conviction or the duration of his sentence . . . fall within the 'core' of habeas corpus and are thus not cognizable when brought pursuant to § 1983." *Nelson v. Campbell*, 541 U.S. 637, 643 (2004). On the other hand, "constitutional claims that merely challenge the conditions of a prisoner's confinement . . . fall outside of that core and may be brought pursuant to § 1983 in the first instance." *Id.* "These avenues are mutually exclusive[.]" *Hutcherson v. Riley*, 468 F.3d 750, 754 (2006). "When an inmate challenges the 'circumstances of his confinement' but not the validity of his conviction and/or sentence, then the claim is properly raised in a civil rights action[.]" *Id.*

Petitioners here do not challenge the validity of their detention or its duration. They attempt to contort their claims into a habeas action by calling their detention "illegal," Pet'rs' Suppl.

Memo. 1-5, but they are not challenging the legality of their immigration detention under the Immigration and Nationality Act, 8 U.S.C. §§ 1225, 1226, or 1231. They similarly do not challenge the duration of their detention under *Zadvydas v. Davis*, 533 U.S. 678 (2001). Instead, they challenge the conditions of their confinement—claiming a lack of proper cleaning supplies, personal protective equipment, or ability to social distance. These claims are not properly asserted in a habeas action.

3. Petitioners have not established that the conditions of their confinement violate the Fifth Amendment.

Under the Fifth Amendment Due Process Clause, "a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). For conditions of confinement to constitute "punishment," the Petitioners must show either (1) "an expressed intent to punish on the part of detention facility officials," or an implied intent to punish through a condition or restriction that a "is not reasonably related to a legitimate goal—if it is arbitrary or purposeless[.]" *Id.* at 538-39. "Thus, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.' *Id.* at 539.

Petitioners fail to show that their detention is not proportionately related to the government's non-punitive responsibilities and administrative purposes. While civil detainees retain greater liberty protections than individuals convicted of crimes, *see, e.g.*, *Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982), the continued immigration detention of Petitioners pending removal cannot be described as punitive or excessive in relation to the legitimate government purpose of protecting the public and ensuring their removal. *See, e.g.*, *Demore v. Kim*, 538 U.S. 510, 523 (2003) ("[T]his Court has recognized detention during deportation proceedings as a constitutionally valid aspect of the deportation process."); *Dawson v. Asher*, No. 20-cv-0409-JLR-MAT, 2020 WL 1304557, at *2 (W.D.

Wash. Mar. 19, 2020). The COVID-19 outbreak does not change this analysis or weaken the government's legitimate interest in Petitioners' detention pending removal. *Id.*

In denying a request for release from immigration detention in the Western District of Washington last month, when Seattle was the epicenter of the COVID-19 outbreak in this country, the court noted that "Plaintiffs do not cite to authority, and the court is aware of none, under which the fact of detention itself becomes an 'excessive' condition solely due to the risk of a communicable disease outbreak—even one as serious as COVID-19." *Dawson*, 2020 WL 1304557, at *2. As in *Dawson*, Petitioners here have not established that their conditions of detention are unconstitutional. ICE and its contractors are undertaking appropriate measures to prevent the spread of the disease, which unfortunately is found throughout our country and is certainly not unique to detention facilities. *See Dawson*, 2020 WL 1304557, at *2.

To the extent Petitioners are arguing that the facilities' populations should be reduced, ICE has already taken steps to do so, and will continue to evaluate cases that may be at high risk for COVID-19. The detainee population at both SDC and ICDC have been greatly reduced. Each facility is currently operating under capacity. That these Petitioners have not been beneficiaries of this exercise of ICE's discretion does not constitute a due process violation.

Petitioners cannot plausibly argue that Respondents are subjecting them to punishment. ICE has implemented procedures and protocols to protect the detainees in its care, including at the facilities at issue in this case, and has also exercised its discretion to reduce the detainee populations at those facilities. These precautions taken at the two facilities at issue carry far more weight than the generalized opinions expressed in the various declarations submitted by Petitioner's proffered experts about populations in immigration detention centers in general and other detention and institutional settings.

Unlike in the cases cited by Petitioners, the present situation is not one where a detainee is being exposed *because of* his detention—for example, where a communicable disease is spreading within the detention centers, while the general public remains unaffected. *See, e.g., Helling v. McKinney*, 509 U.S. 25, 28, 32-35 (finding that an inmate can assert constitutional claim for exposure to environmental tobacco smoke where he was assigned to cell with another inmate who smokes five packs of cigarettes per day); *Gates v. Collier*, 501 F.2d 1291, 1300 (5th Cir. 1974) (constitutional violations at state penitentiary included, *inter alia*, water contaminated by sewage, leading to the spread of infectious disease, and permitting infected prisoners to mingle with the general population); *see also Hutto v. Finney*, 437 U.S. 678, 682-83 (1978) (constitutional violations in state prison system's punitive isolation cells due to, *inter alia*, a practice of sharing mattresses with prisoners who "suffered from infectious diseases such as hepatitis and venereal disease"). Instead, the disease is spreading in the general population of Georgia and the United States. Petitioners' argument that continued detention amounts to a constitutional violation simply lacks merit.

4. Petitioners are not entitled to release from custody.

Assuming that Petitioners could show that they were likely to prevail on their habeas claim that the conditions of their detention violate the Due Process Clause, they cannot establish that they are entitled to immediate release "as opposed to injunctive relief that would leave [them] detained while ameliorating any alleged violative conditions within the facility." *Dawson*, 2020 WL 1304557, at *2.[8] This type of relief is explicitly preferred in the Eleventh Circuit—"even if a prisoner proves an allegation of mistreatment in prison that amounts to cruel and unusual

[8] Petitioners have not sought any changed conditions in the facilities, let alone met their burden to show that they would be entitled to mandatory injunctive relief.

punishment, he is not entitled to release." *Gomez v. United* States, 899 F. 2d 1124, 1126 (11th Cir. 1990). "The appropriate Eleventh Circuit relief from prison conditions that violate the Eighth Amendment during legal incarceration is to require the discontinuance of any improper practices, or to require correction of any condition causing cruel and unusual punishment." *Id; see also Vaz*, 634 F. App'x at 781 ("[E]ven if Petitioner established a constitutional violation, he would not be entitled to the relief he seeks because release from imprisonment is not an available remedy for a conditions-of-confinement claim.").

Petitioners, however, do not ask this Court to order any different medical treatment or sanitation practices for detainees at SDC and ICDC. Instead, Petitioners argue that the facilities must reduce their detainee populations in order to address the COVID-19 situation. They urge this Court to ignore ICE's statutory and regulatory authority and discretion regarding detainee release, and instead agree with Petitioners' self-selection as the detainees to be released. This Court should not oblige them.

Petitioners have not shown that they are likely to succeed on the merits and their motion for a TRO should be denied.

B. Petitioners have not shown irreparable harm.

Petitioners have not demonstrated that they will suffer irreparable injury absent the mandatory injunctive relief they seek. "The injury must be neither remote nor speculative, but actual and imminent." *Ne. Fla. Chapter of the Ass'n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990) (internal quotation marks and citation omitted). Merely showing a "possibility" of irreparable harm is insufficient. *See Winter*, 555 U.S. at 22. Moreover, mandatory injunctions are not granted unless extreme or very serious damage will result. *Marlyn Nutraceuticals, Inc.*, 571 F.3d at 879 (internal citation omitted). "Issuing a

preliminary injunction based only on a possibility of irreparable harm is inconsistent with [the Supreme Court's] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22.

Petitioners claim that release from detention will spare them the heightened risk of adverse consequences from COVID-19. This is not only speculative, it is unlikely, given that COVID-19 is spreading throughout the country. Indeed, as set forth above, certain petitioners seek to be released into communities where the percentage of COVID-19 infections are significantly higher than in their current situation. *See, e.g.*, Sanchez Martinez Decl. ¶ 28; Robinson Decl. ¶ 28. Fundamentally, as in *Dawson*, "[t]here is no evidence . . . that Defendants' precautionary measures are inadequate to contain such an outbreak or properly provide medical care should it occur." 2020 WL 1304557, at *3.

Petitioners have not shown irreparable harm and their motion for a TRO should be denied.

C. The balance of equities and public interest favors Respondents.

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

Petitioners ask the Court to declare their detention unconstitutional, despite Respondents'

valid statutory bases for detaining them. The implications of such an order, were it followed by other courts in this and other jurisdictions, would be far-reaching. ICE detains—and provides the medical care for—many individuals who fall into the categories considered vulnerable to COVID-19. The disruptive effect of an order releasing Petitioners could long survive the COVID-19 pandemic, and could serve as precedent for releasing many non-citizens slated for removal. This type of burden and attendant harm, and its potential impact on ICE operations nationwide, is too great to be permissible at this preliminary stage. Moreover, the public interest is best served by allowing immigration facilities to follow the orderly medical processes and protocols implemented by government professionals, as ICE and its contractors have been doing. *Youngberg*, 457 U.S. at 322-23 (urging judicial deference and finding presumption of validity regarding decisions of government professionals concerning conditions of confinement).

Petitioners have not shown that the balance of hardships and public interest tips in their favor and their motion for TRO should be denied.

CONCLUSION

For all of the foregoing reasons, Petitioners have not satisfied their high burden of establishing entitlement to mandatory injunctive relief, and their Motion for a Temporary Restraining Order (ECF No. 5) should be denied.

Respectfully submitted this 9th day of April, 2020.

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