

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION**

ACHE, *et al.*,

Petitioner-Plaintiffs,

v.

WITTE, *et al.*,

Respondent-Defendants.

Civil Action No.: 6:20-cv-01320

Judge Robert R. Summerhays

Magistrate Judge Patrick J. Hanna

ORAL ARGUMENT REQUESTED

**PINE PRAIRIE PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF THEIR
MOTION FOR LIMITED EXPEDITED DISCOVERY**

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INTRODUCTION

The threat of COVID-19 is showing no signs of abating; it already made one alarming resurgence throughout Louisiana, and state officials predict another dangerous spike to coincide with the fall flu season, which is now beginning.¹ Thirteen petitioners -- nine detained at the LaSalle Ice Processing Center (“LIPC” or “Jena”) in Jena, Louisiana (“Jena Petitioners”) and four detained at the Pine Prairie ICE Processing Center (“PPIPC” or “Pine Prairie”) in Pine Prairie, Louisiana (“Pine Prairie Petitioners”) have filed this suit, seeking urgent relief from this Court arising from the serious risk of infection, illness and possible death from COVID-19. These facilities have already shown themselves to be unable or unwilling to protect medically vulnerable persons from infection and harm.

The circumstances at Pine Prairie ICE Processing Center (“Pine Prairie” or “PPIPC”) are dire. Indeed, as of October 7, 2020, at least 65 people detained at Pine Prairie have tested positive for the novel coronavirus, although ICE reports that there currently are no cases at the facility.² However, reports from detained persons at Pine Prairie tell a different story. Alleging widespread lack of compliance with and enforcement of basic coronavirus safety measures, including measures recommended by the CDC and required by U.S. Immigration and Customs Enforcement’s (“ICE”) own Pandemic Response Requirements (“PRR”), Petitioners raise serious questions as to the validity and reliability of ICE’s claim that there are no COVID-19 cases at Pine Prairie. Seeking full information about the nature of the risks and remedial measures the Respondents are taking to protect them from infection and illness, the Pine Prairie Petitioners here

¹ Sam Karlin, *What we know about coronavirus in Louisiana: A few trends have emerged as schools open*, The Advocate (Oct. 3, 2020), https://www.theadvocate.com/baton_rouge/news/coronavirus/article_6a74664a-04ed-11eb-b81b-070cb4d53f12.html; *The Flu Season*, CDC, <https://www.cdc.gov/flu/about/season/flu-season.htm>.

² *ICE Guidance on COVID-19, ICE Detainee Statistics*, ICE (updated Oct. 9, 2020), <https://www.ice.gov/coronavirus>.

are seeking expedited discovery in the form of a site inspection of PPIP by a correctional health expert. By separate motion, the Jena Petitioners are seeking immediate release from detention because of a growing and dangerous outbreak at Jena, where eight people are now infected.

Petitioners' lives depend on whether Respondents are able to protect persons within the facilities from infection with COVID-19. To enable the parties and the Court to obtain the most current, relevant information about conditions at Pine Prairie, the Pine Prairie Petitioners seek an on-site inspection of the facility by their correctional healthcare expert as soon as possible. Based on the results of the inspection, the Pine Prairie Petitioners will evaluate whether to file a motion for a preliminary injunction seeking appropriate relief from this Court, possibly including immediate release.

This limited and plainly relevant discovery request—which is specifically permitted under Federal Rule of Civil Procedure 34(a)(2)—is appropriately expedited in light of the Pine Prairie Petitioners' allegations that Pine Prairie is not complying with CDC guidelines regarding such fundamental things as social distancing, masks, soap, and cleaning; is not testing or isolating people in accordance with CDC guidelines; continues to admit and transfer detained people into the facility against CDC guidance; has policies disincentivizing the reporting of COVID-19 symptoms; and is otherwise failing to implement adequate measures. These allegations not only seriously undermine ICE's claim that there are no COVID-19 cases at Pine Prairie, they also heighten the urgent risk to the Pine Prairie Petitioners' health and very lives. The requested inspection is critical to get to the bottom of what is actually happening in Pine Prairie.

FACTUAL BACKGROUND

Pine Prairie is a privately-run immigration detention center. ICE reports a total of 65 confirmed COVID-19 cases at Pine Prairie, but no currently active or suspected cases there.³ The Pine Prairie Petitioners are all detained by ICE at Pine Prairie. Petitioners are all people who are medically vulnerable to severe complications and death should they contract COVID-19.⁴ They filed a petition for writ of habeas corpus seeking release in light of the threat to their lives posed by COVID-19 in Pine Prairie.

The Pine Prairie Petitioners attest to Pine Prairie's inability to keep them safe.⁵ Individuals detained at Pine Prairie are housed in close quarters, sharing common spaces, tables, telephones, toilets, sinks, and showers. They are forced to sleep just a few feet away from each other in

³ *Id.*

⁴ Decl. Dr. Anjali Niyoyi, MD, MPH ¶ 36; attached at Exhibit A. Dr. Niyoyi is an Associate Professor of Internal Medicine at Tulane University Medical School. She supervises residents on the inpatient wards at University Medical Center in New Orleans where she regularly treats COVID-19 cases. She is also the founder and director of the Formerly Incarcerated Transitions Clinic in New Orleans, which provides care for incarcerated populations.

⁵ All of the following run contrary to CDC guidelines and ICE's PRR policies for basic protection during the COVID-19 pandemic. *See Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, CDC, updated July 22, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>; and *COVID-19 Pandemic Response Requirements*, ICE, Sept. 4, 2020, <https://www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities.pdf>.

immovable bunk beds.⁶ Even where it might be possible, social distancing is not enforced.⁷ Large groups are forced to sit together in shared eating areas which are not disinfected after each sitting.⁸

Respondents do not enforce mask wearing throughout the facility, by either staff or detained people, and they limit access to the flimsy, single-use paper masks they provide to detained people, sometimes distributing them only weekly.⁹ Indeed, many staff only intermittently wear masks and gloves, and often do so improperly.¹⁰

Detained individuals are required to clean their own sleeping areas, bathrooms, and common areas, with whatever supplies they can obtain from guards, which only sometimes includes disinfectant.¹¹ Alcohol-based hand sanitizers are unavailable, and Respondents limit

⁶ Decl. Marius Agba Ache (9/30/2020, “Ache Suppl. Decl.”) ¶¶ 2, 4, attached as Exhibit B; Decl. Albert Njenda Njomani (9/30/2020, “Njomani Suppl. Decl.”) ¶ 2, attached as Exhibit C; Decl. Bertrand Atenekara Awanayah ¶ 3, attached as Exhibit E; Decl. Alien Castillo Gonzalez ¶ 3, attached as Exhibit F; Decl. Benson Gatu Njuguna (9/16/2020, “Njuguna Suppl. Decl.”) ¶ 6, attached as Exhibit R; Decl. Benson Gatu Njuguna ¶ 9, attached as Exhibit S; Decl. Marius Agba Ache ¶ 3, attached as Exhibit G; Decl. Odlanier Reyes Mieres ¶ 3, attached as Exhibit H; Decl. Yannick Alpha Ndelela ¶ 3, attached as Exhibit I; Decl. Albert Njenda Njomani ¶ 3, attached as Exhibit J; Decl. Michael Atembeshu ¶ 3, attached as Exhibit K; Decl. Paulinus Doh Ndungmbowo ¶ 3, attached as Exhibit L; Decl. Hyson Sama Moma ¶ 3, attached as Exhibit M; Decl. Priso Dalle Durchien ¶ 3, attached as Exhibit N.

⁷ Awanayah Decl. ¶ 3; Castillo Gonzalez Decl. ¶¶ 5, 7; Njuguna Decl. ¶ 13; Ache Decl. ¶ 5; Decl. Stephen Oman ¶¶ 4-5, attached as Exhibit O; Reyes Mieres Decl. ¶ 4; Ndelela Decl. ¶¶ 5-8; Decl. Fogap Ivo Atemafac ¶ 3, attached as Exhibit P; Njomani Decl. ¶ 10; Atembeshu Decl. ¶ 6; Ndungmbowo Decl. ¶ 3; Moma Decl. ¶¶ 5-6; Durchien Decl. ¶¶ 4-5.

⁸ Ache Suppl. Decl. ¶ 5; Njomani Suppl. Decl. ¶ 6; Awanayah Decl. ¶¶ 3-4; Castillo Gonzalez Decl. ¶ 4; Njuguna Decl. ¶ 10; Ache Decl. ¶ 4; Reyes Mieres Decl. ¶¶ 3-4; Oman Decl. ¶ 4; Ndelela Decl. ¶ 4; Atemafac Decl. ¶ 4; Njomani Decl. ¶¶ 6-7; Atembeshu Decl. ¶ 4; Ndungmbowo Decl. ¶ 5; Moma Decl. ¶ 4; Durchien Decl. ¶ 4.

⁹ Awanayah Decl. ¶¶ 7-8; Castillo Gonzalez Decl. ¶ 7; Njuguna Suppl. Decl. ¶ 4; Njuguna Decl. ¶ 13; Ache Decl. ¶¶ 5-6; Oman Decl. ¶ 7; Ndelela Decl. ¶¶ 9-10; Atemafac Decl. ¶ 6; Njomani Decl. ¶ 12; Atembeshu Decl. ¶ 7; Ndungmbowo Decl. ¶ 7; Moma Decl. ¶ 7; Durchien Decl. ¶ 7.

¹⁰ Njomani Suppl. Decl. ¶ 5; Awanayah Decl. ¶ 8; Castillo Gonzalez Decl. ¶ 6; Njuguna Decl. ¶ 11; Ache Decl. ¶ 7; Reyes Mieres Decl. ¶ 5; Oman Decl. ¶ 7; Ndelela Decl. ¶ 11; Atemafac Decl. ¶ 7; Njomani Decl. ¶ 11; Atembeshu Decl. ¶ 8; Ndungmbowo Decl. ¶¶ 6, 8; Moma Decl. ¶ 9; Durchien Decl. ¶ 7.

¹¹ Ache Suppl. Decl. ¶ 4; Njomani Suppl. Decl. ¶ 3; Awanayah Decl. ¶ 10; Castillo Gonzalez Decl. ¶ 8; Njuguna Decl. ¶ 14; Ache Decl. ¶ 8; Oman Decl. ¶ 6; Ndelela Decl. ¶ 14; Atemafac Decl. ¶ 9; Njomani Decl. ¶ 14; Atembeshu Decl. ¶ 11; Ndungmbowo Decl. ¶ 12; Moma Decl. ¶ 11; Durchien Decl. ¶ 8.

access to basic hygiene products such as soap, often distributing it only weekly as well. Respondents frequently run out of soap, requiring the Pine Prairie Petitioners to buy it (if they can afford to).¹²

Finally, Respondents do not provide education regarding when and how to wear masks; when and how to clean and disinfect shared and high-contact surfaces; or the frequency or method of handwashing required to prevent the spread of the virus.¹³

Importantly, the Pine Prairie Petitioners' allegations raise serious questions as to the validity of the data reported by ICE. First, Respondents are not testing in accordance with CDC guidelines, casting doubt on ICE's claim that there are no COVID-19 cases at Pine Prairie – if ICE is not testing properly, of course there will not be any cases to report. For example, the CDC recommends testing of close contacts of positive cases.¹⁴ However, some detained individuals were refused tests after identifying themselves to Pine Prairie officials as having come in close contact with a known case.¹⁵

Second, CDC and ICE quarantine and isolation rules are not strictly enforced either. Some people who have tested positive have been returned to work, including in the kitchen, or simply returned to their dorms, after as little as roughly a week in isolation – including some still

¹² Ache Suppl. Decl. ¶ 3; Njomani Suppl. Decl. ¶ 4; Awanayah Decl. ¶ 9; Castillo Gonzalez Decl. ¶ 8; Njuguna Suppl. Decl. ¶ 3; Njuguna Decl. ¶ 14; Ache Decl. ¶ 8; Reyes Mieres Decl. ¶ 6; Oman Decl. ¶ 6; Ndelela Decl. ¶ 12; Atemafac Decl. ¶ 8; Njomani Decl. ¶ 14; Atembeshu Decl. ¶ 10; Ndungmbowo Decl. ¶ 11; Moma Decl. ¶ 10; Durchien Decl. ¶ 8.

¹³ Awanayah Decl. ¶ 3; Ache Decl. ¶ 9; Atemafac Decl. ¶ 9; Njomani Decl. ¶ 10; Atembeshu Decl. ¶¶ 7, 11; Moma Decl. ¶ 8.

¹⁴ *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, *supra* note 5.

¹⁵ Njuguna Decl. ¶¶ 5-7; Njuguna Suppl. Decl. ¶ 11; Njomani Decl. ¶ 9; Ndungmbowo Decl. ¶ 10; Durchien Decl. ¶ 10.

complaining of symptoms.¹⁶ Others have been taken to medical visits and legal calls only shortly after testing positive, and were made to wait near people who had not tested positive.¹⁷

Third, Respondents regularly shuffle detained persons in and out of Pine Prairie.¹⁸ In so doing, Respondents are introducing new risks and exposing individuals within Pine Prairie to infection. This flies in the face of CDC guidelines, which recommend “suspend[ing] all transfers of incarcerated/detained persons to and from other jurisdictions and facilities. . . unless necessary for medical evaluation, medical isolation/quarantine, health care, extenuating security concerns, release, or to prevent overcrowding.”¹⁹

Fourth, policies at Pine Prairie discourage the reporting of symptoms. Although the CDC recommends explaining to detained people “the importance of reporting symptoms to staff” and “the purpose of quarantine and medical isolation,”²⁰ Pine Prairie appears to offer no such education.²¹ Moreover, Pine Prairie appears to be using solitary confinement dorms to house either COVID-19-positive or suspected cases (or both) against the explicit guidance of the CDC.²² Using

¹⁶ Current CDC guidelines call for isolation for least 10 days, until 24 hours have passed since any fever was resolved, and until other symptoms have improved, as well as the restriction of movement of those in isolation, and thorough and frequent cleaning and disinfecting of all areas where people with confirmed or suspected COVID-19 have spent time. *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, *supra* note 5; Ndelela Decl. ¶ 7; Durchien Decl. ¶¶ 9-10.

¹⁷ Ndelela Decl. ¶ 7; Ndungmbowo Decl. ¶ 6; Durchien Decl. ¶ 5.

¹⁸ Decl. Stephen Oman (9/25/2020, “Oman Suppl. Decl.”) ¶ 1, attached as Exhibit D; Castillo Gonzalez Decl. ¶ 9; Njuguna Suppl. Decl. ¶¶ 7-9; Njuguna Decl. ¶ 12; Njomani Decl. ¶ 16; Atembeshu Decl. ¶ 9; Durchien Decl. ¶ 6.

¹⁹ *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, *supra* note 5.

²⁰ *Id.*

²¹ Ache Decl. ¶ 10; Reyes Mieres Decl. ¶ 7; Oman Decl. ¶ 8; Njomani Decl. ¶ 10; Durchien Decl. ¶ 10.

²² “Ensure that medical isolation for COVID-19 is distinct from punitive solitary confinement of incarcerated/detained individuals, both in name and in practice.” *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, *supra* note 5; Castillo Gonzalez Decl. ¶ 10; Ndungmbowo Decl. ¶ 9.

such punitive tools to isolate COVID-19 cases, particularly when combined with a lack of education regarding reporting, effectively serves to disincentivize symptom reporting.²³

Even more disturbing, at least one detained person reports that staff recently took bottles of hand sanitizer, put them out in common areas and photographed them there, before taking them back into the administrative offices.²⁴ Detained persons were also taken out of their rooms to another room and were photographed ‘sleeping’ in beds with an empty bed between them, as opposed to the cramped quarters they are forced to sleep and live in.²⁵ Other detained people report that guards tried to get them to sign forms saying that they are given and use N-95 masks, but they refused to sign them because they have never been given N-95 masks.²⁶

Such allegations cast significant doubt on the reliability and credibility of ICE’s report that there are no active COVID-19 cases at Pine Prairie. The Pine Prairie Petitioners describe a facility which is both unable and unwilling to adhere to even the most basic CDC guidelines regarding such fundamental things as social distancing, masks, soap, and cleaning. Against this backdrop and particularly relevant for this motion, the Pine Prairie Petitioners allege that Respondents are not complying with CDC guidelines regarding testing, quarantine and isolation, and transfers, and that their policies discourage reporting symptoms. Taken together, these failures mean that Respondents are leaving untested people who should be tested, that they cannot ensure that those who have been ‘isolated’ are not actually continuing to spread the virus, that new infection risks are constantly being introduced into the facility, and that they do not have an accurate picture of even who is symptomatic (not to mention asymptomatic). On top of it all, detained people report

²³ Castillo Gonzalez Decl. ¶ 10.

²⁴ Njuguna Suppl. Decl. ¶ 10.

²⁵ *Id.*

²⁶ Atemafac Decl. ¶¶ 6; Njomeni Decl. ¶ 13.

very troubling instances of deceit on the part of Pine Prairie officials going directly to the heart of the Pine Prairie Petitioners' allegations. ICE's reporting of the state of coronavirus infection at Pine Prairie cannot be trusted.

SUMMARY OF DISCOVERY REQUEST AT ISSUE

The Pine Prairie Petitioners' expedited discovery request is limited to an in-person inspection of Pine Prairie pursuant to Federal Rule of Civil Procedure 34(a), so the Pine Prairie Petitioners can evaluate what's actually happening at the facility and assess violations of their constitutional and statutory rights.²⁷

Specifically, the Pine Prairie Petitioners move this Court to order that their correctional healthcare expert—guided by no more than three individuals assigned by Respondents and accompanied by a member of Petitioners' counsel and the appropriate interpreters, provided by the Petitioners—be permitted to inspect all areas of the Pine Prairie facility without limitation, including: communal areas and cells in all housing units; dining and kitchen areas; the library; the chapel; the medical unit's treatment rooms, common areas, and medical isolation cells; recreational areas; laundry facilities; shower/bathroom facilities; the commissary; the ingress/egress staff and visitor screening areas; and areas where cleaning supplies and personal protective equipment are maintained. Petitioners ask that their correctional healthcare expert be permitted to speak with staff and persons detained in ICE custody in confidence and outside the hearing of the accompanying individuals assigned by Respondents during the course of the inspection, and that the correctional healthcare expert be given access to all relevant records

²⁷ Before filing this motion, Petitioners asked Respondents to consent to an inspection by their correctional healthcare expert, but Respondents would not consent to such an inspection.

necessary to conduct the inspection, and that the expert be permitted to bring cameras, cell phones, writing implements, and any other equipment required to conduct the inspection into the facility.

Petitioners ask this Court to order that the inspection take place on a date and at a time agreed to by the parties within fourteen days of the Court's ruling, and that the inspection last for up to eight hours from when the participants have passed through security.²⁸ Finally, Petitioners request that their correctional healthcare expert and all other participants be provided with or permitted to wear their own full personal protective equipment to safely enable the inspection.

ARGUMENT

Petitioners are entitled to the limited expedited discovery they seek under Federal Rules of Civil Procedure 26(d)(1) and 34(a). A correctional healthcare expert inspection under Rule 34(a) is plainly relevant to the central issues in this case and is warranted. Additionally, good cause exists for allowing this discovery on an expedited basis. This Court should grant the Pine Prairie Petitioners' motion.

I. Petitioners are Entitled to Discovery.

Petitioners in this case seek relief both habeas relief as well as relief under the Rehabilitation Act. Under the Federal Rules of Civil Procedure, Petitioners are plainly entitled to discovery as to their Rehabilitation Act claim, at the very least, just as any civil litigant would be. Fed. R. Civ. P. 26(b) (civil litigants generally "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case.").

²⁸ Should the inspection be paused or delayed once underway for reasons outside of Petitioners' control—e.g., if part or all of the facility is placed on temporary lockdown or movement around the facility is otherwise restricted—Petitioners respectfully request additional time to complete the inspection, to compensate for any such interruptions or delays.

Further, it is well established that habeas petitioners may seek discovery to aid in proving their claims. Courts are expressly empowered to “issu[e] orders appropriate to assist them in conducting factual inquiries,” including discovery, pursuant to the All Writs Act, 28 U.S.C. § 1651. *Harris v. Nelson*, 394 U.S. 286, 299 (1969). Such powers “extend to habeas corpus proceedings.” *Id.* at 300. Specifically, in habeas proceedings, when a petitioner makes a prime facie case for relief, a court “may use or authorize the use of suitable discovery procedures . . . reasonably fashioned to elicit facts necessary to help the court to ‘dispose of the matter as law and justice require.’” *Harris*, 394 U.S. at 290 (quoting 28 U.S.C. § 2243).

The Rules Governing Section 2254 Cases (“Habeas Corpus Rules”) are applicable to Petitioners’ habeas petition, although the Petition is brought under Section 2241.²⁹ *See* Habeas Corpus Rule 1(b) (“The district court may apply any or all of these rules to a habeas corpus petition not” brought under 28 U.S.C. § 2254). Under Habeas Corpus Rule 6, “A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery.” Habeas Corpus Rule 6(a). In the Fifth Circuit, “[g]ood cause may be found when a petition for habeas corpus relief ‘establishes a prima facie claim for relief.’” *Murphy v. Johnson*, 205 F.3d 809, 814 (5th Cir. 2000) (quoting *Harris*, 394 U.S. at 290). “Additionally, a petitioner’s factual allegations must be specific, as opposed to merely speculative or conclusory.” *Id.* (citing *West v. Johnson*, 92 F.3d 1385, 1399-1400 (5th Cir. 1996)).

The Pine Prairie Petitioners unquestionably have good cause for their discovery request. Both in this motion and in their Petition for A Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief (ECF No. 1), the Pine Prairie Petitioners have made specific

²⁹ Petitioners are also entitled to seek discovery under the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 81(4) (Federal Rules of Civil Procedure apply to habeas corpus proceedings to the extent the proceedings are not governed by other rules).

factual allegations concerning their confinement, which, if true, make out a prima facie case for relief. However, ICE publicly claims that there are no COVID-19 cases at Pine Prairie. The Pine Prairie Petitioners' claims, though, if true, significantly undermine ICE's position. If the discovery request is granted, it will aid all the parties and the Court in resolving this central factual issue, and will therefore prevent undue complication and delay in this litigation. Further, as discussed in more detail below, the Pine Prairie Petitioners' requested discovery is relevant, narrowly-tailored, and the least burdensome way to resolve this issue. Here, it is certainly the case that "specific allegations before the court show reason to believe that the petitioner[s] may, if the facts are fully developed, be able to demonstrate that [they are] . . . entitled to relief." *Bracy v. Gramley*, 520 U.S. 899, 908-09 (1997) (quoting *Harris*, 394 U.S. at 300). It is thus the "duty" of this Court "to provide the necessary facilities and procedures for an adequate inquiry." *Id.* at 909 (quoting *Harris*, 394 U.S. at 300).

II. An Inspection By a Correctional Healthcare Expert is Warranted.

A party "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case[.]" Fed. R. Civ. P. 26(b)(1). This includes "entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it." Fed. R. Civ. P. 34(a)(2). Further, "[c]ourts have traditionally construed 'relevance' broadly: information is relevant if it 'encompass[es] any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.'" *Coughlin v. Lee*, 946 F.2d 1152, 1159 (5th Cir. 1991) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978)). A correctional healthcare expert inspection pursuant to Rule 34(a) is plainly relevant to Petitioners' claims; the everyday conditions

within Pine Prairie during the pandemic are central to the Pine Prairie Petitioners' Fifth Amendment and Rehabilitation Act arguments.

District courts around the country hearing similar lawsuits by detained and incarcerated individuals fearful of COVID-19 have recognized that expert inspections are a particularly meaningful and necessary step in these circumstances. *See, e.g.,* Order, *Alvarez, et al. v. LaRose, et al.*, No. 3:20-cv-00782-DMS-AHG (S.D. Cal. Sept. 18, 2020) (ordering inspection of jail by petitioners' expert); Order, *Wilson v. Ponce*, No. 20-cv-04451-MWF-MRW, at 12 (C.D. Cal. July 14, 2020) (ordering a site visit by a neutral expert, with a report to follow); Inspection Order, *Fernandez-Rodriguez et al. v. Licon-Vitale*, No. 2-cv-3315 (S.D.N.Y. May 7, 2020) (ordering inspection by petitioners' expert); Inspection Order, *Cameron v. Bouchard*, No. 20-cv-10949 (E.D. Mich. Apr. 22, 2020) (ordering expert to inspect jail and provide report to court); Inspection Order, *Chunn et al. v. Edge*, No. 20-cv-1590 (E.D.N.Y. Apr. 15, 2020) (granting petitioners' request for expert inspection of detention facility); Consent Order Appointing Amicus, *Banks et al. v. Booth et al.*, No. 20-cv-849 (D.D.C. Ap. 9, 2020) (appointing two amici curiae to inspect D.C. Department of Corrections jail facilities and provide information regarding the facilities' measures in response to COVID-19). Here too, particularly given the troubling nature of the Pine Prairie Petitioners' allegations and the urgent risk they face, the requested inspection is warranted.

III. Good Cause Exists to Grant Petitioners' Limited Expedited Discovery Request.

Federal Rule of Civil Procedure 26(d) allows discovery prior to a Rule 26(f) conference "when authorized . . . by stipulation, or by court order." Fed. R. Civ. P. 26(d)(1). Although the Fifth Circuit has not adopted a standard for determining whether to grant expedited discovery, courts in the Fifth Circuit generally use a "good cause" standard." *See, e.g., St. Louis Group, Inc. v. Metals and Additives Corp., Inc. et al.*, 275 F.R.D. 236, 239 (S.D. Tex. 2011) (discussing "good

cause” standard and “preliminary-injunction style analysis,” and choosing “good cause” standard because majority of courts use it); *Amos v. Taylor*, No. 4:20-CV-7-DMB-JMV, 2020 WL 618824, at *2 (N.D. Miss. Feb. 10, 2020); *ELargo Holdings, LLC v. Doe-68.105.146.38*, 318 F.R.D. 58, 61-62 (M.D. La. 2016) (collecting cases); *Schexnayder v. MD Nigeria, L.L.C.*, No. CIV.A. 15-1195, 2015 WL 3875092, at *2 (W.D. La. June 23, 2015); *Wilson v. Samson Contour Energy E&P, LLC*, No. 14-0109, 2014 WL 2949457, at * 2 (W.D. La. June 30, 2014) (collecting cases); *BKGTH Prods., LLC v. Does 1–20*, No. 13-5310, 2013 WL 5507297, at *6 (E.D. La. Sept. 30, 2013); *Paul v. Aviva Life and Annuity Co.*, No. 3-09-CV-1490-B, 2009 WL 3815949 (N.D. Tex. Nov. 12, 2009); *Turner Indus. Grp., LLC v. Int’l. Union of Operating Eng’rs., Local 450*, No. H-13-0456, 2013 WL 2147515, at *3 (S.D. Tex. May 10, 2013); *Rodale, Inc. v. U.S. Preventive Med., Inc.*, No. 4:08-CV-120, 2008 WL 4682043 (E.D. Tex. Oct. 21, 2008).

Good cause exists “where the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party.” *St. Louis Group, Inc.*, 275 F.R.D. at 239 (quoting *Energy Prod. Corp. v. Northfield Ins. Co.*, 2010 WL 3184232 at *3 (E.D. La. Aug. 6, 2010)). In evaluating good cause, a court takes into account “all of the surrounding circumstances” and the entirety of the existing record and determines whether the request is “**reasonable**.” *Id.* (quoting *Ayyash v. Bank Al-Madina*, 233 F.R.D. 325, 327 (S.D.N.Y. 2005)) (emphasis in original). “The good cause analysis considers factors such as the ‘breadth of the discovery requests, the purpose for requesting expedited discovery, the burden on [the responding party] to comply with the requests and how far in advance of the typical discovery process the request was made.’” *BKGTH Productions, LLC*, 2013 WL 5507297, at *4. “Moreover, the subject matter related to the requests for expedited discovery should be narrowly tailored in scope.” *Id.* “The burden of showing good cause is on the party seeking the expedited discovery.” *St. Louis Group, Inc.*, 275 F.R.D. at 240.

“[E]xpedited discovery is not the norm,” *id.* (citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. O’Connor*, 194 F.R.D. 618, 623 (N.D. Ill. 2000)), and courts only allow it in certain circumstances. Courts have allowed expedited discovery so that a party may determine whether to seek a preliminary injunction. *See, e.g., Tracfone Wireless, Inc. v. King Trading, Inc.*, No. 3-08-CV-0398-B, 2008 WL 918243, at *1 (N.D. Tex. Mar. 13, 2008); *Doe v. Johnson*, No. CV 15-250 TUC DCB, 2015 WL 5086291, at *1 (D. Ariz. Aug. 14, 2015); *Legacy Measurement Sols., Inc. v. Chaput*, No. 15-CV-18-SWS, 2015 WL 11090694, at *3 (D. Wyo. Apr. 16, 2015); *NobelBiz, Inc. v. Wesson*, No. 14-cv-0832 W(JLB), 2014 WL 1588715, at *1 (S.D. Cal. Apr. 18, 2014); *Apple Inc. v. Samsung Electronics Co., Ltd.*, No. 11-cv-01846-LHK, 2011 WL 1938154, at *2 (N.D. Cal. May 18, 2011); *United States v. Erie Cty., NY*, No. 09-CV-849S, 2010 WL 11578742, at *4 (W.D.N.Y. Mar. 6, 2010); *see also Bona Fide Conglomerate, Inc. v. SourceAmerica*, No. 14-cv-0751-GPC (DHB), 2014 WL 12515242, at *2 (S.D. Cal. Nov. 7, 2014). Courts have also allowed expedited discovery “when there is some showing of irreparable harm that can be addressed by limited, expedited discovery.” *St. Louis Group, Inc.*, 275 F.R.D. at 239; *see BKGTH Prods., LLC*, 2013 WL 5507297 at *5–6 (citing cases). These factors weigh in favor of granting the Pine Prairie Petitioners’ request for expedited discovery.

A. Petitioners Seek a Correctional Healthcare Expert Inspection to Assess Whether to Seek a Preliminary Injunction.

Expedited discovery is appropriate in cases “such as those involving requests for a preliminary injunction.” Fed. R. Civ. P. 23(d) advisory committee’s note to 1993 amendment. Even where a preliminary injunction is not actively pending, however, courts have found expedited discovery appropriate where it will allow a plaintiff to “decide whether to seek preliminary injunctive relief.” *Tracfone Wireless, Inc. v. King Trading, Inc.*, No. 3-08-CV-0398-B, 2008 WL 918243, at *1 (N.D. Tex. Mar. 13, 2008).

In *Tracfone Wireless*, the court granted plaintiff expedited discovery “to determine the nature and extent of defendants’ alleged counterfeiting activities so it [could] decide whether to seek preliminary injunctive relief.” 2008 WL 918243, at *1. In *Bona Fide Conglomerate*, the court found that the defendant showed good cause for expedited discovery, reasoning that the discovery sought—copies of recordings that the plaintiff company’s CEO had made of conversations with the defendant’s general counsel—was “relevant to whether an injunction should be sought.” 2014 WL 12515242, at *2. In *NobelBiz*, the court found good cause to order expedited discovery where the plaintiff sought it “to develop the evidentiary record for an imminent request for a preliminary injunction or temporary restraining order.” 2014 WL 1588715, at *1. The court reasoned that expedited discovery would allow it “to address any request for preliminary injunctive relief at the outset of the case, thereby providing a measure of clarity to the parties early in the proceeding and facilitating effective case management.” *Id.* at *2. Further, the plaintiff’s expedited discovery request was “directly relevant to its . . . claim.” *Id.*

The Pine Prairie Petitioners similarly seek expedited discovery to decide whether to seek preliminary injunctive relief regarding their detention in Pine Prairie. An expert inspection of Pine Prairie will permit the Pine Prairie Petitioners to evaluate whether emergency relief is necessary and to appropriately tailor requested remedies, or, if the opinions of Petitioners’ correctional healthcare expert warrant, to forgo seeking a preliminary injunction altogether. Quite simply, a better understanding of the current circumstances inside the facility is not only directly relevant to, but also critical to, an assessment of the relief necessary to safeguard the Pine Prairie Petitioners’ lives, health, and constitutional and statutory rights.

Gaining accurate information is particularly difficult for Petitioners in this case because Respondents have a near-monopoly over the critical evidence—namely living conditions, COVID-

19 mitigation efforts, and available medical care within Pine Prairie. An inspection of the facility by Petitioners' correctional healthcare expert is an appropriate means of reducing that imbalance and giving Petitioners' timely access to information that will help them weigh and, if necessary, formulate a request for preliminary relief.

Here, authorizing limited expedited discovery in the form of a Rule 34(a) inspection by Petitioners' correctional healthcare expert will likewise help ensure that this case is grounded in a fair and accurate understanding of the facts. Petitioners' correctional healthcare expert will provide analysis that is more useful to the parties and the Court if the expert is able to observe the facility firsthand. Ultimately, a correctional healthcare expert inspection will enable the Pine Prairie Petitioners to evaluate the need for an appropriately tailored motion for preliminary injunction and will facilitate effective case management by further streamlining subsequent proceedings.

B. The Expedited Discovery Request Is Narrow in Scope.

The expedited discovery the Pine Prairie Petitioners seek is narrowly tailored to obtaining the information necessary to assess the need for a preliminary injunction seeking relief under the Fifth Amendment and/or the Rehabilitation Act. Further, because a correctional healthcare expert will be able to collect and digest significant information based on an in-person visit, this discovery should narrow the need for extensive back-and-forth between the parties that would otherwise be necessary to develop the factual record. In other words, the least burdensome way for Respondents to establish that Pine Prairie is safe is to allow an inspection.

C. The Burden on Respondents Is Minimal.

Respondents will not be substantially burdened or suffer prejudice from an order granting the Pine Prairie Petitioners' request because of the limited nature of the request and the fact that Respondents will need to do little to prepare for an inspection. Petitioner's request for an inspection

is materially less burdensome than conducting a document search, responding to interrogatories, or sitting for depositions, all of which courts have found appropriate in similar circumstances. *See, e.g., Tracfone Wireless, Inc.*, 2008 WL 918243, at *1 (allowing several depositions and requests for production in expedited discovery). Indeed, because the Pine Prairie Petitioners seek to observe how the facility is operating on a daily basis during the pandemic, Respondents' preparations should be particularly limited to allow Petitioners' correctional healthcare expert to gain an accurate understanding of the facts on the ground as they normally exist.

D. The Pine Prairie Petitioners' Request to Commence Limited Discovery at this Stage Is Reasonable Given the Urgent Risk of Irreparable Harm.

Given the speed with which COVID-19 infection may progress, Petitioners' medical vulnerability to severe illness and even death if they were to contract COVID-19, the troubling reports regarding critical facts on the ground in the facility, and the imbalance of access to the facility, a site inspection at this stage of this litigation is reasonable and appropriate. Courts have granted expedited discovery even when the court determined that it came "fairly far in advance of the normal course of discovery" because "this factor, alone, does not make the requested depositions unreasonable." *Light Salt Investments, LP v. Fisher*, No. 13-cv-1158-MMA (DHB), 2013 WL 3205918, at *2 (S.D. Cal. June 24, 2013). Further, Respondents will face minimal burden, even at this early stage, and no prejudice if the Court grants the Pine Prairie Petitioners' request, while Petitioners, meanwhile, face urgent and dire consequences if counsel is unable to access detailed evidence regarding any ongoing constitutional and statutory violations at Pine Prairie.

CONCLUSION

For the foregoing reasons, this Court should grant the Petitioners' Motion for Limited Expedited Discovery.

Respectfully submitted,

/s/ Matthew S. Vogel

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CERTIFICATE OF CONFERRAL

Pursuant to Federal Rule of Civil Procedure 37(a) and Local Rule 37.1, I hereby certify that, on October 9, 2020, I conferred with AUSA E. Henry Byrd, IV telephonically regarding the discovery request at issue in this motion. I requested that Respondents agree to an inspection of Pine Prairie by Petitioners' correctional healthcare expert. Although the parties conferred in good faith, we were unable to reach an agreement, as Respondents would not consent to such an inspection.

Dated: October 9, 2020

/s/ Matthew S. Vogel
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CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2020, I electronically filed the foregoing document and accompanying motion, exhibits, and proposed order with the Clerk of the Court using the CM/ECF system. I further certify that I spoke with AUSA E. Henry Byrd, IV on the telephone and advised him of this filing on October 9, 2020, prior to its filing. In addition, I will email copies of these documents to AUSAs Jerry Edwards and E. Henry Byrd, IV at the following email address at the U.S. Attorney's Office for the Western District of Louisiana:

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Dated: October 9, 2020

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