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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

ENRIQUE FRANCISCO HERNANDEZ,

Petitioner,

v.

CHAD T. WOLF, Acting Secretary of Homeland Security, *et al.*,

Respondents.

No. CV 20-00617 TJH (KSx)

FEDERAL RESPONDENTS' OPPOSITION TO PETITIONER'S APPLICATION FOR A TEMPORARY RESTRAINING ORDER

[Declaration of Captain Jennifer Moon, Declaration of Jorge Suarez, and Evidentiary Objections filed concurrently herewith]

Hearing Date: None
Hearing Time: None
Ctrm: First Street Courthouse, 350 W. 1st Street, Courtroom 9B, 9th Floor Los Angeles, CA 90012

Hon. Terry J. Hatter Jr.
United States District Judge

TABLE OF CONTENTS

TABLE OF AUTHORITIES

DESCRIPTION PAGE

FEDERAL CASES

FEDERAL STATUTES

OTHER

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Petitioner Enrique Francisco Hernandez ("Petitioner") was arrested on May 23, 2019 and placed in removal proceedings. He was denied bond on June 12, 2019 after an Immigration Judge ("IJ") found him to be a flight risk. Petitioner has brought an application for a temporary restraining order ("TRO") challenging his detention by U.S. Immigration and Customs Enforcement ("ICE") at the Adelanto Detention Facility ("Adelanto"). ECF No. 2. Petitioner seeks release from ICE custody based on an alleged violation of his due process rights due to the potential risks posed by COVID-19 at Adelanto.

This Court should deny the TRO as Petitioner fails to demonstrate the likelihood of success on the merits. Petitioner lacks standing as he has failed to establish that he would suffer a concrete, non-hypothetical injury absent a TRO. Petitioner's likely injury, that he would contract COVID-19 at Adelanto if not released, is based on mere speculation and does not raise a cognizable injury. Indeed, Petitioner provides no evidence that he faces any greater risk of contracting COVID-19 in Adelanto than he would if released from detention into the Los Angeles, California metropolitan area, where there has been over 2,400 confirmed cases in Los Angeles County alone.[1]

Furthermore, Petitioner fails to meet the irreparable injury element of his TRO. Petitioner fails to demonstrate that the protocols ICE has implemented to protect those in its care and custody from COVID-19 or the conditions inside of Adelanto make his detention an excessive condition in relation to the legitimate objection of immigration detention. Adelanto has had no confirmed cases of COVID-19. In addition, overcrowding is not an issue. Importantly, ICE and the ICE Health Service Corp ("IHSC") have implemented robust procedures and protocols to protect the detainees, as

[1] There were 2,400 confirmed cases of COVID-19 in Los Angeles County as of 12:00 p.m on March 30, 2020. Los Angeles County Public Health website, http://publichealth.lacounty.gov/media/Coronavirus/ (lasted accessed March 30, 2020).

described below. Petitioner ignores these facts, instead emphasizing the state of COVID-19 outside of Adelanto.

Based on the foregoing and for reasons further discussed below, Federal Respondents respectfully request that the Court deny Petitioner's TRO Application.

II. STATEMENT OF FACTS

A. Petitioner's Background

Petitioner is a native and citizen of Mexico. Declaration of Jorge Suarez ("Suarez Decl.") ¶ 3. On or about September 8, 1997, Petitioner was convicted in the Superior Court of California, County of Los Angeles, for the offense of Hit and Run with Property Damage, in violation of California Vehicle Code ("CVC") section 20002(a) and sentenced to 40 days in jail and 36 months-probation. *Id.* ¶ 4(a); Exhibit ("Ex.") A, Criminal History Record.

On May 19, 2014, Petitioner was arrested and charged for Burglary in violation of California Penal Code ("CPC") section 459 in Monrovia, California. Suarez ¶ 4(b). As a result of this arrest, on or about July 17, 2014, he was convicted of Theft in violation of CPC section 484(a) in the Superior Court of California, County of Los Angeles in Pasadena and was sentenced to one day in jail and 36 months-probation. *Id.*

On or about March 28, 2016, Petitioner was convicted of Driving Without a Valid License in violation of CVC section 12500(a) in the Superior Court of California, County of Los Angeles in Alhambra. *Id.* ¶ 4(c).

On or about January 30, 2017, Petitioner was convicted of Possession of Controlled Substance in violation of California Health and Safety Code ("CHSC") section 11377 in the Superior Court of California, County of Los Angeles in Pasadena. His existing probation was extended as a result of this new conviction. *Id.* ¶ 4(d).

On or about July 19, 2017, Petitioner was convicted of Petty Theft in violation of CPC section 490.2(a) in the Superior Court of California, County of Los Angeles in Pasadena and was sentenced to 60 days in jail and 3 years of probation. *Id.* ¶ 4(e).

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On January 25, 2018, Petitioner was convicted of Possession of Controlled Substance in violation of CHSC section 11377 in the Superior Court of California, County of Los Angeles in Pasadena and was sentenced to 30 days in jail and 3 years-probation. *Id.* ¶ 4(f).

On June 3, 2017, Petitioner was charged with Shoplifting in violation of CPC section 459.5. *Id.* ¶ 4(g). As a result of this offense, on or about April 10, 2019, Petitioner was convicted of Trespass in violation of CPC section 602(m) in the Superior Court of California, County of Los Angeles and was sentenced to 4 days jail and 36 months-probation. *Id.*

On or about May 15, 2019, Petitioner was convicted of Possession of Burglary Tools in violation of CPC section 466, Shoplifting in violation of CPC section 459.5 and Driving Without a License in violation of CVC 12500(a) in the Superior Court of California, County of Los Angeles in Glendale and was sentenced to 36 months-probation. *Id.* ¶ 4(h).

On or about May 23, 2019, ICE arrested Petitioner pursuant to his arrest by the Glendale Police Department, for providing False Identification to a Peace Officer, in violation of CPC section 148.9(A), Driving Without a Driver License, in violation of CVC section 12500(A). *Id.* ¶ 5. After he was fingerprinted by Glendale Police Department, it was revealed that he had two outstanding warrants from the Glendale Police Department and one from the Pasadena Police Department. *Id.* As a result of his arrest, ICE served on him a Notice to Appear, charging him as subject to removal pursuant to INA § 212(a)(6)(A)(i) as an "alien present in the United States without being admitted or paroled." *Id.*

On or about June 12, 2019, Petitioner had a bond hearing. *Id.* ¶ 6; Ex. B, June 12, 2019 Order of the Immigration Judge. The IJ denied bond and found Petitioner to be a flight risk due to his multiple failure to appears in Superior Court of California and lack of ties to community. *Id.* The IJ also noted that Petitioner was a mandatory detainee under INA section 236(c). *Id.*

On or about November 1, 2019, the merits hearing for Petitioner's applications for asylum, withholding of removal and protection under Convention against Torture was completed. Suarez ¶ 7. The IJ informed parties that she would issue a written decision. *Id.*

On or about November 27, 2019, the IJ denied Petitioner's applications for asylum, withholding of removal and protection under Convention against Torture. *Id.* ¶ 8. On or about December 20, 2019, Petitioner appealed the IJ's decision to the Board of Immigration Appeals ("BIA"). *Id.*

On or about December 2, 2019, Petitioner had a *Rodriguez* bond. *Id.* ¶ 9. The IJ denied bond as the Court did not have jurisdiction. *Id.* Petitioner reserved appeal and appealed the IJ's decision to BIA on December 20, 2019. *Id.*

On January 2, 2020, the IJ granted Petitioner's motion to re-calendar the custody redetermination hearing due to changed circumstances. *Id.* ¶ 10.

On January 14, 2020, the IJ denied Petitioner's request for a change in custody and found that Petitioner was a flight risk who had a removal order. *Id.* ¶ 4(b); Ex. C, January 14, 2020 Order of the Immigration Judge. The IJ also found that Petitioner had multiple failure to appears in State Courts. *Id.*

On or about February 20, 2020, Petitioner requested briefing extension from the BIA for 21 days for his bond appeal for which the BIA granted extension until March 6, 2020. Suarez ¶ 12. On March 20, 2020, Petitioner filed a motion to calendar custody redetermination hearing due to COVID-19. *Id.* ¶ 13. This motion is still pending. *Id.*

As of today, Petitioner's appeals of the IJ's decisions at the BIA are still pending. *Id.* ¶ 14.

B. Measures at Adelanto in response to COVID-19

Since the initial reports of COVID-19, ICE epidemiologists have been tracking the outbreak, regularly updating infection prevention and control protocols, and issuing guidance to field staff on screening and management of potential exposure among detainees. Declaration of Captain Jennifer Moon ("Moon Decl.") ¶ 5; *see also* ICE

Guidance on COVID-19, https://www.ice.gov/covid19 (last accessed March 30, 2020).

Adelanto has a population within their approved capacities and is not overcrowded. *Id*. ¶ 13. Adelanto is screening all detainee intakes when they enter the facilities for COVID-19. *Id*. at ¶ 19. Adelanto has procedures to continue monitoring the populations' health after intake. *Id*. ¶¶ 8-11. Any detainees that present symptoms compatible with COVID-19 will be placed in isolation, where they will be tested. *Id*. ¶ 9. If testing is positive, they will remain isolated and treated. *Id*. In case of any clinical deterioration, they will be referred to a local hospital. *Id*. Again, there were no confirmed cases of COVID-19 at Adelanto as of March 27, 2020. *Id*. 12.

Adelanto has increased sanitation frequency and provides sanitation supplies. *Id*. ¶ 14. Adelanto has provided education on COVID-19 to staff and detainees regarding the importance of hand washing and hand hygiene, covering coughs with the elbow instead of with hands, and requesting to seek medical care if they feel ill. *Id*. ¶¶ 14, 15. Adelanto provides detainees daily access to sick call. *Id*. ¶ 11. Adelanto has also suspended in-person social visitation and facility tours, and changed attorney visits to a non-contact setting to reduce the risk of contracting COVID-19. *Id*. ¶¶ 16, 17.

As of March 27, 2020, there were no confirmed cases of COVID-19 at Adelanto. *Id*. ¶ 12.

III. STATUTORY AND REGULATORY BACKGROUND

Congress enacted a statutory scheme that provides for the civil detention of aliens during removal proceedings. *See Prieto-Romero v. Clark*, 534 F.3d 1053, 1059 (9th Cir. 2008). Where an alien falls within this statutory scheme affects whether his detention is discretionary or mandatory, as well as the kind of review process available to him. *Id.* at 1057.

The statutory authority of the Attorney General to detain an alien during removal proceedings, prior to a final order of removal, is found in 8 U.S.C. § 1226. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018) ("Section 1226 generally governs the process of arresting and detaining [deportable aliens present in the United States] pending their

removal."). Under 8 U.S.C. § 1226(a), the government may arrest and detain an alien "pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a). *See also Diouf v. Napolitano*, 634 F.3d 1081, 1085 (9th Cir. 2011) ("At all times before the removal period begins and mandatory detention is authorized by § 1231(a)(2), the alien is subject to discretionary detention under § 1226(a)."). The Attorney General[2] has the discretion to either (1) detain the alien without bond or (2) release the alien on bond of at least $1,500 or on conditional parole. 8 U.S.C. § 1226(a). Every alien arrested under this subsection is individually considered for release on bond. *See id.*; 8 C.F.R. § 236.1(c)(8). An ICE officer assesses whether the alien has "demonstrate[d]" that "release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding." 8 C.F.R. § 236.1(c)(8).

After the initial custody determination, the alien may ask an IJ for a redetermination of the custody decision. 8 C.F.R. §§ 236.1(d)(1), 1003.19, 1236.1(d)(1). The Ninth Circuit has recognized a bond hearing before an IJ as an opportunity for an alien to contest his detention "before a neutral decision maker." *Prieto-Romero*, 534 F.3d at 1066, 1068. An IJ's custody decision is reviewable by the BIA. *See* 8 C.F.R. §§ 1003.1(b)(7), 1003.19(f), 1003.38.

IV. LEGAL STANDARD FOR TEMPORARY RESTRAINING ORDERS

The standard for issuing a temporary restraining order is "substantially identical" to the standard for issuing a preliminary injunction. *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). "It frequently is observed that a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (emphasis in original) (internal quotations omitted); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). In

[2] Although immigration detention authority was transferred from the Attorney General to the Department of Homeland Security, *see* 6 U.S.C. § 251(2), immigration statutes have not been amended to reflect this change.

moving for a temporary restraining order or a preliminary injunction plaintiff "must establish that [he is] likely to succeed on the merits, that [he is] likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [his] favor, and that an injunction is in the public interest." *Id.*

The Ninth Circuit has adopted a "sliding scale" test for issuing preliminary injunctions, under which "serious questions going to the merits and a hardship balance that tips *sharply* towards the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met." *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-32 (9th Cir. 2011) (emphasis added). Thus, Plaintiff must show that the injunction or TRO is in the public interest and that there is a likelihood, not merely a possibility of irreparable injury. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009).

The purpose of a TRO is to preserve the status quo before a preliminary injunction hearing may be held. *See Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 438-39 (1974) (noting that TROs "should be restricted to serving their underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer"); *see also Reno Air Racing Ass'n., Inc. v. McCord*, 452 F.3d 1126, 1131 (9th Cir. 2006) (noting that "courts have recognized very few circumstances justifying the issuance of an ex parte TRO"). Moreover, "[w]here a party seeks mandatory preliminary relief that goes well beyond maintaining the status quo *pendente lite*, courts should be extremely cautious about issuing a preliminary injunction." *Martin v. International Olympic Committee*, 740 F.2d 670, 675 (9th Cir. 1984); *see also Committee of Cent. American Refugees v. Immigration & Naturalization Service*, 795 F.2d 1434, 1442 (9th Cir. 1986). For mandatory preliminary relief to be granted Plaintiff "must establish that the law and facts *clearly favor* [his] position." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (emphasis in original).

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V. ARGUMENT

The Court should deny Petitioner's TRO as he has failed to establish standing, a likelihood of success on the merits, and the suffering of irreparable harm. As well, Petitioner has not established that public interest weighs decidedly in his favor. Accordingly, and for reasons further discussed below, Respondents respectfully request that the Court deny Petitioner's request for a TRO.

A. Petitioner fails to establish a likelihood of success on the merits.

1. Petitioner cannot succeed on the merits because he lacks standing.

Petitioner fails to establish that he would suffer a concrete, non-hypothetical injury absent a TRO, and therefore lacks standing to seek emergency prospective relief.

"Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy. The doctrine developed in our case law to ensure that federal courts do not exceed their authority as it has been traditionally understood." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). The "irreducible constitutional minimum of standing" contains three requirements. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). First, a plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" *Id*. Second, the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the Court." *Id*. Third, it must be "likely," as opposed to merely "speculative" that the injury will be "redressed by a favorable decision." *Id*. at 560-61 (internal citations omitted).

Petitioner's alleged injury—that he is more likely to test positive for COVID-19 at Adelanto if he is not released immediately—is entirely speculative and therefore does not raise a cognizable injury. To establish injury in fact, Petitioner must show that he suffered "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560). A "concrete" injury must be "'de facto'; that is, it

must actually exist[,]" that is, it must be "real," and not "abstract." *Id*. at 1548.

Petitioner's alleged harm—that his detention increases his risk of COVID-19 infection—is wholly speculative. Petitioner has not alleged or presented any evidence that COVID-19 has actually spread to Adelanto. Indeed, that there is absolutely no evidence that COVID-19 has spread to Adelanto, or that the safeguards and precautions ICE has put in place to prevent the spread of the virus into the facility are inadequate. There were no confirmed cases of COVID-19 at Adelanto as of March 27, 2020, and Adelanto has testing and isolation protocols in place to identify and isolate any such case should they occur. *See generally* Moon Decl.

Petitioner requests a TRO securing "his immediate release," but fails to present any basis, as opposed to speculation, that he is at an increased risk for contracting the coronavirus at Adelanto. Petitioner engages in a lengthy discussion of the trajectory of the coronavirus epidemic on the national and state level, measures taken by the federal, state and local governments, as well as law enforcement agencies, to curtail the spread of the coronavirus. Yet Petitioner, who does not claim to exhibit any symptoms associated with COVID-19 since his detention, does not offer anything more that would establish that detainees at Adelanto are at an increased risk for contracting the coronavirus and developing COVID-19. Indeed, ICE has taken significant precautions to prevent an outbreak of COVID-19 at Adelanto. *See* Moon Decl. Thus, Petitioner cannot meet his burden of establishing he has a heightened risk of injury or death from COVID-19 if he remains detained.

Petitioner's claims of future injury are hypothetical, and Petitioner is not entitled to immediate release from detention based on a conjectural injury that has not happened and is not impending. An injunction is "unavailable absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged [] – a 'likelihood of substantial and immediate irreparable injury.'" *Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983).

2. Petitioner fails to establish a likelihood of success on the merits because he is lawfully detained pending resolution of his removal proceedings.

Petitioner cannot state a claim for habeas relief based on his detention pending the resolution of his current removal proceedings.

8 U.S.C. § 1226(a) authorizes Petitioner's detention "pending a decision on whether [he is] to be removed from the United States" on the current charge of removability. *Prieto-Romero*, 534 F.3d at 1059. As the Supreme Court has recognized, "detention during deportation proceedings [i]s a constitutionally valid aspect of the deportation process." *Demore v. Kim*, 538 U.S. 510, 523 (2003). "Detention during [removal] proceedings gives immigration officials time to determine an alien's status without running the risk of the alien's either absconding or engaging in criminal activity before a final decision can be made." *Jennings*, 138 S. Ct. at 836.

Petitioner's removal proceedings are ongoing and progressing. *See Soto v. Sessions*, 2018 WL 3619727, at *3 (N.D. Cal. July 30, 2018) (concluding "no specter of indefinite detention" where alien is detained pursuant to 8 U.S.C. § 1226(a) pending a decision on her removal, and alien's removal proceedings are proceeding). Petitioner's current detention comports with due process. *See Prieto-Romero*, 534 F.3d at 1065 (finding no constitutional violation in detention of more than three years under § 1226(a)); *Casas-Castrillon v. DHS*, 535 F.3d 942, 949 (2008) (finding no constitutional violation in detention of nearly seven years under § 1226(a)). The Supreme Court has previously held that, unlike detention after the entry of a final order of removal, pre-removal-order detention, such as Petitioner's, has "a definite termination point": the end of administrative removal proceedings. *See Demore*, 538 U.S. at 529. While Petitioner may prefer to defend himself in the current removal proceedings out of ICE custody, Petitioner cannot establish a claim for habeas relief based on his detention pending the resolution of his current removal proceedings.

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3. Petitioner fails to establish likelihood of success on the merits as his allegations of due process violations must fail.

In the immigration context, the Supreme Court has consistently upheld the constitutionality of detention, citing the Government's legitimate interest in protecting the public and preventing aliens from absconding into the United States and never appearing for their removal proceedings. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018); *Demore*, 538 U.S. at 520-22; *Zadvydas v. Davis*, 533 U.S. 678, 690-91 (2001). Detention pending removal is not an "excessive" means of achieving those interests, and Petitioner has presented no evidence stating the contrary. The Supreme Court for over a century has affirmed detention as a "constitutionally valid aspect of the deportation process." *Demore*, 538 U.S. at 523 (listing cases).

Petitioner claims that even if Respondents have a legitimate, non-punitive interest in continuing to enforce immigration laws, a presumption of punishment arises because Petitioner is subjected to worse conditions than many convicted prisoners. As proof, Petitioner cites to the purported release of convicted prisoners due to potential exposure. Petition for Writ of Habeas Corpus, ECF No. 1 ("Petition") ¶¶ 43-45. Petitioner's argument is lacking in foundation and illogical. First, there is no evidence before this Court as to why the inmates who are the subject of the cited newspaper articles are being released from detention. There is no insight as to the status of their sentences, conditions of their confinement, or any other information. Second, by Petitioner's logic, if some inmates have been released from detention for unknown reasons, then all immigration detainees across the country must be released lest their punishment be considered punitive. This argument is not supported by law or logic, and cannot serve as the basis for Petitioner's TRO claim.

B. Petitioner fails to establish irreparable harm absent a TRO.

In addition to lacking any likelihood of success on the merits, Petitioner fails to establish that he faces irreparable injury absent a TRO.

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The Supreme Court's "frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is likely in the absence of an injunction." *Winter*, 555 U.S. at 22 (emphasis in original). "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id*. Conclusory or speculative allegations are not enough to establish a likelihood of irreparable harm. *Herb Reed Enters., LLC v. Florida Entm't Mgmt., Inc.*, 736 F.3d 1239, 1250 (9th Cir. 2013); *see also Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) ("Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction."); *Am. Passage Media Corp. v. Cass Comm'ns, Inc.*, 750 F.2d 1470, 1473 (9th Cir. 1985) (finding irreparable harm not established by statements that "are conclusory and without sufficient support in facts").

As explained above, Petitioner argues that he faces irreparable harm based only on his fear of contracting COVID-19 due to his detention at Adelanto. This generalized argument is conclusory and speculative and therefore fails to establish irreparable injury. *See Herb Reed Enters.*, 736 F.3d at 1250. Petitioner has not alleged or presented any evidence that COVID-19 has actually spread to Adelanto. There were no confirmed cases of COVID-19 at Adelanto as of March 27, 2020, and Adelanto has testing and isolation protocols in place to identify and isolate any such case should they occur. *See generally* Moon Decl.

The decisions by other district courts considering similar requests demonstrate the fact-specific nature of the analysis. *See Vasif "Vincent" Basank, et al., v. Thomas Decker, et al.*, No. 20 Civ. 2518 (S.D.N.Y. Mar. 26, 2020), ECF No. 11 (ordering release of ten immigration detainees held in a county jail with confirmed cases of COVID-19); *Calderon Jimenez v. Wolf*, No. 18 Civ. 10225 (D. Mass. Mar. 26, 2020), ECF No. 507 (ordering release of a detained immigrant held in a county jail with a confirmed case of COVID-19); *United States of America v. Barry Allen Gabelman*, No. 2:20-CR-19 JCM

(NJK), 2020 WL 1430378, at *1 (D. Nev. Mar. 23, 2020) (denying motion to reconsider: "The court acknowledges that the spread of COVID-19 may be acutely possible in the penological context, but the court cannot release every detainee at risk of catching COVID-19 because the court would be obligated to release every detainee."); *Dawson v. Asher*, No. C20-0409JLR-MAT, 2020 WL 1304557, at *3 (W.D. Wash. Mar. 19, 2020) (denying request for temporary restraining order: "Plaintiffs do not show that 'irreparable injury is likely in the absence of an injunction.' [] The 'possibility' of harm is insufficient to warrant the extraordinary relief of a TRO.")

Indeed, a district court in the Ninth Circuit recently rejected a similar emergency request for release by immigration detainees on the basis of their heightened susceptibility and fact of confinement. *Dawson v. Asher*, 2020 WL 1304557 (W.D. Wash. Mar. 19, 2020). The Court rejected their request, explaining: "There is no evidence of an outbreak at the detention center or that Defendants' precautionary measures are inadequate to contain such an outbreak or properly provide medical care should it occur." *Id*. at *3. That rationale equally applies here, where there is no evidence of any COVID-19 cases at Adelanto or that Adelanto has not taken precautionary measure to screen for COVID-19 and prepare for a positive case.

Because Petitioner's claim of irreparable injury is purely speculative and not supported by the evidence he provides, he fails to make the requisite clear showing of irreparable harm needed to warrant TRO relief. *See Winter*, 555 U.S. at 22; *Am. Passage Media Corp.*, 750 F.2d at 1473.

C. The balance of equities and public interest supports denial of TRO.

It is well-settled that the public interest in enforcement of United States immigration laws is significant. *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-58 (1976); *Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d 1211, 1221 (D.C. Cir. 1981) ("The Supreme Court has recognized that the public interest in enforcement of the immigration laws is significant."). Petitioner seeks release because he believes he is at a heightened risk for contracting COVID-19 at Adelanto, citing his age of 43 years old and

health issues, including hypertension, gout, and heart problems. Petition ¶ 4, 11. Many immigration detainees share these generic characteristics, and not just now but as applicable to other health crises. The disruptive effect of ordering Petitioner released on this slim, hypothetical basis would long survive the COVID-19 pandemic, and the precedent would serve to release many aliens eligible for removal back into the general public.

Moreover, the public interest is best served by allowing the orderly medical processes and protocols implemented by government professionals. *See Youngberg v. Romeo*, 457 U.S. 307, 322-23 (1982) (urging judicial deference and finding presumption of validity regarding decisions of medical professionals concerning conditions of confinement). This type of burden and attendant harm, and its potential impact on ICE operations nationwide, is too great to be permissible at this preliminary stage.

Because Petitioner cannot show that the balance of hardships and public interest tip in his favor, the Court should deny Petitioner's request for a TRO.

D. Petitioner may not challenge the conditions of his confinement through a habeas petition seeking immediate release.

Petitioner's habeas petition seeks to challenge the conditions of his confinement. Specifically, whether his detention exposes him to a higher risk of exposure to COVID-19. Petitioner has not shown that the medical staff at Adelanto are failing to treat medical conditions that are known to them. Nor does Petitioner ask this Court to order any different medical treatment or sanitation practices for detainees at Adelanto. Instead, Petitioner argues that the only valid method of protection is release. *Id.* To do so, Petitioner must demonstrate that the conditions at Adelanto are insufficient to protect him. Accordingly, Petitioner is making a conditions-of-confinement claim.

A petition for habeas relief seeking immediate release is inappropriate in the context of a conditions-of-confinement claim. "[T]he writ of habeas corpus is limited to attacks upon the legality or duration of confinement." *Crawford v. Bell*, 599 F.2d 890, 891 (9th Cir. 1979). "It is a well-settled general principle that a habeas petition is the

appropriate means to challenge the 'actual fact or duration' of one's confinement, whereas a civil rights claim is the proper means to challenge the 'conditions' of one's confinement. *Kamara, v. Farquharson*, 2 F. Supp. 2d 81, 88 (D. Mass. 1998) (citing *Heck v. Humphrey*, 512 U.S. 477, 481 (1994) and *Viens v. Daniels*, 871 F.2d 1328, 1333 (7th Cir.1989)).

In *Crawford*, the Ninth Circuit held that "release from confinement" was not the appropriate remedy to address the petitioner's claims "alleg[ing] that the terms and conditions of [petitioner's] incarceration constitute[d] cruel and unusual punishment" and "violated his due process rights." *Id.* at 891-92. Such a claim must be brought as a civil rights claim, that if proven, would be remedied by "a judicially mandated change in conditions and/or an award of damages." *Crawford*, 599 F.2d at 892. Thus, because Petitioner does not assert any illegality or impermissible duration of confinement, his petition for habeas relief, and the remedy of immediate release, are both inappropriate.

VI. CONCLUSION

For the foregoing reasons, the Federal Respondents respectfully request that the Court deny Petitioner's TRO Application, and ultimately deny his habeas petition.

Dated: March 27, 2020

Respectfully submitted,

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