

**UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF MASSACHUSETTS**

MARIA ALEJANDRA CELIMEN SAVINO,  
et al.,

Petitioners-Plaintiffs,

v.

THOMAS HODGSON, et al.,

Respondents-Defendants.

Case No. 1:20-cv-10617-WGY

**NOTICE OF SUPPLEMENTAL AUTHORITY**

Petitioners-Plaintiffs, through undersigned counsel, submit this notice to inform the Court of relevant supplemental authorities not available to them when they filed their Motion for Temporary Restraining Order and Memorandum in Support of Motion. ECF Nos. 11, 12:

1. The opinion and order of Judge Terry Hatter of the U.S. District Court for the Central District of California dated March 27, 2020, directing the immediate release of two petitioners from immigration detention. *Castillo v. Barr*, CV 20-00605 TJH (AFMx), ECF No. 32, (copy attached as Exhibit A). Judge Hatter relied on evidence of conditions similar to those at Bristol County, *id.* at 10 (individuals “are not kept at least 6 feet apart[,] . . . are forced to touch surfaces touched by other[s] . . . such as common sinks, toilets, and showers”), and concluded that “[a] civil detainee’s constitutional rights are violated if a condition of his confinement places him at substantial risk of suffering serious harm, such as the harm caused by a pandemic” and that detention centers “cannot be deliberately indifferent to the potential exposure of civil detainees to a serious, communicable disease.” *Id.* at 6, 9.

2. The opinion and order of Judge Judith Levy of the U.S. District Court for the Eastern District of Michigan, dated March 27, 2020, directing the release of a criminal defendant, subject to the requirement that he self-quarantine for 14 days. *U.S. v. Kennedy*, No. 5:18-cr-20315, ECF No. 77 (copy attached as Exhibit B), at 14. Judge Levy explained that “under the facts of this case, the danger posed to Defendant in the Saginaw County Jail by the COVID-19 pandemic constitutes an independent compelling reason to temporarily release him from custody.” *Id.* at 2.

3. The Declaration of Ben Haldeman dated March 29, 2020, and attached exhibits containing handwritten letters from immigration detainees at Bristol County Immigration Detention Facilities attesting to the dangerous and unsanitary conditions there, the ongoing admission of new ICE detainees, and the precarious health of many putative class members (copy attached as Exhibit C). Mr. Haldeman is an immigration attorney at New Haven Legal Assistance Association, Inc. who visited Bristol County on March 27 and 28 and provided these detainee statements to undersigned counsel the night of March 28, 2020.

4. The Declaration of Vanesa Suarez dated March 29, 2020 (copy attached as Exhibit D), attesting to phone conversations with Mr. Lloyd Wafula, a man detained by ICE at Bristol County Immigration Detention Facilities, who has helped organize the collective statements of putative class members pleading for assistance, *see* ECF Nos. 1-4, 1-5. Ms. Suarez is the Deportation Defense Organizer at the Connecticut Bail Fund. Shortly after Mr. Wafula’s organizing efforts, he was moved to solitary confinement, where his communication privileges became severely limited. As a result, he cannot provide his own statement and asked Ms. Suarez to provide his account to undersigned counsel.

Respectfully Submitted,

/s/ Michael J. Wishnie

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 29, 2020, the above-captioned document was filed through the ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF), and paper copies will be sent to those indicated as non-registered participants.

/s/ Michael J. Wishnie

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**United States District Court  
Central District of California  
Western Division**

**PEDRO BRAVO CASTILLO and  
LUIS VASQUEZ RUEDA.,**

**Petitioners,**

**v.**

**WILLIAM BARR, et al.,**

**Respondents.**

**CV 20-00605 TJH (AFMx)**

**Temporary Restraining  
Order**

**and**

**Order to Show Cause**

The Court has considered the application for a temporary restraining order filed by Petitioners Pedro Bravo Castillo and Luis Vasquez Rueda, together with the moving and opposing papers.

Castillo is a 58-year-old man who has, or had, suffered from kidney stones, arthritis and a hernia. Vasquez is a 23-year-old man who is recovering from a work-related facial fracture. Castillo and Vasquez are, currently, being detained at the Adelanto Detention Center [“Adelanto”], in San Bernardino County. San Bernardino County is within the Central District of California.

Castillo and Vasquez filed this case as a petition for a writ of *habeas corpus* and complaint for declaratory and injunctive relief. Castillo and Vasquez are civil

1 detainees, having been arrested by officers from the United States Department of  
2 Homeland Security's ["DHS"] Bureau of Immigration and Customs Enforcement  
3 ["BICE"] on March 16, 2020, and March 17, 2020, respectively, and then placed into  
4 removal proceedings, with the service of a Notice to Appear at the time of their arrest.  
5 Castillo's removal proceedings are pursuant to the Immigration and Nationality Act  
6 ["INA"] § 212(a)(6)(A)(i)(I), for being an alien present in the United States without  
7 being admitted or paroled, while Vasquez's removal proceedings are pursuant to INA  
8 § 237(a)(1)(B), for being an alien who after admission as a nonimmigrant under INA  
9 § 101(a)(15) remained in the United States for a time longer than permitted.

10 Adelanto is a private, for-profit immigration detention facility operated by Geo  
11 Group, Inc. Adelanto has the capacity to hold, under normal situations, well over  
12 1,000 detainees through a contract with BICE. Over the years, and as recently as 2018,  
13 DHS's Office of the Inspector General had, repeatedly, found that significant and  
14 various health and safety risks existed at Adelanto.

15 On March 4, 2020, the State of California declared a state of emergency in  
16 response to the coronavirus and the resulting COVID-19 disease. On March 10, 2020,  
17 San Bernardino County followed suit and declared a state of emergency. On March 11,  
18 2020, the World Health Organization ["WHO"] declared COVID-19 to be a global  
19 pandemic. On March 13, 2020, President Donald J. Trump, formally acknowledged  
20 and declared a national emergency in response to WHO's pandemic declaration.

21 On March 18, 2020, BICE announced that "[t]o ensure the welfare and safety of  
22 the general public as well as officers and agents in light of the ongoing COVID-19  
23 pandemic response, [it] will temporarily adjust its enforcement posture beginning today  
24 ... [and that its] highest priorities are to promote life-saving and public safety  
25 activities." Further, BICE stated that it would focus enforcement "on public safety risks  
26 and individuals subject to mandatory detention based on criminal grounds [, and for  
27 those people who do not fall into those categories, agents] will exercise discretion to  
28 delay enforcement actions until after the crisis or utilize alternatives to detention, as

1 appropriate."

2 According to the United States Centers for Disease Control and Prevention, the  
3 coronavirus is spread mainly through person-to-person contact. More specifically, the  
4 coronavirus is spread between people who are in close contact – within about 6 feet –  
5 with one another through respiratory droplets produced when an infected person coughs  
6 or sneezes. The droplets can land in the mouths or noses, or can be inhaled into the  
7 lungs, of people who are within about 6 feet of the infected person. Moreover, studies  
8 have established that the coronavirus can survive up to three days on various surfaces.

9 COVID-19 is highly contagious and has a mortality rate ten times greater than  
10 influenza. Most troublesome is the fact that people infected with the coronavirus can  
11 be asymptomatic during the two to fourteen day COVID-19 incubation period. During  
12 that asymptomatic incubation period, infected people are, unknowingly, capable of  
13 spreading the coronavirus. Despite early reports, no age group is safe from COVID-  
14 19. While older people with pre-existing conditions are the most vulnerable to COVID-  
15 19-related mortality, young people without preexisting conditions have, also,  
16 succumbed to COVID-19. There is no specific treatment, vaccine or cure for COVID-  
17 19.

18 Because of the highly contagious nature of the coronavirus and the, relatively  
19 high, mortality rate of COVID-19, the disease can spread uncontrollably with  
20 devastating results in a crowded, closed facility, such as an immigration detention  
21 center. At Adelanto, a holding area can contain 60 to 70 detainees, with a large  
22 common area and dormitory-type sleeping rooms housing four or six detainees with  
23 shared sinks, toilets and showers. Guards regularly rotate through the various holding  
24 areas several times a day. At meal times – three times a day – the 60 to 70 detainees  
25 in each holding area line up together, sometimes only inches apart, in the cafeteria.  
26 The guards, detainees and cafeteria workers do not regularly wear gloves or masks to  
27 prevent the spread of the coronavirus. While detainees have access to gloves, there is  
28 no requirement that they wear them. Detainees do not have access to masks or hand

1 sanitizer – though thorough hand washing could be more effective than hand sanitizers  
2 at preventing the spread of the coronavirus.

3 Just days ago, the first BICE detainee was confirmed to have been infected with  
4 COVID-19 in New Jersey at the Bergen County Jail, a BICE detention facility.  
5 Moreover, last week, a correctional officer at the Bergen County Jail was, also,  
6 confirmed to have been infected.

7 Yesterday, Judge Analisa Torres of the United States District Court for the  
8 Southern District of New York issued an order releasing certain immigration detainees,  
9 stating the following:

10 The nature of detention facilities makes exposure and spread of the  
11 virus particularly harmful. Jaimie Meyer M.D., M.S., who has worked  
12 extensively on infectious diseases treatment and prevention in the context  
13 of jails and prisons, recently submitted a declaration in this district noting  
14 that the risk of COVID-19 to people held in New York-area detention  
15 centers, including the Hudson, Bergen County, and Essex County jails, “is  
16 significantly higher than in the community, both in terms of risk of  
17 transmission, exposure, and harm to individuals who become infected.”  
18 Meyer Decl. ¶ 7, *Velesaca v. Wolf*, 20 Civ. 1803 (S.D.N.Y. Feb. 28,  
19 2020), ECF No. 42.

20 Moreover, medical doctors, including two medical experts for the  
21 Department of Homeland Security, have warned of a “tinderbox scenario”  
22 as COVID-19 spreads to immigration detention centers and the resulting  
23 “imminent risk to the health and safety of immigrant detainees” and the  
24 public. Catherine E. Shoichet, *Doctors Warn of “Tinderbox scenario” if*  
25 *Coronavirus Spreads in ICE Detention*, CNN (Mar. 20, 2020),  
26 [https://www.cnn.com/2020/03/20/health/doctors-ice-detention-](https://www.cnn.com/2020/03/20/health/doctors-ice-detention-coronavirus/index.html)  
27 [coronavirus/index.html](https://www.cnn.com/2020/03/20/health/doctors-ice-detention-coronavirus/index.html). “It will be nearly impossible to prevent  
28 widespread infections inside the Hudson, Bergen, and Essex County jails



1 now that the virus is in the facilities because detainees live, sleep, and use  
2 the bathroom in close proximity with others, and because ‘[b]ehind bars,  
3 some of the most basic disease prevention measures are against the rules  
4 or simply impossible.’” Petition ¶ 47 (internal quotation marks and citation  
5 omitted).

6 *Basank, et al., v. Decker, et al.*, 20 Civ. 2518 (S.D.N.Y., Feb. 28, 2020), ECF No.  
7 11.

8 On March 23, 2020, the Ninth Circuit ordered, *sua sponte* and without further  
9 explanation, the release of an immigration petitioner “[i]n light of the rapidly escalating  
10 public health crisis, which public health authorities predict will especially impact  
11 immigration detention centers.” *Xochihua-Jaimes v. Barr*, 2020 WL 1429877, No. 18-  
12 71460 (9th Cir. Mar. 23, 2020).

13 Here, Petitioners base their petition on three claims: (1) Violation of the Fifth  
14 Amendment for a state-created danger; (2) Violation of the Fifth Amendment based on  
15 the special relationship between the Government and the persons in its custody; and (3)  
16 Violation of the Fifth Amendment based on punitive detention.

17 The theme underlying the Petitioners’ various Fifth Amendment claims is that  
18 they are civil, not criminal, detainees. When the Government detains a person for the  
19 violation of an immigration law, the person is a civil detainee, even if he has a prior  
20 criminal conviction. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). As civil  
21 detainees, Petitioners are entitled to more considerate treatment than criminal detainees,  
22 whose conditions of confinement are designed to punish. *See Youngberg v. Romeo*, 457  
23 U.S. 307, 321-22 (1982). Moreover, under the Fifth Amendment’s Due Process  
24 Clause, a civil detainee cannot be subjected to conditions that amount to punishment.  
25 *See King v. Cty. of L.A.*, 885 F.3d 548, 556-557 (9th Cir. 2018).

26 When the Government takes a person into custody and detains him against the  
27 person’s will, the Constitution imposes upon the Government a duty to assume  
28 responsibility for that detainee’s safety and general well being. *See Helling v.*

1 *McKinney*, 509 U.S. 25, 32 (1993). Under the Eighth Amendment, the Government  
2 must provide criminal detainees with basic human needs, including reasonable safety.  
3 *Helling*, 509 U.S. at 32. The Government violates the Eighth Amendment if it confines  
4 a criminal detainee in unsafe conditions. *See Helling*, 509 U.S. at 33. Moreover, the  
5 Government may not “ignore a condition of confinement that is sure or very likely to  
6 cause serious illness.” *See Helling*, 509 U.S. at 32.

7 The law is clear – the Government cannot put a civil detainee into a dangerous  
8 situation, especially where that dangerous situation was created by the Government.  
9 *See Hernandez v. City of San Jose*, 897 F.3d 1125, 1133 (9th Cir. 2018). The Due  
10 Process Clause of the Fifth Amendment prohibits the Government from exposing an  
11 individual to a danger which he would not have otherwise faced. *See Kennedy v. City*  
12 *of Ridgefield*, 439 F.3d 1055, 1061 (9th Cir. 2006) citing *DeShaney v. Winnebago*  
13 *County Dep’t of Soc. Serv.*, 489 U.S. 189, 197, 201 (1989). A civil detainee’s  
14 constitutional rights are violated if a condition of his confinement places him at  
15 substantial risk of suffering serious harm, such as the harm caused by a pandemic. *See*  
16 *Smith v. Wash.*, 781 F. App’x. 595, 588 (9th Cir. 2019).

17 Here, Petitioners argued that the conditions at Adelanto expose them to a  
18 substantial risk of suffering serious harm – increasing their exposure to or contracting  
19 COVID-19. When the Government detains a person, thereby taking custody of that  
20 person, it creates a special relationship wherein the Government assumes responsibility  
21 for that detainee’s safety and well-being. *See, e.g., Henry A. v. Willden*, 678 F.3d 991,  
22 998 (9th Cir. 2012). If the Government fails to provide for a detainee’s basic human  
23 needs, including medical care and reasonable safety, the Due Process Clause is violated.  
24 *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 200 (1989). Indeed,  
25 the Due Process Clause mandates that civil immigration detainees are entitled to more  
26 than minimal human necessities. *See Jones v. Blanas*, 393 F.3d 918, 931 (9th Cir.  
27 2004). At a minimum, here, the Government owes a duty to Petitioners, as civil  
28 immigration detainees, to reasonably abate known risks. *See Castro v. Cty. of Los*

1 *Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016). Inadequate health and safety measures  
2 at a detention center cause cognizable harm to every detainee at that center. *See*  
3 *Parsons v. Ryan*, 754 F.3d 657, 679 (9th Cir. 2014).

4 Petitioners are entitled to a temporary restraining order if they show: (1) A  
5 likelihood of success on the merits; (2) That they are likely to suffer irreparable harm  
6 in the absence of relief; (3) The balance of equities tip in their favor; and (4) An  
7 injunction is in the public’s interest. *See Winter v. Natural Res. Def. Council, Inc.*, 555  
8 U.S. 7, 20 (2008). Under the Ninth Circuit’s sliding scale approach, a stronger  
9 showing of one element may offset a weaker showing of another. *See Pimentel v.*  
10 *Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012). Accordingly, Petitioners are entitled  
11 to a temporary restraining order if “serious questions going to the merits [are] raised  
12 and the balance of hardships tips sharply in [their] favor.” *All. for the Wild Rockies v.*  
13 *Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

14 In its opposition brief, the Government sets forth the United States Attorney  
15 General’s discretionary right to detain an alien in removal proceedings prior to a final  
16 order of removal. *See* 8 U.S.C. § 1226. Indeed, the Attorney General has the  
17 discretion to either: (1) Detain the person without bond or (2) Release the person on a  
18 bond of at least \$1,500.00 or on conditional parole. 8 U.S.C. § 1226(a). In making  
19 the initial bond determination, a BICE officer must assesses whether the person has  
20 “demonstrate[d]” that “release would not pose a danger to property or persons, and that  
21 the alien is likely to appear for any future proceeding.” 8 C.F.R. § 236.1(c)(8). If the  
22 BICE officer determines that release, with or without bond, is not appropriate, then the  
23 person may appeal to an Immigration Judge. 8 C.F.R. §§ 236.1(d)(1), 1003.19,  
24 1236.1(d)(1). The Immigration Judge’s decision, then, would be appealable to the  
25 Board of Immigration Appeals. 8 C.F.R. §§ 1003.1(b)(7), 1003.19(f), 1003.38.

26 However, because the Petitioners, here, have asserted claims for violations of  
27 their Fifth Amendment substantive due process rights, and those claims exceed the  
28 jurisdictional limits of the Immigration Court and the Board of Immigration Appeals,

1 Petitioners need not first exhaust their administrative remedies. *Garcia-Ramirez v.*  
2 *Gonzales*, 423 F.3d 935, 938 (9th Cir. 2005).

3 The Government argued that Petitioners lack standing because they cannot  
4 establish that they would suffer a concrete, non-hypothetical injury absent a temporary  
5 restraining order in that their likelihood of contracting COVID-19 is speculative. *See*  
6 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

7 However, it is clear that “[a] remedy for unsafe conditions need not await a tragic  
8 event.” *Helling*, 509 U.S. at 33. The Government cannot be “deliberately indifferent  
9 to the exposure of [prisoners] to a serious, communicable disease on the ground that the  
10 complaining [prisoner] shows no serious current symptoms.” *Helling*, 509 U.S. at 33.  
11 “That the Eighth Amendment protects against future harm to inmates is not a novel  
12 proposition.” *Helling*, 509 U.S. at 33. The Supreme Court clearly stated that “... the  
13 Eighth Amendment protects [prisoners] against sufficiently imminent dangers as well  
14 as current unnecessary and wanton infliction of pain and suffering... .” *Helling*, 509  
15 U.S. at 33. Indeed, the Court concluded that where prisoners in punitive isolation were  
16 crowded into cells and some of them had infectious maladies, “... the Eighth  
17 Amendment required a remedy, even though it was not alleged that the likely harm  
18 would occur immediately and even though the possible infection might not affect all of  
19 those exposed.” *Helling*, 509 U.S. at 33. Civil detainees are entitled to greater liberty  
20 protections than individuals detained under criminal processes. *See Jones*, 393 F.3d at  
21 932.

22 In its *amicus* brief filed in *Helling*, the Government stated that it “... recognizes  
23 that there may be situations in which exposure to toxic or similar substances would  
24 present a risk of sufficient likelihood or magnitude – and in which there is a sufficiently  
25 broad consensus that exposure of *anyone* to the substance should therefore be prevented  
26 – that the [Eighth] [A]mendment’s protection would be available even though the effects  
27 of exposure might not be manifested for some time.” *Helling*, 509 U.S. at 34. The  
28 Government, here, cannot say, with any degree of certainty, that no one – staff or

1 detainee – at Adelanto has not been, or will not be, infected with the coronavirus. The  
2 science is well established – infected, asymptomatic carriers of the coronavirus are  
3 highly contagious. Moreover, the Petitioners presently before the Court are suffering  
4 from a condition of confinement that takes away, *inter alia*, their ability to socially  
5 distance. The Government cannot be deliberately indifferent to the Petitioners’ potential  
6 exposure to a serious, communicable disease on the ground that they are not, now,  
7 infected or showing current symptoms. *See Helling*, 509 U.S. at 32.

8 It is “cruel and unusual punishment to hold convicted criminals in unsafe  
9 conditions.” *Helling*, 509 U.S. at 33. The Eighth Amendment is violated when a  
10 condition of a criminal detainee’s confinement puts him at substantial risk of suffering  
11 serious harm and that the condition causes suffering inconsistent with contemporary  
12 standards of human decency. *See Smith v. Wash.*, 781 F. App’x. 595, 597-598 (9th  
13 Cir. 2019). However, a civil detainee seeking to establish that the conditions of his  
14 confinement are unconstitutional need only show that his conditions of confinement  
15 “put [him] at substantial risk of suffering serious harm.” *See Smith*, 781 F. App’x.  
16 597-598. Here, BICE cannot be deliberately indifferent to the potential exposure of  
17 civil detainees to a serious, communicable disease on the ground that the complaining  
18 detainee shows no serious current symptoms, or ignore a condition of confinement that  
19 is more than very likely to cause a serious illness. *See Helling*, 509 U.S. at 32.

20 Under the Due Process Clause, a civil detainee cannot be subject to the current  
21 conditions of confinement at Adelanto. The Supreme Court has acknowledged that it  
22 has “... great difficulty agreeing that prison authorities may not be deliberately  
23 indifferent to an inmate’s current health problems but may ignore a condition of  
24 confinement that is sure or very likely to cause serious illness and needless suffering the  
25 next week or month or year.” *Helling*, 509 U.S. at 33

26 As the Court writes this order, the number of confirmed COVID-19 cases in the  
27 United States has already exceeded the number of confirmed cases in every other  
28 country on this planet. Indeed, all of the experts and political leaders agree that the

1 number of confirmed cases in the United States will only increase in the days and weeks  
2 ahead. The number of cases in the United States has yet to peak. In San Bernardino  
3 County, the number of confirmed cases, there, has tripled over the past five days.

4 The risk that Petitioners, here, will flee, given the current global pandemic, is  
5 very low, and reasonable conditions can be fashioned to ensure their future appearance  
6 at deportation proceedings. While both Petitioners have committed prior criminal  
7 offenses in this country related to driving under the influence, both Castillo and  
8 Vasquez have completed their sentences of five days and three days incarceration,  
9 respectively. Petitioners are not criminal detainees, they are civil detainees entitled to  
10 more considerate treatment than criminal detainees. *See Youngberg*.

11 Civil detainees must be protected by the Government. Petitioners have not been  
12 protected. They are not kept at least 6 feet apart from others at all times. They have  
13 been put into a situation where they are forced to touch surfaces touched by other  
14 detainees, such as with common sinks, toilets and showers. Moreover, the Government  
15 cannot deny the fact that the risk of infection in immigration detention facilities – and  
16 jails – is particularly high if an asymptomatic guard, or other employee, enters a  
17 facility. While social visits have been discontinued at Adelanto, the rotation of guards  
18 and other staff continues.

19 The Petitioners have established that there is more than a mere likelihood of their  
20 success on the merits. *See Winter*, 555 U.S. at 20.

21 The Petitioners have established that they are likely to suffer irreparable harm in  
22 the absence of relief. *See Winter*, 555 U.S. at 20. It is well established that the  
23 deprivation of constitutional rights unquestionably constitutes irreparable injury. *See*  
24 *Hernandez v. Session*, 872 F.3d 976, 994 (9th Cir. 2017).

25 The balance of the equities tip sharply in favor of the Petitioners. The Petitioners  
26 faces irreparable harm to their constitutional rights and health. Indeed, there is no harm  
27 to the Government when a court prevents the Government from engaging in unlawful  
28 practices. *See Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013).

1 Finally, the emergency injunctive relief sought, here, is absolutely in the public’s  
2 best interest. The public has a critical interest in preventing the further spread of the  
3 coronavirus. An outbreak at Adelanto would, further, endanger all of us – Adelanto  
4 detainees, Adelanto employees, residents of San Bernardino County, residents of the  
5 State of California, and our nation as a whole.

6 This is an unprecedented time in our nation’s history, filled with uncertainty,  
7 fear, and anxiety. But in the time of a crisis, our response to those at particularly high  
8 risk must be with compassion and not apathy. The Government cannot act with a  
9 callous disregard for the safety of our fellow human beings.

10 Accordingly,

11 **It is Ordered** that the motion for a temporary restraining order be, and hereby  
12 is, **Granted**.

13 **It is further Ordered** that the Respondents shall, forthwith and without delay,  
14 release Petitioners Pedro Bravo Castillo and Luis Vasquez Rueda from custody pending  
15 further order of this Court.

16 **It is further Ordered** the Respondents shall show cause, if they have any, as  
17 to why the Court should not issue a preliminary injunction in this case. The  
18 Respondents’ response, if any, to this order to show cause shall be filed by Noon on  
19 April 6, 2020. Petitioners’ reply, if any, to Respondents’ response shall be filed by  
20 Noon on April 9, 2020. The matter will then stand submitted.

21  
22 Date: March 27, 2020

23   
24 **Terry J. Hatter, Jr.**  
25 **Senior United States District Judge**  
26  
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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

United States of America,

Plaintiff,

Case No. 18-20315

v.

Judith E. Levy

United States District Judge

Keith Kennedy (D-3),

Elizabeth A. Stafford

Magistrate Judge

Defendant.

\_\_\_\_\_ /

**ORDER TEMPORARILY REVOKING DETENTION**

On March 11, 2020 Magistrate Judge David Grand detained Defendant Keith Kennedy subject to a bond review hearing before Judge Judith Levy. (*See* ECF No. 71.) Judge Grand detained Defendant due to several violations of his pretrial release conditions, including the following: failing several drug screens, failing to report to pretrial services, failing to report to inpatient substance abuse treatment, and failing to report for a bond review hearing. (*See id.*; ECF No. 58.) On March 26, 2020, the Court conducted a bond reviewing hearing of Defendant's confinement at the Saginaw County Jail. The hearing took



place telephonically due to federal, state, and court stay-at-home directives in response to the COVID-19 pandemic.

The Court is authorized to revisit the Magistrate Judge's order pursuant to 18 U.S.C. § 3145(b). As set forth below, the Court finds that it is necessary to temporarily release Defendant, pursuant to 18 U.S.C. § 3142(i)(4), *see infra* pg. 8, for two reasons. First, under the facts of this case, the danger posed to Defendant in the Saginaw County Jail by the COVID-19 pandemic constitutes an independent compelling reason to temporarily release him from custody. Second, temporary release is necessary for Defendant to prepare his pre-sentencing defense.

## **BACKGROUND**

On March 22, 2020, the Governor of Michigan issued the following statement: "The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine or antiviral treatment for this disease." Executive Order, No. 2020-20 (Mar. 22, 2020).

Since March 11, 2020, the date of Defendant's hearing before Magistrate Judge Grand, the exceptionally dangerous nature of the COVID-19 pandemic has become apparent. On March 10, 2020, the Governor of Michigan announced the state's first two cases of COVID-19 and simultaneously declared a State of Emergency. Executive Order, No. 2020-4 (Mar. 10, 2020). The number of new cases is growing exponentially. As of March 27, 2020, that number is now at 3,657 confirmed cases and 92 known related deaths. *See Coronavirus, Michigan.Gov*, <https://www.michigan.gov/coronavirus/0,9753,7-406-98163-520743--,00.html>. COVID-19 has a high risk of transmission, and the number and rate of confirmed cases indicate broad community spread. Executive Order, No. 2020-20 (Mar. 22, 2020). Indeed, as of March 27, 2020, Michigan jails are attempting to lower their detained populations "as officials scramble to remove people thought to be at high risk of contracting the coronavirus, but little risk to the general public if they were not behind bars." James David Dickson, *Jail populations plunge in Metro Detroit as coronavirus spreads*, Detroit News (March 27, 2020), <https://www.detroitnews.com/story/news/local/macomb->

county/2020/03/27/jail-populations-plunge-metro-detroit-coronavirus-spreads/2914358001/. Defendant's case fits this description.

On March 23, 2020, the Centers for Disease Control and Prevention (CDC) acknowledged that correctional and detention facilities “present[] unique challenges for control of COVID-19 transmission among incarcerated/detained persons, staff, and visitors.” *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, Centers for Disease Control (Mar. 23, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html> [Hereinafter “CDC Guidance 3/23/2020”]. Specifically, the CDC noted that many detention conditions create a heightened risk of danger to detainees. These include: low capacity for patient volume, insufficient quarantine space, insufficient on-site medical staff, highly congregational environments, inability of most patients to leave the facility, and limited ability of incarcerated/detained persons to exercise effective disease prevention measures (e.g., social distancing and frequent handwashing). *Id.*

The CDC recommended that all correctional facilities take preventative measures, including: ensuring an adequate supply of

hygiene and medical supplies, allowing for alcohol-based sanitizer throughout facilities, providing no-cost soap to all inmates for frequent handwashing, cleaning and disinfecting frequently touched surfaces several times per day, performing pre-intake screening and temperature checks for all new entrants, increasing space between all detained persons to at least six feet, staggering meals, and having healthcare staff perform regular rounds. *Id.* Even if all of the CDC’s interim recommendations are followed, and this record suggests that they are not, the Court is concerned that such measures will prove insufficient to stem deadly outbreaks. *See, e.g., New York City Board of Correction Calls for City to Begin Releasing People From Jail as Part of Public Health Response to COVID-19*, N.Y.C. Bd. of Corr. (Mar. 17, 2020), <https://www1.nyc.gov/assets/boc/downloads/pdf/News/2020.03.17%20-%20Board%20of%20Correction%20Statement%20re%20Release.pdf> (arguing that, despite the “heroic work” of Department of Correction and Correctional Health Services staff “to prevent the transmission of COVID-19 in the jails and maintain safe and humane operations, the City must drastically reduce the number of people in jail right now and limit new admissions to exceptional circumstances”). Indeed, on March

26, 2020, Attorney General Barr issued a separate directive ordering the Director of the Bureau of Prisons to “prioritiz[e] home confinement as appropriate in response to the COVID-19 pandemic . . . to protect the health and safety of BOP personnel and the people in our custody.” *Prioritization of Home Confinement as Appropriate in Response to COVID-19 Pandemic*, Att’y Gen. (Mar. 26, 2020).

Research shows that prisoners and jail inmates are more likely than the general population to report experiencing infectious diseases, indicating that these individuals face a heightened risk during this pandemic.<sup>1</sup> Laura M. Maruschak et al., *Medical Problems of State and Federal Prisoners and Jail Inmates, 2011-12*, U.S. Department of Justice, Bureau of Justice Statistics, (2016), <https://www.bjs.gov/content/pub/pdf/mpsfpji1112.pdf>.

By way of example, Michigan prisons are beginning to prepare “contingency plans” for extreme outbreaks, but the evidence suggests that it is only a matter of time before a deadly outbreak occurs for which

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<sup>1</sup> As of March 26, 2020, there have been fourteen confirmed cases of a Michigan prisoner testing positive for COVID-19, up from one case on March 24, 2020. Gus Burns, *Michigan prisons prep for possibility of coronavirus outbreak among inmate population*, M-Live (Mar. 26, 2020), <https://www.mlive.com/public-interest/2020/03/michigan-prisons-prep-for-possibility-of-coronavirus-spread-among-inmate-population.html>.

the prison system is woefully unprepared. *See id.* ([The Michigan Department of Corrections spokesperson] “said administrators haven’t projected how many inmates might eventually contract the highly contagious virus, and he didn’t immediately know how much quarantine space is available throughout the prison network.”) Because many individuals infected with COVID-19 do not display symptoms, the virus will almost certainly be present in jails and prisons before cases are formally identified.

During the March 26 hearing, Defendant credibly testified that he has conditions which render him particularly vulnerable to COVID-19. Defendant, who was audibly ill with congestion and who coughed intermittently throughout the call, testified that he is exhibiting flu-like symptoms. Defendant also credibly testified that Saginaw County Jail has not been treating his underlying conditions or his flu-like symptoms. He testified that, prior to detainment, he was on high blood pressure medication, thyroid medication, and blood sugar medication. Despite these conditions and symptoms, Defendant testified that he was not being provided with these medications, not having his blood pressure taken regularly, not having his thyroid tested, not having his

temperature taken regularly, and unable to access to tissues into which he could sneeze or cough.<sup>2</sup> Defendant also testified that the detainees had no access to hand sanitizer and were instead provided with a small bar of soap once a week.

## LAW AND ANALYSIS

Where a detention order has been issued, the Court is permitted to issue a “subsequent order” temporarily releasing an individual in custody “to the extent that the judicial officer determines such release to be necessary for the preparation of the person’s defense or for another compelling reason.” 18 U.S.C. § 3142(i)(4). While the language of § 3142(i)(4) appears under the heading “Release or detention of a defendant pending trial,” this provision applies to Defendant even though he has pled guilty and is thus pending sentencing rather than trial. The language specifies that the Court may permit temporary release “by subsequent order.” *Id.* The Court’s current directive is a “subsequent order,” issued subsequent to a prior detainment order under 18 U.S.C. § 3142.<sup>3</sup> *United States v. Thornton*, 787 F.2d 594, 594 (6th Cir. 1986) (Table

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<sup>2</sup> Defendant did testify that the detainees had access to toilet paper.

<sup>3</sup> The Court notes that typical post-plea releases involve a finding “by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety

decision) (suggesting that a district court could temporarily release a detainee pursuant to § 3142(i)(4) by subsequent order even after a prior order holding that the detainee was a flight risk or a risk to public safety); *United States v. Dante Stephens*, No. 15-cr-0095, 2020 WL 1295155, \*3 (S.D.N.Y. Mar. 19, 2020) (holding that 18 U.S.C. § 3142(i)(4) constitutes a “separate statutory ground” for post-conviction release).

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of any other person or the community.” 18 U.S.C. § 3143(a)(1). However, it is unnecessary for the Court to make a finding under 18 U.S.C. § 3143, because the Court is releasing Defendant pursuant to the independent statutory ground 18 U.S.C. § 3142(i)(4). Nevertheless, the Court finds, by clear and convincing evidence based on Defendant’s actions and testimony, that Defendant would not pose a danger to the safety of any other person or to the community. The Court notes that Defendant testified under oath about his concern for his aging parents and his desire to remain at home, in quarantine, to support them. Defendant was solemn, thoughtful, and responsive to the Court’s questions and concerns. Defendant does not have a violent history. The Court found Defendant to be a credible witness when discussing his health and treatment at Saginaw County Jail, his willingness to cooperate with Probation, and his motivation for staying at home once released.

The Court also notes that any § 3143(a)(1) considerations would need to account for the restricted flight possibilities presented by the current COVID-19 pandemic, as well as “balance the public health safety risk posed by the continued incarceration of [] defendants in crowded correctional facilities with any community safety risk posed by a defendant’s release.” *See Karr v. State*, No. A-13630, 2020 WL 1456469, \*3 (Alaska Ct. App. Mar. 24, 2020); *see also Matter of Extradition of Toledo Manrique*, No. 19-71055, 2020 WL 1307109, \*1 (N.D. Cal. Mar. 19, 2020) (“This [flight risk] problem has to a certain extent been mitigated by the existing pandemic. The Court’s concern was that Toledo would flee the country, but international travel is hard now. Travel bans are in place . . .”)



For the reasons below, the Court finds that temporary pretrial release is necessary for the compelling reason that it will protect Defendant, the prison population, and the wider community during the COVID-19 pandemic, and also that pretrial release is necessary for the preparation of Defendant's pre-sentencing defense.

Section 3142(i) does not define "compelling reason," and the Sixth Circuit has yet to interpret this statutory language. However, as courts across the country have begun to recognize, the global health crisis posed by COVID-19 necessitates informed, speedy, and preemptive action to reduce the risk of infection, illness, and death to prisoners and prison officials alike. *See Xochihua-Jaimes v. Barr*, No. 18-71460, ECF No. 53 (9th Cir. Mar. 23, 2020) (*sua sponte* ordering release of non-citizen from immigration detention center "[i]n light of the rapidly escalating public health crisis, which public health authorities predict will especially impact immigration detention centers."); *United States v. Perez*, No. 19-cr-00297, ECF No. 62 (S.D.N.Y. Mar. 19, 2020) (finding that the defendant's heightened risk to COVID-19 complications constitutes a compelling reason for release under § 3142(i)); *United States v. Barkman*, No. 19-cr-0052, 2020 U.S. Dist. LEXIS 45628, at \*11 (D. Nev. Mar. 17,

2020) (granting emergency relief amending probation order to delay confinement for thirty days because of risk of infection to both Defendant and others in jail). Under any possible interpretation of Section 3142(i)'s language, current events and Defendant's particular vulnerability to the disease constitute a compelling reason for release under § 3142(i).

Even if Defendant did not have a heightened susceptibility to COVID-19, the public health crisis—and its impact on Defendant's ability to present a defense—nonetheless satisfies § 3142(i). Saginaw County Jail has suspended on-site visitation “due to coronavirus concerns.” Brianna Owczarzak, *MDOC halts visits to MI prisons due to coronavirus concerns* (March 13, 2020), [https://www.wnem.com/news/mdoc-halts-visits-to-mi-prisons-due-to-coronavirus-concerns/article\\_cbb094ea-6530-11ea-8dcc-6f67de338459.html](https://www.wnem.com/news/mdoc-halts-visits-to-mi-prisons-due-to-coronavirus-concerns/article_cbb094ea-6530-11ea-8dcc-6f67de338459.html). The Federal Bureau of Prisons and Michigan Department of Corrections have also broadly suspended on-site visits in light of coronavirus concerns. See Federal Bureau of Prisons, *Federal Bureau of Prisons COVID-19 Action Plan*, [https://www.bop.gov/resources/news/20200313\\_covid-19.jsp](https://www.bop.gov/resources/news/20200313_covid-19.jsp) (explaining the nationwide suspension and noting that “case-by-case accommodation

will be accomplished at the local level”); Michigan Department of Corrections, *MDOC Halts All Visits at State Prisons* (Mar. 13, 2020), <https://www.michigan.gov/coronavirus/0,9753,7-406-98163-521571--,00.html>.

Defendant and his attorney, Mr. Kinney, testified specifically to their difficulty in conducting attorney-client communications under current conditions. Defendant testified that his attorney was able to call him, but unable to visit him to prepare for this hearing. Mr. Kinney additionally testified that, though he was able to speak by phone with his client, he was unable to receive assurances from the facility that the calls were private. Mr. Kinney noted that he was “not comfortable that [he and Defendant] could actually talk about anything over the phone,” because “there’s certain things that I don’t want him to say” without a guarantee of attorney-client privacy.

These communication difficulties are endemic to confinement during the current pandemic and, under the facts of this case, further support Defendant’s release under § 3142(i). Defendant has an upcoming bond review hearing on June 4, 2020 and an upcoming sentencing hearing on July 28, 2020. (ECF Nos. 75, 76.) Release is necessary in order

to allow Defendant to adequately prepare and consult with defense counsel for these proceedings. *See Stephens*, 2020 WL 1295155 at \*5 (holding that Defendant's inability to communicate regularly and effectively with counsel in light of BOP's visitation policies satisfied requirements for release under § 3142(i)).

The United States argues that release is improper here because it was unaware of any known COVID-19 cases at Saginaw County Jail. However, this argument fails to address the facts of the current global public health crisis—particularly as Michigan prisons are beginning to see exponential spread of the disease. *See Burns, supra*. The seemingly preemptive nature of Defendant's release renders it no less necessary or compelling. To the contrary—as the above background makes clear—waiting for either Defendant to have a confirmed case of COVID-19, or for there to be a major outbreak in Defendant's facility, would render meaningless this request for release. Such a failure to act could have devastating consequences for Defendant and would create serious medical and security challenges to the existing prison population and the wider community.

## CONCLUSION

Defendant has set forth compelling reasons for his temporary release amidst this growing public health emergency. Accordingly, Defendant is immediately released pursuant to the conditions set forth in the bond documents, with the additional modification that Defendant is to self-quarantine for 14 days as discussed during the hearing.

The Court will revisit this Order in four months.

IT IS SO ORDERED.

Dated: March 27, 2020  
Ann Arbor, Michigan

s/Judith E. Levy  
JUDITH E. LEVY  
United States District Judge

### **CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on March 27, 2020.

s/William Barkholz  
WILLIAM BARKHOLZ  
Case Manager