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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION**

10 ENRIQUE FRANCISCO
11 HERNANDEZ,

12 Petitioner,

13 v.

14 CHAD T. WOLF, Acting Secretary of
Homeland Security; MATTHEW T.
15 ALBENCE, Deputy Director and
Senior Official Performing Duties of
16 the Director of U.S. Immigration and
Customs Enforcement; DAVID A.
17 MARIN, Field Office Director; JAMES
JANECKA, Warden, Adelanto ICE
18 Processing Center

Respondents.

No. CV: 5:20-cv-00617-TJH

Hon. Terry J. Hatter, Jr.

**PETITIONER’S REPLY TO
RESPONDENT’S OPPOSITION TO
PETITIONER’S APPLICATION FOR
A TEMPORARY RESTRAINING
ORDER**

[COVID-19 HABEAS PETITION]

1 **I. INTRODUCTION**

2 In its opposition to Mr. Hernandez’ application for a temporary restraining
3 order, the Government’s predicament is manifest. Caught between the bedrock of
4 this Court’s decision against it a few days ago in a nearly identical case—a case the
5 potency of which the Government wholly fails to acknowledge—and the hard,
6 irrefutable facts of the terrifying, universal public health crisis afflicting us all,
7 especially the most vulnerable, like Mr. Hernandez, the Government’s opposition
8 brief deflects, distracts, and, ultimately, sputters.

9 Yet Mr. Hernandez’ reality remains the same. His life is in increasingly
10 serious danger behind bars in Adelanto. Detained for no crime, Mr. Hernandez
11 now languishes, punished, his erstwhile civil detention horrifyingly commuted into
12 something best left to the pages of Foucault. As set forth below, the Constitution
13 cannot and does not countenance his continued detention under these
14 circumstances. Neither should this Court.

15 **II. ARGUMENT**

16 One day after Mr. Hernandez filed the instant habeas petition and motion for
17 a temporary restraining order, this Court ordered the release of an Adelanto
18 detainee petitioner who was similarly, if not nearly identically, situated. *Bravo*
19 *Castillo v. Barr*, 5:20-cv-00605-TJH-AFM, ECF No. 32, at *10 (C.D. Cal. Mar.
20 27, 2020). Mr. Hernandez respectfully suggests that this Court need go no further
21 than its decision in *Bravo Castillo* to conclude that identical relief is warranted
22 here.

23 Tellingly, the Government fails even to cite to this case, let alone attempt to
24 distinguish it. It cannot.

1 Minor biographical differences between Mr. Hernandez and the *Bravo*
2 *Castillo* petitioners should not occlude the relevant facts here. Mr. Hernandez, like
3 those in *Bravo Castillo*, faces continued detention in the petri dish that is Adelanto.
4 In the few short days since this Court issued its order releasing the petitioners in
5 that case, nothing has improved at Adelanto for detainees like Mr. Hernandez.
6 And nothing in the Government’s opposition papers should cause this Court to
7 deviate from its earlier findings, which include that,

8 COVID-19 is highly contagious and has a mortality rate ten times
9 greater than influenza[;] that people infected with the coronavirus can
10 be asymptomatic during the two to fourteen day COVID-19 incubation
11 period[; d]uring that asymptomatic incubation period, infected people
12 are, unknowingly, capable of spreading the coronavirus.

11 *Id.* at 3. Mr. Hernandez trusts that the Court is familiar with its own
12 findings, and thus will not rehearse the rest of them here. These findings, of
13 course, reflect the terrifying reality that is Adelanto, as Mr. Hernandez’ evidence
14 amply demonstrates. *See* ECF No. 1 at ¶¶ 37–63. It simply strains belief that the
15 Government would ask this Court to disregard the realities that it, the Mr.
16 Hernandez, and most of the planet have now accepted. The Court should decline
17 this invitation.

18 **A. The Government Has Not Rebutted Mr. Hernandez’ Strong Likelihood**
19 **of Success on the Merits**

20 Faced with the inescapable reality that is COVID-19, the Government recites
21 a litany of now-familiar arguments that are, in large part, irrelevant to this Court’s
22 exercise of its equitable powers here.

23 Its first red herring is that Mr. Hernandez somehow lacks standing to seek
24 his own release. Here again—and citing no case in which a court has dismissed a
25 habeas on standing grounds—the Government retreats into gaslighting, arguing
26 against the law and facts that Mr. Hernandez’ current (one hopes) uninfected status

1 somehow deprives him of the benefits of a writ whose very premise and august
2 history derives from a captor’s power to inflict harm moving forward.

3 Mr. Hernandez’ Constitutional injury does not turn on whether he is
4 *currently* infected—mere exposure to the potential risk is enough. The Ninth
5 Circuit has recognized this, of course, in well-established authority holding that the
6 Constitution protects detainees from “serious risk of substantial harm,” even if they
7 have not yet suffered ill effects. *Thomas v. Ponder*, 611 F.3d 1144, 1151 n.5 (9th
8 Cir. 2010); *see also Helling v. McKinney*, 509 U.S. 25, 33 (1993) (“A remedy for
9 unsafe conditions need not await a tragic event.”).

10 Next, the Government invokes the custody provisions of its own
11 administrative apparatus, 8 U.S.C. § 1226(a), to suggest, it seems, that custody, as
12 an institution, by an executive agency during removal proceedings somehow
13 forever immunizes particular detention practices from constitutional scrutiny. This
14 of course contradicts separation of powers; centuries of habeas jurisprudence; and
15 simple logic. Indeed, reducing the writ’s protections to a putative statutory
16 scheme—one that does not even purport to inform the conditions of detention—
17 would risk a serious affront to the Suspension Clause that this Court should be
18 loath to entertain.

19 Then, the Government questions Mr. Hernandez’ evidence of criminal
20 institutions releasing inmates early as somehow “lacking in foundation and
21 illogical.”¹ ECF No. 14 at 11 (citing ECF No. 1 at ¶¶ 43–45). Here again, it is
22 hard to understand how the fact that, in case after case, the nation’s penal
23 institutions are making the decision to release inmates due to COVID-19, is not
24

25
26 ¹ By “foundation” we presume that the Government means relevance, as it has not
27 questioned the authenticity of any articles the Petitioner has submitted.

1 germane to the motion pending before the Court. To the contrary, the etiological
2 and penological consensus of those institutions, amply demonstrated in the
3 petition, anchor the relevance that the Government disputes. *See* ECF No. 1 ¶ 45.

4 Finally, the Government’s suggestion that “some inmates have been released
5 from detention for unknown reasons” is incorrect. In all the accounts that Mr.
6 Hernandez cited, the extreme risk from COVID-19 infection is the well-known
7 common denominator behind the releases.

8 **B. Granting a TRO Would Save Mr. Hernandez from the Irreparable
9 Harm of ExposURE to COVID-19 at Adelanto And Public Interest
10 Favors Release**

11 Separate from the ongoing constitutional violations that necessarily
12 constitute an irreparable harm warranting immediate relief, Mr. Hernandez asserts
13 possibly the most quintessential irreparable harm: long lasting health consequences
14 and possibly death. *Bravo Castillo v. Barr*, 5:20-cv-00605-TJH-AFM, at *10
15 (C.D. Cal. Mar. 27, 2020) (citing *Hernandez v. Session*, 872 F.3d 976, 994 (9th
16 Cir. 2017) for authority that ongoing constitutional violation warrants grant of
17 TRO).

18 The Government offer no evidence that describes the *current* conditions at
19 Adelanto. Instead, the Government curiously and without explanation only discuss
20 Adelanto’s COVID-19 status as of March 27. Since then, Adelanto has reportedly
21 put yet another ward, Ward 3, under quarantine after detainees exhibited flu-like
22 symptoms. Bell Dec’l at p. 2 ¶ 4.

23 Nor does the Government offer evidence to undermine the health crisis that
24 Mr. Hernandez’ faces each day he remains at Adelanto, where social distancing
25 and other protective measure are impossible. The Government only proffers the
26 non-medical opinion of Captain Jennifer Moon, who provides no measure of

1 confidence or certainty that Mr. Hernandez will be safe from COVID-19 if he
2 remains at Adelanto. Indeed, Moon’s declaration is wholly silent about what
3 screening, if any, Adelanto employees undergo upon entering the facility, a critical
4 risk factor described in the Petition. *See generally* ECF No. 14-1. Moreover,
5 Moon confirms that Adelanto medical staff consider “at-risk” only those who
6 exhibit symptoms or have had contact with an infected person or region. *Id.* This
7 approach does nothing to mitigate the risk of transmission from asymptomatic
8 persons and is hugely problematic for medically vulnerable detainees, like Mr.
9 Hernandez, who “may have delayed presentation of fever and respiratory
10 symptoms.”² Finally, Moon’s explanation of isolating symptomatic or COVID-
11 19-positive detainees is in fact a form of solitary confinement that medical experts
12 deem “shockingly unsafe” and an “unacceptable and potentially deadly form of
13 quarantine given the expedient progression and severity of disease in those with
14 COVID-19.”³

15 Even with adequate medical treatment, COVID-19 swiftly attacks a patient’s
16 lungs and can kill them within days. If this Court were to await physical injury
17 here, as the Government urges it to do, it would be too late—Mr. Hernandez’
18 likelihood of surviving would be grim at best. Mr. Hernandez therefore warrants
19 immediate release from Adelanto so he does not become another statistical
20

21 _____
22 ² *Interim Clinical Guidance for Management of Patients with Confirmed*
23 *Coronavirus Disease (COVID-19)*, CDC.GOV (last visited Mar. 30, 2020, 6:35pm),
[https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-](https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html)
[patients.html](https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html).

24 ³ “*Why some people can’t avoid mass gathering—detention*,” THEHILL.COM (Mar.
25 29, 2020), [https://thehill.com/opinion/civil-rights/490071-why-some-people-cant-](https://thehill.com/opinion/civil-rights/490071-why-some-people-cant-avoid-mass-gathering-detention)
[avoid-mass-gathering-detention](https://thehill.com/opinion/civil-rights/490071-why-some-people-cant-avoid-mass-gathering-detention).

1 tragedy. As underscored today by the Washington Post’s reporting on COVID-19
2 outbreak overwhelming Louisiana’s federal prison, waiting until the infection
3 arrives at Adelanto is not an option for Mr. Hernandez or the public. ⁴

4 This Court has already explained why the public interest favors release of
5 medically detainees: “An outbreak at Adelanto would, further, endanger all of us –
6 Adelanto detainees, Adelanto employees, residents of San Bernardino County,
7 residents of the State of California, and our nation as a whole.” *Bravo Castillo v.*
8 *Barr*, 5:20-cv-00605-TJH-AFM, at *11.

9 For these reasons, the balance of equities and public interest strongly favor
10 releasing Mr. Hernandez.

11
12 Dated: 3/30/2020

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24 ⁴ “An explosion of coronavirus cases cripples a federal prison in Louisiana,”
25 Washington Post (Mar. 30, 2020). “An explosion of coronavirus cases cripples a
26 federal prison in Louisiana,” WASHINGTON POST (Mar.30, 2020),
https://www.washingtonpost.com/national/an-explosion-of-coronavirus-cases-cripples-a-federal-prison-in-louisiana/2020/03/29/75a465c0-71d5-11ea-85cb-8670579b863d_story.html.