UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

TATALU HELEN DADA, ET. AL. *Petitioners*	CIVIL ACTION NO. 1:20-CV-00458
VERSUS	JUDGE DRELL
DIANNE WITTE, in her official capacity As Interim New Orleans Field Office Director, U.S. Immigration and Customs Enforcement, ET. AL. *Respondents*	MAGISTRATE JUDGE PEREZ-MONTES

RESPONDENTS' OBJECTIONS
TO REPORT AND RECOMMENDATION

NOW INTO COURT, through undersigned counsel, come Federal Respondents, represented herein by David C. Joseph, the United States Attorney for the Western District of Louisiana, and E. Henry Byrd, IV. Assistant United States Attorney, who, pursuant to Fed. R. Civ. P. 72(b) and Local Rule 74.1(B), hereby object to the Report and Recommendation (the "R&R") (ECF Doc. 17) of Magistrate Judge Joseph H.L. Perez-Montes filed on April 30, 2020, as follows:

GENERAL OBJECTIONS

1.

Respondents object to the R&R's failure to recommend that the Temporary Restraining Order ("TRO") filed by the immigration detainees ("Petitioners") be denied.

2.

As a threshold matter, the Magistrate Judge incorrectly determined that the Court has jurisdiction to adjudicate Petitioners' claims for immediate release from detention under 28 U.S.C. § 2241 when their claims, unrelated to the cause of their detentions, unequivocally challenge the

constitutionality of their confinement because of the conditions it imposes on them – claims not cognizable in the Fifth Circuit under habeas.

3.

The Magistrate Judge erred in determining that Respondents' had waived its' sovereign immunity.

4.

The Magistrate Judge failed to apply the correct legal principles regarding the stringent requirements for injunctive relief, including the requirement that "an injunction should be no more burdensome to the defendant than necessary to provide complete relief." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

5.

The R&R improperly discredits Respondents' legitimate governmental objective in preventing detained aliens from absconding and ensuring that they appear for removal proceedings, as well as protecting the community from the dangers posed by criminal aliens. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018*); Demore v. Kim*, 538 U.S. 510, 523 (2003); *Zadvydas v. Davis*, 533 U.S. 678, 690-91 (2001).

6.

The R&R simply ignores the Respondents' uniform precautionary and treatment measures taken against COVID-19 as evidenced by its' submitted declarations and instead relies upon Petitioners' self-serving individual declarations.

8.

The R & R failed to give proper weight to the fact that several of the Petitioners have criminal histories in ordering their immediate release, especially when six (6) of the Petitioners under mandatory detention are aggravated felons.

9.

The Magistrate Judge erred in holding that Petitioners' detention is punitive despite clear Supreme Court precedent holding that detention pending removal is both not punitive and constitutionally permissible.

10.

The Magistrate Judge erred in ordering the immediate release of Petitioners, including those Petitioners in custody pursuant to mandatory detention and the two "hunger striking" Petitioners whose alleged susceptibilities to COVID-19 are the solely the result of their hunger strikes. The release of these detainees may have the unintended consequence of encouraging further hunger strikes in detention facilities – thereby endangering the lives of additional detainees.

11.

The situation with Petitioners is dynamic. Since the R&R was issued, some Petitioners have been released from detention. Other Petitioners have completed immigration proceedings who are now subject to final orders of removal. The medical condition of at least one Petitioner has declined and is hospitalized due to health conditions related to his hunger strike. These facts are addressed in the supporting memorandum and declaration filed simultaneously herewith.

SPECIFIC OBJECTIONS

12.

Respondents object to the portion of the R&R entitled "Jurisdiction," Subsection "2," entitled "The Court has jurisdiction under § 2241 because Petitioners challenge the 'fact and duration' of their detention not their 'conditions of confinement.'" R & R, pp. 7- 16.

13.

Page 9 of the R&R erroneously concludes that the Petitioners' claims are not "conditions of confinement" claims because their claims about their alleged deficient conditions are only "*indicators of the targeted harm: the confinement itself*" rather than the actual targeted harm. This distinction fails to transform Petitioners' claims about the inadequate conditions of their collective confinement into permissible "fact or duration" claims under 28 U.S.C. § 2241. Where the complaint alleges unconstitutional conditions of confinement as the Complaint here, it is not about the fact of confinement but the fact of *those conditions.*

14.

Further, on pages 10-11, the R & R confuses Fifth Circuit habeas jurisprudence stating,

> But the jurisprudence indicates that two different characteristics actually separate conditions claims from fact claims: (1) the nature of the claim; and (2) the remedy requested. See, e.g., *Preiser v. Rodriguez*, 411 U.S. 475, 500, 93 S. Ct. 1827, 1841, 36 L. Ed. 2d 439 (1973) ("[W]hen a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus.").
>
> As to the first characteristic, by nature, a fact claim challenges the detention itself. Conversely, by nature, a conditions claim attacks circumstances associated with the detention. As to the second characteristic, if a petitioner seeks immediate release or similar relief, the petitioner must do so through a fact claim. But if a petitioner seeks correction of a circumstance or event associated with detention, the petitioner must do so through a conditions claim.

According to the R&R, any detainee could simply seek release to sidestep the Fifth Circuit's express admonition that habeas corpus is not a means to challenge conditions of confinement. This loophole would swallow the rule.

15.

In a footnote on Page 12, the R&R improperly found that Petitioners' claims were related to the "cause of their detention" and in doing so effectively eliminated the clear Fifth Circuit requirement. The finding incorrectly endorses Petitioners' argument that the "causes" justifying their initial detention "have now shifted." This unrecognized shifting-causes argument impermissibly reads out the Fifth Circuit requirement that, "[w]hen a claim is 'unrelated to the cause of detention,' habeas is not the appropriate remedy." *Rafiq v. Myers,* 19-cv-0615, 2019 WL 3367140, *2 (W.D. LA. June 25, 2019) (J. Hicks)[1] (*citing Pierre v. United States*, 525 F.2d 933, 935 (5th Cir. 1976)).

16.

The R&R erred in recommending that the district court grant the preliminary injunction in light of his own admissions that the law surrounding 28 U.S.C. § 2241 and its application across the country is at best unclear: "[t]hese characteristics may be "blurry" in some situations" (p. 11); "[u]nfortunately, consensus still eludes us"; "[a]nd other [courts] have reached either different or contrary results." R&R, pp. 14- 5. These admitted uncertainties alone counsel strongly against granting such extraordinary relief. To obtain an injunction, the movant's likelihood of success must be more than negligible, C*ompact Van Equipment Company, Inc. v. Leggett & Platt, Inc.*, 566 F.2d 952, 954 (5th Cir. 1978), and the preliminary injunction should not be granted unless the question

[1] The citation is to the R&R issued by Magistrate Judge Kay. The R & R was adopted by Chief Judge Hicks after considering Petitioner's objections.

presented by the litigant is free from doubt. *Congress of Racial Equality v. Douglas*, 318 F.2d 95, 97 (5th Cir.), *cert. denied*, 375 U.S. 829 (1963).

17.

Page 22 of the R&R incorrectly uses the "reasonably related to a legitimate governmental objective" standard rather than the "deliberate indifference standard" which applies to civil detainees in this setting.

18.

Page 22 of the R&R wrongly substitutes its own "non-exhaustive list of factors" for determining which of the Petitioners is entitled to immediate release from detention instead of acknowledging and deferring to Respondents' discretionary and developed system and expertise for identifying and releasing "at risk" detainees. This is especially true now that all but one of the Petitioners has been identified as subclass members in *Faour Abdallah Fraihat, et al. v. U.S. Immigration and Customs Enforcement, et al*, 2020 WL 1932570, C.D.Cal. April 20, 2020, (J. Jesus Bernal), docket no. 5:19cv01546, Docs. 132 and 133. The district court in California issued an order requiring ICE to identify subclass members with risk factors. Two subclasses were developed as a result of the order.

19.

Page 27 of the R&R fails to properly take account of the important immigration detention scheme authorized by Congress and affirmed by the Supreme Court, allowing Respondents to exercise discretion on a case-by-case basis in a manner appropriate to the present challenge. The R&R fails to give proper weight to the Respondents' discretion and mandatory detention authority when he remarked that "[o]f course, a detainee's criminal history cannot be decisive, because civil detention cannot masquerade for continued criminal detention for a prior offense."

20.

Page 33 of the R&R wrongly concludes that Suresh Kumar and Pardeep Kumar should be released from Respondents' custody despite the glaring fact that their alleged at-risk health conditions meriting their release were intentionally created as a result of their persistent "hunger striking." Allowing for the immediate release of these aliens approves the ability of these (and future) detainees to create Constitutional violations by hunger-striking in order to secure their immediate release.

21.

Page 47 of the R&R wrongly recommends that the district court grant injunctive relief in the form of the immediate release of all but three (3) of the Petitioners. The Magistrate Judge erred in determining that immediate release is the only remedy available to thirteen (13) of those Petitioners based upon his recommendation that one of the Petitioners, Aracelio Rodriguez ("Rodriguez"), not be released.

On Page 43 of the R&R, the Magistrate Judge determined that Rodriguez was not entitled to injunctive relief because his detention facility, Jackson Parish Correctional Center ("JPCC"), had no suspected or confirmed cases of COVID-19 and only "minor shortcomings of sanitization having been reported." Clearly, based upon the Magistrate Judge's own metric, Respondents are not *incapable* of providing safe conditions. Not only does this observation demonstrate that these claims are in fact as to "conditions of confinement," but the blanket recommendation for immediate release, rather than a less drastic alternative, fails in light of the requirement that a "[t]he district court must narrowly tailor an injunction to remedy the specific action which gives rise to the order." *In re Abbott*, —— F.3d ——, 2020 WL 1911216 (5th Cir. Apr. 20, 2020) (citing *John Doe #1 v. Veneman*, 380 F.3d 807, 818 (5th Cir. 2004).

22.

In support of these Objections, Respondents file herewith a Memorandum in Support of Respondents' Objections to Report and Recommendation. Respondents also adopt by reference their Memorandum in Opposition to Petitioners' Motion for Temporary Restraining Order (Doc. No. 8), and their Declarations in Support (Docs. 8-1 and 8-2).

WHEREFORE, FEDERAL RESPONDENTS PRAY that their Objections to Report and Recommendation issued in this matter on April 30, 2020 be sustained and that the Court reject those portions of the Report and Recommendation to which objections have been made and the recommendation that Petitioners' Motion for a Temporary Restraining Order and Writ of Habeas Corpus be granted.

RESPONDENTS FURTHER PRAY that Petitioners' Motion for a Temporary Restraining Order, Preliminary Injunction and Writ of Habeas Corpus be denied.

RESPONDENTS FURTHER PRAY for all order and decrees necessary in the premises for full, general and equitable relief.

Respectfully submitted,

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UNITED STATES ATTORNEY

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 4, 2020, a copy of the foregoing was electronically filed with the Clerk of 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. I also certify that there are no non-CM/ECF participants to this action.

s/E. Henry Byrd, IV
E. Henry Byrd, IV (#37435)
Assistant United States Attorney

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
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TATALU HELEN DADA, ET. AL. *Petitioners*	CIVIL ACTION NO. 1:20-CV-00458
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DIANNE WITTE, in her official capacity As Interim New Orleans Field Office Director, U.S. Immigration and Customs Enforcement, ET. AL. *Respondents*	MAGISTRATE JUDGE PEREZ-MONTES

RESPONDENTS' MEMORANDUM IN SUPPORT OF
OBJECTIONS TO REPORT AND RECOMMENDATION

Respectfully submitted,

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Federal Respondents respectfully submit this Memorandum in support of their Objections to the April 30, 2020 Report and Recommendation (the "R&R") (ECF Doc. No, 17) issued by Magistrate Judge Joseph H.L. Perez-Montes.

The Magistrate Judge recommended that the Motion for a Temporary Restraining Order (ECF. Doc. 2.) filed by Petitioners be granted in part, in the form of a Preliminary Injunction requiring the immediate release from immigration detention for thirteen (13) of the sixteen (16) named Petitioners. The Respondents object to this recommendation. For the reasons set forth below, Respondents urge the Court to reject those portions of the R&R to which objections have been made and enter an Order denying Petitioners' Motion for a Temporary Restraining Order ("TRO").

In the alternative, Respondents urge the Court to narrowly tailor any injunctive remedy by ordering the inter-facility transfer of all or some of the Petitioners remaining in the custody of Respondents.

I. INTRODUCTION

Petitioners in this Habeas Corpus action are asking this Court to intervene in the operations of six immigration detention facilities in this district by ordering their immediate release from immigration detention due to the risks posed by COVID-19. They ask that this Court circumvent ICE's efforts to ensure that high-risk detainees are protected and receive review and release as appropriate (indeed, three (3) of the sixteen (16) petitioners have been granted release in the normal course of custody reviews and at-risk status determinations); they ask this Court to disregard ICE's mandate and ability to follow CDC guidelines or to provide any constitutionally satisfactory response to this health crisis; importantly, they ask this Court to doubt Respondents' legitimate

interest in the continued detention of immigration detainees that is authorized by Congress and recognized by the Supreme Court.

In support of their extraordinary request for immediate release, Petitioners use anecdotal evidence to describe inadequate conditions of their confinement at the various detention facilities where they are held, in an obvious effort to paint a bleak and desperate picture. In seeking relief, they ask that the Court ignore controlling legal precedent and disregard the broader implications that such a dramatic decision would usher.

Clearly, Respondents recognize that COVID-19 presents a significant, fluid, and unprecedented challenge for everyone, including the parties involved in the habeas actions pending before this Court. Respondents' actions to prevent and protect against the spread of COVID-19 comply with CDC guidance, public health recommendations, and the Constitution. For the reasons stated below, the TRO should be denied, and the habeas petition should be dismissed for lack of jurisdiction and failure to state a claim.

II. SUMMARY OF ARGUMENT

The Magistrate Judge's R&R errs in both the jurisdictional and substantive handling of Petitioners' request for injunctive relief. As to jurisdiction, the Magistrate Judge employed an unworkable and unreliable method of reclassifying Petitioners' "conditions of confinement" claim to a "fact of confinement claim" in an effort to create jurisdiction in this Court. Petitioners' self-imposed limitation on their prayer for relief does not rescue their habeas petition. As to substance, the R&R ignores key facts: (1) the purely speculative nature of whether or not Petitioners actually have a lower risk of contracting COVID-19 outside of their respective detention facilities; (2) the risk that *any* of the Petitioners, especially the criminal detainees under mandatory detention pending removal, will ever again participate in their removal proceedings; (3) the fact that two the

"at risk" detainees identified by the Magistrate Judge for release purposefully starved themselves to obtain their compromised health statuses; (4) the fact that detention itself, a fact that the R&R found to be unconstitutional, is on the contrary a constitutionally valid aspect of the deportation process; and (5) the fact that there are other less-burdensome means available, according to the R&R, to provide complete relief to Petitioners.

Concerns about exposure to COVID-19 is, of course, shared by all. However, an order directing ICE to release Petitioners into the United States—especially considering that half of the Petitioners have criminal histories, *see* Gvmt. Ex. A., ¶¶ 4-18—is clearly contrary to the safety of the American public. Given the vast expanse and indiscriminate nature of Petitioners' requested order, the balance of interests clearly favors Respondents, especially considering some of Petitioners' criminal convictions and status of immigration proceedings. The disruptive effect of such an order would long survive the COVID-19 pandemic, and would serve to release many aliens slated for removal back into the general public. Moreover, the public interest is best served by allowing orderly medical processes and protocols to be 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).

III. FACTUAL AND PROCEDURAL BACKGROUND

Petitioners are thirteen (13) immigration detainees in various stages of immigration proceedings at various detention facilities located in the Western District of Louisiana.[1] On April 14, 2020 they filed the instant Writ of Habeas Corpus and Complaint for Injunctive Relief (ECF

[1] Three of the Petitioners, Eduardo Devora-Espinosa, Karthikeyan Ponnusamy, and Desmond Nkobenei, have been released from ICE custody in the normal course of custody reviews and at-risk status determinations subsequent to the filing of Petitioners' request for relief. *See* ECF Doc. 8-1; *see also* Gvmt. Ex. A, ¶¶ 15, 17 (Declaration of John Hartnett, ICE Deputy Field Office Director, New Orleans Field Office).

Doc. 1) and Motion for a Temporary Restraining Order ("TRO") (ECF Doc. 2) seeking their immediate release from immigration detention based upon their collective concern that they will contract the COVID-19 virus while in ICE detention. On April 20, 2020, the Magistrate Judge issued a briefing Order requiring a Response to Petitioners' TRO two days later, on April 22, 2020. (ECF. Doc. 5). On April 24, an oral argument was held before the Magistrate Judge. (ECF. Doc. 11). On April 30, 2020, the Magistrate Judge issued a Report and Recommendation (the "R&R") granting in part Petitioners' request for injunctive relief. (ECF Doc. 17). In his R&R the Magistrate Judge ordered that any Objections be filed by the following Monday, May 4, 2020. *Id.* Pursuant to that Order, Respondents submit the following memorandum in response to its Objections to the R&R.

IV. STANDARD OF REVIEW

Under well-settled Fifth Circuit precedent, a temporary restraining order is an extraordinary remedy that should not be granted unless the movant establishes the following four elements by a preponderance of the evidence: "(1) there is a substantial likelihood of success on the merits; (2) there is a substantial threat that irreparable injury will result if the injunction is not granted; (3) the threatened injury outweighs the threatened harm to the defendant; and (4) granting the preliminary injunction will not disserve the public interest." *Karaha Bodas Co. v. Perusahaan Pertambangan*, 335 F.3d 357, 363 (5th Cir. 2003). A TRO, like all injunctive relief, is an extraordinary remedy requiring the movant to unequivocally show the need for its issuance. *Sepulvado v. Jindal*, 729 F.3d 413, 417 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 1789 (2014) (internal citations and quotations omitted). The party moving for a TRO must carry the burden as to all four elements before a TRO may be considered. *Cf. Voting for America, Inc. v. Steen*, 732 F.3d 382, 386 (5th Cir. 2013) (internal quotations and citations omitted).

A preliminary injunction is an extraordinary remedy. *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985). It should only be granted if the movant has clearly carried the burden of persuasion on all four prerequisites. *Id.* The decision to grant a preliminary injunction is to be treated as the exception rather than the rule. *Id.* (citing *State of Texas v. Seatrain Inter. S.A.*, 518 F.2d 175, 179 (5th Cir. 1975)). To obtain an injunction, the movant's likelihood of success must be more than negligible, C*ompact Van Equipment Company, Inc. v. Leggett & Platt, Inc.*, 566 F.2d 952, 954 (5th Cir. 1978), and the preliminary injunction should not be granted unless the question presented by the litigant is free from doubt. *Congress of Racial Equality v. Douglas*, 318 F.2d 95, 97 (5th Cir.), *cert. denied*, 375 U.S. 829 (1963).

It is also well-settled that "an injunction should be no more burdensome to the defendant than necessary to provide complete relief." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). In determining whether relief should be granted, a "[t]he district court must narrowly tailor an injunction to remedy the specific action which gives rise to the order." *In re Abbott*, —— F.3d —— –, 2020 WL 1911216 (5th Cir. Apr. 20, 2020) (citing *John Doe #1 v. Veneman*, 380 F.3d 807, 818 (5th Cir. 2004).

V. ARGUMENT

A. Petitioners are unlikely to succeed on the merits of their habeas claims because this Court lacks jurisdiction

The Fifth Circuit, and district courts within this Circuit, have long recognized that habeas corpus actions are the proper vehicle to "challenge the fact or duration of confinement," whereas allegations that challenge an individual's "conditions of confinement" are "properly brought in civil rights actions." *Schipke v. Van Buren*, 239 F. App'x 85–86 (5th Cir. 2007); *Poree v. Collins*, 866 F.3d 235, 243 (5th Cir. 2017) (noting the "instructive principle [is] that challenges to the fact

or duration of confinement are properly brought under habeas, while challenges to the conditions of confinement are properly brought under [civil rights actions]") (citations omitted).

Indeed, Chief Judge Rosenthal in the Southern District of Texas recently illustrated and correctly applied this principle. *Drakos v. Gonzalez*, 4:20-cv-1505 (S.D. TX. May 1, 2020). Drakos, a pretrial detainee, sought an order directing his release because "the possibility of contracting Covid-19 at the Harris County jail renders his confinement there unconstitutional." *Id.* * 1. The court determined that "[w]hile [Drakos] requests injunctive relief ordering his release, his attack is on the conditions of his confinement, not on the fact that he was ordered detained before trial." *Id.* *2. "Therefore, the relief Drakos seeks is not available in habeas corpus" because "[g]enerally, [civil rights actions] are the proper vehicle to attack unconstitutional conditions of confinement . . ." *Id.* (citing *Cook v. TDCJ*, 37 F.3d 166, 168 (5th Cir.1994); *Carson v. Johnson*, 112 F.3d 818, 820 (5th Cir. 1997)). Despite Drakos's clear request for release, the Court nonetheless determined Drakos's claims were not "fact or duration" but actually "conditions" of confinement-based.

Similarly, Petitioners in this case characterize their complaint as an assertion that the *fact* of their confinement, where they cannot be protected from COVID-19, violates their Fifth Amendment rights. They have also made equally clear that they do not seek to improve the conditions of their confinement, nor do they seek monetary damages. **This self-imposed limitation on their prayer for relief, restricting their request to a remedy provided by habeas, does not save their habeas petition.** A prayer for relief that specifies release as a remedy, is not, on its own, the "heart of habeas corpus" because the heart of habeas corpus is a challenge involving both "the fact or duration of [] physical confinement itself, and . . . seeking immediate release or a speedier release. *Preiser v. Rodriguez*, 411 U.S. 475, 498 (1973).

The R&R erred in recommending that this Court has jurisdiction pursuant to 28 U.S.C. 2241 over Petitioners' claims which challenge the adequacy of disease prevention measures within six (6) detention centers. They challenge the constitutionality of their confinement in light of the unique circumstances presented by the COVID-19 pandemic, and they ask for complete release. But their challenge involves the legality of their confinement only insofar as the conditions of their confinement fail to meet constitutional standards. They have not independently challenged the authority by which they are detained, the fact that they are being detained pursuant to the laws of the United States, or the duration of their detention. Instead, they argue that their confinement is unconstitutional because of the conditions it imposes upon them. **This is a conditions of confinement claim.**

Petitioners here reveal that that they are simply asserting that, during their detention, they are being insufficiently protected from COVID-19. Since protections afforded by and during detention are conditions of detention, a complaint about a lack of COVID-19 protections, or insufficient COVID-19 protections is a complaint about the conditions of confinement. Where the complaint is about the fact that conditions are a certain way, it's not about the fact of confinement but the fact of those conditions.

i. <u>The R&R "misses the mark" in attempting to characterize Petitioners' claims about the inadequate conditions of their collective confinement into permissible "fact or duration" claims under 28 U.S.C. § 2241.</u>

The R&R transforms Petitioners' clear "conditions of confinement claims" into "fact or duration" claims. In an attempt to reconcile the inadequacy-of-conditions issue at the heart of Petitioners' complaint, the R&R distinguishes between conditions as the *targeted harm*, clear conditions cases, versus *indicators of the targeted harm: confinement*, clear "fact or duration" cases. R&R p. 9. The R&R's method would create a loophole that permitted *any* challenge to

confinement conditions under habeas so long as the Petitioner simply sought immediate release as her only remedy. Such a method fails to provide any meaningful guidance with respect to classification of "conditions of confinement claims" versus "fact or duration claims." Adopting this method would render pointless the Fifth Circuit's interest in separating conditions claims from fact claims.

The Magistrate Judge adds to the confusion and contravenes Fifth Circuit jurisprudence in holding that:

> But the jurisprudence indicates that two different characteristics actually separate conditions claims from fact claims: (1) the nature of the claim; and (2) the remedy requested. See, e.g., *Preiser v. Rodriguez*, 411 U.S. 475, 500, 93 S. Ct. 1827, 1841, 36 L. Ed. 2d 439 (1973) ("[W]hen a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus.").
>
> As to the first characteristic, by nature, a fact claim challenges the detention itself. Conversely, by nature, a conditions claim attacks circumstances associated with the detention. As to the second characteristic, if a petitioner seeks immediate release or similar relief, the petitioner must do so through a fact claim. But if a petitioner seeks correction of a circumstance or event associated with detention, the petitioner must do so through a conditions claim.

Pages 10-11 of the R&R

According to the Magistrate Judge, any detainee could simply seek release to sidestep the Fifth Circuit's express admonition that habeas corpus is not a means to challenge conditions of confinement. *Poree,* 866 F.3d at 243. This loophole, like the previous one, would swallow the rule.

ii. <u>The R&R improperly eliminated the Fifth Circuit requirement that a habeas petition must be related to the cause of detention.</u>

In Footnote 11 on Page 12 of the R&R improperly held that Petitioners' claims were related to the "cause of their detention" and in doing so effectively eliminated the clear Fifth Circuit requirement. The Magistrate Judge incorrectly states that the Petitioners' argument that the

"causes" justifying their initial detention "have now shifted." This unrecognized shifting-causes argument impermissibly reads out the Fifth Circuit requirement that, "[w]hen a claim is 'unrelated to the cause of detention,' habeas is not the appropriate remedy. *Rafiq v. Myers*, 19-cv-0615, 2019 WL 3367140, * 2 (W.D. LA. June 25, 2019) (*citing Pierre v. United States*, 525 F.2d 933, 935 (5th Cir. 1976)); *see also Rourke v. Thompson*, 11 F.3d 47, 49 (5th Cir. 1993) (A plaintiff "cannot avail himself of the writ of habeas corpus when seeking injunctive relief unrelated to the cause of his detention." 11 F.3d 47, 49 (5th Cir. 1993) (citing *Pierre*, 525 F.2d at 935 (5th Cir. 1976) ("Simply stated, habeas is not available to review questions unrelated to the cause of detention.")).

According to the R&R, the "cause of detention" requirement, a clear limitation on the use of habeas, can shift to another reason totally independent of the underlying detention. Applying this shifting-causes logic to future habeas improperly eliminates the Fifth Circuit restriction. Had the Fifth Circuit intended to overrule its earlier decisions in *Rourke v. Thompson* and *Pierre v. United States* in *Poree*, it would have at least cited them. *See Poree*, 866 F.3d 242–43 (5th Cir. 2017) (reiterating the principle in this Circuit and others that "[t]ypically, habeas is used to challenge the fact or duration of confinement, and [a civil rights action] is used to challenge conditions").

If habeas jurisdiction applied here, the rationale for the writ would be undercut because a foundational requirement – that the complained-of- custody to be unlawful – would be eliminated. *See Preiser*, 411 U.S. at 486 ("in each case [a petitioner's] grievance is that he is being *unlawfully* subjected to physical restraint, and in each case habeas corpus has been accepted as the specific instrument to obtain release from confinement." (emphasis added) (footnote omitted); *see also Munaf v, Geren*, 533 U.S. 674, 693 (2008) ("Habeas is at its core a remedy for *unlawful* executive detention) (emphasis added). Finding habeas proper in these circumstances would reduce the

jurisdictional bar to require only a request for complete release coupled with the fact of custody, instead of illegal custody.

For these reasons, Respondents respectfully urge this Court to reject the R&R's recommendation that Petitioners' claims are cognizable under 28 U.S.C. § 2241.

B. Petitioners are not likely to succeed on the merits of their habeas claim because they do not state a constitutional violation.

As petitioners are civil detainees, their conditions of confinement claims are, like pretrial detainees, governed by the due-process clause. *See Hare v. City of Corinth*, 74 F.3d 633, 638-639 (5th Cir. 1996) (en banc). Due process under the Fifth Amendment "requires that a pretrial detainee not be punished." *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979). Though the state has a recognized interest in detaining defendants for trial, the substantive limits on state action set by the Due Process Clause provide that the state cannot punish a pretrial detainee. *Id.* at 535. In this circuit, the legal standard used to measure the due process rights of pretrial detainees depends on whether the detainee challenges the constitutionality of a condition of his confinement or whether he challenges an episodic act or omission of an individual state official. *Estate of Henson v. Wichita Cty., Tex.*, 795 F.3d 456 (5th Cir. 2015).

The R&R incorrectly chooses to endorse only one of the two tests recognized in this Circuit without a proper discussion of the other. As the Fifth Circuit has previously espoused, "*Bell's* reasonable-relationship test is functionally equivalent to a deliberate indifference inquiry." *Hare*, 74 F.3d at 643.[2]

[2] Recently the Fifth Circuit Fifth Circuit issued a decision involving a diabetic state prisoner's TRO request for changes to the prison's conditions due to the COVID-19 pandemic. *Marlowe v. LeBlanc*, 2020 WL 2043425, at *1-*2 (5th Cir. Apr. 27, 2020). After the district court issued a TRO, the Fifth Circuit granted the Government's stay because, among other things, the district court's deliberate indifference analysis was faulty:

"We do not question that COVID-19 presents a risk of serious harm to those confined in prisons, nor that Plaintiff, as a diabetic, is particularly vulnerable to the virus's effects. But, for purposes of resolving Plaintiff's Eighth Amendment claim, we are not tasked with resolving whether, absent RCC's precautionary measures, the COVID-19

When a Petitioner is challenging her conditions of confinement[3], this court applies the test established by *Bell* and asks whether the condition is "reasonably related to a legitimate governmental objective." *See Hare,* 74 F.3d at 646. "[I]f a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees." *Bell,* 441 U.S. at 539. Where "a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.' "*Id.* The Supreme Court has cautioned courts to "be mindful that these inquiries spring from constitutional requirements and that judicial answers to them must reflect that fact rather than a court's idea of how best to operate a detention facility." *Bell*, 441 U.S. at 539.

Shepherd v. Dallas Cty., 591 F.3d 445 (5th Cir. 2009) involved a pretrial detainee's claim that he was denied due process under the Fifth Amendment due to improper medication and inadequate medical attention. The Fifth Circuit stated that "incidence of disease or infection, standing alone, [does not] imply unconstitutional confinement conditions." *Id*. at 454. In *Shepherd*, the Fifth Circuit addressed the issue when conditions of confinement transgress the limits of the Constitution under the Eighth Amendment as well as the Fifth Amendment's Due Process Clause.

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pandemic presents a substantial risk of serious harm to prisoners like Plaintiff. Rather, the question here is whether the Eighth Amendment requires RCC to do more than it has already done to mitigate the risk of harm.

. . .

[I]ndeed, Defendants have been heightening their efforts to contain the virus. Although the virus has spread within RCC, given the many prevention measures RCC has taken, an increase in infection rate alone is insufficient to prove deliberate indifference."

[3] The reality that Petitioners' claim sounds in "conditions of confinement" rather than "fact or duration" is made even clearer simply by the fact that this Court, in deciding whether their due process rights have been violated, is compelled to engage in an analysis of their "conditions of confinement."

In this realm, the R&R cites to *Shepherd* in support of the conclusion that this conditions of confinement case may be brought under 28 U.S.C. §2241. The R&R, however, fails to recognize that Shepherd was a Section 1983 case in which the pre-trial detainee sought damages. Recently, the Fifth Circuit again relied on Shepherd when issuing a stay of injunctive relief granted by a district court in a case brought by state prisoners under the Eighth Amendment related to prison conditions related to COVID-19. *See Valentine v. Collier*, No. 20-20207, 2020 WL 1934431, at *5 (5th Cir. Apr. 22, 2020). While the *Valentine* case was brought by state prisoners under the Eighth Amendment, the Shepherd case was not, and the Fifth Circuit's continued reliance on Shepherd in light of the pandemic is significant. *Id*. at *3, ("The 'incidence of diseases or infections, standing alone,' does not 'imply unconstitutional confinement conditions since any densely populated residence may be subject to outbreaks.'").

i. Petitioners' detention is not punitive detention under the 5th Amendment.

Petitioners argue that the condition of their detention constituting punishment is their continued detention itself. The argument is based two factors: the Petitioners' own ages and medical conditions, which increase their risk of COVID-19-related complications, and the detention centers' allegedly inadequate prevention measures. They argue that as a result of those two factors, their detention is not reasonably related to a legitimate governmental interest. The argument is not likely to succeed.

"Preventing detained aliens from absconding and ensuring that they appear for removal proceedings is a legitimate governmental objective." *Jennings* v. Rodriguez, 138 U.S. 830, 836 (2018); *Demore v. Kim*, 538 U.S. 510, 523; *Zadvydas v. Davis*, 533 U.S. 678, 690–91 (2001). Detention ceases to bear a reasonable relation to its purpose when the goal is no longer practically attainable. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972); *accord Zadvydas*, 533 U.S. at 690. The

prevention of absconding and ensuring future appearance is attainable by means of continuing to detain Plaintiffs. Indeed, they have identified no instances where the government's goal of detaining a particular detainee became unattainable due to COVID-19 risk factors and continued detention. A reasonable relation therefore exists, and thus "does not, without more, amount to 'punishment.' " *Bell*, 441 U.S. at 539.

The R&R attempts to measure the weight of the government's legitimate objective against the Petitioners' ages, alleged health conditions, and the petitioners' self-reported inadequacies in ICE's prevention efforts by conducting its own inquiry. The R&R's purported weighing of interests uniformly fails to include any of the Respondents' interests. The inquiry fails to consider the legitimate nonpunitive interest Respondents have in (1) detaining Petitioners to ensure they appear at removal proceedings and (2) protecting the community from dangers presented by criminal aliens. *Jennings*, 138 U.S .at 836 (2018); *Demore*, 538 U.S. at 523; *Zadvydas*, 533 U.S. at 690-91. These authorities and objectives are balanced by discretionary authority that permits Respondents to consider whether release is appropriate for certain detainees. *See* 8 C.F.R. § 236.1(c)(8); 8 U.S.C. § 1182(d)(5). Indeed, release is a discretionary act that may depend upon whether the detainee is a danger to the community or a flight risk. *See infra*.

In sum, Petitioners have not carried their burden of establishing a likelihood of success. The government has an established, nonpunitive, and legitimate interest in detaining Plaintiffs to ensure they appear at removal proceedings. The goal of their detention remains attainable and the evidence does not show keeping them in detention is excessive.

C. <u>Petitioners are not likely to suffer irreparable harm if they are not released</u>

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 v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 22 (2008). 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.

In short, there has been no showing that the Petitioners are likely to contract COVID-19 if they are to be released from their respective facilities. For instance, there have been no reports of COVID-19 positive results at the female detention area at LIPC, where all of the female Petitioners (Dada, de Saavedra, Carrera, Dejaso and Del Bosque) are detained. *See* Gvmt. Ex. A, ¶ 20. While Respondents respect that a court "need not await a tragic event" to afford injunctive relief, a court must initially establish that harm is *likely*. Harm in this instance would mean not only contracting the virus, but deteriorating because of it. Considering the amount of detainees currently detained within the six facilities, the number of positive infections, the medical care being provided, and the high rates of recovery, the likelihood of the irreparable injury becomes less imminent. Further, given these detainees circumstances, it is questionable whether they would have appropriate access to medical care should they be released.

In relying on facts and circumstances simply not in the record before this Court, the R&R erred in finding that only with the Petitioners' release from detention, will they be spared from the irreparable harm caused by COVID-19.

D. <u>The public interest is disserved by the immediate release of Petitioners</u>

It is well-settled that the public interest in enforcement of United States immigration laws is significant. *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) ("The government's interest in efficient administration of the immigration laws at the border is also weighty."); *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."); *see also Nken v. Holder*, 556 U.S. 418, 435 (2009) ("There is always a public interest in prompt execution of removal orders: The continued presence of an alien lawfully deemed removable undermines the streamlined removal proceedings IIRIRA established, and permit[s] and prolong[s] a continuing violation of United States law." (internal quotation marks omitted)).

The R&R, while seeming to recognize and value the paramount importance that both the United States Congress and the Supreme Court have placed on the Respondents' objectives, it goes on to undervalue those objectives by questioning the very need for detention in the first place. In adopting wisdom from an outlying opinion in the Southern District of Texas, the R&R states that, "[t]he Court acknowledges and values those [governmental] interests. But their weight [is limited] in several respects:

> [D]etention is not necessary to further Defendants' interest in preventing [detainees] from absconding. ….

R&R p. 26 (*citing Vazquez Barrera v. Wolf*, No. 4:20-CV-1241, 2020 WL 1904497, at *7 (S.D. Tex. Apr. 17, 2020).

The R&R discusses the legitimacy of Respondents' conditional supervision program and all but suggests that Respondents should just outright release detainees regardless of their flight-risk or whether they are subject to mandatory detention based upon their criminal convictions. *Id.*

In relying on these generalized assumptions about detention in general, the R&R ignores the disruptive effect of such an order that would long survive the COVID-19 pandemic, and would serve to release many aliens slated for removal back into the general public. The public interest is best served by allowing orderly medical processes and protocols to be implemented by government

professionals. *See Youngberg*, 457 U.S. at 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. Respondents urge this Court to "be mindful that these inquiries spring from constitutional requirements and that judicial answers to them must reflect that fact rather than a court's idea of how best to operate a detention facility." *Bell*, 441 U.S. at 539.

E. Ordering the Immediate Release of Petitioners is not narrowly tailored to remedy the specific action which gives rise to the R&R's Recommendation

The R&R's blanket recommendation for immediate release, rather than a less drastic alternative, fails in light of the requirement that a "[t]he district court must narrowly tailor an injunction to remedy the specific action which gives rise to the order." *In re Abbott*, 2020 WL 1911216 (citing *John Doe #1 v. Veneman*, 380 F.3d 807, 818 (5th Cir. 2004).

The R&R recommends that the district court grant injunctive relief in the form of the immediate release of all but three (3) of the Petitioners. The Magistrate Judge erred in determining that immediate release is the only remedy available to thirteen (13) of those Petitioners based upon his recommendation that one of the Petitioners, Aracelio Rodriguez ("Rodriguez"), *not* be released. R&R pp. 43-44.

The Magistrate Judge determined that Rodriguez was not entitled to injunctive relief because his detention facility, Jackson Parish Correctional Center ("JPCC"), had no suspected or confirmed cases of COVID-19 and only "minor shortcomings of sanitization having been reported." Clearly, based upon the Magistrate Judge's own metric –in addition to tacitly endorsing that these are in fact "conditions of confinement claims" – the Magistrate Judge acknowledges that Respondents are not *incapable* of providing safe conditions. Currently, no COVID-19 cases have

been reported at JPCC. *See* (ECF Doc. 8-2). ICE has determined that a transfer of the remaining Petitioners to this facility or other facilities with no reported COVID-19 cases is possible and it is considering that option pursuant to its discretionary authority. *Id*. In fact, as of April 22, 2020, JPCC has the capacity to house 1000 detainees and currently houses 502 detainees. *Id.* Considering this safe and reasonable alternative to the extraordinary injunctive relief proposed, the R&R's recommendation for total and nearly unbridled release falls short. Because the R&R determined that prevention is not *impossible* as Petitioners allege, the Respondents' are *capable* of providing a satisfactory response to the COVID-19 pandemic.

F. Suresh and Pardeep Kumar should not be released from Respondents' custody because, among other reasons, they intentionally created their alleged medical vulnerabilities

The R&R wrongly concludes that Suresh Kumar and Pardeep Kumar should be released from Respondents' custody despite the glaring fact that their alleged at-risk health conditions meriting their release were intentionally created as a result of their persistent "hunger striking." Allowing for the immediate release of these aliens approves the ability of these (and future) detainees to create constitutional violations by hunger-striking in order to secure their immediate release. It also has the potential of endangering the health and safety of other detainees who might follow a similar course.

G. Petitioners' Current Immigration and Detention Status and Medical Conditions and *Fraihat* Case

As the R & R provides, numerous cases addressing the same issues facing this Court are being filed throughout the nation. Additionally, Petitioners' immigration status, detention status and medical conditions change daily. *See* Gvmt. Ex. A.

On April 20, 2020, the U.S. District Court for the Central District of California issued an Order granting a group of ICE detainees in similar litigation injunctive relief requiring ICE to,

inter alia: (1) "identify and track all ICE detainees with Risk Factors" "within ten days"; (2) "make timely custody determinations for detainees with Risk Factors"; and (3) required ICE to "extend to detainees with Risk Factors regardless of whether they have submitted requests for bond or parole, have petitioned for habeas relief, have requested other relief, or have had such requests denied"; and (4) "defin[e] the minimum acceptable detention conditions for detainees with the Risk Factors, regardless of the statutory authority for their detention, to reduce their risk of COVID-19 infection pending individualized determinations or the end of the pandemic[.]" *Faour Abdallah Fraihat, et al. v. U.S. Immigration and Customs Enforcement, et al*, 2020 WL 1932570, C.D.Cal. April 20, 2020, (J. Jesus Bernal), docket no. 5:19cv01546, Doc. 132, p. 38.

> The district court then certified the following two subclasses of "at risk" detainees:
>
> > Subclass 1:
> > All people who are detained in ICE custody who have one or more of the Risk Factors placing them at heightened risk of severe illness and death upon contracting the COVID-19 virus. The Risk Factors are defined as being over the age of 55; being pregnant; or having chronic health conditions, including: cardiovascular disease (congestive heart failure, history of myocardial infarction, history of cardiac surgery); high blood pressure; chronic respiratory disease (asthma, chronic obstructive pulmonary disease including chronic bronchitis or emphysema, or other pulmonary diseases); diabetes; cancer; liver disease; kidney disease; autoimmune diseases (psoriasis, rheumatoid arthritis, systemic lupus erythematosus); severe psychiatric illness; history of transplantation; and HIV/AIDS.
>
> > Subclass 2:
> > All people who are detained in ICE custody whose disabilities place them at heightened risk of severe illness and death upon contacting [sic] the COVID-19 virus. Covered disabilities include: cardiovascular disease (congestive heart failure, history of myocardial infarction, history of cardiac surgery); high blood pressure; chronic respiratory disease (asthmas, chronic obstructive pulmonary disease including chronic bronchitis or emphysema, or other pulmonary diseases); diabetes; cancer; liver disease; kidney disease; autoimmune diseases (psoriasis, rheumatoid arthritis, systemic lupus erythematosus); severe psychiatric illness; history of transplantation; and HIV/AIDS.

Id., C.D.Cal. docket no. 19cv1546, Doc. 133, pp. 1-2 (April 20, 2020).

In compliance with the district court's order, ICE began evaluating the "at risk" detainees including all of the detained Petitioners in this proceeding. ICE identified all but one Petitioner here (Gebremichael) as a member of one of the two subclasses regardless of whether they are subject to mandatory detention. Two Petitioners, Ponnsamy and Nkobenei, have been released as a result of this review. *See* Gvmt. Ex. A, ¶¶ 15, 17. ICE continues its review in compliance with the district court's order.

The following is the current immigration status and other pertinent information regarding Petitioners here:

Tatalu Helen Dada is a 40-year old Nigerian citizen. She was convicted of conspiracy to defraud to obtain immigration status, false statements in connection with immigration documents and mail fraud in violation of 18 USC §§ 371, 1546(a), 1341 in this Court. See *United States v. Dada*, 3:18cr0086. On December 19, 2019, she was denied release on bond by an immigration judge, because she is subject to mandatory detention under 8 U.S.C. § 1226(c) based on her conviction for a crime of moral turpitude for which a sentence of 1 year or more may be imposed (8 U.S.C. 1227(a)(2)(A)(i). ICE has determined that Dada is a Fraihat subclass 2 member. Her administrative immigration proceeding is pending a decision from the immigration judge (IJ) on her application for relief from removal. Thus, she is not subject to a final order of removal. Dada is considered a flight risk because of her criminal history and that she has no pending hearings with the immigration court. Dada is detained in LIPC.

Griselda Del Bosque is a 57-year old Mexican citizen. She is an aggravated felon subject to mandatory detention under 8 U.S.C. § 1226(c) due to her controlled substances conviction for which a sentenced of 235-months was imposed by the U.S. District Court for the Northern District of Texas. See 8 U.S.C. §1227(a)(2)(A)(iii) and (B). ICE has determined that Del Bosque is a

Fraihat subclass 1 and 2 member. She has an administrative hearing scheduled before an IJ on May 4, 2020 and thus, is not subject to a final order of removal. ICE considers Del Bosque a flight risk and danger to the community due to her criminal conviction. Del Bosque is detained in LIPC.

Suresh Kumar is a 37-year old citizen of India. He is one of two petitioners who have been on a hunger strike. He was found inadmissible under 8 USC § 1182(a)(7(A)(i)(I) (no valid entry docs) and ordered removed. S. Kumar appealed to Board of Immigration Appeals (BIA), which appeal is pending. He is detained under 8 U.S.C. § 1226(a). The effects of S. Kumar's hunger strike render him a member of Fraihat subclass 1 and 2. ICE considers him a flight risk, because he was ordered removed by an IJ and has no pending hearings with the immigration court. S. Kumar is detained in LIPC.

Pardeep Kumar is a 28-year old citizen of India. He is the other petitioner who has been on a hunger strike. He was found inadmissible under 8 USC § 1182(a)(7(A)(i)(I) (no valid entry docs). The BIA dismissed his appeal on April 24, 2020. He is now subject to a final order of removal. He is detained under 8 U.S.C. § 1231(a)(1) as he is within the removal period. The effects of P. Kumar's hunger strike render him a member of Fraihat subclass 1 and 2. ICE considers him a flight risk because he has a final order of removal. He is detained in LIPC but scheduled for transfer by air ambulance on May 5, 2020 to Larkin Hospital near the Krome Detention Center in Florida due to serious medical issues related to his long-term hunger strike that do not appear to be related to COVID19. Kumar's medical condition currently precludes his release as he should remain in custody receiving medical care.

Nadira Sampath-Grant is a 53-year old citizen of Trinidad and Tobago. She is an aggravated felon due to her conviction for conspiracy to dispense and distribute oxycodone in the U.S. District Court for the Southern District of Florida. On Jan 3, 2020, a final order of removal

was issued against her. On February 5, 2020, ERO New Orleans was notified that the Consulate was ready to issue a travel document. ICE has determined that Sampath-Grant is a member of Fraihat subclass 1 and 2. ICE considers her a flight risk because she has a final order of removal and ICE has been notified that a travel document is forthcoming. She is detained in LIPC. Even assuming the Court adopts other portions of the R & R, it should not adopt the recommendation to release Sampath-Grant, because her removal is likely in the foreseeable future. Upon removal, she will necessarily be released from detention and from the conditions of which she complains.

Matilde Flores de Saavedra is a 78-year old citizen of Mexico. She is an aggravated felon due to her conviction for conspiracy to transport undocumented aliens 8 U.S.C. 1324(a)(1)(A)(v)(I). De Saavedra's conviction subjects her to mandatory detention under 8 U.S.C. § 1226(c) due to aggravated felony conviction as defined by 8 USC 1101(43)(N). On May 4, 2020, de Saavedra has a hearing scheduled before an IJ. Thus, she is not subject to a final order of removal. ICE has determined that de Saavedra is a member of Fraihat subclass 1 and 2. She is detained in LIPC.

Rosabel Carrera is a 59-year old citizen of Mexico. She is an aggravated felon due to her conviction for conspiracy to transport illegal aliens for which she was sentenced to 46-months imprisonment. Her conviction subjects her to mandatory detention under 8 U.S.C. §1226(c). On February 6, 2020, the BIA sustained DHS' appeal and remanded the immigration case to the IJ. She is pending a hearing before the IJ scheduled for May 22, 2020. ICE has determined that Carrera is a member of Fraihat subclass 1 and 2. She is detained in LIPC.

Sonia Lemus Tejada Dejaso is a 53-year old citizen of Guatemala. She is an aggravated felon due to her conviction for harboring an alien for private gain and sentenced to 24 months imprisonment. Her conviction subjects her to mandatory detention under 8 U.S.C. § 1226(c). On

December 18, 2019, she was ordered removed by IJ and she appealed to BIA, which appeal is pending. ICE has determined that Dejaso is a member of Fraihat subclass 1 and 2. ICE considers her a flight risk because she was ordered removed by an IJ and has no pending hearings with the immigration court. She is detained in LIPC.

Hasan Saleh is a 62-year old citizen of Jordan. He is an aggravated felon due to his 1994 conviction for welfare fraud for which he was sentenced to 6-months and a 2018 conspiracy to commit food stamp and wire fraud conviction for which he was sentenced to 24-months. On February 20, 2020, Saleh was ordered removed. He is subject to a final order and is in the removal period under 1231(a)(1). On April 7, 2020, a travel document for Saleh's removal was requested and is pending issuance. ICE ERO does not anticipate encountering difficulty to effect Hasan's removal to Jordan based on past experience. ICE has determined that Saleh is a member of Fraihat subclass 1 and 2. ICE considers him a flight risk because he has a final order of removal. He is detained in LIPC. Even assuming the Court adopts other portions of the R & R, it should not adopt the recommendation to release Saleh, because his removal is likely in the foreseeable future. Upon removal, he will necessarily be released from detention and from the conditions of which he complains.

Abraham Bebremedhim Gebremichael is a 33-year old citizen of Ethiopia. He was charged with being inadmissible under 8 USC 1182(a)(7(A)(i)(I) (no valid entry docs). Gebremichael has a hearing scheduled before an IJ on May 22, 2020, and thus, not subject to a final order of removal. Gebremichael is the only petitioner who ICE has determined is not a member of the Fraihat class. Grebremichael claims to suffer from Bradycardia, a condition that is not expressly covered in the Fraihat Order. Additionally, while CDC Guidelines define at risk people with severe heart disease, the Guidelines do not provide that Bradycardia satisfy such

criteria. Because Gebremichael was evaluated for placement in the Fraihat subclasses and not identified as such member by ICE, the agency's determination should be provided deference. He is detained in the Richwood Correctional Center. Even assuming the Court adopts other portions of the R & R, it should not adopt the recommendation to release Gebremichael, because he has not shown that he is entitled to injunctive relief (or his release).

Rolando Alex Colon is a 47-year old citizen of Honduras. On April 21, 2020, the BIA dismissed Colon's appeal and thus, he is subject to a final order of removal. ERO is in possession of Colon's passport. His removal is imminent and travel has been scheduled. ICE has determined that Saleh is a member of Fraihat subclass 1. ICE considers Colon to be a flight risk because he has a final order of removal. He is detained in the Catahoula Correctional Center. Even assuming the Court adopts other portions of the R & R, it should not adopt the recommendation to release Colon, because his removal is imminent as ICE possesses his valid passport. Upon removal, he will necessarily be released from detention and from the conditions of which he complains.

Kathikeyan Ponnusamy is a 41-year old citizen of India. He was identified as a Fraihat subclass 2 member, and on May 1, 2020, Ponnusamy was released from ICE custody. His claim is moot.

Aracelio Rodriguez is a 61-year old citizen of Cuba. He is detained in the Jackson Parish Correctional Center which has not reported any COVID-19 cases. The R & R does not recommend his release. The BIA dismissed Rodriguez's appeal on March 31, 2020. Rodriguez has been identified as a member of Fraihat subclass 1 and his detention is being reviewed.

Desmond Nkobenei is a 28-year old citizen of Cameroon. His appeal is pending before the BIA. He was identified as a Fraihat subclass 2 member, and on April 30, 2020, Nkobenei was released from ICE custody. His claim is moot.

Sirous Asgari is a 59-year old citizen of Iran. The R & R does not recommend his release. Asgari tested positive for COVID-19 and is being treated in a negative pressure room. ICE has identified Asgari as a Fraihat subclass 1 member. Asgari is subject to a final removal order. He was scheduled to be removed on March 10, 2020 but flight was canceled due to COVID19 restrictions. ICE considers him to be a flight risk because he has a final order of removal, and his removal is likely in the foreseeable future. He is detained in the Winn Correctional Center.

Eduardo Devora-Espinosa is a Cuban citizen who was granted parole and released on April 15, 2020. His claim is moot.

The specific information provided above supports a finding that ICE is reviewing all at risk detainees to determine whether they should be released in light of the pandemic which further supports that the detention at issue is not punitive. The Court should allow that process to go forward.

VI. CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Court reject the Report and Recommendation issued in this matter on April 30, 2020. Should the Court adopt all or part of the recommendations of the R&R providing for the release of any Petitioner, Respondents request that this Court stay the injunctive relief so that the Department of Justice may determine whether to seek review of such decision. Alternatively, Respondents request that this Court stay any relief to the aliens whose removal may be effected within the coming days or weeks, allowing for their removal from the United States and release from detention.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 4, 2020, a copy of the foregoing was electronically filed with the Clerk of 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. I also certify that there are no non-CM/ECF participants to this action.

s/E. Henry Byrd, IV
E. Henry Byrd, IV (#37435)