FILED
2020 May-13 PM 02:50
U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

ARCHILLA, *et al*.,

Petitioners-Plaintiffs,

v.

WITTE, *et al*.,

Respondents-Defendants.

Case No. 4:20-cv-596-RDP-JHE

PETITIONERS' POST-ARGUMENT SUPPLEMENTAL BRIEF ON THEIR MOTION FOR A TEMPORARY RESTRAINING ORDER

In response to the Court's invitation during the May 12 argument on Petitioners' Motion for a Temporary Restraining Order, Petitioners respectfully submit this post-argument supplemental brief seeking to clarify several key points regarding Petitioners' claims for relief and respond to several factual allegations made by Respondents.

1. **Because Petitioner's Do Not Seek to Remediate Prison Conditions, But Seek Release From Unlawful Detention, Their Claims Sit at the Core of Habeas.**

Because of the considerable colloquy at oral argument around the question of the Court's jurisdiction, Petitioners seek to briefly clarify their central contention: this Court has jurisdiction under 28 U.S.C. § 2241 because Petitioners have presented substantial evidence showing that their continued detention is unconstitutional, and release via a writ of habeas corpus in an available and appropriate remedy under the circumstances—indeed, it is the only adequate remedy to the ongoing constitutional injuries they are suffering.

First, it is true that the traditional vehicle to contend that a detainee's or prisoner's conditions of confinement are unconstitutional is an action under 42 U.S.C. § 1983 raising Fifth or Eighth Amendment claims in the case of state facilities; or, as a direct injunctive claim under the Constitution in the case of federal facilities.[1] But Plaintiffs do not – and could not – challenge their conditions of confinement in the way traditional civil rights claims provide because they do not seek to use the writ to impose new or improved conditions in a facility in the manner that courts have said habeas does not permit. *See, e.g. Gomez v. United States*, 899 F.2d 1124, 1125 (11th Cir. 1990) (rejecting habeas where petitioner challenged the "medical treatment" during the course of detention.); *Vaz v. Skinner*, 634 Fed. App'x. 778, 781 (11th Cir. 2015) (rejecting habeas petition seeking better medical treatment.); *Daker v. Warden*, No. 18-13800, 2020 WL 751817, at *2 (11th Cir. Feb. 14, 2020) (rejecting habeas petition seeking adequate food and medical care.); *cf. Cook v. Baker*, 139 Fed. App'x. 167, 169 (11th Cir. 2005) (dismissing § 1983 action because § 2254 habeas corpus was the exclusive remedy for petitioner's claim challenging his conviction).

Second, Petitioners' contention – supported by overwhelming record evidence – is that the unprecedented COVID-19 pandemic presents such a risk to the health and life of medically vulnerable individuals like Petitioners, that it renders their detention unlawful under the Fifth Amendment, and the only relief possible is release. That the unprecedented and ultimately unconstitutional pandemic-related situation in the Etowah County Detention Center forms the grounds for relief does not foreclose habeas jurisdiction over their release. *Vazquez-Berrera v. Wolf*, No. 20-cv-1241, 2020 WL 1904497, at *5 (S.D. Tex. Apr. 17, 2020) (observing that "[t]he

[1] A claim under *Bivens* can only ever be brought for *damages* for past federal official misconduct; *Bivens* is not a vehicle to obtain prospective, injunctive relief. Unlike the more modern implied damages remedy recognized in 1971 in *Bivens*, courts have long had inherent equitable authority to issue injunctions to remedy constitutional violations. *See Ex Parte Young*, 209 U.S. 123 (1908); *see also Brown v. Plata*, 563 U.S. 493, 511 (2011) (upholding order reducing prison population under court's inherent equitable authority); *Mobile Cty. Jail Inmates v. Purvis*, 581 F. Supp. 222, 224-25 (S.D. Ala. 1984) (exercising remedial powers to order a prison's population reduced to alleviate unconstitutional conditions.)

mere fact that Plaintiffs' constitutional challenge requires discussion of conditions in immigration detention does not necessarily bar such a challenge in a habeas petition," and issuing order of release); *see also Dada v. Witte*, No. 1:20-CV-0458, Dkt. 17 at *9 (W.D. La. Apr. 30, 2020) (Report and Recommendation) (explaining that "the remedy for conditions claims is generally corrective. The remedy for fact claims, however, generally terminates the detention altogether, or alters it such that a new form of custody or control is imposed" and recommending release of 13 petitioners under § 2241.)

As Petitioners' stressed during the TRO hearing before this Court, the Middle District of Georgia agreed that § 2241 jurisdiction is appropriate where petitioners' Fifth Amendment claim stems from circumstances than cannot be timely remedied by reforms on detention conditions. *A.S.M. v. Donahue*, No. 7:20-CV-62 (CDL), 2020 WL 1847158, at *1 (M.D. Ga. Apr. 10, 2020) ("the general principle eschewing habeas relief as a means for remedying condition of confinement constitutional violations rests upon the assumption that eliminating the contested confinement conditions is possible without releasing the detainee from detention."). *A.S.M.* reached the merits and denied the requested TRO – over a month ago – at a point in time when COVID-19 was not nearly as widespread and on a factual record far less conclusively establishing the imperative of release than the record in this case. Accordingly, as an emerging consensus of courts have held, [2]

[2] *See e.g. Vazquez Barrera*, 2020 WL 1904497, at *8; *Essien v. Barr*, No. 20-CV-1034-WJM, 2020 WL 1974761, at *3 (D. Colo. Apr. 24, 2020) ("In theory, these causes of action are oil and water: a habeas claim may lead to an order releasing the prisoner or detainee or nothing at all; whereas a conditions-of- confinement claimant may only lead to an order requiring the government to improve the conditions of confinement, but not an order releasing the prisoner or detainee."); *Mays v. Dart*, No. 20 C 2134, 2020 WL 1812381, at *6 (N.D. Ill. Apr. 9, 2020) ("The plaintiffs' claims, as they have framed them, do bear on the duration of their confinement (they contend, ultimately, that they cannot be held in the Jail consistent with the Constitution's requirements), and they are not the sort of claims that are, or can be, appropriately addressed via a claim for damages."); *Malam v. Adducci*, No. 20-10829, 2020 WL 1672662, at *3 (E.D. Mich. Apr. 5, 2020), as amended (Apr. 6, 2020) ("Supreme Court and Sixth Circuit precedent support the conclusion that where a petitioner claims no set of conditions would be sufficient to protect her constitutional rights, her claim should be construed as challenging the fact, not conditions, of her confinement and is therefore cognizable in habeas."); *Sheikh v. Gillis*, No. 5:19-cv-134 Dkt 19 at 4 (S. D. Miss. Apr. 29, 2020) (Report and Recommendation); *Wilson v. Williams*, No. 20 cv 794, Dkt. 22 at 10-11 (N.D. Ohio Apr. 22, 2020); *Basank v. Decker*, No. 20 CIV. 2518, 2020 WL 1481503, at *6 (S.D.N.Y. Mar. 26, 2020).

Petitioners' claim properly sounds in habeas. *See Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973) ("a determination that [the petitioner] is entitled to immediate [] or a speedier release" is a proper habeas claim).

Third, once the Court is vested with habeas jurisdiction, the habeas statute requires the Court to reach Petitioners' substantive claim that Petitioners are being held "in violation of the Constitution or laws or treaties of the United States." 42 U.S.C. §2243. Petitioners contend that their continued detention violates the Fifth Amendment standards governing the treatment of civil immigration detainees. Should the Court find that the evidence demonstrates a constitutional violation – either under the *Bell v. Wolfish* reasonable-relationship test that Petitioners contend governs these Fifth Amendment claims, or even under the Eighth Amendment deliberate indifference standard – the Court is fully authorized to order Petitioners' release, *Boumediene v. Bush*, 553 U.S. 723, 779 (2008), so as "to insure that miscarriages of justice within [the writ's] reach are surfaced and corrected." *Harris v. Nelson*, 394 U.S. 286, 291 (1969).

2. Respondents' Own Evidence Proves Petitioners' Point—Their Continued Detention in ECDC Poses an Irremediable Risk to Their Health and Safety

The evidence presented by Respondents prior to, during, and after the TRO hearing regarding ECDC's safety protocols, unit capacity, "quarantine" practices and the "sterile" ICE unit, and ICE's custody review process for medically vulnerable individuals like Petitioners demonstrate that: (1) Petitioners' detention is "excessive in relation to" its asserted purpose, *McMillian v. Johnson*, 88 F.3d 1554 (11th Cir.), *opinion amended on reh'g*, 101 F.3d 1363 (11th Cir. 1996) (citing, *inter alia, Bell v. Wolfish*, 441 U.S. 520, 538 (1979)), **and** (2) Respondents have acted with deliberate indifference by "failing to respond . . . in an (objectively) reasonable manner" to the known, substantial risk of serious harm faced by Petitioners. *See Rodriguez v. Sec'y for Dep't of Corr.*, 508 F.3d 611, 617-18 (11th Cir. 2007). Officer Pitman acknowledges in his supplemental

declaration, ECF No. 30, that the main ICE unit, Unit 9 (where all seventeen detained Petitioners are confined) is near its full capacity—with 96 detainees currently occupying a unit with a total capacity of 110. Once the additional ICE detainees currently in booking or other units are moved into Unit 9, unless Respondents release or (ill-advisedly) transfer a number of detainees currently in their custody, that unit will be at or above its (non-pandemic) capacity. The fact that ICE currently has several detainees in the jail's booking area—an open area with benches surrounded by several group (and, reportedly, individual) cells, and that also serves as the point of intake for all of the hundreds of county detainees coming into the jail on a weekly or daily basis—fundamentally undermines any of Respondents' subsequent efforts at isolation, "quarantine," or "cohorting," which are themselves insufficient and even counterproductive measures to prevent the spread of COVID-19 within the facility. *See* ECF No. 26-3 (Declaration of Dr. Homer Venters). Finally, the fact that ICE has reportedly only released three detainees of a total population of over 110 in the over eight weeks since a national emergency was declared, and over a month since ICE's April 4 guidance, as well as ICE's reliance on the mandatory detention statute, 8 U.S.C. § 1226(c),[3] *see* ECF No. 30 ¶ 9, to essentially wash its hand of its responsibility to make individualized custody decisions for certain at-risk individuals, show that Respondents—in marked contrast to other correctional authorities in Alabama and across the country—are unwilling to take seriously the grave risk to Petitioners and other at-risk detainees.

3. Ordering Petitioners' Release from Detention Under Appropriate Conditions—Including ICE's Highly Effective Alternatives to Detention Program—Will Sufficiently Protect the Government's Interests While Safeguarding Petitioners' Basic Health and Safety

[3] Respondents, and this Court, have the ability to release individuals subject to §1226(c). *See Cabral v. Decker*, 331 F. Supp. 3d 255, 259 (S.D.N.Y. 2018) (collecting cases); *see also* C.F.R. § 212.5(b)(1) and (5) (authorizing DHS to parole noncitizens "who have serious medical conditions in which continued detention would not be appropriate" or whose detention is otherwise "not in the public interest").

While Petitioners believe that release from custody is justified and appropriate, the core of what Petitioners seek is release from *detention*, which can be accomplished without an outright release from *custody*, via ICE's alternative to detention programs. Indeed, this Court has a narrow and effective way to address *both* Petitioners' interests in remaining alive and healthy *and* Respondents' legitimate interests of public safety and the prevention of absconding: Respondents' robust alternative to detention programs. Studies have confirmed that these programs are remarkably effective at ensuring that individuals do not abscond, *see* ECF No. 26-6 ¶¶ 6, 17-18, U.S. Gov't Accountability Office, GAO-15-26, *Alternatives to Detention: Improved Data Collection and Analyses Needed to Better Assess Program Effectiveness*, 30 (Nov. 2014), https://www.gao.gov/assets/670/666911.pdf, and the Court is undoubtedly familiar with similar alternative to detention programs in the criminal context (including check-ins and ankle monitors), which are routinely used to meet the same government objectives.

Notably, these facts are uncontroverted; Respondents have never given the Court any reason to doubt the effectiveness of their alternative to detention programs. Because ICE already uses its alternative to detention programs regularly when it releases people, ordering ICE to release Petitioners on conditions that ICE itself sets would not interject this Court into ICE's day-to-day operations or cause serious or lasting disruptions to them. Petitioners do not challenge these legitimate objectives. Rather, Petitioners' continued detention in ECDC during this extraordinary and potentially lethal threat presented by the novel coronavirus cannot be constitutionally justified, particularly when ICE itself has minimally intrusive alternatives to detention at its disposal to ensure Petitioners' safety and satisfy its own objectives.

Dated: May 13, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on today's date, I electronically filed the foregoing document and accompanying exhibits with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent to all counsel of record by operation of the Court's electronic filing system.

Dated: May 13, 2020

/s/ Jessica Myers Vosburgh
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