IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

JUANA GONZALEZ MORALES,
ABDALLAH KHAMIS,
DWIGHT MUNDLE,
and EDINAHI ZACARIAS CABRERA — PETITIONERS

V. — CIVIL ACTION NO: 5:20-cv-181-DCB-MTP

SHAWN GILLIS, in his official capacity
as Warden;
DIANNE WITTE, in her official capacity
As Interim New Orleans Field Officer Director;
TONY PHAM, in his official capacity as
Senior Official Performing the Duties of the
Director of the U.S. Immigration and Customs Enforcement;
and IMMIGRATION AND CUSTOMS ENFORCEMENT — RESPONDENTS

RESPONSE IN OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER

Petitioners Juana Gonzalez Morales, Abdallah Khamis, Dwight Mundle and Edinahi Zacarias Cabrera are immigration detainees being held for removal or potential removal from the United States at Adams County Detention Center (ACDC). Petitioners have filed a petition of writ of habeas corpus seeking release due to COVID-19 and their alleged increased risk of serious illness. Before this Court now is Petitioners' motion for temporary restraining order. They seek an order (1) requiring periodic, widespread testing and (2) prohibiting transfers into and out of ACDC. In the alternative, they request a health inspection of ACDC, to be followed by a plan implementing reforms based on the inspection. Respondents respectfully request that the Court deny the motion for temporary restraining order. Petitioners have not demonstrated (1)

a substantial likelihood of success on the merits, (2) irreparable harm, or (3) that their interests outweighs the public interest in maintaining immigration law and process.

BACKGROUND

Petitioners here are being held by Immigrations and Customs Enforcement (ICE) at ACDC, a contract facility, pending removal proceedings. Petitioners are in varying stages of the removal process. Petitioners challenge their detention because of COVID-19, contending that the ACDC's precautions are insufficient to protect their health and safety. Respondents acknowledge the seriousness of the COVID-19 pandemic. However, ACDC has taken a number of precautions and steps to reduce the incidence of COVID-19 in the facility.

A. Immigration Detention and Inspections

ICE is the agency charged with removing aliens who lack lawful immigration status in the United States. Hagan Decl. ¶ 3, Ex. 1. ICE detains individuals to ensure their presence for immigration proceedings and removal. *Id.*

ICE has contracted ACDC to detain immigration detainees. ACDC provides the facility management, and personnel for 24-hour supervision of detainees. *Id.* ¶ 5.

ACDC operates under the supervision of ICE's Health Service Corps. *Id.* ¶¶ 7, 8. The conditions of detention at ACDC are governed by national detention standards to ensure the safe and secure detention environment for detainees and staff. *Id.* ¶ 6.

Further, ACDC is inspected regularly by appropriate governing authorities and has passed multiple inspections. It passed the Office of Detention Oversight inspection with excellence that was conducted July 6-9, 2020. *Id.* ¶ 11. It also passed a quarterly, corporate inspection September 28-29, 2020. *Id.* ACDC will also under two upcoming inspections in

October and November 2020—the Nakamoto Uniform Corrective Action Plans and Quality of Medical Care and the American Correctional Standards Audit. *Id.*

B. ACDC's COVID-19 Protocols and Precautions

Since the beginning of the COVID-19 pandemic, 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." Hagan Decl. ¶ 19. ICE continually updates its guidance and information on symptoms of COVID-19, dealing with asymptomatic staff who may have come into close contact with confirmed cases of COVID-19, isolation protocols and numerous other measures related to COVID-19 precautions and protocol. *Id.* ¶ 21.

With respect to testing ICE and ACDC follows the guidelines issued by the Centers for Disease Control (CDC). *Id.* ¶ 20. On September 3, 2020, all detainees at ACDC were tested for COVID-19. *Id.* ¶ 23. Since that time, all newly admitted detainees at ACDC, are tested for COVID-19 during medical intake screenings. *Id.* All newly admitted detainees are also cohorted for 14 days outside of the general population. *Id.* ¶¶ 23, 25.

For detainees that are part of the general population, ACDC isolates and tests detainees who present symptoms of COVID-19. *Id.* ¶ 24. If there is known exposure to COVID-19, a detainee is placed in cohorts, housing all exposed detainees together, with restricted movement for a period of fourteen (14) days. *Id.* ¶¶ 24, 25. Detainees are monitored daily for fever and symptoms of respiratory illness. *Id.* ¶ 25.

ACDC has special housing units for quarantining for detainees who are suspected of or test positive for COVID-19 infection. *Id.* ¶ 26. Symptomatic detainees are placed in single-cell isolation units pending test results. *Id.* Suspected or confirmed cases remain in isolation for a

period of 14 days after the detainee is symptom free. *Id.* Also, anyone who has tested positive is isolated until they no longer have fever for 72 hours without fever reducing medication, have improved symptoms and have two negative COVID-19 tests at least 24 hours apart. *Id.* The facility has six (6) medical holding cells and two negative pressure observation rooms. *Id.* ¶ 27. All proper PPE is provided to staff who service detainees in the isolated units, and the staff who enter these areas are limited. *Id.* ¶ 26.

As of 12 p.m. on September 30, 2020, there are eight (8) detainees with confirmed cases of COVID-19, who are being housed in isolation and on medical observation. Hagan Decl. ¶ 28. Although Petitioners cite rising numbers of COVID-19 over the course of the pandemic, the numbers are misleading because the vast majority of those cases are from individuals who transfer into ACDC, and ACDC has always maintained its cohorting policy for all detainees transferring into the facility so that no one in the general population is exposed to a transferred detainee until they have undergone the requisite cohorting time. In this regard, of the eight (8) confirmed cases of COVID-19, all were transferred to the facility and the positive COVID-19 diagnosis was made during intake screening and the detainees have been in isolation since entering the facility. *Id.* ¶ 28. And none of the Petitioners here are housed are housed in the same unit with any of the confirmed cases. *Id.* There are no suspected cases of COVID-19 among any of the remaining detainees at ACDC. *Id.*

ACDC has also implemented guidelines and practices to encourage social distancing. The facility has the capacity to house 2,300 detainees, but only had 797 ICE detainees as of September 30, 2020. *Id.* ¶ 12. The facility is at approximately one-third (1/3) of its capacity. There is daily monitoring of the population percentage at each housing unit, with the goal of facilitating social distancing as much as practicable. *Id.* ¶ 13. All detainees are encouraged to

stay 6 feet apart. Benches and seating is marked to show detainees where they should not sit to maintain social distances. *Id.* ¶ 14. ACDC had reduced the number of detainees that are called to the dining hall in a controlled group to maintain social distancing. *Id.* ¶ 15. Security staff also monitors detainees to ensure that they do not crowd phones or tables or get too close to each other when waiting on activities. *Id.* ¶ 16.

ACDC has also taken other precautions such as increased sanitation frequency and efforts, providing hand-sanitizer, masks and other protective equipment to staff, and providing cleaning solution to detainee workers. Hagan Decl. ¶ 29. In addition to bleach, ACDC uses a chemical that kills COVID-19 to clean throughout the facility. *Id.* ACDC frequently disinfects high contact areas, dining halls and the recreation yard. *Id.* ACDC issues masks to detainees and staff three (3) times per week, and they have been trained on the proper use of masks. *Id.* Also, detainees are provided hygiene products twice weekly and can be provided additional hygiene products if requested. *Id.* And living areas are sanitized within every hour and more frequently during high traffic times. *Id.*

The facility has also ceased all social visits. Hagan Decl. ¶ 30. For legal visits, non-contact visits are encourages and all legal visitors must wear gloves, masks and eye protection to limit the possible spread of COVID-19. *Id.*

Additionally, all staff and vendors are screened for body temperatures and travel history before they enter the facility. Hagan Decl. ¶ 31.

The facility also provides educational information to staff and detainees on COVID-19. Hagan Decl. ¶¶ 17, 18, 33. There are posters throughout the facility in multiple languages regarding effective efforts to slow the spread of COVID-19. *Id.*

C. Petitioners' Allegations

Petitioners claim that they have certain conditions that put them at higher risk of serious illness or death if they contract COVID-19. Petitioner Gonzalez Morales [redacted]. Pet. Mem. (ECF No. 3) at 5. Petitioner Khamis [redacted] *Id.* Petitioner Mundle [redacted]. *Id.* And Petitioner Zacarias Cabrera [redacted]. *Id.*

Petitioners also complain about detention centers in general and ACDC in particular. Pet. Mem. at 5-8. They contend that it is impossible to socially distance in detention centers. *Id.* They claim that the facility is crowded and that up to 92 people share one dorm. *Id.* They also claim that the mitigation efforts of ACDC are inadequate. *Id.* As noted above, the Warden disputes the claims regarding the precautions taken by the facility.

Petitioners claim that the precautions taken at ACDC are not sufficient to slow the spread of COVID-19. *Id.* However, as noted above, ACDC is following CDC guidelines and implementing standards and precautions developed by epidemiologists with ICE. Further, there is no evidence of widespread COVID-19 cases at ACDC. The vast majority of cases result from individuals transferred to the facility. ACDC takes substantial steps to ensure that individuals transferring into the population are tested and cohorted for 14 days before they enter the general population.

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)).

ARGUMENT

A. Petitioners have not shown a "substantial likelihood of success on the merits" as required to obtain a TRO that alters the status quo because this Court lacks jurisdiction over their claims.

i. Petitioners are unlikely to succeed on the merits because they cannot invoke habeas to challenge the conditions of their confinement.

Petitioners invoke habeas corpus to challenge the constitutionality of their conditions of confinement and seek release. But habeas corpus is not a means by which to challenge conditions of confinement. The "sole function" of habeas is to "grant relief from unlawful imprisonment or custody and it cannot be used properly for any other purpose." *Pierre v. United States*, 525 F.2d

933, 935–36 (5th Cir. 1976).

An individual may seek habeas relief under 28 U.S.C. § 2241 if he is "in custody" under federal authority "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c). The "root principle" of habeas "is that neither men nor women should suffer illegal imprisonment." *Deters v. Collins*, 985 F.2d 789, 792 (5th Cir. 1993). However, "the grant of such a writ is not without limitations." *See id.* at 793. As the Fifth Circuit has held:

> Simply stated, habeas is not available to review questions ***unrelated to the cause of detention***. Its sole function is to grant relief from unlawful imprisonment or custody and ***it cannot be used properly for any other purpose***. While it is correctly alluded to as the Great Writ, it cannot be utilized . . . as a springboard to adjudicate matters ***foreign to the question of the legality of custody***.

Pierre v. United States, 525 F.2d at 935–36 (emphases added); *accord Patterson v. Johnson*, 184 F.3d 816 (5th Cir. 1999); *Sacal-Micha v. Longoria*, 2020 WL 1518861, at *3 (S.D. Tex. Mar. 27, 2020); *Rivera Rosa v. McAleenan*, 2019 WL 5191095, at *14 (S.D. Tex. Oct. 15, 2019).

The term "habeas corpus," as used today, "actually refers to the habeas corpus ad subjiciendum." *Deters*, 985 F.2d at 792 (citing Black's Law Dictionary 709–10 (6th ed. 1990)). This is the "Great Writ" referenced in the Constitution, and it was issued "for an inquiry into the cause of restraint." *See Carbo v. United States*, 364 U.S. 611, 614–15 (1961). "At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention." *See I.N.S. v. St. Cyr*, 533 U.S. 289, 301 (2001). Indeed, the "direct ancestor" of 28 U.S.C. § 2241(c)(1) is the Judiciary Act of 1789, which "authorized federal courts to grant the writ of habeas corpus *for the purpose of an inquiry into the cause of commitment* when a prisoner is 'in

custody under or by color of the authority of the United States.'"[1] *Sabino v. Reno*, 8 F. Supp. 2d 622, 627–28 (S.D. Tex. 1998) (citing *Felker v. Turpin*, 518 U.S. 651, 660 n.1 (1996)). And although the definition of what constitutes "custody" has changed "since the inception of habeas corpus jurisprudence, the purpose of the writ"—an inquiry into the cause of detention or custody—"has not changed since its birth in the sixteenth century." *Deters*, 985 F.2d at 792.

Thus, on review, the issue for courts conducting an "examination of the record" is "whether the person restrained of his liberty is detained without authority of law."[2] *See Pierre*, 525 F.2d at 935–36. Relatedly, as the Fifth Circuit has held, a plaintiff "cannot avail herself of habeas corpus relief when seeking injunctive relief that . . . is *unrelated to the cause of her detention*." *Schipke v. Van Buren*, 239 F. App'x 85, 85 (5th Cir. 2007) (emphasis added); *accord Rourke*, *supra*. In sum, in habeas cases, courts examine the record to determine the cause of the restraint—that is, whether legal authority exists for the custody or detention.

The Fifth Circuit has further described proper habeas challenges as falling into two (2) categories: fact-based challenges to the cause of detention and duration-based challenges to the

[1] In 1867, Congress extended this right with the "direct ancestor of § 2241(c)(3)," authorizing the federal courts to grant habeas relief to state prisoners. *See Kuhlmann v. Wilson*, 477 U.S. 436, 445 n.7 (1986) (citing Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385); *Felker, v. Turpin*, 518 U.S. 651, 660 n.2 (1996).

[2] Notably, the Fifth Circuit has also indicated that discovery is not generally available in habeas corpus cases. *See Vineyard v. Keesee*, 70 F.3d 1266 (5th Cir. 1995) ("Little authority exists regarding the ambit of, and procedure for, discovery in § 2241 cases. The Federal Rules of Civil Procedure are not normally applicable to § 2241 proceedings, but 28 U.S.C. § 2246 authorizes interrogatories in limited circumstances."); *Hernandez v. Garrison*, 916 F.2d 291, 293 (5th Cir. 1990) ("The rules of pretrial discovery, including the use of interrogatories pursuant to Fed. R. Civ. P. 33, are not applicable to habeas corpus proceedings, unless they are necessary to help the court 'dispose of the matter as law and justice require.'"). This is consistent with the purpose of habeas because the facts are generally undisputed—as opposed to fact-intensive conditions of confinement claims, for instance—and the inquiry is a legal one: whether lawful authority exists for the detention.

cause of detention. *See Poree v. Collins*, 866 F.3d 235, 243 (5th Cir. 2017) (noting "the instructive principle being that challenges to the fact or duration of confinement are properly brought under habeas"); *Schipke*, 239 F. App'x at 85–86 (same); *Parker v. Fort Worth Police Dep't*, 980 F.2d 1023, 1025 (5th Cir. 1993) (noting plaintiff may challenge the "validity or length of his current confinement" in a habeas petition); *Hendrix v. Lynaugh*, 888 F.2d 336, 337 (5th Cir. 1989) ("Federal district courts do not have jurisdiction to entertain [habeas corpus] actions if, at the time the petition is filed, the petitioner is not 'in custody' *under the conviction or sentence which the petition attacks*.") (emphasis added); *Williams v. Davis*, 192 F. Supp. 3d 732, 748 (S.D. Tex. 2016) ("The writ of habeas corpus provides an important, but narrow, examination of an inmate's conviction and sentence.").

Fact-based challenges. The Supreme Court and Fifth Circuit have provided examples of permissible fact-based challenges to the cause of detention. Most notably, in the criminal context, this includes challenges to the validity of a conviction. *See, e.g.*, *Brecht v. Abrahamson*, 507 U.S. 619, 633–34 (1993) (explaining that "the writ of habeas corpus has historically been regarded as an extraordinary remedy, a bulwark against convictions that violate fundamental fairness"); *Sellers v. Haney*, 639 F. App'x 276, 277 (5th Cir. 2016) (finding plaintiff's claims sounded in habeas where his "assertions do in fact call into question the validity of the conviction, as he seeks dismissal of the bill of information and immediate release").

In the immigration context, a fact-based challenge could include a detainee's claim of U.S. citizenship and that his detention is not authorized under immigration statutes. Indeed, Congress has provided a habeas remedy for such an individual who finds himself in expedited removal.[3] *See*

[3] A detainee in regular removal proceedings under 8 U.S.C. § 1229a would have to first exhaust his available administrative remedies, including asserting citizenship as a defense in his proceedings. *See Rios- Valenzuela v. Dep't of Homeland Sec.*, 506 F.3d 393, 396 (5th Cir. 2007)

8 U.S.C. § 1252(e)(2)(A) (review is "available in habeas corpus proceedings" of expedited removal determinations made under 8 U.S.C. § 1225(b)(1) as to "whether the petitioner is an alien"). In sum, "fact" challenges involve an inquiry into whether the prisoner or detainee should have ever been confined at all because the conviction or immigration charge is invalid.

Duration-based challenges. Examples of duration-based challenges to the cause of detention also abound. In the criminal context, a common example is a prisoner's claim that he was unlawfully denied good-time credits which "extended his detention" and "directly implicate the duration of his confinement." *See Whitehurst v. Jones*, 278 F. App'x 362, 363 (5th Cir. 2008); *see also Wilson v. Foti*, 832 F.2d 891, 892 (5th Cir. 1987) (holding that plaintiff's allegation that "he is being confined improperly because of the state's failure to credit him with the 'good time' to which he is allegedly entitled" sounded in habeas, not as a civil rights action). And in the immigration context, a permitted duration-based challenge to the cause of detention under habeas is a prolonged detention claim under 8 U.S.C. § 1231 and *Zadvydas v. Davis*, 533 U.S. 678 (2001). Thus, in duration challenges, the confinement may have begun with lawful authority, but that authority may ultimately expire under certain circumstances.

Further, when plaintiffs have combined habeas claims and extraneous claims, the Fifth Circuit has treated them separately. For example, when a prisoner sued prison and health officials on grounds that he was "refused medical attention" and that his "prison disciplinary proceedings and the resultant loss of his good-time credits" were too severe, the Fifth Circuit held that his challenge to the disciplinary proceedings was "properly asserted in a habeas

---

(noting that "if the person is in removal proceedings he can claim citizenship as a defense" in those proceedings); *Hinojosa v. Horn*, 896 F.3d 305, 314 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 1319 (2019) ("A person seeking habeas relief must first exhaust available administrative remedies.").

petition because the loss of good-time credits implicates the duration of [his] confinement." *Magoon v. Figueroa*, 70 F.3d 1267, 1995 WL 696795, at *1 (5th Cir. Oct. 18, 1995). However, as to the remaining issues, including that he was "refused medical attention," those "challenge[d] the conditions of his confinement and would be more properly asserted in a civil rights action." *Id.* *See also Serio v. Members of Louisiana State Bd. of Pardons*, 821 F.2d 1112, 1119 (5th Cir. 1987) ("[When] a petition combines claims that should be asserted in habeas with claims that properly may be pursued as an initial matter under § 1983, and the claims can be separated, federal courts should do so.").

Nor may an inmate or detainee transform a civil rights claim into a habeas claim—as Petitioners attempt to do here—with artful pleading: by alleging conditions are unconstitutional, requesting release, and claiming they challenge the very "fact" of their detention. There are at least two major problems with this formulation. First, it assumes that a "fact"-based habeas claim requires an inquiry into only the very existence of custody. But the "in custody" determination is a separate jurisdictional requirement. *See Zolicoffer v. U.S. Dep't of Justice*, 315 F.3d 538, 540 (5th Cir. 2003) ("For a court to have habeas jurisdiction under section 2241, the prisoner must be 'in custody' at the time he files his petition *for the conviction or sentence he wishes to challenge*.") (emphasis added). The "custody" inquiry is only the first step: a habeas petitioner must also ultimately show that there is no lawful authority for his detention. That is, there must be a challenge to and an inquiry into the cause of the detention. Here, Petitioners do not challenge the legal authority for their detention in this proceeding.

Second, Petitioners' logic has far-reaching implications. Under their theory, every state and federal prisoner, and immigration detainee could—today and after the pandemic threat has long since passed—seek release under habeas simply by alleging unconstitutional conditions of

confinement, with no inquiry into the cause of the detention. There is no limiting principle to cabin Petitioners' logic to this case only. No Fifth Circuit case has ever adopted Petitioners' expansive view. This Court should also reject it.

Petitioners invoke habeas corpus to challenge the constitutionality of their conditions of confinement and seek release as well as other relief. But habeas corpus is not a means by which to challenge conditions of confinement because the alleged conditions are unrelated to the cause of detention. The Fifth Circuit has 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 Buran*, 239 F. App'x 85, 85–86 (5th Cir. 2007).

In *Schipke*, the plaintiff filed what she styled as a habeas claim alleging that her constitutional rights had been "grossly violated" and that she had been "tortured" while incarcerated. *Schipke v. Van Buren*, No. 4:06-cv-349, Pet., Doc. 1 ¶ 10 (N.D. Tex. May 22, 2006). She claimed she had been denied basic human needs, including food and water. *Id.* ¶ 11. She had also been denied access to a telephone for legal calls, showers, fresh air, and sunshine. *Id.* ¶ 13. In affirming the district court's dismissal of her claims, the Fifth Circuit noted that "none of the claims raised by Schipke challenge the fact or duration of her confinement." 239 F. App'x at 86.

Similarly, in *Cook v. Hanberry*, the petitioner filed a habeas petition alleging that "he is entitled to release because the treatment accorded him by the prison officials violated the Eighth Amendment." 596 F.2d 658, 659–60 (5th Cir. 1979). The Fifth Circuit held, "[a]ssuming arguendo that his allegations of mistreatment demonstrate cruel and unusual punishment, *the petitioner still would not be entitled to release from prison*. The appropriate remedy would be to enjoin [the]

practices." *Id.* at 660 (emphasis in original). Likewise, in *Spencer v. Bragg*, a federal prisoner brought a habeas petition complaining of his alleged exposure to asbestos and lack of proper medical treatment, among other things. Those conditions-based claims were not cognizable in habeas. 310 F. App'x 678, 679 (5th Cir. 2009). *See also Poree v. Collins*, 866 F.3d 235, 243 (5th Cir. 2017) (noting the "instructive principle 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); *Hernandez v. Garrison*, 916 F.2d 291, 293 (5th Cir. 1990) (holding that claims of overcrowding, denial of medical treatment, and access to an adequate law library were not proper subjects of a habeas corpus petition).

District courts within the Fifth Circuit have followed this precedent. Chief Judge Rosenthal in the Southern District of Texas dismissed with prejudice a habeas petition brought by a pretrial detainee seeking "his release because, he argues, the possibility of contracting Covid-19 at the Harris County jail renders his confinement there unconstitutional." *Drakos v. Gonzalez*, 4:20-cv-1505, 2020 WL 2110409, at *1 (S.D. Tex. May 1, 2020). Judge Rosenthal noted that the petitioner "does not challenge the fact or duration of his confinement." *Id.* She added, ***"[w]hile he 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.* For that reason, ***"the relief Drakos seeks is not available in habeas corpus."*** *Id.* (emphasis added.) *See also Livas v. Myers*, 2020 WL 1939583, at *8 (W.D. La. Apr. 22, 2020) ("Neither party nor this Court found a single precedential case in the Fifth Circuit . . . allowing conditions of confinement claims to be brought under § 2241."); *United States v. Robinson*, 2009 WL 1507130, at *4 (S.D. Tex. 2009) (Atlas, J.) ("Claims concerning the conditions of confinement are actionable, if at all,

under 42 U.S.C. § 1983 or *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), and not under the habeas corpus statutes.").

Even when a petitioner alleges that inadequate conditions of confinement create the risk of serious physical injury, illness, or death, a petition for a writ of habeas corpus is not the proper vehicle for such a claim. *See, e.g.*, *Spencer*, 310 F. App'x at 679 (affirming lower court dismissal of petitioner's habeas claim even though he alleged that conditions of confinement endangered his life); *Northup v. Thaler*, 2012 WL 4068676, at *2 (S.D. Tex. 2012), *rep. & rec. adopted*, 2012 WL 4068997 (S.D. Tex. 2012) (dismissing petitioner's habeas claim based on alleged risk of abuse by other inmates).

Courts have similarly held that such claims are not cognizable in the civil immigration context is no exception. When a Mexican national sought release from ICE custody under habeas due to alleged unconstitutional conditions and concerns for COVID-19, a judge in the Southern District of Texas dismissed the petition, noting, "the Fifth Circuit has not recognized such a claim." *Sacal-Micha*, 2020 WL 1815691, at *5 n.6 (Rodriguez, J.). Likewise, when civil Border Patrol detainees in South Texas sought classwide release from custody to cure allegedly unconstitutional conditions, that Court noted, "[a]ny person in custody can obtain relief from allegedly inadequate conditions by being released, but this fact does not create a permissible habeas corpus claim when the complaint turns on the conditions of confinement." *Rivera Rosa v. McAleenan*, 2019 WL 5191095, at *18 (S.D. Tex. 2019).[4]

[4] *See also Sarres Mendoza v. Barr*, 2019 WL 1227494, at *2 (S.D. Tex. Mar. 15, 2019) (denying Honduran detainee's motion for leave to amend because the proposed claims on "conditions of confinement may not be brought in a habeas corpus proceeding, and are actionable, if at all, in a civil rights action"); *Patrick v. Whitaker*, 2019 WL 588465, at *4, n.36 (S.D. Tex. Feb. 13, 2019), *appeal dismissed*, 2019 WL 4668409 (5th Cir. Jul. 30, 2019) (ICE detainee's "motion for leave

There is a disagreement among the district court's within the Fifth Circuit on this issue. This Court has held that jurisdiction exists to hear claims such as Petitioners' under habeas. *See Espinoza v. Gillis*, 2020 WL 2949779, at *2 (S.D. Miss. June 3, 2020) (denying TRO motion but noting, "[w]hile the petitioners are challenging the conditions of their confinement, a civil rights action, their requested relief is immediate release from detention. Challenges to the duration of confinement should be brought as a habeas petitioner. Here, the requested relief, immediate release from detention, permits the petitioners to proceed with their habeas petition"). *But see Orellana Lluvicura v. Gillis*, 2020 WL 4934260 (S.D. Miss. July 27, 2020) (Starrett, J.) (dismissing COVID-19 positive ICE detainee's habeas petition because he did not "challenge[] the cause of his detention" and "merely requesting, as relief, release from custody does not convert the action into one under the habeas statute." And, even if petitioner's claims are true, "it does not necessarily follow that [he] must be immediately released."). Of the district courts within the Fifth Circuit that have looked at the issue, the vast majority have

Here, Petitioners' habeas petition challenge their conditions of confinement. "A detention facility's protocols for isolating individuals, controlling the movement of its staff and detainees, and providing medical care are part and parcel of the conditions in which the facility maintains custody over detainees." *Sacal-Micha*, 2020 WL 1815691, at *4. These conditions of confinement are precisely what Petitioners challenge here. Because their request for release is based on the conditions of their detention, rather than the authority for their detention, the Fifth Circuit has barred their claim. If the Court allows this habeas claim, any detainee—and any state or federal prisoner—could allege that release is the only way to cure allegedly unlawful conditions

---

to file supplemental pleadings concerning the conditions of his confinement" is denied because "Petitioner's proposed claims are not actionable under 28 U.S.C. § 2241.").

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.

ii. Petitioners are unlikely to succeed on the merits because they cannot demonstrate that ICE's precautionary measures amount to deliberate indifference in violation of petitioners' due process rights.

Petitioners also style their action as a complaint for injunctive or declaratory relief for violations of the Rehabilitation Act and the Due Process Clause. Assuming the Court determines that this is a proper ground for jurisdiction, Petitioners claims fail on the merits.

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); *see also Jones v. Blanas*, 393 F.3d 918 (9th Cir. 2004) (evaluating conditions of confinement claim of civil detainee under Fifth Amendment). In *Hare*, the Fifth Circuit created two standards for conditions-of-confinement claims depending on the nature of the allegation. The court held "that the episodic act or omission of a state jail official does not violate a [civil] detainee's due process right to medical care . . . unless the official acted or failed to act with subjective deliberate indifference."

Alternatively, "[c]onstitutional attacks on general conditions, practices, rules, or restrictions of pretrial confinement," or "jail condition cases," are governed by the reasonable relation test articulated in *Bell v. Wolfish*, 441 U.S. 520 (1979). The Supreme Court held in *Bell* that so long as the challenged condition is "reasonably related to a legitimate governmental objective" it passes constitutional muster. *Id.* at 539. "[I]solated examples of illness, injury, or death, standing alone, cannot prove that conditions of confinement are constitutionally adequate. Nor can the incidence of diseases or infections, standing alone, . . . since any densely populated residence may be subject to outbreaks." *Shepherd v. Dallas Cty.*, 591 F.3d 445, 454 (5th. Cir.

2009). A detainee does not establish a case simply by alleging that the detention center has disease or infection present. "Rather, a detainee . . . must demonstrate a pervasive pattern of serious deficiencies in providing for his basic human needs." *Id*. Petitioners do not choose a theory and instead seem to allege both simultaneously.

In defining the deliberate-indifference standard, the Supreme Court clarified in *Helling v. McKinney* that while "accidental or inadvertent failure to provide adequate medical care to a prisoner would not violate the [constitution], 'deliberate indifference to serious medical needs of prisoners' violates the [constitution] because it constitutes the unnecessary and wanton infliction of pain contrary to contemporary standards of decency." 509 U.S. 25, 32 (quoting *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

"Deliberate indifference is an extremely high standard." *Domino v. Tex. Dep't of Criminal Justice*, 239 F.3d 752, 756 (5th Cir. 2001). "Deliberate indifference in the context of failure to provide reasonable medical care means that: (1) the prison officials were aware of facts from which an inference of substantial risk of serious harm could be drawn; (2) the officials actually drew that inference; and (3) the officials' response indicated that they subjectively intended that harm occur." *Thompson v. Upshur County., Texas*, 245 F.3d 447, 458–59 (5th Cir. 2001). A prisoner claiming deliberate indifference must allege that government officials "refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs." *Davidson v. Texas Dept. of Criminal Justice*, 91 F. App'x 963, 965 (5th Cir. 2004). Further, "deliberate indifference cannot be inferred merely from a negligent or even a grossly negligent response to a substantial risk of serious harm." *See Thompson*, 245 F.3d at 459–60.

Here, Petitioners' allegations do not support either a "pervasive pattern of serious deficiencies in providing for basic human needs" or a "wanton disregard for serious medical needs." Petitioners' allegations focus on the fact that they are detained with others in typical detention-facility conditions and cannot exercise social distancing. But, as the Fifth Circuit has noted, "any densely populated residence may be subject to outbreaks," and the existence of a disease does not state a constitutional violation. *Shepherd*, 591 F.3d at 454.

Should Petitioners' claims be characterized as a jail-condition case governed by *Bell*, they still fail as detention is reasonably related to the Government's legitimate interest in pre-order detention of aliens to prevent absconding and, in the cases of criminal aliens, to protect the community. 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 v.Kim* , 538 U.S. 510, 520–22; *Zadvydas v. Davis*, 533 U.S. 678, 690–91 (2001). Nor is detention pending removal process an excessive means of achieving those interests. 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).

ACDC has taken steps to reduce the risk that COVID-19 will be introduced into the facility by (1) screening all necessary visitors and (2) testing all detainees that are transferred into the facility and cohorting them for 14 days. Further, ACDC has taken steps to reduce a potential spread by isolating those who may have been exposed or who are showing potential COVID-19 symptoms. Additionally, all COVID-19 positive detainees are isolated and treated consistent with CDC guidelines. In addition, ACDC has taken steps to educate its staff and

detainees regarding social distancing and has made adjustments to its facility operations to encourage social distancing. While the methods implemented by ICE may not be perfect, they are not so wanton so as to constitute deliberate indifference to the medical needs of its detainees. On these facts, Petitioners cannot show a constitutional violation. *See Sacal-Micha*, 2020 WL 1815691, at *6. ("But ultimately, Sacal does not assert that Respondents are doing nothing to protect him, other detainees, and staff members from COVID-19, but only that Respondents are not doing enough. . . . Courts have refused to provide habeas relief even when the claimed inadequacies allegedly placed the petitioner in grave peril.").

B. Petitioners are not likely to suffer irreparable harm in the absence of preliminary relief.

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) (emphasis in original). "To seek injunctive relief, the plaintiff must show a real and immediate threat of future or continuing injury apart from any past injury." *Aransas Project v. Shaw*, 775 F.3d 641, 648 (5th Cir. 2014). "Speculative injury is not sufficient; there must be more than an unfounded fear on the part of the applicant." *Hurley v. Gunnels*, 41 F.3d 662 (5th Cir. 1994) (quoting *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 *(5th Cir. 1985)*).

In their motion for TRO, Petitioners request that the Court require periodic, wide-spread testing and prohibit transfers in or out of the facility. In the alternative, Petitioners are requesting an order for an inspection of the facility and a plan to follow. Although they cite a court decision(s) that may have ordered various forms of this type of relief, they have failed to demonstrate to this Court how any of these requested forms of relief would place Petitioners in a

better position than the expansive protocols and precautions taken by ACDC. In particular, Petitioners complain about the potential for a widespread outbreak at ACDC; however, ACDC has now dealt effectively, even if not perfectly, with coronavirus for more than six (6) months and there have been no widespread outbreaks. If as Petitioners argue the risk is in part from community transmission, it is hard to see how periodic testing or a review of the system facilities would completely eliminate the risk to Petitioners. While the Respondents recognize that certain conditions create an increased risk of adverse consequences if a person contracts coronavirus, their argument in this regard is speculative.

Importantly, a number of the cases cited by Petitioners do not support their contention that the relief they requested is warranted. For instance, in *Zepeda Revas v. Jennings*, 2020 WL 4554646, *1 (N.D. Cal. Aug. 6, 2020), the court did order testing but that was after the court found that there was an "outbreak" of COVID-19, and the facility resisted testing because it feared there would be positive cases and the facility responded to the COVID-19 pandemic in a "cavalier fashion." The issues in the *Zepeda Revas* court are not present here. ACDC has tested every staff member and detainee in the facility and also tests every transferee and cohorts them for 14 days before they can enter the general population. Further, unlike the *Zepeda Revas* case, ACDC already isolates both symptomatic and COVID-19 positive individuals. Also in *Savino v. Souza*, 2020 WL 2404923 (D. Mass. May 12, 2020), the court was faced with a situation over overcrowding in a jail facility. Likewise, *Gayle v. Meade*, 2020 WL 2086482 (S.D. Fla. Apr. 30, 2020), involves a case where there was "overflow" of detainees. Here, ACDC is at nearly one-third of its capacity. Thus, these cases are also not instructive.

Petitioners have not shown that they would suffer irreparable harm if the Court fails to implement their proposed remedies.

C. The balance of equities and the public interest weigh in the Respondents' favor.

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."). Moreover, courts have recognized that internal policies regarding discipline, care and security of prisoners is best left to officials with expert judgment and have resisted efforts to interfere in decisions regarding to care for those in the care of officials. *See, e.g., United States v. Cortez-Meza*, 2020 WL 31228597, *1 (D. Nev. Jun. 12, 2020).

Concerns about exposure to COVID-19 are, of course, shared by all. However, an order requiring ICE to conduct periodic widespread testing without regard to the present situation in the facility, limiting transfers of detainees in or out of the facility—which would effectively prevent ICE from effecting removals—or requiring an inspection does not serve the public interest and would most likely interfere with ICE's ability to orderly administer the removal process and ACDC's ability to orderly supervise and care for all of the detainees. There is no overcrowding in this case. There is no widespread outbreak in this case. There are positive cases of individuals who transferred into the facility. Those individuals have been isolated and have had no contact with Petitioners here. Moreover, ACDC regularly undergoes inspections including two successful inspections in recent months and two impending inspections. Given the state of the COVID-19 cases, the protocols implemented at ACDC and the public interest in ensuring that ICE can conduct removal proceedings in an orderly fashion, the balance of interests

weigh in favor of Respondents. The disruptive effect of such an order would long survive the COVID-19 pandemic. Moreover, the public interest is best served by allowing orderly medical processes and protocols to be implemented by government professionals (which again, include the same type of medical experts represented in Petitioners' papers). *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.

CONCLUSION

For all of the foregoing reasons, the Respondents respectfully request that the Court deny Petitioners' TRO motion (and any motion for a preliminary injunction).

Dated: October 2, 2020

Respectfully submitted,

D. MICHAEL HURST, JR.
United States Attorney

By: ANGELA GIVENS WILLIAMS
Assistant United States Attorney
MS Bar No. 102469
United States Attorney's Office
501 East Court Street, Suite 4.430
Jackson, Mississippi 39201
Telephone: (601) 973-2820
Facsimile: (601) 965-4409
Email: angela.williams3@usdoj.gov