UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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HASSAN CHUNN; NEHEMIAH McBRIDE; AYMAN RABADI by his Next Friend Migdaliz Quinones; and JUSTIN RODRIGUEZ by his Next Friend Jacklyn Romanoff; ELODIA LOPEZ; and JAMES HAIR, individually and on behalf of all others similarly situated,

Petitioners,

-against-

WARDEN DEREK EDGE,

Respondent.

----------x

Civil Action No.
20-CV-1590
(Kovner, J.)
(Mann, M.J.)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF RESPONDENT'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(1), 12(b)(6), OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

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May 10, 2020

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PRELIMINARY STATEMENT

Before the first case of COVID-19 was reported in New York City, the BOP was taking numerous steps to protect the inmate population at the MDC from what would become a global pandemic. Those efforts began as early as January 2020—months before this lawsuit—and have continually expanded as additional information became known and additional resources become available. Despite BOP's indisputable record of success in controlling the spread of COVID-19 at the MDC, Petitioners filed the instant action, charging that Respondent was deliberately indifferent to the safety of MDC's inmates.

Respondent now respectfully submits this reply memorandum of law in further support of his motion to dismiss. As set forth below, Petitioners' brief in opposition to the Respondent's motion fails to salvage this action. First, as discussed below, four of the six Petitioners' claims are now moot and subject to dismissal. And, as set forth more fully in Respondent's opening brief (Dkt. No. 62), this Court lacks subject matter jurisdiction over this action. Importantly, Petitioners fail to overcome the Prison Litigation Reform Act's ("PLRA") strict limitations on a district court's ability to order the release of inmates, including its express prohibition on a single district judge doing so. *See* 18 U.S.C. § 3626(a)(3).

But even if jurisdiction existed here, Petitioners still fail to meet the heightened standard needed to show a violation of their Fifth Amendment or Eighth Amendment rights arising out of current conditions at the MDC. For the reasons set forth below and for the reasons set forth in Respondent's opening brief, the Court should dismiss this action.[1]

[1] Respondent's motion to dismiss included a request to strike Petitioners' class allegations. After Respondent filed his motion, Petitioners moved for class certification (Dkt. No. 71). Respondent subsequently opposed that motion (Dkt. No. 79) and fully incorporates those arguments against class certification herein (Dkt. No. 79 at 26-34).

ARGUMENT

I. This Court Lacks Jurisdiction Over This Petition

A. The Claims of Chunn, McBride, Rodriguez, and Rabadi must be dismissed.

"Under Article III of the U.S. Constitution, when a case becomes moot, the federal courts lack subject matter jurisdiction over the action." *Doyle v. Midland Credit Mgmt., Inc.*, 722 F.3d 78, 80 (2d Cir. 2013). Petitioners concede that the claims of Chunn and McBride are "currently moot" and "must be dismissed for lack of jurisdiction "because they have been released from the MDC and served the entirety of their sentences." Petitioners' Opposition ("Opp.") 6. For the same reason, Rodriguez's claims are also moot, as it undisputed[2] that Rodriguez was released from the MDC on April 26, two days after Respondent filed his motion. Similarly, Rabadi is being released from MDC on May 19; he remains at MDC because he is in the midst of a 14-day quarantine prior to his exit. *See* Cho Decl., Exhibit A. As Chunn, McBride, Rodriguez, and Rabadi have no pending case or controversy, their claims should be dismissed as moot.

B. The Court lacks jurisdiction over the remaining Petitioners' claims

In order to demonstrate that the Court has jurisdiction here, Petitioners craft an argument that, on its face, is at odds with itself. On the one hand, while trying to establish jurisdiction under § 2241, citing Second Circuit case law, Petitioners contend that they are not challenging the length or duration of confinement. Opp. 9. On the other hand, at a later point in their brief when trying to avoid provisions of the PLRA fatal to their claims, they paradoxically argue, in order to be able to cite a Sixth Circuit case, that their petition challenges the "fact or duration of confinement." Opp. 17. As explained below, Petitioners' internally inconsistent argument wholly misses the mark as to the applicability of the PLRA.

[2] In their May 8 Opposition brief, Petitioners inexplicably fail to acknowledge Rodriguez's release, despite the fact that they produced, on May 6, a signed declaration from Rodriguez indicating his release from MDC. *See* PETS001599; Pet. Hearing Ex. 76.

Contrary to Petitioners' claims (Opp. 17-21), 18 U.S.C. § 3626 of the PLRA applies and bars Petitioners' claims.[3] The PLRA contains a prohibition for a broad range of claims, covering "any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison." § 3626(g)(2). The *only* exception, which is not applicable here, is for "habeas corpus proceedings challenging the fact or duration of confinement in prison." *Id.*

Petitioners argue that their claims fall into this "fact or duration of confinement" exception to the PLRA. But yesterday's decision in *Alvarez v. Larose*, No. 20-CV-782 (DMS) (AHG), Dkt. No. 46 (S.D. Cal. May 9, 2020),[4] is instructive here. In *Alvarez*, plaintiffs—a putative class of federal criminal detainees charged with, or convicted of, serious crimes—challenged the conditions of confinement at their U.S. Marshals Service facility as inadequate to address the threat to health and safety posed by COVID-19. *Id.* at *1-*3. Like Petitioners here, the *Alvarez* plaintiffs claimed that release was warranted due to the facility's response to the COVID-19 pandemic. *Id.* Also like Petitioners, the *Alvarez* plaintiffs asserted that they "do not challenge the reason for their confinement, their conviction or charge, the length of their sentence, or a release determination based on good time credits—claims that are often characterized as 'the core of habeas corpus.'" *Id.* (citing *Preiser v. Rodriguez*, 411 U.S. 475, 487 (1973)*; cf.* Opp. 9. Instead, akin to Petitioners here, the *Alvarez* plaintiffs argued that their claims

[3] Petitioners rely on two inapposite immigration rulings (Opp. 10) to argue that the provisions of the PLRA do not apply. Their reliance on those rulings is misplaced, as aliens in immigration detention are not subject to the PLRA. *Alvarez*, Dkt. No. 46, at *2 (distinguishing between civil immigration detainees and criminal inmates); *Pozo v. Schmidt*, No. 18-CV-1486, 2020 WL 2129567, at *5 (E.D. Wis. May 5, 2020) ("finding that the PLRA applies to immigration detainees would ignore the longstanding understanding that immigration proceedings are civil—not criminal—in nature") (citing *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984). Further, detained aliens are subject to 8 U.S.C. § 1226(a), which gives the government discretion to detain an alien over the course of his removal proceedings before an immigration judge; the government also retains discretion to release the alien on bond under certain circumstances. *See Sajous v. Decker*, No. 18-CV-2447 (AJN), 2018 WL 2357266, at *1 (S.D.N.Y. May 23, 2018). Such a scenario has no bearing on the rights afforded criminal defendants before their Article III sentencing judges.

[4] This decision's publication is forthcoming. A copy of the decision is annexed to the Cho Decl. as Exhibit B.

"are based solely on the current conditions inside [the facility] given the COVID-19 pandemic." *Alvarez*, Dkt. 46, at *6.

The *Alvarez* district court explained that, "[i]n other words, unlike a claim concerning the fact of confinement, Plaintiffs' claims would not exist *but for* their current conditions of confinement at [the facility]." *Id.* (emphasis in original). The court then correctly held that *Alvarez* "is not a 'habeas corpus proceeding[] challenging the fact or duration of confinement in prison[,]' which would fall outside the purview of the PLRA"; "[i]t is a habeas claim based on confinement conditions." *Alvarez*, Dkt. 46 at *6. As a result, contrary to the *Alvarez* plaintiffs' assertion, the PLRA applied and the plaintiffs failed to establish a likelihood of success on the merits. The court reasoned that:

> [The PLRA] limits the Court's authority to order release of prisoners "[i]n any civil actions with respect to prison conditions." 18 U.S.C. § 3626(a)(3)(A). It provides, "no court shall enter a prisoner release order unless . . . (i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied. . . ; and (ii) the defendant has had a reasonable amount of time to comply with the previous court orders." *Id.* It precludes prisoner release orders unless "entered [] by a three-judge court." *Id.* § 3626(a)(3)(B). In addition, before entering such an order, the three-judge panel must first find, by clear and convincing evidence, "(i) crowding is the primary cause of the violation of a Federal right; and (ii) no other relief will remedy the violation of the Federal right." *Id.* § 3626(a)(3)(E). Finally, the PLRA defines "prisoner release order" in expansive terms to include "any order … that has the purpose or effect of reducing or limiting the prison population, or that directs the release from … a prison." *Id.* § 3626(g)(4). These limitations "ensure that the 'last resort remedy' of a population limit is not imposed 'as a first step.'"

Id., at *8 (citing *Brown v. Plata*, 563 U.S. 493, 511 (2011)).

As in *Alvarez*, Petitioners may not circumvent the PLRA simply by seeking release in a case, like this one, that challenges conditions of confinement. Petitioners' requested relief is irreconcilable with the plain text of the PLRA. Here, there can be no dispute that Petitioners' lawsuit is a "civil action with respect to prison conditions" governed by the provisions of the PLRA. 18 U.S.C. § 3626(g)(2). The PLRA defines "civil action with respect to prison conditions" broadly to mean "any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by

government officials on the lives of persons confined in prison, but [that term] does not include habeas corpus proceedings challenging the fact or duration of confinement in prison[.]" *Id.* Petitioners seek release as a remedy for allegedly unconstitutional conditions at the MDC—for themselves and for the putative class members. As set forth above, the PLRA strictly limits the relief that this Court may grant and precludes the Court from releasing inmates from the MDC as Petitioners request. 18 U.S.C. § 3626(a)(3)(B); *see, e.g., Plata v. Newsom*, -- F. Supp. 3d -- , 2020 WL 1908776, at *2 (N.D. Cal. Apr. 17, 2020) (denying an emergency motion regarding prevention and management of COVID-19 and noting that, pursuant to the PLRA, the court lacked authority to grant the release or transfer, finding that a "prisoner release order" could only be granted by a three-judge court.) (citing 18 U.S.C. § 3626(a)(3)(B)); *Money v. Pritzker*, -- F. Supp. 3d --, 2020 WL 1820660, at *14 (N.D. Ill. Apr. 10, 2020) (holding that the PLRA prevented the court from entering the relief requested by petitioners for the release of inmates).[5]

Significantly, Congress enacted "the PLRA in an effort, in part, to oust the federal judiciary from day-to-day prison management." *Inmates of Suffolk Cty. Jail v. Rouse*, 129 F.3d 649, 655 (1st Cir. 1997) (citations omitted); *see also Benjamin v. Jacobson*, 172 F.3d 144, 182 (2d Cir. 1999) (*in banc*) (Calabresi, J., concurring) ("The *in banc* majority argues at length that Congress meant to get the federal courts out of the business of running jails, and it cites any number of congressional statements to that effect. I agree."). "Congress intended the PLRA to revive the hands-off doctrine," which was "a rule of judicial quiescence derived from federalism and separation of powers concerns." *Gilmore v. People of the State of Cal.*, 220 F.3d 987, 991, 997 (9th Cir. 2000). Section 3626 thus "restrict[s] the equity

[5] Petitioners fail to establish that this Court has the authority to immediately "release" hundreds of MDC inmates, much less the named Petitioners. Petitioners paradoxically contend that they "are not asking for amended sentences, they are asking for release." Opp. 8. In reality, Petitioners are trying to skirt the fact that their requested "release" from legal custody is the equivalent of a sentence reduction. And, as Petitioners are aware, courts in the Second Circuit have unequivocally ruled that a § 2241 habeas petition challenging the conditions of confinement cannot serve as a vehicle to modify or otherwise reduce a criminal sentence which is the exact relief Petitioners impermissibly seek. *See* Dkt. No. 62-1 at 14-16.

jurisdiction of federal courts," *Gilmore*, 220 F.3d at 999, and, "[b]y its terms . . . restricts the circumstances in which a court may enter an order 'that has the purpose or effect of reducing or limiting the prison population.'" *Brown v. Plata*, 563 U.S. 493, 511 (2011) (quoting § 3626(g)(4)). The PLRA's "requirements ensure that the 'last resort remedy' of a population limit is not imposed 'as a first step.'" *Id.* at 514 (quoting *Inmates of Occoquan v. Barry*, 844 F.2d 828, 843 (D.C. Cir. 1988)). "The release of prisoners in large numbers . . . is a matter of undoubted, grave concern." *Brown*, 563 U.S. at 501.

Not only does the PLRA preclude the relief that Petitioners seek, but even if the Court were inclined to grant such relief (which it should not), Petitioners' request for such relief is premature. *See United States v. Raia*, 954 F.3d 594, 597 (3d Cir. 2020) ("[S]trict compliance with [statutory exhaustion requirements] takes on added—and critical—importance" when prison officials, who have a "shared desire for a safe and healthy prison environment," engage in "extensive and professional efforts to curtail the virus's spread."). On these grounds alone, the Amended Petition must be denied.

And to the extent the Court considers the putative claims of class members (who include pre-trial inmates) seeking immediate release or process by a "release committee," courts have held that habeas is an inappropriate collateral attack when pretrial detainees can seek release in their pending criminal cases, as they can and have done here. *See Reese v. Warden Philadelphia FDC*, 904 F.3d 244, 246-48 (3d Cir. 2018); *Medina v. Choate*, 875 F.3d 1025 (10th Cir. 2017); *Falcon v. U.S. Bureau of Prisons*, 52 F.3d 137, 139 (7th Cir. 1995); and *Fassler v. United States*, 858 F.2d 1016 (5th Cir. 1988).[6]

Petitioners cannot point to any authority that would permit their requested relief, whereby each inmate in the putative class would be permitted to: (1) seek release from that inmate's sentencing judge; (2) if the sentencing judge does not agree to the inmate's release, the inmate would seek release from

[6] Moreover, contrary to Petitioners' assertion, there is no basis in law that would allow Respondent to release the pre-trial inmates (none of whom are Petitioners) when those inmates are subject to orders issued in accordance with the Bail Reform Act, 18 U.S.C. § 3142.

the Court in the instant case; and (3) skip entirely over the PLRA's restrictive requirements seeking release via, *inter alia*, a three-judge court specially constituted pursuant to 18 U.S.C. § 3626(a)(3)(B). *See Grinis v. Spaulding*, No. 20-CV-10738 (GAO), 2020 WL 2300313, at *2 (D. Mass. May 8, 2020) (denying motion for a preliminary injunction and noting that there is "a question of which judicial authority has jurisdiction to issue such an order: A 'prisoner release order' may only be ordered by a three-judge court specially constituted [citing 18 U.S.C. § 3626(a)(3)(B)][, and a] 'compassionate release' order altering the sentence of a convicted felon apparently may only be entered by the sentencing judge [citing 18 U.S.C. § 3582(c)]."). Accordingly, dismissal of the Petition is warranted.[7]

C. Petitioners still fail to show why a Special Master is warranted

As Respondent has now demonstrated several times without any compelling response from Petitioners, Petitioners' request for a Special Master and some kind of nebulous "release committee" abuses the writ of habeas corpus, unduly duplicates judicial efforts, and circumvents traditional remedies afforded to safeguard a criminal defendant's liberty interests. Petitioners again fail to cite to a single case in which a Court appointed a Special Master at the preliminary injunction phase of a proceeding; instead, they rely on the wholly inapposite decisions in *City of New York v. Mickalis Pawn Shop*, LLC, 645 F.3d 114, 145 (2d Cir. 2011), where a Special Master was appointed in a complex action against retail firearm dealers after a *permanent* injunction was issued; and *United States v. Yonkers Bd. of Educ.*, 29 F.3d 40, 42 (2d Cir. 1994), where a Special Master was appointed to address housing segregation after discovery and a "lengthy bench trial in 1983 and 1984." The Court should categorically reject such an unprecedented appointment here.

[7] *Alvarez* is also instructive with respect to denying Petitioners' claims for emergency relief. The *Alvarez* court held that it "could not issue injunctive relief without unfairly intruding on Defendants' operation of the prison system and defying Congress's clear policy determinations regarding challenges to prison conditions and prisoner release orders[;] [i]n addition, the public interest does not favor the immediate release of a class of inmates who may lack viable housing outside of [the facility] and may be deprived of access to food, means of personal hygiene, and medical care if released, all at once, from the facility." *Alvarez*, Dk. No. 46, at *8.

The Court simply does not have the authority to seize the role of the Article III judge in granting or denying the release of inmates and hand it over to a Special Master.[8] Petitioners appear to propose a system whereby this Court would appoint a Special Master who would lord over BOP without any limitation and would interject into the criminal cases of district judges across the country whenever an inmate at MDC seeks compassionate release or home confinement. Petitioners presuppose that the Special Master is best situated to make decisions about MDC's operations. The Supreme Court, however, has acknowledged that running a prison "is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Turner v. Safley*, 482 U.S. 78, 85 (1987). The "formidable task of running a prison" falls to those other two branches, and "separation of powers concerns counsel a policy of judicial restraint" and "deference to the appropriate prison authorities." *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 353 (1987). Prison officials, not Special Masters, are the ones who "make the difficult judgments concerning institutional operations." *Pesci v. Budz*, 935 F.3d 1159, 1166 (11th Cir. 2019). A Special Master cannot be permitted to "sit[] as a super-warden to second-guess the decisions of the real wardens." *Prison Legal News v. Sec'y, Fla. Dep't of Corr.*, 890 F.3d 954, 965 (11th Cir. 2018) (explaining the "substantial deference to the decisions of prison administrators because of the complexity of prison management, the fact that responsibility therefor is necessarily vested in prison officials, and the fact that courts are ill-equipped to deal with such problems.").[9]

[8] Indeed, in the past week alone, sentencing judges have decided applications for compassionate release and home confinement related to inmates in BOP custody. *See, e.g.*, *United States v. Watson*, No. 19 Cr. 4, Dkt. No. 161 (E.D.N.Y. May 6, 2020 (Kuntz, J.) (denying application for pre-sentence release after "[h]aving carefully reviewed Defendant's medical records at the MDC," "the Court concluded [*inter alia*] that Defendant was not denied timely medical care as a result of his detention during the crisis").

[9] Petitioners incorrectly state that "the government implicitly concedes that" the Court can order Petitioners' request for a Special Master given that the PLRA allows Special Masters, during the *remedial* phase of the action, "to conduct hearings on the record and prepare proposed findings of fact." 18 U.S.C. § 3626(f)(1). Opp. 23. To the contrary, the Second Circuit has already addressed this precise issue, holding that "[t]he PLRA has substantially limited the capacity of federal courts to appoint special masters to oversee prison conditions, specifically in order to ensure compliance with the Eighth Amendment." *Webb v. Goord*, 340 F.3d 105, 111 (2d Cir. 2003).

II. Even if the Court had Jurisdiction over the Amended Petition, Petitioners' Claims are Subject to Dismissal

Even if the Court had jurisdiction over the Amended Petition (which it does not), Petitioners' claims are subject to dismissal under Fed. R. Civ. P. 12(b)(6). In order to succeed on their Eighth Amendment claims, Petitioners must show not only that Respondent denied them "the minimal civilized measure of life's necessities," but also that he acted with a "sufficiently culpable state of mind." *Gaston v. Coughlin*, 249 F.3d 156, 164 (2d Cir. 2001) (internal quotation marks omitted). In prison-condition cases, the requisite state of mind is one of "deliberate indifference." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (internal quotation marks omitted). Deliberate indifference "entails something more than mere negligence." *Id.* at 835.

Petitioners simply cannot prevail under this standard. BOP officials have not been indifferent, let alone deliberately so. Beginning months before this lawsuit was filed, and continuing through the present, BOP implemented and updated numerous policies designed to prevent the introduction and spread of COVID-19 within MDC. *See* Declarations, at Dkt. Nos. 18, 21, 47, 72, 80-83.[10] The BOP's Action Plan for COVID-19, as outlined in Respondent's motion to dismiss at 3-6, has been enormously successful in combatting COVID-19 at MDC. In their opposition, Petitioners turn the deliberate-indifference inquiry on its head, focusing exclusively on the results of BOP's effort rather than its reasonableness in the face of the immense challenges facing MDC during the pandemic. While Petitioners may debate whether the BOP's COVID-19 action plan "will be enough as a matter of public health policy," that debate "is not the measure of a constitutional [] violation." *United States v. Villegas*, -- F. Supp. 3d -- , 2020 WL 1649520, at *2 (C.D. Cal. Apr. 3, 2020) ("the Bureau of Prisons is by all objective accounts responding to the COVID-19 pandemic as any reasonable observer could expect

[10] Contrary to Petitioners' assertion, this matter is subject to dismissal under Fed. R. Civ. P. 12(b)(6). *See Lia v. Saporito*, 909 F. Supp. 2d 149, 161 (E.D.N.Y. 2012) ("Agency determinations and administrative findings are public records of which a court may properly take judicial notice."). Nonetheless, Respondent has moved, in the alternative, for summary judgment.

under the circumstances to prevent infectious outbreak, protect inmate health, and preserve internal order—all legitimate government aims."); *see also Plata*, 2020 WL 1908776 (N.D. Cal. Apr. 17, 2020) (noting while it "might adopt additional distancing measures if it were solely responsible for" jail administration, it "cannot conclude that Defendants' actions are constitutionally deficient."); *Sacal-Micha v. Longoria*, -- F. Supp. 3d -- , 2020 WL 1518861, at *6 (S.D. Tex. Mar. 27, 2020) (finding that a facility's inability to implement measures that would be "required to fully guarantee [plaintiffs'] safety," because the facility cannot control overall inmate population or implement ideal social distancing does not amount to a violation of constitutional rights).

Petitioners fail to plead any facts which could support the necessary conclusions that conditions at the MDC are of the sort that would be "repugnant to the conscience of mankind," (*Estelle v. Gamble*, 429 U.S. 97, 105-06 (1976)), or that officials have shown indifference, much less deliberate indifference, to the risks posed by COVID-19. Respondent is acutely aware of the risk that COVID-19 poses to MDC's inmate population and to the public at large, and Respondent can hardly be said to be indifferent, as shown by what prison officials have done and will continue to do. Petitioners cannot credibly dispute Respondent's serious effort to mitigate those risks; instead, Petitioners merely state their disagreements with certain aspects of BOP's approach to treating this unprecedented medical crisis and speculate, despite evidence to the contrary, that those efforts will be a failure. However, their disagreements, along with their misplaced focus and speculation about the results of Respondent's efforts, fail to state a constitutional violation, and this matter should be dismissed.

CONCLUSION

Accordingly, for the reasons set forth in Respondent's opening brief and herein, the Court should dismiss the Amended Petition in its entirety and grant Respondent such further relief that the Court deems just and proper.

Dated: Brooklyn, New York
May 10, 2020

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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HASSAN CHUNN; NEHEMIAH McBRIDE; AYMAN RABADI by his Next Friend Migdaliz Quinones; and JUSTIN RODRIGUEZ by his Next Friend Jacklyn Romanoff; ELODIA LOPEZ; and JAMES HAIR, individually and on behalf of all others similarly situated,

Petitioners,

-against-

WARDEN DEREK EDGE,

Respondent.

Civil Action No.
20-CV-1590
(Kovner, J.)
(Mann, M.J.)

----------x

James R. Cho, an attorney duly admitted to practice in the Eastern District of New York, declares pursuant to 28 U.S.C. § 1746, under penalty of perjury, that the following is true and correct:

1. I am an Assistant United States Attorney, of counsel to Richard P. Donoghue, United States Attorney, Eastern District of New York, attorney for Respondent. I am familiar with the facts in the instant case.

2. Attached hereto as Exhibit A are records related to Petitioner Ayman Rabadi's release, bearing Bates Stamp Nos. AR1-2.

3. Attached hereto as Exhibit B is a copy of the to-be-published decision in the case styled *Alvarez v. Larose*, No. 20-CV-782 (DMS) (AHG), Dkt. No. 46 (S.D. Cal. May 9, 2020).

Dated: Brooklyn, New York
May 10, 2020

RICHARD P. DONOGHUE
United States Attorney

By: /s/
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Assistant U.S. Attorney

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TRAVEL ITINERARY- RABADI, AYMAN [redacted]
FURLOUGH TRANSFER 05/19/2020

MR. RABADI WILL BE DEPARTING MDC BROOKLYN VIA PRIVATE TRANSPORTATION AT APPROXIMATELY 9:00 AM. HIS SON, CHRIS RABADI, WILL TAKE HIM TO HIS FINAL DESTINATION OF GEO CARE, INC., [redacted].

MR. RABADI IS AWARE THAT HE HAS 2 HOURS TO GET TO HIS DESTINATION. HE IS ALSO AWARE THAT IN THE EVENT OF AN EMERGENCY HE IS TO CALL EITHER THE RRC AT [redacted] OR MDC BROOKLYN [redacted] FOR DIRECTION AND THAT HE IS NOT TO DEVIATE FROM THE TRAVEL ITINERARY.

BOP2Q 531.01 * INMATE HISTORY * 05-08-2020
PAGE 001 OF 001 * DESTNATION * 16:39:13

REG NO..: 68499-054 NAME....: RABADI, AYMAN
CATEGORY: [redacted] FUNCTION: PRT FORMAT:

FCL	ASSIGNMENT	DESCRIPTION	START DATE/TIME	STOP DATE/TIME
BRO	[redacted]	COMM CORR CENTER BRONX NY-HC	05-19-2020 1528	CURRENT
BRO	[redacted]	BROOKLYN MDC CAD-MALE	02-18-2020 1208	02-18-2020 1210
5-L	[redacted]	COMM CORR CENTER BRONX NY-HC	10-21-2015 0800	10-21-2015 1311
B15	[redacted]	FORT DIX FCI-GEN POP	07-28-2014 0805	08-05-2014 1443

G0000 TRANSACTION SUCCESSFULLY COMPLETED

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JACINTO VICTOR ALVAREZ, JOSEPH BRODERICK, MARLENE CANO, JOSE CRESPO-VENEGAS, NOE GONZALEZ-SOTO, VICTOR LARA-SOTO, RACQUEL RAMCHARAN, GEORGE RIDLEY, MICHAEL JAMIL SMITH, LEOPOLDO SZURGOT, JANE DOE, on behalf of themselves and those similarly situated,

Plaintiffs-Petitioners,

v.

CHRISTOPHER J. LAROSE, Senior Warden, Otay Mesa Detention Center, et al.,

Defendants-Respondents.

Case No.: 20-cv-00782-DMS (AHG)

ORDER DENYING MOTION FOR TEMPORARY RESTRAINING ORDER

This case is the second one to come before this Court concerning the detention of persons in Otay Mesa Detention Center ("Otay Mesa" or "OMDC") in light of the COVID-19 pandemic. The first case, *Alcantara, et. al., vs. Archambeault, et. al.*, No. 20cv00756, concerned civil detainees in immigration custody. In that case, this Court provisionally certified a subclass of medically vulnerable civil immigration detainees at OMDC and

found they had established a likelihood of success on their Fifth Amendment due process claim in light of the conditions and their treatment at the facility. Based on that showing, the Court granted the plaintiffs' motion for a temporary restraining order and directed the defendants to immediately review for release those subclass members. That process is underway.

The claims in the present case are virtually identical to those raised in *Alcantara*, but Plaintiffs in this case are situated differently. Unlike the plaintiffs in *Alcantara*, who are civil immigration detainees, Plaintiffs here are criminal detainees either awaiting trial or sentencing in federal court. That difference places these detainees in an entirely different position from those in *Alcantara*, as Congress, through the Prison Litigation Reform Act ("PLRA"), has imposed significant limitations on court intervention in matters that are traditionally within the discretion of the Executive Branch and its prisons. There is no dispute Plaintiffs are "prisoners" under the PLRA,[1] and if subject to its provisions this Court may not order the release of Plaintiffs. For the reasons set forth below, the Court finds the PLRA applies to Plaintiffs' claims and divests the Court of authority to grant the requested relief. Accordingly, Plaintiffs' motion for temporary restraining order is denied.

I.
BACKGROUND

Otay Mesa separately houses both Immigration and Customs Enforcement ("ICE") civil detainees and United States Marshall Service ("USMS") criminal detainees. Plaintiffs in this case fall into the latter category. On April 25, 2020, when the present case was filed, there were approximately 340 criminal detainees at OMDC. (Mot. for TRO at 9). It

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[1] *See* 18 U.S.C. § 3626(g)(3) (defining "prisoner" as "any person subject to incarceration, detention, or admission to any facility who is accused of, convicted of, sentenced for, … violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program").

appears that as of May 5, 2020, 66 of these detainees have tested positive for COVID-19.[2] Plaintiffs allege the virus will continue to proliferate in the detention facility because of Defendants' failure to reduce the OMDC population, maintain adequate cleaning and hygiene standards, and comply with Center for Disease Control ("CDC") guidelines for detention facilities. (*Id.*). Plaintiffs include declarations of detainees in support of these allegations.

As a result of Defendants' alleged inaction in controlling the COVID-19 outbreak at OMDC, Plaintiffs filed the present motion for TRO, seeking the release of the medically vulnerable pretrial and post-conviction detainee subclasses. Plaintiffs define medically vulnerable as individuals who are aged 45 years or older or who have medical conditions that the CDC has determined increase their likelihood of becoming severely ill from COVID-19. Plaintiffs allege Defendants' failure to implement adequate measures to protect detainees amounts to unconstitutional punishment in violation of the Fifth Amendment and constitutes deliberate indifference to the detainees' rights under the Eighth Amendment. Defendants concede Plaintiffs' factual allegations but contend the PLRA precludes this Court from issuing the relief Plaintiffs seek. In light of Defendants' arguments under the PLRA, the Court has deferred briefing on class certification and declines to address the balance of Defendants' arguments, which include arguments under the PLRA for failure to exhaust remedies and Plaintiffs' failure to seek relief under the Bail Reform Act in their respective pending criminal cases. Those matters may be raised in the briefing on the upcoming hearing on Plaintiffs' motion for preliminary injunction.

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[2] Kate Morrissey, *First ICE detainee dies from COVID-19 after being hospitalized from Otay Mesa Detention Center*, San Diego Union Tribune (May 6, 2020), https://www.sandiegouniontribune.com/news/immigration/story/2020-05-06/first-ice-detainee-dies-from-covid-19-after-being-hospitalized-from-otay-mesa-detention-center.

II.

DISCUSSION

The purpose of a TRO is to preserve the status quo before a preliminary injunction hearing may be held; its provisional remedial nature is designed merely to prevent irreparable loss of rights prior to judgment. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 439 (1974). The standard for issuing a temporary restraining order is identical to the standard for issuing a preliminary injunction. *Lockheed Missile & Space Co., Inc. v. Hughes Aircraft Co.*, 887 F. Supp. 1320, 1323 (N.D. Cal. 1995). Injunctive relief is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). To meet that showing, Plaintiffs must demonstrate "'[they are] likely to succeed on the merits, that [they are] likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is in the public interest.'" *Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting *Winter*, 555 U.S. at 20).

A. Likelihood of Success

"The first factor under *Winter* is the most important—likely success on the merits." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015). While Plaintiffs carry the burden of demonstrating likelihood of success, they are not required to prove their case in full at this stage but only such portions that enable them to obtain the injunctive relief they seek. *See Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).

Defendants contend Plaintiffs are not likely to succeed on the merits because the PLRA precludes this Court from issuing the relief they seek. Specifically, Defendants argue Plaintiffs are challenging the conditions of their confinement—not the fact or duration of their detention—and seeking release of prisoners. As characterized, Defendants argue the PLRA would apply and preclude the requested relief—as an order requiring release of prisoners may not be entered except by a three-judge panel of the district court and only after other less intrusive orders have failed to remedy the deprivation

of the federal right at issue. Plaintiffs argue habeas is the proper vehicle for the relief they seek and the PLRA does not apply to habeas proceedings.

Plaintiffs' argument that the PLRA does not apply to habeas proceedings is partially correct. By its terms, the PLRA does not apply to habeas proceedings "challenging the fact or duration of confinement in prison." 18 U.S.C. § 3626(g)(2). The question in this case, therefore, is whether the claims alleged challenge the fact or duration of Plaintiffs' confinement or the conditions of Plaintiffs' confinement. Simply invoking the habeas label is not determinative, as plaintiffs may challenge either kind of claim—"fact or duration of confinement" or conditions of confinement—in a habeas proceeding. *See Ziglar v. Abbasi*, 137 S.Ct. 1843, 1862-63 (2017) (leaving open the question whether detainees "might be able to challenge their confinement conditions via a petition for writ of habeas corpus.")

Given Plaintiffs' allegations, the Court finds Plaintiffs' claims rest entirely on the conditions of the Otay Mesa facility. In the first paragraph of their Complaint, Plaintiffs "challenge their continued detention, and the detention of all similarly situated individuals, under *conditions of confinement* that imperil their lives in violation of the Fifth and Eighth Amendments to the U.S. Constitution . . . ." (Compl. ¶ 1 (emphasis added)). Plaintiffs' factual allegations focus exclusively on Defendants' "actions and inactions" concerning the "conditions of confinement" at Otay Mesa. (*Id.* at ¶¶ 98, 100). For example, Plaintiffs discuss the "[c]leaning standards in OMDC common areas," the scarcity of cleaning supplies and hygiene products, USMS's failure to implement CDC guidelines on preventive measures, Otay Mesa's failure to conduct widespread testing, a lack of masks and gloves, and the absence of appropriate social distancing and quarantining measures. (*Id.* at ¶¶ 10, 44, 55, 61, 62, 63, 64; *see also id.* at ¶ 109 ("Defendants have failed to take reasonable measures to abate the risk that the [subject class members] will contract COVID-19.")). Plaintiffs note that the facility's "conditions and population levels" place the proposed class members at "a high risk of exposure" to the virus. (*Id.* at ¶ 72). For relief, Plaintiffs seek release of "as many incarcerated persons as necessary to allow [for] proper social distancing among those remaining in OMDC." (*Id.* at ¶ 11; *see also id.* at ¶

12 (Plaintiffs "further request various improvements to, and ongoing monitoring of, detention conditions at OMDC, and the staggered release of remaining [Plaintiffs] and other class members until necessary social distancing hygiene measures can be sustained.")).

Plaintiffs' claims, under any good faith calculus, cannot be characterized as a "habeas corpus proceeding[] challenging the fact or duration of confinement in prison." 18 U.S.C. § 3626(g)(2). Plaintiffs do not challenge the reason for their confinement, their conviction or charge, the length of their sentence, or a release determination based on good time credits—claims that are often characterized as "the core of habeas corpus." *Preiser v. Rodriguez*, 411 U.S. 475, 487 (1973). Rather, their claims are based solely on the current conditions inside OMDC given the COVID-19 pandemic. In other words, unlike a claim concerning the fact of confinement, Plaintiffs' claims would not exist *but for* their current conditions of confinement at Otay Mesa. Accordingly, the present case is not a "habeas corpus proceeding[] challenging the fact or duration of confinement in prison[,]" which would fall outside the purview of the PLRA. It is a habeas claim based on confinement conditions.

Plaintiffs argue they seek release, which is a remedy traditionally provided by a writ of habeas corpus. But this argument conflates the nature of relief with the substance of the claim to avoid the limitations of the PLRA. Moreover, the PLRA specifically contemplates "prisoner release orders" in "civil action[s]" concerning "prison conditions." 18 U.S.C. § 3626(a)(3)(A). The PLRA clearly addresses both Plaintiffs' claim and their chosen remedy. *See Money v. Pritzker,* --- F. Supp. 3d ----, 2020 WL 1820660, at *14 (N.D. Ill. Apr. 10, 2020) (stating PLRA "prevents" court from granting release of inmates based on prison conditions and COVID-19); *Plata v. Newsom,* --- F. Supp. 3d ----, 2020 WL 1908776, at * 1 (N.D. Cal. Apr. 17, 2020) (similar).

During oral argument, Plaintiffs cited a recent Sixth Circuit case, *Wilson v. Williams*, No. 20-3447 (6th Cir. May 4, 2020), in support of their argument that the PLRA does not apply. In *Wilson*, federal inmates filed a petition for a writ of habeas corpus, seeking

release from or enlargement of their custody to limit their exposure to the COVID-19 virus. *Wilson*, No. 20-3447. The Sixth Circuit found the inmates' claims concerned the fact of their detention, not the conditions of their confinement, because the inmates argued "no set of conditions would be constitutionally sufficient." *Id.* Consequently, the court found the PLRA's restrictions on the issuance of prisoner release orders did not apply.

The Court does not find *Wilson* persuasive for two reasons. First, unlike the inmates in *Wilson*, Plaintiffs fail to argue there are no set of conditions of confinement that would be constitutionally sufficient. Although Plaintiffs presented this argument at the hearing on the present motion, it is not included in their Complaint or their motion for TRO. At most, Plaintiffs argue it would be "structurally impossible" for OMDC detainees to socially distance. (Mot. for TRO at 11; Compl. ¶ 71 (alleging "practically impossible" to protect detainees)). But in their Complaint, Plaintiffs allege that a significant reduction in the population of inmates would "allow [for] proper social distancing." (Compl. ¶ 11). The reasoning in *Wilson*, therefore, is inapplicable here.

Second, the Court disagrees with the proposition that there are no set of conditions at Otay Mesa that would be constitutionally sufficient under the Fifth Amendment. As Plaintiffs allege in their Complaint, a significant reduction in population, an increase in sanitation, and compliance with CDC guidelines for detention facilities would eliminate considerable risk of Otay Mesa inmates contracting COVID-19. (*Id*. at ¶¶ 11, 12). And, of course, that is so. The Fifth Amendment prohibits punishment of detained persons prior to "a formal adjudication of guilt" but cannot require a complete elimination of all risk of contracting the virus. *Bell v. Wolfish*, 441 U.W. 520, 535 n.16 (1979) (citing *United States v. Lovett*, 328 U.S. 303, 317–18 (1946)). Holding otherwise would place an impossible burden on detention facilities.

Contrary to Plaintiffs' assertion, this Court finds the present case clearly presents a challenge to the conditions of Plaintiffs' confinement at OMDC. As such, the PLRA applies. *See* 18 U.S.C. § 3626(a)(3)(A) (stating PLRA applies to "any civil action in federal court with respect to prison conditions"); *Nettles v. Grounds*, 830 F.3d 922, 934 (9th Cir.

2016) (stating prisoner must comply with PLRA if claim challenges any "aspect of prison life" other than "fact or duration of the conviction or sentence").

Congress enacted the PLRA to "revive the hands-off doctrine" and restore "judicial quiescence derived from federalism and separation of powers concerns" to remove the judiciary from prison management. *Gilmore v. California,* 220 F.3d 987, 991, 996–97 (9th Cir. 2000). By its terms, the PLRA "restricts the circumstances in which a court may enter an order 'that has the purpose or effect of reducing or limiting the prison population.'" *Brown v. Plata,* 563 U.S. 493, 511 (2011). As noted by the Supreme Court in *Plata*, "[t]he release of prisoners in large numbers … is a matter of undoubted, grave concern." *Id.* at 501. The PLRA specifically requires courts to give "substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by" the release of prisoners. 18 U.S.C. § 3626(a)(1).

There is no dispute the PLRA is restrictive. It limits the Court's authority to order release of prisoners "[i]n any civil actions with respect to prison conditions." 18 U.S.C. § 3626(a)(3)(A). It provides, "no court shall enter a prisoner release order unless . . . (i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied. . . ; and (ii) the defendant has had a reasonable amount of time to comply with the previous court orders." *Id.* It precludes prisoner release orders unless "entered [] by a three-judge court." *Id.* § 3626(a)(3)(B). In addition, before entering such an order, the three-judge panel must first find, by clear and convincing evidence, "(i) crowding is the primary cause of the violation of a Federal right; and (ii) no other relief will remedy the violation of the Federal right." *Id.* § 3626(a)(3)(E). Finally, the PLRA defines "prisoner release order" in expansive terms to include "any order … that has the purpose or effect of reducing or limiting the prison population, or that directs the release from … a prison." *Id.* § 3626(g)(4). These limitations "ensure that the 'last resort remedy' of a population limit is not imposed 'as a first step.'" *Plata*, 563 U.S. at 514 (quoting *Inmates of Occoquan v. Barry*, 844 F.2d 828, 843 (D.C. Cir. 1988)).

Here, Plaintiffs are challenging confinement conditions and requesting release. The substance of their claim and form of relief fall squarely within the purview of a "prisoner release order" under the PLRA. Because the Court may not grant the requested relief, Plaintiffs have failed to establish a likelihood of success on the merits of their claim.

B. Remaining Injunctive Relief Factors

The next three factors require Plaintiffs to demonstrate they are "likely to suffer irreparable harm in the absence of preliminary relief," the "balance of equities tips in [their] favor" and the "public interest favors granting an injunction." *Hernandez*, 872 F.3d at 995, 996 (internal quotations omitted). Given, however, that Plaintiffs have failed to show at "an irreducible minimum that there is a fair chance of success on the merits[,]" the Court cannot enter injunctive relief based on these remaining three factors. *Martin v. Int'l Olympic Comm.*, 740 F.2d 670, 675 (9th Cir. 1984). Nevertheless, the Court briefly addresses these factors below.

Turning to likelihood of irreparable injury, recent reports indicate that as of May 5, 2020, 66 criminal detainees in OMDC have tested positive. COVID-19 is highly contagious. (Mot. for TRO at 15). Individuals are capable of spreading the virus, despite being asymptomatic themselves. (*Id.*). Moreover, individuals who are medically vulnerable—including the subclass members seeking relief here—face a heightened risk of serious injury or death upon contracting COVID-19. (*Id.* at 13). None of this is disputed. A strong showing of likelihood of irreparable injury standing alone, however, cannot trigger the issuance of injunctive relief. Without "serious questions" as to the likelihood of success on the merits, the Court cannot issue a TRO. *All for the Wild Rockies v. Pena*, 865 F.3d 1211, 1217 (9th Cir. 2017).[3]

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[3] The Court also notes that as pretrial and convicted but yet to be sentenced detainees, Plaintiffs have remedies available to them under the Bail Reform Act, (18 U.S.C. §§ 3142 and 3143). Plaintiffs can seek release under appropriate conditions before the judge to whom their case is assigned. Accordingly, Defendants argue Plaintiffs have a legal remedy

Plaintiffs also do not satisfy the remaining two factors of injunctive relief. The Supreme Court has held that where the government is the party opposing an injunction, the balance of the equities and public interest injunctive relief factors tend to merge. *See Nken v. Holder*, 556 U.S. 418, 435 (2009); *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). Here, the Court could not issue injunctive relief without unfairly intruding on Defendants' operation of the prison system and defying Congress's clear policy determinations regarding challenges to prison conditions and prisoner release orders. In addition, the public interest does not favor the immediate release of a class of inmates who may lack viable housing outside of OMDC and may be deprived of access to food, means of personal hygiene, and medical care if released, all at once, from the facility. Plaintiffs have failed to meet their burden of demonstrating the injunctive relief factors weigh in favor of granting a TRO.[4]

III.

CONCLUSION AND ORDER

For these reasons, Plaintiffs' motion for temporary restraining order is denied.

IT IS SO ORDERED.

Dated: May 9, 2020

Hon. Dana M. Sabraw
United States District Judge

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and have not suffered irreparable harm. The Court defers ruling on this factor pending further briefing on preliminary injunction.

[4] Plaintiffs have alleged alternative relief in the form of enlargement, "in which an individual remains in custody, but the place of custody is enlarged by the Court." (*See* Comp. ¶ 81.) That relief was not requested in the TRO. The Court therefore defers ruling on that issue pending briefing on preliminary injunction.