IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

KANAT UMARBAEV, Petitioner, v. MARC J. MOORE, et al., Respondents.	Civil Action No. 3:20-CV-1279-B-BN consolidated for pretrial management with 3:20-CV-1291-B-BN; 3:20-CV-1292-B-BN; 3:20-CV-1293-B-BN; 3:20-CV-1294-B-BN; 3:20-CV-1295-B-BN; 3:20-CV-1296-B-BN; 3:20-CV-1297-B-BN; 3:20-CV-1298-B-BN; 3:20-CV-1299-B-BN; 3:20-CV-1300-B-BN

UNOPPOSED MOTION FOR LEAVE TO FILE
44-PAGE CONSOLIDATED RESPONSE

This action was initially filed as a single habeas corpus petition on behalf of eleven separate individuals in immigration detention. Petitioners seek their releases from detention due to the current coronavirus pandemic and also, with respect to some petitioners, based on an alleged denial of access to counsel. Petitioners set out their claims and arguments for relief in a 32-page petition and an accompanying 33-page supporting memorandum. (*See* Doc. 1; Doc. 8.)

The Court severed the action into eleven separate actions (one for each petitioner), but consolidated them for pretrial management and directed the U.S. Attorney's office to file a single consolidated response. (*See* Doc. 9.) The Court's order did not specify a specific page limit for the consolidated response, and respondents hereby seek leave of Court to file a 44-page response (in 13-pt font, which would be equivalent to 38 pages in 12-pt font), which page length it is respectfully submitted has been necessary in order to

fully address petitioners' claims and individual circumstances and relevant histories. The response is being submitted electronically as an attachment to this motion for leave.

Respectfully submitted,

ERIN NEALY COX
United States Attorney

/s/ Brian W. Stoltz
Brian W. Stoltz
Assistant United States Attorney
Texas Bar No. 24060668

George M. Padis
Assistant United States Attorney
Texas Bar No. 24088173

1100 Commerce Street, Third Floor
Dallas, Texas 75242
Telephone: 214-659-8626
Facsimile: 214-695-8807
brian.stoltz@usdoj.gov
george.padis@usdoj.gov

Attorneys for Respondents

Certificate of Conference

This is to certify that I have conferred with counsel for petitioners about the relief requested in this motion, and the relief requested in unopposed.

/s/ Brian W. Stoltz
Brian W. Stoltz
Assistant United States Attorney

Certificate of Service

On May 26, 2020, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all parties electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Brian W. Stoltz
Brian W. Stoltz
Assistant United States Attorney

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CONSOLIDATED RESPONSE TO PETITIONS FOR WRITS OF HABEAS CORPUS AND MOTIONS FOR TEMPORARY RESTRAINING ORDER

ERIN NEALY COX
United States Attorney

Brian W. Stoltz
George M. Padis
Assistant United States Attorneys

1100 Commerce Street, Third Floor
Dallas, Texas 75242-1699
Telephone: 214-659-8626
Facsimile: 214-659-8807
brian.stoltz@usdoj.gov
george.padis@usdoj.gov

Attorneys for Respondents

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I. Introduction

Petitioners are eleven immigration detainees—many with criminal convictions or other considerations that render them dangerous to the community and flight risks—who seek habeas corpus releases from custody under 28 U.S.C. § 2241. They principally contend that the coronavirus/COVID-19 pandemic requires their release because of alleged deficiencies in medical care and other physical accommodations at their detention center, which conditions petitioners allege fail to sufficiently protect them against contracting COVID-19. But as explained herein, the Court should reject petitioners' invitation to expand habeas-corpus jurisdiction to conditions-of-confinement claims.

Critically, petitioners do not dispute the lawfulness of their underlying immigration detentions. Instead, because petitioners challenge only the conditions of their confinement, their claims are not cognizable in habeas corpus and should be denied for that reason alone. Fifth Circuit precedent makes clear that the habeas corpus remedy of release is unavailable for alleged deficiencies in medical care or other conditions of confinement. Such claims are instead properly pursued in civil rights suits where the available remedy is injunctive relief to correct alleged deficiencies—not the habeas relief of the plaintiff's outright release. Indeed, federal courts routinely consider cases in which prisoners or detainees challenge conditions of their confinement that they claim pose an immediate danger to their health and safety, such as unsanitary living spaces or excessive heat without air conditioning. Depending on the facts and evidence, courts can and do order injunctive relief to correct any deficient conditions, and monetary damages can also sometimes be requested if allowed by law. But conditions-of-confinement claims cannot

properly be pursued through habeas.

Further, even assuming that petitioners' coronavirus claims could be litigated in a habeas petition (which they cannot), petitioners' claims would fail. Petitioners have not shown and cannot show that any immigration official has been deliberately indifferent to their medical care or that the COVID-19 precautionary measures implemented by U.S. Immigration and Customs Enforcement (ICE) are somehow constitutionally deficient. To be sure, the COVID-19 pandemic presents a significant and fast-developing challenge. ICE therefore has responded carefully, thoroughly, and expeditiously to meet that challenge. Circumstances continue to evolve and so has the federal response. And ICE has looked to the evolving Centers for Disease Control and Prevention (CDC) guidelines in managing the situation. But ICE should not be compelled to release immigration detainees—especially detainees with criminal records and other considerations that render them dangerous to the community and flight risks—because of a pandemic affecting the entire country, and despite having taken adequate precautions while following CDC guidelines.

In addition to the COVID-19 claims, four petitioners also allege that their right to access counsel has been denied. But this claim is meritless and provides no basis for any relief.

The petitions for habeas corpus and any related requests or motions for temporary restraining orders or other extraordinary relief should be denied, and this action (and the companion consolidated actions) should then be terminated in its entirety.

II. Background

Petitioners[1] seek release from their immigration detention at the Prairieland Detention Center in Alvarado, Texas. Prairieland is operated by LaSalle Corrections, a private company, but is overseen by ICE officials to ensure compliance with ICE's Performance-Based National Detention Standards 2011, which generally govern conditions of detention in private immigration facilities. In addition to these performance standards, ICE has also implemented more specific standards and operational changes tailored to the current COVID-19 pandemic, as discussed in more detail below.

A. Prairieland detainees have access to adequate medical care before and during the COVID-19 pandemic.

In accordance with ICE performance standards, immigration detainees at Prairieland have daily access to medical services, and medical staffers visit detainee housing units multiple times per day to distribute medication and conduct welfare checks. (App.[2] 783.) Prairieland can admit patients to the local hospital when a higher level of care is required. (App. 783.) When detainees want a medical appointment, they can use one of several tablets, fill out a paper form, or make a verbal request to a facility officer or medical staff. (App. 783.) Detainees' access to medical care has remained consistent—including during the global coronavirus outbreak.

[1] Petitioners Behzad Jalili and Alfredo Hechevarria Fonteboa were released on bond after this case was filed, rendering their (severed) habeas petitions moot.

[2] "App. __" citations refer by page number to the materials in the appendix filed with this response.

B. ICE responded to early reports of COVID-19 and promulgated *ERO COVID-19 Pandemic Response Requirements*.

Since the initial reports about the spread of coronavirus, 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 detainees. (App. 780.) ICE strives to follow closely the CDC's *Interim Guidance on Management of Coronavirus 2019 (COVID-19) in Correctional and Detention Facilities*[3] and the CDC's general public guidance.[4] (App. 780, 783.) In early April, ICE Enforcement and Removal Operations (ERO) released its *ERO COVID-19 Pandemic Response Requirements*, a guidance document that builds upon previously issued guidance and prescribes specific mandatory requirements expected to be adopted by all detention facilities housing ICE detainees, as well as best practices for such facilities. (App. 780.)

C. Prairieland has implemented recommended precautions to reduce the risk of COVID-19 transmission and infection.

Prairieland has implemented a number of strategies in response to the COVID-19 pandemic. Most critically, Prairieland is operating at a small fraction—about 32%—of its approved capacity.[5] (App. 782.) By reducing the overall population, Prairieland has decreased density, increased space between individuals, decreased the frequency of

[3] *See Interim Guidance on Management of Coronavirus 2019 (COVID-19) in Correctional and Detention Facilities*, CDC, https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html (last visited May 26, 2020).

[4] *See Coronavirus (COVID-19)*, CDC, https://www.cdc.gov/coronavirus/2019-ncov/index.html (last visited May 26, 2020).

[5] Specifically, Prairieland currently houses 247 detainees in a facility with a capacity of 780. (App. 782.)

person-to-person contact, and increased options for detainees to practice social distancing. (*See* App. 782.)

In addition to reducing its overall population density, Prairieland has made many operational changes designed to increase social distancing and prevent the spread of COVID-19 within the facility, and also to prevent its further introduction from the outside. Normal visitation has been suspended. (App. 782.) Detainees may submit a request to have a call with their attorney, and although in-person attorney visits remain a possibility for any detainee (attorneys would be encouraged to wear personal protective equipment), no in-person legal visits have been requested at Prairieland since the outbreak of COVID-19. (App. 782.)

Transfers have all but stopped: only four new detainees have been transferred to Prairieland after April 11, 2020. (App. 781.) Prairieland thoroughly screens the few transferee detainees when they arrive. (App. 781.) During intake medical screenings, detainees are examined for fever and respiratory illness and verbally screened to determine whether they have had close contact with a person with a laboratory-confirmed case of COVID-19 in the past fourteen days. (App. 781.) Then, all new recently transferred Prairieland detainees are kept together, isolated from the general population, and observed for at least fourteen days. (App. 781.) If a detainee presents COVID-19 symptoms, he or she is medically isolated and tested for COVID-19. (App. 781.) If the test result is positive, the detainee remains quarantined and receives treatment from staff wearing appropriate personal protective equipment. (App. 781.)

Prairieland has also implemented safeguards to prevent cross-contamination

between dormitories and between medically isolated detainees, quarantined detainees, and the general population. (App. 781–82.) From April 15 to May 20, all meals were served in disposable trays brought to detainees in their dormitories, and no detainees ate in the cafeteria. (App. 782.) Beginning May 20, detainees are allowed to eat in the cafeteria, but only with detainees from their own dormitory, and with the cafeteria cleaned in between uses. (App. 782.) Detainees sit with at least one seat between them so that they can maintain social distance in the cafeteria. (App. 782.) All common areas (law library, video teleconference room, etc.) are also used by one dormitory at a time and cleaned after each dormitory uses any such area. (App. 782.)

Prairieland has implemented numerous and adequate measures to prevent asymptomatic staff from transmitting COVID-19 to detainees as well. (App. 782–83.) Facility officers are provided N-95 masks. (App. 783.) Staff who serve food are required to wear personal protective equipment when they bring the food into the dorm, and such equipment is likewise worn when food is served and prepared in the cafeteria. (App. 782.) Contract security staff do not rotate posts. (App. 783.) Other security staff who do rotate between dormitories must remove their personal protective equipment after leaving one dorm, discard it, step into a bleach solution, and put on new equipment before entering the next dormitory. (App. 783.)

Prairieland also encourages and reinforces proper hand hygiene and good hygiene practices. (App. 784.) Posters containing proper hand hygiene instructions are posted in the dormitories in English, Spanish, and French. (App. 784, 791–93.) When managers and supervisors visit dormitories, they regularly reinforce the importance of cleaning

more frequently. (App. 784.) For example, if detainees are currently cleaning their personal space once a day, they are encouraged to clean it more frequently, and they are likewise encouraged not to touch their face and to wash their hands frequently. (App. 784.) Prairieland has worked to ensure that sufficient stocks of no-cost hygiene supplies, cleaning supplies, and personal protective equipment are available to detainees. (App. 782–83.) Each detainee has been issued a surgical mask and washable cloth masks, and facility staff encourage detainees to wear those masks. (App. 783.) Detainees also receive instructions on the proper use of surgical masks. (App. 783.) All dormitories include cleaning solutions available to detainees to use to clean their personal space and items they may use, and a dorm porter assists in cleaning the dormitories. (App. 784.) Prairieland also provides plentiful soap and tissue paper in the restrooms. (App. 784.) In addition, officers in the dormitories carry a bleach-based solution in a squirt bottle, and detainees may ask the officers to apply that solution to surfaces or items. (App. 784.)

Prairieland has intensified cleaning and disinfecting of the facility. (App. 784.) It has increased the frequency of the cleaning of the dorms and other spaces with a bleach-based solution. (App. 784.) Hard surfaces (such as tables and chairs) and surfaces that are frequently touched (such as doorknobs and light switches) are cleaned and disinfected with a bleach-based solution. (App. 784.) For example, when a single-dormitory group of detainees departs the video teleconferencing room after a court hearing, officers clean such surfaces with a bleach-based solution before a new single-dormitory group of detainees enters. (App. 784.)

D. Through its screening procedures, Prairieland has identified and quarantined asymptomatic carriers, and has prevented transmission to the general population.

Prairieland's screening process has detected COVID-19 cases and prevented transmission to the general population. (*See* App. 781–84.) Prairieland received transferee detainees in March and early April, and as has been publicly disclosed, a total of 46 detainees tested positive for COVID-19. (App. 781.) All of these individuals are male and were medically isolated in separate cells in a separate housing unit away from all other detainees. (App. 781.) Thirty-nine of these detainees have since recovered—indicated by two consecutive negative COVID-19 laboratory tests—and have been released back into the general population. (App. 002 ¶ 12.) Thus, only seven of the detainees who have tested positive for COVID-19 remain in medical isolation, and these detainees are generally asymptomatic. (App. 781.)

E. Petitioners file this habeas action seeking their release from Prairieland.

Petitioners filed a consolidated habeas corpus petition on behalf of eleven individuals detained at Prairieland. (*See* Doc. 1.) Subsequently two petitioners, who had been granted bond in their immigration proceedings, posted bond and were released.[6] The other nine petitioners remain in detention, and their individual histories will be discussed below as relevant to respondents' arguments. The Court severed the action into eleven separate actions, one per petitioner, and ordered the U.S. Attorney's office to file this expedited consolidated response to petitioners' filings. (*See* Doc. 9.)

[6] These now-released petitioners are Behzad Jalili and Alfredo Hechevarria Fonteboa.

III. Argument and Authorities

The Court should deny petitioners' motions for temporary restraining orders and habeas corpus petitions because the petitions are procedurally improper and petitioners' constitutional claims are meritless. Petitioners seek writs and orders mandating their immediate release from custody at Prairieland, principally alleging that deficiencies in medical care and other conditions of their confinement violate their Fifth Amendment due-process rights by increasing their risk of becoming infected with COVID-19. (Doc. 1, ¶¶ 144–55; Doc. 8 at 15–19.) In addition, four petitioners seek release under a second theory that their First Amendment right of access to counsel has been violated. (Doc. 1, ¶¶ 106–15 (count two[7]); Doc. 8 at 19–22.) But as explained below, petitioners are not entitled to any relief because:

(a) their claims for release based on allegedly deficient conditions of confinement relating to medical care and disease prevention are not cognizable in habeas;

(b) even if habeas were a proper vehicle for a conditions-of-confinement challenge, the conditions at Prairieland are constitutionally adequate and no deliberate indifference has been shown; and

(c) the right-to-counsel claims asserted by four petitioners likewise are not cognizable in habeas and otherwise fail as a matter of law.

[7] Count two's paragraph numbers restart at 106.

A. Petitioners' claims based on alleged deficiencies in medical care and other conditions of their confinement are not cognizable in habeas.

An individual may seek habeas relief under 28 U.S.C. § 2241 if he is "in custody" under federal authority "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c). The "root principle" of habeas "is that neither men nor women should suffer illegal imprisonment." *Deters v. Collins*, 985 F.2d 789, 792 (5th Cir. 1993). However, "the grant of such a writ is not without limitations." *Id.* at 793. As the Fifth Circuit has held, habeas relief is confined to correct only defects in the legality of the cause of detention:

> Simply stated, habeas is not available to review questions *unrelated to the cause of detention*. Its sole function is to grant relief from unlawful imprisonment or custody and *it cannot be used properly for any other purpose*. While it is correctly alluded to as the Great Writ, it cannot be utilized . . . as a springboard to adjudicate matters *foreign to the question of the legality of custody*.

Pierre v. United States, 525 F.2d 933, 935–36 (5th Cir. 1976) (emphases added); *accord Patterson v. Johnson*, 184 F.3d 816, 1999 WL 4994592, at *1 (5th Cir. 1999); *Sacal-Micha v. Longoria*, No. 1:20-CV-37, 2020 WL 1518861, at *3–4 (S.D. Tex. Mar. 27, 2020).

The term "habeas corpus," as used today, "actually refers to the *habeas corpus ad subjiciendum*." *Deters*, 985 F.2d at 792 n.8 (citing Black's Law Dictionary 709–10 (6th ed. 1990)). This is the "Great Writ" referenced in the Constitution, and it was issued "for an inquiry into the cause of restraint." *Carbo v. United States*, 364 U.S. 611, 615 (1961). "At its historical core, the writ of habeas corpus has served as a means of reviewing the

legality of Executive detention." *I.N.S. v. St. Cyr*, 533 U.S. 289, 301 (2001). Indeed, the "direct ancestor" of 28 U.S.C. § 2241(c)(1) is the Judiciary Act of 1789, which "authorized federal courts to grant the writ of habeas corpus *for the purpose of an inquiry into the cause of commitment* when a prisoner is 'in custody under or by color of the authority of the United States.'"[8] *Sabino v. Reno*, 8 F. Supp. 2d 622, 627–28 (S.D. Tex. 1998) (emphasis added) (citing *Felker v. Turpin*, 518 U.S. 651, 660 n.1 (1996)). And although the definition of what constitutes "custody" has changed "since the inception of habeas corpus jurisprudence, the purpose of the writ"—an inquiry into the cause of detention or custody—"has not changed since its birth in the sixteenth century." *Deters*, 985 F.2d at 792.

Thus, on review, the only issue for courts conducting an "examination of the record" is "whether the person restrained of his liberty is detained without authority of law."[9] *See Pierre*, 525 F.2d at 935–36. Relatedly, as the Fifth Circuit has held, a plaintiff "cannot avail herself of habeas corpus relief when seeking injunctive relief that . . . is *unrelated to the cause of her detention*." *Schipke v. Van Buren*, 239 F. App'x 85,

[8] In 1867, Congress extended this right with the "direct ancestor of § 2241(c)(3)," authorizing the federal courts to grant habeas relief to state prisoners. *Kuhlmann v. Wilson*, 477 U.S. 436, 445 n.7 (1986); *accord Felker*, 518 U.S. at 660 n.2.

[9] Notably, the Fifth Circuit has also indicated that discovery is not generally available in habeas corpus cases. *See Vineyard v. Keesee*, 70 F.3d 1266, 1995 WL 696732, at *3 (5th Cir. 1995) ("Little authority exists regarding the ambit of, and procedure for, discovery in § 2241 cases. The Federal Rules of Civil Procedure are not normally applicable to § 2241 proceedings, but 28 U.S.C. § 2246 authorizes interrogatories in limited circumstances."); *Hernandez v. Garrison*, 916 F.2d 291, 293 (5th Cir. 1990) ("The rules of pretrial discovery, including the use of interrogatories pursuant to Fed. R. Civ. P. 33, are not applicable to habeas corpus proceedings, unless they are necessary to help the court 'dispose of the matter as law and justice require.'"). This is consistent with the purpose of habeas because the facts are generally undisputed—as opposed to fact-intensive conditions-of-confinement claims, for instance—and the inquiry is purely legal: whether lawful authority exists for the detention.

85 (5th Cir. 2007) (emphasis added); *accord Rourke v. Thompson*, 11 F.3d 47, 49 (5th Cir. 1993). In sum, in habeas cases, courts examine the record to determine the cause of the restraint—that is, whether legal authority exists for the custody or detention.

The Fifth Circuit has described proper habeas challenges as falling into two categories: fact-based challenges to the cause of detention and duration-based challenges to the length of detention. *See, e.g.*, *Poree v. Collins*, 866 F.3d 235, 243 (5th Cir. 2017) (noting "the instructive principle being that challenges to the fact or duration of confinement are properly brought under habeas"); *Schipke*, 239 F. App'x at 85–86 (same); *Parker v. Fort Worth Police Dep't*, 980 F.2d 1023, 1025 (5th Cir. 1993) (noting that a plaintiff could challenge the "validity or length of his current confinement" in a habeas petition); *Hendrix v. Lynaugh*, 888 F.2d 336, 337 (5th Cir. 1989) ("Federal district courts do not have jurisdiction to entertain [habeas corpus] actions if, at the time the petition is filed, the petitioner is not 'in custody' *under the conviction or sentence which the petition attacks*." (emphasis added)); *see also Williams v. Davis*, 192 F. Supp. 3d 732, 748 (S.D. Tex. 2016) ("The writ of habeas corpus provides an important, but narrow, examination of an inmate's conviction and sentence.").

Fact-based challenges. The Supreme Court and Fifth Circuit have provided examples of permissible fact-based challenges to the cause of detention. Most notably, in the criminal context, fact-based challenges include attacks on the validity of a conviction. *See, e.g.*, *Brecht v. Abrahamson*, 507 U.S. 619, 633–34 (1993) (explaining that "the writ of habeas corpus has historically been regarded as an extraordinary remedy, a bulwark against convictions that violate fundamental fairness"); *Sellers v. Haney*, 639 F. App'x

276, 277 (5th Cir. 2016) (finding that a plaintiff's claims sounded in habeas where his "assertions do in fact call into question the validity of the conviction, as he seeks dismissal of the bill of information and immediate release"). In the immigration context, a fact-based challenge could include a detainee's claim of U.S. citizenship such that his detention is not authorized under immigration statutes. Indeed, Congress has provided a limited habeas remedy of this nature in expedited-removal proceedings.[10] *See* 8 U.S.C. § 1252(e)(2)(A) (review is "available in habeas corpus proceedings" of expedited removal determinations made under 8 U.S.C. § 1225(b)(1) as to "whether the petitioner is an alien" and as to certain other limited issues regarding the alien's status). In sum, "fact" challenges inquire into whether the prisoner or detainee should have ever been confined at all because the underlying conviction or immigration charge is invalid.

Duration-based challenges. Examples of duration-based challenges also abound. In the criminal context, one common example is a claim that a prisoner has been unlawfully denied good-time credits that "extended his detention" and "directly implicate the duration of his confinement." *Whitehurst v. Jones*, 278 F. App'x 362, 363 (5th Cir. 2008); *see also Wilson v. Foti*, 832 F.2d 891, 892 (5th Cir. 1987) (holding that a plaintiff's allegation that "he is being confined improperly because of the state's failure to credit him with the 'good time' to which he is allegedly entitled" sounded in habeas,

[10] A detainee in regular (as opposed to expedited) removal proceedings under 8 U.S.C. § 1229a must first exhaust available administrative remedies, including asserting citizenship as a defense in his proceedings. *See Rios-Valenzuela v. Dep't of Homeland Sec.*, 506 F.3d 393, 396 (5th Cir. 2007) (noting that "if the person is in removal proceedings he can claim citizenship as a defense" in those proceedings); *Hinojosa v. Horn*, 896 F.3d 305, 314 (5th Cir. 2018) ("A person seeking habeas relief must first exhaust available administrative remedies.").

not as a civil rights action). Another example is a claim that the Federal Bureau of Prisons has miscalculated the length of a prisoner's sentence by, e.g., failing to give proper credit for pre-sentence time in custody. *See Smith v. McConnell*, 950 F.3d 285, 286–87 (5th Cir. 2020). And in the immigration context, a permitted duration-based challenge under habeas is a prolonged-detention claim under 8 U.S.C. § 1231 and *Zadvydas v. Davis*, 533 U.S. 678 (2001). Thus, in "duration" challenges, the confinement may have begun with lawful authority, but that authority may expire under certain circumstances (e.g., at the conclusion of the prisoner's properly-calculated term of imprisonment).

Further, when plaintiffs have combined fact- or duration-based habeas claims with extraneous claims, the Fifth Circuit has held that the extraneous claims may be asserted only in a separate civil rights action. For example, when a prisoner sued prison officials asserting that he was "refused medical attention" and that his "prison disciplinary proceedings and the resultant loss of his good-time credits" were too severe, the Fifth Circuit held that his challenge to the disciplinary proceedings was "properly asserted in a habeas petition because the loss of good-time credits implicates the duration of [his] confinement." *Magoon v. Figueroa*, 70 F.3d 1267, 1995 WL 696795, at *1 (5th Cir. 1995). However, the remaining issues—including that the prisoner was "refused medical attention"—were found to "challenge the conditions of his confinement [such that they] would be more properly asserted in a civil rights action." *Id.*; *accord Nubine v. Thaler*, 395 F. App'x 109, 110 (5th Cir 2010) (explaining that a prisoner's challenge to prison temperatures and food were "civil rights claims" that should be separated out from the

prisoner's habeas claim—which involved the loss of good-time credit—and addressed as a section 1983 action); *Serio v. Members of La. State Bd. of Pardons*, 821 F.2d 1112, 1119 (5th Cir. 1987) ("[When] a petition combines claims that should be asserted in habeas with claims that properly may be pursued as an initial matter under § 1983, and the claims can be separated, federal courts should do so.").

Nor may an inmate or detainee transform a civil rights claim into a habeas claim through artful pleading by alleging that conditions are unconstitutional, requesting release, and then claiming that they challenge the very "fact" of their detention. There are at least two major problems with this formulation. First, it assumes that a "fact"-based habeas claim requires an inquiry into only the very existence of custody. But the "in custody" determination is a separate jurisdictional requirement. *See Zolicoffer v. U.S. Dep't of Justice*, 315 F.3d 538, 540 (5th Cir. 2003) ("For a court to have habeas jurisdiction under section 2241, the prisoner must be 'in custody' at the time he files his petition *for the conviction or sentence he wishes to challenge*." (emphasis added)). The "custody" inquiry is only the first step: a habeas petitioner must also ultimately show that there is no lawful authority for his detention. Put another way, there must be *both* a challenge to and an inquiry into the cause of the detention. Here, petitioners do not challenge the legal authority for their detention under the immigration-detention statutes.

Second, although this case involves immigration detainees seeking release during the current coronavirus pandemic, petitioners' logic has far-reaching implications. Under petitioners' theory, every state and federal prisoner, as well as any immigration detainee or other civil detainee could—today and after the pandemic threat has long since

passed—seek habeas release simply by alleging unconstitutional conditions of confinement, with no inquiry into the cause of the detention. No limiting principle cabins petitioners' logic to this case. Petitioners' reasoning would apply whenever prisons and detention facilities face other infectious outbreaks, as they periodically do.[11] It would apply whenever prisoners allege that excessive temperatures are experienced in the summertime due to a lack of air conditioning or other structural inadequacies at a facility.[12] It would apply whenever prisoners claim that facilities are unsanitary, mold-infested, or otherwise deficient.[13] No Fifth Circuit case has ever adopted petitioners' expansive view that allegedly deficient *conditions* of a prison or detention facility give rise to the habeas corpus remedy of release. This Court should also reject it.

1. There is no dispute that lawful authority exists to detain petitioners.

To the extent this case presents any true question of habeas corpus, the Court's analysis should be short. Petitioners do not dispute that they have been lawfully detained due to pending civil immigration charges against them. (*See generally* Doc. 1.) And they do not challenge the lawfulness of this detention, itself, or otherwise claim that the

[11] *See, e.g.*, *McCormick v. Stalder*, 105 F.3d 1059, 1061–62 (5th Cir. 1997) (discussing the issue of tuberculosis outbreaks in prisons).

[12] *See, e.g.*, *Hinojosa v. Livingston*, 807 F.3d 657, 665–68 (5th Cir. 2015) (finding sufficient allegation of an Eighth Amendment violation in a suit for damages, where the complaint alleged dangerous heat conditions and officials' disregard of serious health risks for an inmate's medical conditions); *Ball v. LeBlanc*, 792 F.3d 584, 596 (5th Cir. 2015) (affirming injunction requiring heat-reduction measures at a death-row facility in Angola, Louisiana); *Gates v. Cook*, 376 F.3d 323, 339–40 (5th Cir. 2004) (affirming an injunction requiring Mississippi prison to provide ice water, fans, and daily showers to death-row inmates when heat index was 90 degrees Fahrenheit or above).

[13] *See, e.g.*, *Smith v. Leonard*, 244 F. App'x 583, 584 (5th Cir. 2007) (remanding for further proceedings on a prisoner's section 1983 claim challenging "poor prison conditions" based on the presence of mold).

immigration statutes do not in fact authorize their detention. This would be the only appropriate question in a habeas corpus action, but it is not disputed here. Therefore, petitioners' habeas claims should be denied.

2. Fifth Circuit precedent does not authorize conditions-of-confinement claims in the habeas context.

Petitioners invoke habeas corpus to challenge the constitutionality of their conditions of confinement (under related twin arguments that the conditions are medically inadequate and also that they therefore constitute improper "punishment"[14]), and seek extraordinary mandatory relief requiring their immediate release. But as discussed above, habeas corpus is not a means to challenge conditions of confinement, where the alleged conditions are unrelated to the cause of detention. The Fifth Circuit has long recognized that habeas corpus actions are the proper vehicle to "challenge the fact or duration of confinement," whereas allegations that challenge an individual's "conditions of confinement" are "properly brought in civil rights actions." *Schipke*, 239 F. App'x at 85–86. In such a civil rights action, the plaintiff may seek injunctive relief to compel the warden to correct the allegedly unconstitutional conditions, but the habeas remedy of "accelerated release"—which is what petitioners seek here—is not available.

[14] Petitioners' argument that the conditions of their confinement amount to improper "punishment" is simply another gloss on a conditions-of-confinement claim, and therefore the relevant analysis remains unchanged as to the question of whether habeas corpus is an appropriate remedy—and it is not. Indeed, the Fifth Circuit case that petitioners cite when discussing their "punishment" theory, *Cadena v. El Paso County*, 946 F.3d 717 (5th Cir. 2020), was expressly noted by that court to present a "conditions of confinement claim." *See id.* at 727. And consistent with the nature of such a claim and the available remedies (injunctive relief or damages), the plaintiff in *Cadena* sought money damages through a civil rights claim under section 1983, *see id.* (referring to "municipal liability")—not the habeas corpus remedy of release.

See Mora v. Warden, 480 F. App'x 779, 780 (5th Cir. 2012) (explaining that a habeas petition was properly dismissed where the petitioner challenged only alleged failures to meet his medical and dietary needs in custody, because the claim was "not cognizable under § 2241").

For example, in *Schipke*, the district court dismissed the petitioner's conditions-of-confinement claims, and the Fifth Circuit affirmed because "none of the claims raised by Schipke challenge the fact or duration of her confinement." *Schipke*, 239 F. App'x at 86. In the proceedings below, the plaintiff had filed what she styled a habeas claim alleging that her constitutional rights had been "grossly violated" and that she had been "torture[d]" while incarcerated. *See* Complaint ¶ 10, *Schipke v. Van Buren*, No. 4:06-CV-349 (N.D. Tex. May 22, 2006). She claimed that she had been denied basic human needs, including food and water, as well as showers, fresh air, sunshine, and access to counsel. *Id.* ¶¶ 11, 13. But these allegations did not give rise to any habeas claim.

Similarly, in *Cook v. Hanberry*, the Fifth Circuit rejected the petitioner's claim that he was "entitled to release because the treatment accorded him by the prison officials violated the Eighth Amendment." 596 F.2d 658, 659–60 (5th Cir. 1979). The Fifth Circuit held that this claim was not cognizable under habeas but instead was grounds for a suit for a civil rights injunction, explaining, "Assuming *arguendo* that his allegations of mistreatment demonstrate cruel and unusual punishment, *the petitioner still would not be entitled to release from prison*. The appropriate remedy would be to enjoin [the] practices . . . ." *Id.* at 660 (emphasis added).

And in *Spencer v. Bragg*, a federal prisoner's habeas petition complained of

conditions of confinement, including exposure to asbestos and lack of proper medical treatment. 310 F. App'x 678, 679 (5th Cir. 2009). But those conditions-based claims were held not cognizable in habeas. *Id.* at 679; *see also Poree*, 866 F.3d at 243 (noting the "instructive principle that challenges to the fact or duration of confinement are properly brought under habeas, while challenges to the conditions of confinement are properly brought [as a civil rights action]" (footnotes omitted)); *Hernandez v. Garrison*, 916 F.2d 291, 293 (5th Cir. 1990) (holding that claims of overcrowding, denial of medical treatment, and access to an adequate law library were not proper subjects of a habeas corpus petition); *Springer v. Underwood*, No. 3:19-CV-1433-S-BN, 2019 WL 3307220, at *2 (N.D. Tex. June 28, 2019), *adopted*, 2019 WL 3306130 (N.D. Tex. July 22, 2019) (holding that an inmate's request for a "reduction in his sentence" due to alleged "exposure to asbestos and mold" "does not convert his civil rights claims to habeas claims").

Several district courts within the Fifth Circuit have recognized that these principles apply with equal force to claims concerning the current coronavirus pandemic. In a recent case in the Southern District of Texas, the court dismissed a pretrial detainee who sought "his release" under a theory that "the possibility of contracting Covid-19 at the Harris County jail renders his confinement there unconstitutional." *Drakos v. Gonzalez*, 4:20-CV-1505, 2020 WL 2110409, at *1 (S.D. Tex. May 1, 2020). Because the petitioner was "not challeng[ing] the fact or duration of his confinement," the court explained that, "[w]hile he requests injunctive relief ordering his release, his attack is on the conditions of his confinement, not on the fact that he was ordered detained before

trial." *Id.* For that reason, the court concluded that "the relief [the petitioner] seeks is not available in habeas corpus," and dismissed his petition. *Id.*

Similarly, in a case in the Western District of Louisiana, a group of petitioners with medical vulnerabilities sought release from a Federal Bureau of Prisons facility "because of the extraordinary conditions caused by COVID-19." *Livas v. Myers*, No. 2:20-CV-422, 2020 WL 1939583, at *4, 7 (W.D. La. Apr. 22, 2020). "Neither party nor this Court found a single precedential case in the Fifth Circuit . . . allowing conditions of confinement claims to be brought under § 2241," the court noted. *Id.* at *8. The court explained that the "'sole function' of habeas is to 'grant relief from unlawful imprisonment or custody and it cannot be used properly for any other purpose'" and that the petitioners "do not and cannot contend that their imprisonment or custody itself is unlawful." *Id.* at *7 (quoting *Pierre*, 525 F.2d at 935–36). Because the *Livas* petitioners "[did] not and cannot contend that their imprisonment or custody itself is unlawful," the court found that it lacked any authority to order their release. *Id.*; *see also id.* at *8 ("To rule otherwise would make this Court a de facto 'super' warden of Oakdale.").

These principles continue to apply to the civil immigration context. In the recently decided *Sacal-Micha* case in the Southern District of Texas, an immigration detainee sought a habeas release from custody due to allegedly unconstitutional conditions and concerns about COVID-19, but the court dismissed the petition, noting that "[t]he Fifth Circuit has not recognized such a claim." *Sacal-Micha v. Longoria*, No. 1:20-CV-37, 2020 WL 1815691, at *5 n.6 (S.D. Tex. Apr. 9, 2020). As the court explained, "[e]ven when a petitioner alleges that inadequate conditions of confinement create the risk of

serious physical injury, illness, or death, a petition for a writ of habeas corpus is not the proper vehicle for such a claim." *Id.* at *3.

Likewise, when immigration detainees in South Texas sought classwide release from custody to cure allegedly unconstitutional "abhorrent" conditions of confinement, the court explained that "[a]ny person in custody can obtain relief from allegedly inadequate conditions by being released, but this fact does not create a permissible habeas corpus claim when the complaint turns on the conditions of confinement." *Rosa v. McAleenan*, No. 1:19-CV-138, 2019 WL 5191095, at *18 (S.D. Tex. Mar. 15, 2019); *see also Sarres Mendoza v. Barr*, No. H-18-3012, 2019 WL 1227494, at *2 (S.D. Tex. Feb. 13, 2019) (denying an immigration detainee's motion for leave to amend because the proposed claims attacking the "conditions of confinement may not be brought in a habeas corpus proceeding, and are actionable, if at all, in a civil rights action"); *Patrick v. Whitaker*, No. H-18, 2068, 2019 WL 588465, at *4 n.36 (S.D. Tex. 2019) (denying an immigration detainee's "motion for leave to file supplemental pleadings concerning the conditions of his confinement" because "Petitioner's proposed claims are not actionable under 28 U.S.C. § 2241"), *appeal dismissed for lack of jurisdiction*, No. 19-20187, 2019 WL 4668409 (5th Cir. 2019).

The consensus within the Fifth Circuit holds that federal courts lack habeas jurisdiction over conditions-of-confinement claims—even if a petitioner alleges that those conditions create an imminent risk of serious physical injury, illness, or death, and even in the face of COVID-19. *See, e.g.*, *Spencer*, 310 F. App'x at 679 (affirming the dismissal of a petitioner's habeas claim even though he alleged that the conditions of

confinement endangered his life); *Northup v. Thaler*, No. C-12-16, 2012 WL 4068676, at *2 (S.D. Tex. Aug. 7, 2012), *adopted*, 2012 WL 4068997 (S.D. Tex. Sept. 14, 2012) (dismissing a petitioner's habeas claim that was based on an alleged risk of abuse by other inmates); *see also United States v. Robinson*, No. H-00-0286001, 2009 WL 1507130, at *4 (S.D. Tex. May 28, 2009) ("Claims concerning the conditions of confinement are actionable, if at all, under 42 U.S.C. § 1983 or *Bivens* . . . , and not under the habeas corpus statutes.").

Here, petitioners' Fifth Amendment claims challenge the conditions of their confinement, under related theories that petitioners have not been provided with medical care and other physical accommodations that they believe are required to prevent or mitigate against exposure to COVID-19, and that this violates the Constitution and also amounts to improper "punishment." But a "detention facility's protocols for isolating individuals, controlling the movement of its staff and detainees, and providing medical care are part and parcel of the conditions in which the facility maintains custody over detainees." *Sacal-Micha*, 2020 WL 1815691, at *4. Because petitioners' request for release is based on the conditions of their detention, rather than on the authority for their detention, Fifth Circuit precedent bars their claims. Indeed, if petitioners' habeas claims were allowed here, any civil detainee—as well as any state or federal prisoner—could sidestep Fifth Circuit caselaw by alleging that release is the only way to cure allegedly unlawful conditions of confinement. This loophole would swallow the rule.

3. The *Vasquez Barrera* decision cited by petitioners does not support any claim to relief here.

The lone case from within the Fifth Circuit that petitioners rely on in support of their claims for release due to the coronavirus pandemic is *Vazquez Barrera v. Wolf*, No. 4:20-CV-1241, 2020 WL 1904497 (S.D. Tex. Apr. 17, 2020). (*See* Doc. 8 at 2.) But as explained below, *Vazquez Barrera* is distinguishable and in any event does not support petitioners' asserted broad use of habeas to accomplish a mass-release of detainees based on allegedly deficient conditions of confinement.

In *Vazquez Barrera*, a court in the Southern District of Texas considered a motion for temporary restraining order requested by two immigration detainees and ordered one detainee's release due to the coronavirus pandemic. *See Vazquez Barrera*, 2020 WL 1904497, at *1–2.[15] However, *Vazquez Barrera* arose in different circumstances—at an earlier stage of the COVID-19 pandemic—and the underlying factual conditions were a far cry from the current conditions at Prairieland. *Vazquez Barrera* was decided in early April, when the detention center at issue in Conroe, Texas was found not to be providing "even simple hygiene measures," such as hand sanitizer or face masks, and the court also found that it was "impossible" to maintain social distancing and that detainees were "prevent[ed] . . . from protecting themselves" from COVID-19. *See id.* at *2, 5. In contrast, Prairieland is currently operating at well under capacity, such that social distancing is happening, and it is providing sanitizer, cloth and surgical masks, and other

[15] The case remains pending, and the government recently filed a motion to dismiss for lack of jurisdiction. *See* Motion to Dismiss for Lack of Subject Matter Jurisdiction, *Vazquez Barrera v. Wolf*, No. 4:20-CV-1241 (S.D. Tex. May 1, 2020).

hygiene materials to its population, as well as educational materials about COVID-19 and mitigation measures. (*See* App. 781–84, 791–93.) In *Vazquez Barrera*, the court was also faced with a situation, again as of early April, in which it appeared that there were "no conditions of confinement that are sufficient to prevent irreparable constitutional injury given the facts presented in [the petitioners'] individual cases." 2020 WL 1904497, *at *4. Here, on the other hand, Prairieland has successfully mitigated against and prevented the spread of COVID-19 throughout its facility, and no irreparable serious constitutional injury has been shown.

Vazquez Barrera also does not show any legal foundation for petitioners' argument that the habeas remedy of release should be available for alleged deficiencies in the conditions of confinement. The *Vasquez Barrera* court cited two Fifth Circuit cases when discussing the possible availability of habeas corpus: *Poree v. Collins*, 866 F.3d 235 (5th Cir. 2017), and *Coleman v. Dretke*, 409 F.3d 665, 667 (5th Cir. 2005).[16] *See Vazquez Barrera*, 2020 WL 1904497, at *4. However, neither case supports a conclusion that a habeas corpus claim based on conditions of confinement is allowable if the petitioner seeks only release.

In *Poree*, the petitioner Carlos Poree was an insanity acquittee who sought transfer from the Eastern Louisiana Mental Health System (ELMHS) to a transitional facility. *See Poree*, 866 F.3d at 238. A state court found that Poree still suffered from a major mental illness and posed a potential danger to himself or others, and therefore denied the

[16] Two opinions were issued by the panel in *Coleman*—the initial opinion and then an additional opinion in response to arguments raised by other judges on the Fifth Circuit who were dissenting from the denial of rehearing en banc.

requested transfer. *Id.* at 242. Poree filed a writ in the Louisiana appellate court and the Louisiana Supreme Court; both were denied. *Id.* The federal district court then also denied Poree's habeas petition which challenged the outcome of the underlying state court proceedings. *Id.*

The Fifth Circuit began by analyzing "whether Poree's claim properly sounds in habeas." *Id.* The court noted that "Poree challenges the fact of his confinement at the Forensic Division of ELMHS." *Id.* at 243. The court found that "[a] request for relief from an initial civil confinement institution to a transitional home" is similar to "release from physical confinement in prison" where "the state retains a level of control over the releasee." *Id.* at 244. The key question was whether the relief Poree sought—transfer from an institution to a transitional home—amounted to a request for release. The court determined that it did, and also narrowed its holding to Poree's precise claim, declining to address the boundaries of habeas. *Id.* Moreover, when the court addressed the "merits of Poree's claim," it reviewed none of the specific physical conditions at Poree's place of confinement or the psychiatric care there. *Id.* at 242, 246–51. Instead, the court limited its review to only the underlying state court decision in which Poree was committed because of his "potential dangerousness." *Id.* This is akin to reviewing an underlying criminal conviction or immigration charge to determine if the *fact* of the petitioner's detention is lawful. It thus has no application to what petitioners are requesting here, which would require the Court to essentially perform a *res nova* inquiry into the conditions of confinement at Prairieland, rather than simply review the records of an underlying proceeding to determine if detention is legally authorized.

The second case noted in *Vazquez Barrera* is likewise inapplicable. In *Coleman*, a Texas parole board imposed sex offender conditions on a former prisoner, and the plaintiff-prisoner was taken back into custody for violating the conditions. *See Coleman*, 409 F.3d at 667. He then sought release from custody to mandatory supervision via a habeas corpus petition. *Id.* at 669. The seven-judge dissent from the denial of rehearing en banc argued that a move from custody to mandatory supervision was "merely a change in the condition of . . . confinement rather than a release from custody for habeas purposes." *Id.* But the panel concluded that "release from physical confinement in prison constitutes release from custody for habeas purposes, even though the state retains a level of control over the releasee." *Id.* For that reason, the plaintiff could bring a habeas corpus claim. And as with *Poree*, it is instructive to consider what "merits" analysis the court actually conducted. The court did not concern itself with any of the conditions of confinement at the prisoner's place of incarceration; instead, at issue was the traditional habeas-type analysis of whether an underlying proceeding—this time the state parole board's decision to require sex offender registration and therapy as a condition of parole—comported with relevant legal requirements. *See Coleman v. Dretke*, 395 F.3d 216, 221–25 (5th Cir. 2004).

In short, neither *Poree* nor *Coleman* overruled the Fifth Circuit's existing precedents that prohibit conditions-of-confinement claims from serving as grounds for habeas relief, including *Cook v. Hanberry*, *Rourke v. Thompson*, and *Pierre v. United States*.

B. Even if their Fifth Amendment claims were cognizable in habeas, petitioners fail to show any entitlement to relief because no constitutional violation can be shown.

The constitutional claims of immigration detainees are analyzed under the Fifth Amendment's due-process clause, in the same manner as the claims of pretrial detainees in the criminal context. *See Edwards v. Johnson*, 209 F.3d 772, 778 (5th Cir. 2000) ("We consider a person detained for deportation to be the equivalent of a pretrial detainee; a pretrial detainee's constitutional claims are considered under the due process clause instead of the Eighth Amendment."). "To prevail on a claim of unconstitutional conditions of confinement, a plaintiff must show":

> (1) a rule or restriction or . . . the existence of an identifiable intended condition or practice . . . [or] that the jail official's acts or omissions were sufficiently extended or pervasive;
>
> (2) which was not reasonably related to a legitimate governmental objective; and
>
> (3) which caused the violation of [the inmate's] constitutional rights.

Cadena, 946 F.3d at 727 (quoting *Duvall v. Dallas Cty.*, 631 F.3d 203, 207 (5th Cir. 2011)) (internal quotation marks omitted).

As indicated by the first element, constitutional challenges may consist of an attack on an identified rule, restriction, condition, practice, etc., or an attack on particular acts or omissions of an official. *See Sacal-Micha*, 2020 WL 1815691, at *4 (quoting *Shepherd v. Dallas Cty.*, 591 F.3d 445, 452 (5th Cir. 2009)). Under either theory, the ultimate inquiry is whether the plaintiff has demonstrated an "intent to punish," which

intent will generally be taken to exist if an official policy or practice causes an unconstitutional harm, or if a particular official has acted with deliberate indifference on some specific occasion. *See Shepherd*, 591 F.3d at 452. Here, petitioners cannot show either form of violation, nor can they otherwise meet their burden for establishing that their conditions of confinement are unconstitutional.

1. Petitioners fail to identify or prove any rule, restriction, practice, or *de facto* policy that manifests an intent to punish.

Under Fifth Circuit caselaw, an allegedly unconstitutional condition "is usually the manifestation of an explicit policy or restriction," such as "the number of bunks per cell, mail privileges, disciplinary segregation," etc. *Shepherd*, 591 F.3d at 452. Less commonly, "a condition may reflect an unstated or *de facto* policy, as evidenced by a pattern of acts or omissions 'sufficiently extended or pervasive, or otherwise typical of extended or pervasive misconduct by [jail] officials, to prove an intended condition or practice.'" *Id.* (quoting *Hare v. City of Corinth*, 74 F.3d 633, 645 (5th Cir. 1996) (en banc)). "Proving a pattern is a heavy burden, one that has rarely been met in [Fifth Circuit] caselaw." *Id.* at 454. "[I]solated examples of illness, injury, or even death, standing alone, cannot prove that conditions of confinement are constitutionally inadequate." *Id.* "Nor can the incidence of diseases or infection, standing alone, imply unconstitutional confinement conditions, since any densely populated residence may be subject to outbreaks. Rather, a detainee challenging [detention] conditions must demonstrate a pervasive pattern of serious deficiencies in providing for his basic human needs." *Duvall*, 631 F.3d at 208. The plaintiff must also prove that the specific rules or

policies "caused . . . extreme suffering or resulted in adverse medical outcomes serious enough to establish a constitutional violation." *Cadena*, 946 F.3d at 728.

For example, in *Shepherd*, the jury found unconstitutionally deficient evaluation, monitoring, and treatment of medical issues at the Dallas County Jail based on "extensive independent evidence on the jail's treatment of inmates with chronic illness," including "a comprehensive evaluative report commissioned by the County," a report from the U.S. Department of Justice finding "the jail was operating in violation of inmates' constitutional right to adequate medical care," "affidavits from employees of the jail and its medical contractor attesting to the accuracy and applicability of the reports, and a plethora of additional documentary evidence." 591 F.3d at 451–53. "From this evidence," the Fifth Circuit upheld the jury's finding of "a *de facto* jail policy of failing properly to treat inmates with chronic illness." *Id.* at 453.

Here, petitioners have entirely failed to identify an explicit policy, rule, or restriction—or a pervasive *de facto* policy—at Prairieland that has "caused extreme suffering or resulted in adverse medical outcomes serious enough to establish a constitutional violation." *See Cadena*, 946 F.3d at 728. On the contrary, respondents have undertaken extraordinary measures to prevent the spread of COVID-19 and reduce detainees' and staff's risk of transmission and infection. (*See* pp. 4–8, *supra*.) Nor have petitioners identified a "pervasive pattern of serious deficiencies in providing for [] basic human needs" sufficient to discharge their "heavy burden" to prove this is one of the "rare" cases of a *de facto* policy. *Shepherd*, 591 F.3d 452, 454. These omissions alone preclude petitioners from prevailing on this theory. *See Cadena*, 946 F.3d at 727.

The Fifth Circuit's consideration of infection-based claims in a detention setting in *Duvall v. Dallas County* is also instructive. *See* 631 F.3d 203. The wide gulf between the facts in *Duvall* and respondents' extensive and largely successful measures to prevent COVID-19 infection at Prairieland demonstrates that petitioners' due-process claims cannot succeed on the merits. In *Duvall*, jail officials had "long known of the extensive MRSA[17] problem" within the jail, and "the infection rate in the Jail was ten to twenty times higher than in comparable jails." *Id.* at 208. Here, on the other hand, only seven detainees with confirmed cases of COVID-19 infections have not yet recovered, and petitioners have pointed to no evidence that the rate of infection at Prairieland is any higher than in comparable detention facilities—let alone "ten to twenty times higher."

Moreover, in *Duvall*, "the Jail's policy manuals for sanitation and health care did not even mention MRSA," *id.* at 209; here, respondents are devoting substantial resources to implement effective measures, as ICE epidemiologists have promulgated guidance, mandatory requirements, and best practices specifically tailored to respond to the COVID-19 pandemic. (*See* App. 780.) And as recounted above, Prairieland is operating at approximately one-third of its capacity; detainees and staff have been provided face masks; surfaces that are frequently touched (such as doorknobs and light switches) are cleaned and disinfected with a bleach-based solution; the few detainees who have tested positive and have not yet recovered are medically isolated in accordance with CDC guidelines and receive adequate medical treatment; and detainees who have

[17] MRSA refers to a particularly virulent form of staph infection, known as Methicillin-resistant Staphylococcus aureus.

recently had close contact with a person with COVID-19 are medically isolated for at least fourteen days, in accordance with CDC guidelines. (*See* pp. 4–8, *supra*.) Further, while in *Duvall*, jail officials "knew that the few measures that the jail did take in an attempt to control the rate of infection had been ineffective," 631 F.3d at 209, the same is not true here. To the contrary, Prairieland's extensive preventive measures appear to be working and have effectively prevented a large spike in COVID-19 cases through the general population—unlike the spikes reportedly experienced in some other group settings across the country.

2. Petitioners' mere disagreement with the adequacy of Prairieland protective measures does not establish deliberative indifference, and there is no evidence that respondents subjectively believe the measures they are taking are inadequate.

Although petitioners argue that respondents have acted with deliberate indifference to their serious medical needs in violation of the Constitution, no such showing has or can be made. Deliberate indifference requires criminal recklessness, meaning "the official kn[ew] of and disregard[ed] an excessive risk to [the detainee's] health." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994); *accord Williams v. Hampton*, 797 F.3d 276, 281 (5th Cir. 2015) (en banc). "Deliberate indifference is an extremely high standard to meet." *Domino v. Tex. Dep't of Crim. Justice*, 239 F.3d 752, 756 (5th Cir. 2001). It "cannot be inferred merely from a negligent or even a grossly negligent response to a substantial risk of serious harm," *Thompson v. Upshur Cty.*, 245 F.3d 447, 459 (5th Cir. 2001), and instead "exists wholly independent of an optimal standard of care," *Gobert v. Caldwell*, 463 F.3d 339, 349 (5th Cir. 2006). "For an episodic act

claim," a detainee can show deliberate indifference only "by demonstrating that an official 'refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs.'" *Cadena*, 946 F.3d at 729.

Mere disagreement with detention officials' medical decisions in response to COVID-19 does not establish deliberate indifference. *See id.* The Fifth Circuit reinforced this principle recently in *Valentine v. Collier*, in which a district court had entered a preliminary injunction against Texas prison officials after finding their response to COVID-19 inadequate. 956 F.3d 797, 799 (5th Cir. 2020). The Fifth Circuit stayed the injunction, holding that the prison officials were "likely to prevail on the merits of [their] appeal" because (1) "after accounting for the protective measures TDCJ has taken, the Plaintiffs have not shown a 'substantial risk of serious harm'" and (2) the district court misapplied the deliberate-indifference standard. *Id.* at 801. On the first point, the court noted that prison officials were taking "protective measures"—if not the exact same protective measures that the district court would have preferred—including "access to soap, tissues, gloves, masks, regular cleaning, signage and education, quarantine of new prisoners, and social distancing during transport." *Id.* at 801–02. On the second point, the court found that "even assuming that there is a substantial risk of serious harm, the Plaintiffs lack evidence of the Defendants' subjective deliberate indifference to that risk." *Id.* at 802. The Fifth Circuit concluded that the "district court misapplied" the deliberate-indifference standard by analyzing "'whether [the Defendants] reasonably abate[d] the risk' of infection or stated differently, 'whether and how [TDCJ's] policy is being

administered.'" *Id.* (citations omitted). "Such an approach resembles the standard for civil negligence, which *Farmer* explicitly rejected." *Id*. The court explained that prison officials' "general awareness of the dangers posed by COVID-19" is insufficient without "evidence that [individual officials] subjectively believe the measures they are taking are inadequate." *Id.* "[M]ere 'disagreement' with [officials'] medical decisions does not establish deliberate indifference." *Id.* at 803 (quoting *Cadena*, 946 F.3d at 729).

The same is true here. Petitioners may wish that respondents had adopted a different approach to the coronavirus pandemic (in particular, by simply releasing all of them from custody), but the fact that respondents have instead implemented other measures in response to the pandemic does not show deliberate indifference. (*See* pp. 4–8, *supra*.) There is no evidence that respondents subjectively believe that the measures they are taking are inadequate. Rather, the contrary is true. As the ICE official with detention management responsibility over Prairieland explains in his declaration submitted with this response, "I am unaware of any rule, restriction, policy, or pervasive acts or omissions which increases the [Prairieland] detainees' or staff's risk of infection from COVID-19. On the contrary, every rule, restriction, and policy I have been working on all-day, every day is specifically designed to prevent the spread of COVID-19 and reduce risk of infection."[18] (App. 783.)

[18] There likewise is no evidence of deliberate indifference to the extent petitioners may rely on the fact that detainees were transferred from the Pike County Correctional Facility, a county jail in Pennsylvania where at least two inmates died as a result of the coronavirus outbreak, and a number of other inmates and staff were infected. (*See* Doc. 1, ¶¶ 92–94); *see also* Lori Comstock, 2 Pike County Inmates Die from COVID-10; Other Inmates, Staff Positive, *N.J. Herald* (Apr. 8, 2020), https://www.njherald.com/news/20200408/2-pike-county-inmates-die-from-covid-19-other-inmates-staff-positive. For the few petitioners who were transferred from Pike County to Prairieland, those petitioners' situations *improved*. They were

3. Petitioners have not shown a substantial risk of serious harm in violation of the Constitution, especially after accounting for the protective measures that Prairieland has taken.

Petitioners' contentions of deliberate indifference or any other constitutional violation are belied by the evidence showing that Prairieland has implemented numerous measures to protect all its detainees, including petitioners, from the risks associated with COVID-19, including as follows:

- Prairieland is operating with a substantially reduced population, at approximately 32% of its capacity. (App. 782.)
- Contract security staff do not rotate posts, and anyone who does need to move between dormitories must remove their personal protective equipment after leaving one dorm, discard it, step into a bleach solution, and put on new equipment before entering the next dormitory. (App. 783.)
- Prairieland is isolating detainees who have tested positive for COVID-19 from all other detainees. (App. 783.)
- All dormitories include cleaning solutions available to detainees to use to clean their personal space and items they may use, and a dorm

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transferred from a county jail with coronavirus transmissions within the hard-hit New York–Newark–Jersey City metropolitan statistical area (MSA) to a substantially less risky environment—a facility exclusively housing ICE detainees in rural Texas with access to the substantial and less-impacted medical resources of the Dallas–Fort Worth–Arlington MSA. Thus, these petitioners have suffered no constitutionally serious injury from transfer (relatively) out of harm's way. And respondents cannot have subjectively intended to harm these petitioners by transferring them from a county jail near New York to rural Texas.

To the contrary, there can be little doubt that if the petitioners who were transferred had been kept in Pike County, they would have argued that their continued presence there violated their constitutional rights. Indeed, while detained in Pike County, petitioner Kanat Umarbaev made this argument to a district court in the Middle District of Pennsylvania, but the court rejected his argument and denied release. *See Umarbaev v. Lowe*, No. 1:20-CV-00413, 2020 WL 1814157, at *7 (M.D. Pa. Apr. 9, 2020).

Similarly, to the extent other petitioners at Prairieland may claim that the transfer of detainees from elsewhere violated their own rights, (*see* Doc. 8 at 19), such a claim is baseless because of the steps ICE has taken to isolate newly arriving detainees from the general population, efforts that have proven successful at preventing the spread of COVID-19 at the facility. (*See* pp. 4–8, *supra*.)

porter assists with cleaning. (App. 784.)

- Prairieland has increased the frequency of the cleaning of the dorms and other spaces with a bleach-based solution. In addition, officers in the dormitories carry a bleach-based solution in a squirt bottle, and a detainee may ask the officer to apply the solution to a surface or item. (App. 784.)

- Outside visitation has been suspended, and in-person visits with legal representatives are no-contact visitations. (App. 782.)

- Each detainee has been issued a surgical mask, and facility officers wear N-95 masks in the dormitories. Contractor medical staff also has appropriate personal protective equipment, including masks. (App. 782–83.)

- Posters about proper hygiene are posted in the dormitories. Prairieland also provides plentiful soap and tissue paper in the restrooms. (App. 784, 791–93.)

Prairieland's protective measures are consistent with CDC guidelines and the measures undertaken by Texas prisons deemed sufficient under the Eighth Amendment in *Valentine*. *See* 956 F.3d at 801–02 ("[TDCJ's] protective measures include . . . 'access to soap, tissues, gloves, masks, regular cleaning, signage and education, quarantine of new prisoners, and social distancing during transport.'"). Just as the plaintiffs were unlikely on appeal in *Valentine* to succeed in showing a substantial risk of serious harm after accounting for protective measures, so too here; petitioners cannot show any constitutional violation on the merits.

Further, to the extent petitioners are suggesting that all the steps taken by ICE are still inadequate to "fully guarantee [their] safety," that is not the standard. *See Sacal-Micha*, 2020 WL 1518861, at *6 ("[I]t is possible that despite ICE's best efforts, Sacal may be exposed and contract the virus. . . . But the fact that ICE may be unable to

implement the measures that would be required to fully guarantee Sacal's safety does not amount to a violation of his constitutional rights and does not warrant his release."); *see also Jorge V. S. v. Green*, No. 20-CV-3675, 2020 WL 1921936, at *3 (D.N.J. Apr. 21, 2020) ("That these steps [by ICE in accordance with CDC guidance for detention facilities] do not guarantee Petitioner will remain healthy and free of the disease is immaterial, the constitution requires no such perfection."); *Dawson v. Asher*, No. C20-0409JLR-MAT, 2020 WL 1704324, at *12 (W.D. Wash. Apr. 8, 2020) ("No one can entirely guarantee safety in the midst of a global pandemic. However, the standard under which the court evaluates Petitioners' second TRO motion is not guaranteed safety—an impossible standard to meet no matter the circumstances—but rather a likelihood of irreparable harm.").

4. Petitioners' medical records show adequate treatment of any medical conditions, and ICE has good reason to continue detaining petitioners.

Contrary to petitioners' suggestion that respondents have acted with deliberate indifference or with some intent to inflict "punishment," the individual medical records for each of the still-in-custody petitioners show that prompt, extensive, and adequate medical treatment has been provided to each of them. And due to other specific considerations, ICE has good reason to want to continue detainers the petitioners who have not been released on bond.

- **Petitioner Kanat Umarbaev, who has multiple criminal convictions and earlier this year physically resisted ICE's attempt to board him on a plane to remove him from the country, tested positive for COVID-19 more than a month ago but has not displayed symptoms since then.** Umarbaev has reported a history of high blood pressure, and tested positive for

COVID-19 on or around April 19, 2020, after complaints of a sore throat and feeling bad for one week. (App. 020, 026–28, 74.) He has not displayed any symptoms since that time, though, and his medical records document that his blood pressure is well controlled with current treatment. (*See* App. 003–09.)

ICE has good reason for keeping Umarbaev in custody. He has two DWI convictions. He was scheduled to be removed from the country in January of this year, but actively and physically resisted ICE's efforts to board him onto a plane for his removal flight, and ICE officials had to take him out of the airport. (*See* App. 785.) Indeed, given this history and the fact that Umarbaev is currently in ICE custody only because he physically resisted his removal earlier this year, it would be particularly unjust for Umarbaev to now obtain his release back into the United States, where he would pose a further danger to the community. Umarbaev should not be rewarded for his own obstruction.

- **Petitioner "Jane Doe," who is in removal proceedings after being convicted of conspiracy to defraud the United States, is receiving her prescribed medical treatments.** As noted in petitioners' briefing, Doe has a history of HIV, and her HIV medications were continued at intake. (App. 120–22, 133.) She reported congestion and a cough on April 29, 2020, but at that time denied any fever, and she received treatment for the cough and for allergies. (App. 113–14.) As a female, Doe is detained in a separate section of Prairieland (apart from the men's section), and in which there have been no COVID-19 cases. (App. 781.)

  ICE has good reason for keeping Doe in custody. Doe was convicted for her role in an identity-theft ring that filed fraudulent tax returns to obtain refund checks using stolen identities. Because of Doe's criminal history with identity theft, ICE considers her to be a flight risk if released. (*See* App. 785.)

- **Petitioner Lee Alejandro Espinoza Urbina, who has multiple felony convictions, has recovered from COVID-19 and is not otherwise at higher risk for severe illness.** Espinoza Urbina tested positive for COVID-19 in mid-April but has since recovered as indicated by consecutive negative tests on April 27 and May 2. (App. 217, 222–23, 265, 267.)

  ICE has good reason to keep Espinoza Urbina in custody. He has a

lengthy criminal history, including a force-assault-with-a-deadly-weapon conviction, two burglary convictions, a threat-with-an-intent-to-terrorize conviction, two DUI convictions, a resisting-a-public-officer conviction, and a number of other charges that remain pending, including assault with a firearm on a person. (*See* App. 786.)

- **Petitioner Kirk Golding has several criminal convictions and is not at higher risk for severe illness.** Golding has reported asthma, but has never been formally diagnosed with that condition, and a peak-flow lung-capacity test during his physical examination did not medically indicate asthma or a need for an inhaler. (App. 316–17, 320–21.) He tested negative for COVID-19 on April 17, 2020. (App. 370.)

  ICE has good reason to keep Golding in custody. He has drug and DUI convictions, and earlier this year was arrested on several new drug charges, including for manufacturing/delivery/possession with intent to manufacture or distribute. He was also previously charged with conspiracy, simple assault, aggravated assault, recklessly endangering, robbery, theft by unlawful taking or disposing, and receiving stolen property. (*See* App. 787.)

- **Petitioner Juan Francisco Portillo Hernandez, who was referred to ICE by local police for MS-13 gang ties, has not reported any COVID-19 symptoms and is not at higher risk for severe illness.** Portillo Hernandez's medical records do not show any reported nausea, vomiting, or blood in vomit. He has not reported to medical staff any COVID-19 symptoms, he has not had close contact with a person who tested positive for COVID-19, and he does not have any documented medical conditions placing him at higher risk for severe illness from COVID-19. (*See generally* App. 376–403.)

  ICE has good reason to keep Portillo Hernandez in custody. Local police reported him to ICE earlier this year as having gang ties, and he subsequently admitted that he is a Mara Salvatrucha gang member (commonly known as MS-13). (*See* App. 787.)

- **Petitioner Edgar Haro Osuna is subject to removal after having been convicted of passport-related fraud and aggravated identify theft, and his diabetes is being appropriately treated.** Haro Osuna was diagnosed with diabetes before arriving at Prairieland. (App. 419–22.) His conditions are being treated with

and controlled by medication (e.g., aspirin, buspirone, humulin, ibuprofen, lisinopril, metformin, novolog, sertraline), which he is receiving. (*See* App. 419.)

ICE has good reason to keep Haro Osuna in custody. He was previously convicted of making false statements on a passport application and aggravated identity theft after stealing someone's identity in order to apply for a U.S. passport, and was sentenced to a 24-month term of imprisonment. (*See* App. 788.)

- **Petitioner Osita Nwolisa is not at higher risk for severe illness and is suspected of marriage fraud; bond has been set for his release.** Nwolisa did not report any chronic conditions during his intake screening on March 5, 2020. (App. 521–22.) He subsequently reported a history of high blood pressure and was educated about the risk of that condition, but refused medication. (App. 509–11, 556.) He later reported chest pain and was provided treatment, and he agreed to take blood pressure medication at this medical encounter. (App. 509.) A bond in the amount of $10,000 has been set for Nwolisa, as he is considered a flight risk. (*See* App. 788.)

- **Petitioner Emmanuel Figueroa Ramos, who has a prior firearm conviction and has engaged in threatening and assaultive behavior in ICE custody, has recovered from COVID-19 and is not otherwise at higher risk for severe illness—even though his lawyer "wanted [asthma] added to his record."** Figueroa Ramos arrived at Prairieland on April 11, 2020. (App. 613.) As of May 11, he reported back pain but did not indicate difficulty breathing. (App. 587.) Figueroa Ramos subsequently reported to medical staff that he had had asthma since the age of three, and had not reported this condition at intake or during a physical, but that his "lawyer told him to add it to his medical record." (App. 581, 585.) A peak-flow lung-capacity test was conducted and did not medically indicate asthma or a need for an inhaler. (App. 575, 583.) Figueroa Ramos tested positive for COVID-19 on April 19 and was thereafter housed in isolation with another detainee who had also tested positive. (*See* App. 607–611, 679, 681.)

  ICE has good reason to keep Figueroa Ramos in custody. He was arrested on charges of unlawful carry of a firearm and receiving stolen property after police responded to a domestic disturbance, initially did not arrest him, but then determined he had an

outstanding warrant. After his arrest it was revealed that Figueroa Ramos had been in possession of a concealed firearm in his waistband when police first encountered him, and had given that weapon to a 17-year-old friend to hide. Police recovered the firearm, which was stolen, and Figueroa Ramos later was convicted on a misdemeanor weapons charge. While in ICE custody, he sent vulgar and threatening message to facility officers and caused a disturbance by throwing items at officers and threatening to kill one. (*See* App. 788–89.)

- **Petitioner Patricia Esteban Ramos,[19] who was convicted on a misdemeanor assault charge after she resisted officers and tried to take an officer's handgun during a domestic disturbance, is being treated for diabetes.** Esteban Ramos reported high blood pressure and high cholesterol on intake. (App. 707–11, 722.) On March 9, 2020, medical staff also diagnosed her with diabetes and started medication. (App. 703–06, 712–13.) Esteban Ramos was educated about this condition and has been provided follow-up care and instruction after she initially was not taking her medication consistently. (*See* App. 696, 705.) As a female, Esteban Ramos is detained in a separate section of Prairieland (apart from the men's section), and in which there have been no COVID-19 cases.. (App. 781.)

  ICE has good reason to keep Esteban Ramos in custody. She is currently in removal proceedings after receiving a misdemeanor assault conviction. After police were called to her residence for a domestic disturbance, Esteban Ramos struggled with officers while they were attempting to restrain her partner, and she attempted to grab one officer's handgun from his holster. (*See* App. 789–90.)

ICE officials believe continued detention remains appropriate for each remaining petitioner for whom no bond has been set, because each represents a significant flight risk or a danger to the community if released. (App. 790.) And with respect to COVID-19, because there is no evidence that respondents subjectively believe the measures they are taking are inadequate and because petitioners cannot show any of respondents "refused to

[19] The petition identifies Ramos as "Patricia Esteban Ramon."

treat [a petitioner], ignored [a petitioner's] complaints," or "intentionally treated [a petitioner] incorrectly," petitioners cannot shown any constitutional violation. *See Cadena*, 946 F.3d at 727. Moreover, in light of petitioners' criminal histories and other considerations noted above, there is a legitimate governmental interest in keeping petitioners in custody during their immigration proceedings and while making arrangements for removal. *See id.*

C. Petitioners' right-to-counsel claims provide no basis for relief.

Four petitioners who have been isolated or in quarantine at Prairieland as part of COVID-19 treatment and mitigation efforts briefly argue that their right to access counsel was thereby violated.[20] (*See* Doc. 8 at 19–21.) But this argument fails for several reasons. First, to the extent these petitioners are asserting that their right to counsel in their underlying immigration proceedings has been infringed, this Court lacks jurisdiction for that claim. Specifically, 8 U.S.C. § 1252(b)(9) consolidates all "questions of law and fact" arising from removal proceedings for judicial review only after a final order of removal—at which time a petition for review may be filed in an appropriate court of appeals. Section 1252(b)(9) expressly states "no court shall have jurisdiction, by habeas corpus under section 2241," for claims within its scope. And a claim that a detained immigrant had been denied access to counsel during immigration proceedings is a claim that must be consolidated in a petition for review to the court of appeals after the conclusion of the administrative process; thus, no jurisdiction exists in a district court.

[20] These petitioners are Kanat Umarbaev, Lee Alejandro Espinoza Urbina, Kirk Golding, and Behzad Jalili (who has since been released).

See Valle v. U.S. Dep't of Homeland Sec., No. 3:19-CV-2254-L, 2019 WL 7207201, at *4 (N.D. Tex. Dec. 27, 2019) (finding no jurisdiction in district court for claims that aliens were being deprived of access to the counsel due to the use of remote video teleconferencing technology in immigration proceedings).

Second, to the extent petitioners claim that they have been denied access to counsel for the purposes of this lawsuit, the record shows otherwise. Petitioners are represented by six attorneys, including two attorneys associated with an immigration-rights clinic at a law school in Fort Worth. (*See* Doc. 1 at 33–34.) Petitioners have also submitted declarations in support of their request for release (including, where applicable, with notations that a translator has been used). (*See, e.g.*, Doc. 1-2 at A.56–A.62 (Espinoza Urbina), A.67–A.70 (Golding), A.77–A.80), A.92–A.97 (Umarbaev); *see also* Doc. 1-2 at A.98 ("certificate of translation" for Umarbaev).) No denial of access to counsel is shown—especially under the current circumstances of the coronavirus pandemic. Petitioners cannot have it both ways by arguing that ICE has not done enough to protect them and therefore has violated the Constitution, while simultaneously claiming that the use of medical isolation and quarantine as a precautionary measures during the pandemic is a constitutional violation.

Last, even if some denial of access to counsel were to be shown, petitioners cite no authority establishing that the proper remedy is the habeas corpus relief of release.

D. Petitioners are not entitled to temporary extraordinary relief.

To the extent petitioners also seek a temporary restraining order, that request should likewise be denied. A temporary restraining order is an extraordinary remedy that

is "not to be granted routinely, but only when the movant, by a clear showing, carries [the] burden of persuasion." *Black Fire Fighters Ass'n v. City of Dallas*, 905 F.2d 63, 65 (5th Cir. 1990). A party seeking such relief must show: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm; (3) that threatened injury faced by the plaintiff outweighs the threatened harm to the defendant; and (4) that granting the injunctive relief will not disserve the public interest. *Canal Auth. of the State of Fla. v. Callaway*, 489 F.2d 567, 572–73 (5th Cir. 1974) (en banc).

In this case, petitioners also "face[] an additional hurdle because [they seek] a mandatory injunction"—a court order that the government release them from custody—"as opposed to a prohibitive injunction." *Mylan Pharm., Inc. v. Shalala*, 81 F. Supp. 2d 30, 36 (D.D.C. 2000). Because mandatory injunctions are inconsistent with the very purpose of preliminary relief, *see Meis v. Sanitas Serv. Corp.*, 511 F.2d 655, 656 (5th Cir. 1975), the Fifth Circuit has admonished that "[o]nly in rare instances is the issuance of a mandatory preliminary injunction proper." *Harris v. Wilters*, 596 F.2d 678, 680 (5th Cir. 1979). Mandatory injunctive relief "is particularly disfavored and should not be issued unless the facts and law clearly favor the moving party." *Rush v. Nat'l Bd. of Med. Exam'rs*, 268 F. Supp. 2d 673, 678 (N.D. Tex. 2003).

Because as discussed above petitioners are not entitled to any writ of habeas corpus, they likewise have shown no entitlement to a temporary restraining order. In addition, petitioners' criminal histories and their statuses as potential dangers to the community and flight risks demonstrate a strong public interest in keeping them in detention, as well as a corresponding threatened injury to the public interest if relief were

to be granted. No extraordinary relief is warranted.

IV. Conclusion

Petitioners are not entitled to a writ of habeas corpus, nor have they met the requirements to obtain any form of temporary extraordinary relief. Their petitions and motions should be denied in their entirety.

Respectfully submitted,

ERIN NEALY COX
United States Attorney

/s/ Brian W. Stoltz
Brian W. Stoltz
Assistant United States Attorney
Texas Bar No. 24060668

George M. Padis
Assistant United States Attorney
Texas Bar No. 24088173

1100 Commerce Street, Third Floor
Dallas, Texas 75242
Telephone: 214-659-8626
Facsimile: 214-695-8807
brian.stoltz@usdoj.gov
george.padis@usdoj.gov

Attorneys for Respondents

Certificate of Service

On May 26, 2020, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all parties electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Brian W. Stoltz
Brian W. Stoltz
Assistant United States Attorney