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

Juana GONZALEZ MORALES, *et al.,* *Plaintiff-Petitioners*, v. Shawn GILLIS, *et al.,* *Respondent-Defendants*.	Civil Action No.: 5:20-cv-00181-DCB-MTP Judge David C. Bramlette Magistrate Judge Michael T. Parker

PLAINTIFFS' MEMORANDUM IN RESPONSE TO DEFENDANTS' MOTION TO DISMISS

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Petitioner-Plaintiffs Juana Gonzalez Morales, Abdallah Khamis, Dwight Mundle, and Edinahi Zacarias Cabrera (collectively "Plaintiffs"), who all have medical conditions that render them particularly vulnerable to COVID-19, petitioned this Court to order their release from Adams County Detention Center ("ACDC") pursuant to 28 U.S.C. § 2241 (habeas corpus) and 29 U.S.C. § 701 (the Rehabilitation Act). As an alternative, interim measure, Plaintiffs requested that this Court order a site inspection and mandate reforms based on the results of that inspection pursuant to 28 U.S.C. § 1331 (federal question) and Section 504 of the Rehabilitation Act.

Now, Defendants move to dismiss Plaintiffs' petition on the grounds that they have failed to demonstrate a Fifth Amendment or Rehabilitation Act claim. Yet in support of their motion to dismiss, Defendants improperly submit and rely upon factual assertions made by witnesses in two declarations, attesting to the conditions in the facility. As it must evaluate Plaintiffs' allegations as true, the court may not consider contested factual matters in assessing the viability of Plaintiffs' legal claims. Because Defendants have chosen to put the factual record into dispute, a proper course for the court would be to defer a ruling on this motion, convert the motion to dismiss into one for summary judgment and to permit limited discovery before ruling on whether the actual factual record permits the Defendants judgment as a matter of law.

Should the Court choose to disregard Defendants' factual assertions and resolve the motion to dismiss, the motion should be denied. The Court has jurisdiction over Plaintiffs' claim for release as the only viable remedy, pursuant to habeas, as well as broad, ancillary habeas authority to order discovery – including the inspection Plaintiffs seek – in order to evaluate Plaintiffs' claim for release. In the *alternative*, Plaintiffs seek relief in the form of an order compelling Defendants to take certain measures – likewise informed by an inspection of the facility Plaintiffs seek for purposes of proving that claim – over which the court has independent

jurisdiction pursuant to 28 U.S.C. § 1331 and its corresponding equitable powers.

Plaintiffs likewise have stated claims for relief – that would entitle them to release pursuant to habeas or, in the alternative for an injunction requiring improved conditions. Their allegations show that despite knowledge of the risks of inaction, Defendants have failed to implement basic COVID-19 mitigation measures and that exposing Plaintiffs to such an unreasonable risk of harm violates (1) Plaintiffs' rights under the Due Process Clause as civil detainees to be free of government punishment and (2) Plaintiffs' rights under the Rehabilitation Act to be free from discrimination based on disability.

BACKGROUND

Defendants detain Plaintiffs at ACDC in the throes of an active COVID-19 outbreak despite knowledge that their medical conditions render them particularly vulnerable to the virus. Plaintiff Gonzalez Morales suffers from obesity. *See* Petition for Writ of Habeas Corpus and Complaint for Injunctive and Declaratory Relief ("Pet.") ¶41. Plaintiff Khamis suffers from Health Condition A. *Id.* at ¶22. Plaintiff Mundle suffers from hypertension. *Id.* ¶23. Plaintiff Zacarias Cabrera suffers from asthma. *Id.* ¶24. The Centers for Disease Control and Prevention ("CDC") warns that all four conditions may or do place people at increased risk for serious complications should they contract COVID-19.[1]

The CDC has warned that jails should take precautions to decrease the risk of COVID-19 spread such as enabling social distancing, limiting transfers, making hygiene and supplies and personal protective equipment ("PPE") easily available, educating detained people, and testing regularly. *Id.* ¶¶58, 60, 62, 66. Many experts emphasize that release may be the only way to keep high risk individuals safe. *Id.* ¶¶70, 72.

[1] Center for Disease Control and Prevention, *People with Certain Medical Conditions,* updated Oct. 16, 2020, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html.

However, despite knowledge of experts' recommendations and Plaintiffs' conditions, Defendants have failed to act to protect Plaintiffs. Defendants confine them in dorms where social distancing is impossible with up to 90 others who all share tables, telephones, and bathrooms. *Id.* ¶¶47, 60, 65. Detained people clean their own dorms once a day, often with used rags and without access to PPE and cleaning supplies. *Id.* ¶¶48, 65, 66. Bathrooms and showers are not disinfected between uses. *Id.* ¶47.

Guards, staff, and medical personnel often do not wear masks. *Id.* ¶¶47, 65. Defendants have not provided Plaintiffs with clean masks on a regular basis or educated them about mask usage. *Id.* ¶¶47, 66. Defendants have caused consistent soap shortages and when Plaintiffs run out of soap, they have to buy soap from ACDC or wash their hands without it. *Id.* ¶¶48, 65. Nor have Defendants educated detained people about hand washing. *Id.* ¶48.

Defendants also continue to transfer large groups of people to ACDC from all over the country. *Id.* ¶¶13, 52, 65, 111. Despite the frequent transfers, Defendants do not test its detained people and staff periodically or actively attempt to find and isolate close contacts of those who test positive. *Id.* ¶¶63, 65. Instead, Defendants generally test a detained person only upon the onset of symptoms. *Id.* ¶63. These failures have exacerbated the continued spread of COVID-19 within ACDC. Defendants reported a rise in active cases from 2 in early July to 32 in mid September., for a total of 74 over the course of the pandemic. *Id.* ¶14. Today, ICE reports a total of 96 confirmed cases at ACDC over the course of the pandemic – 22 more than at the time of the filing of the complaint – of which 21 are current and active.[2]

I. The Court Should Construe Defendants' Motion to Dismiss as a Motion for Summary Judgment and Order a Limited Discovery Period.

When reviewing a motion to dismiss, a district court should consider only "the complaint

[2] ICE, *ICE Guidance on COVID-19, ICE Detainee Statistics*, Oct. 27, 2020, https://www.ice.gov/coronavirus.

in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights*, Ltd., 551 U.S. 308, 322 (2007) (citations omitted). A court may take judicial notice of public records and facts "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b); *Cinel v. Connick,* 15 F.3d 1338, 1343 n. 6 (5th Cir. 1994).

When "matters outside of the pleadings are presented to and not excluded by the court," a court should construe the motion as a motion for summary judgment. Fed. R. Civ. P. 12(d). A party that references extraneous evidence other than by judicial notice is "on notice that the district court could properly treat . . . [the] motion to dismiss as one for summary judgment." *Darlak v. Bobear*, 814 F.2d 1055, 1065 (5th Cir. 1987). A court may convert the motion so long as it gives the parties a "reasonable opportunity to present all the material that is pertinent to the motion." *Trinity Marine Prod., Inc. v. United States*, 812 F.3d 481, 487 (5th Cir. 2016).

In motions for summary judgment, "the nonmoving party must have had an opportunity to discover information necessary to its opposition to the summary judgment motion before summary judgment may be granted." *George v. Go Frac, LLC*, No. SA-15-CV-943-XR, 2016 WL 94146, at *2 (W.D. Tex. Jan. 7, 2016). To obtain discovery, a nonmovant must demonstrate "1) why he needs additional discovery, and 2) how the additional discovery will likely create a genuine issue of material fact." *Chenevert v. Springer*, 431 F. App'x 284, 287 (5th Cir. 2011). Alternatively, a court may deny a motion for summary judgment as premature. *See Gabarick v. Laurin Mar. (Am.), Inc.*, 406 F. App'x 883, 890 (5th Cir. 2010).

Defendants argue that discovery is generally unavailable in habeas cases "because the

facts are generally undisputed." Mem. in Supp. of Mot. to Dismiss ("Defs.' Mem."), ECF No. 25 at 9-10. However, the habeas statute itself allows courts to take evidence "orally or by deposition." 28 U.S.C. § 2246. However, when a petitioner makes a prime facie case for relief in a habeas case, a court "may use or authorize the use of suitable discovery procedures...reasonably fashioned to elicit facts necessary to help the court to 'dispose of the matter as law and justice require.'" *Harris v. Nelson*, 394 U.S. 286, 290 (1969) (quoting 28 U.S.C. § 2243). Therefore, "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." Id. at 300; *see also Momennia v. Estrada*, No. 3–03–0525–M, 2003 WL 21318323 (N.D.Tex. May 21, 2003) (ordering discovery in immigration habeas case); Order granting Motion for Discovery, *Njuguna v. Staiger*, No. 6:20-CV-00560, ECF No. 43 (W.D. La. Oct. 14, 2020) (ordering depositions in immigration habeas case regarding COVID-19 precautions at ICE detention facility.)[3] Defendants here submit and rely on a declaration from an ICE Assistant Field Office Director in support of their motion to dismiss. *See* Declaration of Robert G. Hagan, ECF No. 23-1; Defs.' Mem. at 2-3. Defendants also rely upon another declaration they used to respond to Plaintiff's Motion for Temporary Restraining Order in this case. *See* Defs.' Mem. at 3-7, 20. These declarations are neither incorporated into Plaintiffs' petition by reference nor are matters of which a court may take judicial notice. Nothing contained therein are public record or "generally known," and many of the facts in the declarations conflict with the facts in the petition itself.

For example, Defendants claim that "ACDC isolates and tests detainees who present symptoms of COVID-19." Defs.' Mem. at 5. However, Plaintiffs plead that only those who are "highly symptomatic" are tested *See* Pet. ¶63. Defendants claim that if "there is known exposure

[3] Attached at Exhibit 1.

to COVID-19, a detainee is placed in cohorts, housing all exposed detainees together, with restricted movement for a period of fourteen (14) days." Defs.' Mem. at 5. Plaintiffs claim that Defendants do not even attempt to determine who has been exposed to COVID-19. *See* Pet. ¶63.

The extent to which ACDC provides hygiene supplies is also in dispute. Defendants claim that it provides "cleaning solution to detainee workers," yet Plaintiffs report that "ICE has failed to provide enough cleaning materials." Defs.' Mem. at 6; Pet. ¶66. Defendants assert that detained people "are provided hygiene products twice weekly and can be provided additional hygiene products if requested." Defs.' Mem. at 6. Plaintiffs, on the other hand, plead that "detained people sometimes do not have enough soap to wash hands" and that "once supplies run out, Plaintiffs are required to buy soap from the commissary." Pet. ¶¶ 48, 65. Defendants claim that ACDC "frequently disinfects high contact areas, dining halls and the recreation yard" and that "living areas are sanitized within every hour and more frequently during high traffic times." Defs.' Mem. at 6. In contrast, Plaintiffs report that detained people "are left to clean the sleeping areas, bathrooms, and common areas with spray bottles and re-used rags at ACDC," and that their dorms "are cleaned only once per day, sometimes without disinfectant." Pet. ¶¶48, 60, 65, 66.

The extent to which masks are used and issued remains in dispute as well. Defendants state that "ACDC issues masks to detainees and staff three (3) times per week, and they have been trained on the proper use of masks." Defs.' Mem. at 6. On the other hand, Plaintiffs plead that "detained individuals were not provided with clean masks on a regular basis" and that ACDC did not "instruct detained people how and when to wear or disinfect them." Pet. ¶¶47, 66. Even the extent of the spread of COVID-19 is in dispute. Defendants report that as of "12 p.m. on September 30, 2020, there are eight (8) detainees with confirmed cases of COVID-19." Defs.'

Mem. at 5. Meanwhile, Immigration and Customs Enforcement's ("ICE") own publicly available COVID-19 website reported 19 active cases at ACDC on that day.[4]

Likewise, many of Defendants' contentions about factual issues important to the disposition of this case lack specificity. Regarding positive cases, Defendants claim generally that "the numbers are misleading because the vast majority of those cases are from individuals who transfer into ACDC." Defs.' Mem. at 5. But they do not specify how many of the almost 100 confirmed cases there came from outside and how many came from community spread within ACDC. Nor do Defendants state how many ACDC staff, who regularly interact with Plaintiffs, have tested positive.

Critically, Defendants do not specify whether anyone has ever tested positive in Plaintiffs' dorms. Defendants state that "[t]here is daily monitoring of the population percentage at each housing unit, with the goal of facilitating social distancing as much as practicable" yet make no mention of population numbers in Plaintiffs' dorms or whether distancing is actually possible there. *Id.* at 6. Similarly, Defendants make the vague claim that ACDC "uses a chemical that kills COVID-19 to clean throughout the facility" but does not expound on what that chemical is, how it "kills COVID-19," or where, when, and how that chemical is used. *Id.*

Many of these materials and documents necessary to resolve the above factual questions are in sole possession of Defendants and inaccessible to Plaintiffs, who are confined to their dorms for most each day. Plaintiffs can report on what they see, but they have no access to testing protocol documents, population courts at the dorms other than their own, or soap and disinfectant inventory and distribution logs. They cannot know the time and location of all people who tested positive in the facility. These facts are critical in determining whether

[4] ICE, *ICE Guidance on COVID-19, ICE Detainee Statistics*, Sep. 30 2020, https://web.archive.org/web/20201001230921/https://www.ice.gov/coronavirus#tab2

Defendants engaged in a pattern of excessive disregard for Plaintiffs' basic human needs, as discussed below.

Therefore, this Court should convert Defendants' motion to dismiss to a motion for summary judgment and then order a limited discovery period in which the parties can further develop the factual record. In the alternative, the Court should ignore the factual submissions by Defendants and decide the motion to dismiss while "'accept[ing] all well-pleaded facts as true, and ... view[ing] them in the light most favorable to the plaintiff.'" *Walker v. Beaumont Indep. Sch. Dist.*, 938 F.3d 724, 735 (5th Cir. 2019), *quoting Campbell v. Wells Fargo Bank, N.A.,* 781 F.2d 440, 442 (5th. Cir. 1986).

II. This Court Has Jurisdiction Over Plaintiffs' Release Claims.

Defendants characterize Plaintiffs' claims as challenges to the conditions of their confinement, which they assert cannot be challenged in habeas. Defs.' Mem. at 10.[5] Plaintiffs maintain that because the nature of the claim is one that challenges the fact of their detention under unlawful circumstances and because the ultimate relief sought is release from detention, rather than an injunction ordering changes to conditions, habeas is the proper jurisdictional vehicle to evaluate these claims. *See also Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973) ("a determination that [the petitioner] is entitled to immediate release or a speedier release" is proper

[5] The cases Defendants cite are distinguishable from the instant case. *Drakos v. Gonzalez*, 4:20- cv-1505, 2020 WL 2110409, at *1 (S.D. Tex. May 1, 2020), was a pro se case filed by an individual in pretrial criminal detention, and the Order, issued without briefing, was based on the pro se petitioner's handwritten petition. In *Orellana Lluvicura,* No. 5:20-CV-128-KS-MTP, 2020 WL 4934260 (S.D. Miss. July 17, 2020) this Court found that it lacked jurisdiction over COVID-19 habeas claims because petitioner did "not challenge[] the cause of his detention" and because even if it granted relief, "it does not necessarily follow that Petitioner must be immediately released." 2020 WL 4934260, at *2. Here, Plaintiffs do challenge the cause of their detention in that they challenge whether a reasonable relation exists between the cause of their detention and their conditions of confinement. Further, Defendants and the *Orellana Lluvicura* court both cite the dicta that "habeas is not available to review questions unrelated to the cause of detention" for the proposition that jurisdiction does not exist here. *Pierre v. United States*, 525 F.2d 933, 935 (5th Cir. 1976). However, *Pierre* decided whether the results of administrative hearings can be heard by a habeas court and does not involve conditions of confinement at all. *Id.* at 934. The second basis for denial of jurisdiction is addressed below.

habeas claim); *Poree v. Collins,* 866 F.3d 235, 244 (5th Cir. 2017) (petition seeking transfer to less restrictive facility "properly sounds in habeas.").

Indeed, in similar cases, including one where Plaintiffs alleged that COVID-19 conditions at ACDC violated their Fifth Amendment rights, this court and others in this circuit have agreed with that Plaintiffs claims sound in habeas. *See Espinoza v. Gillis*, No. 5:20-CV-106-DCB-MTP, 2020 WL 2949779, at *2 (S.D. Miss. June 3, 2020) (holding that "the requested relief, immediate release from detention, permits the petitioners to proceed with their habeas petition."; *see also Beswick v. Barr*, No. 5:20-CV-98-DCB-MTP, 2020 WL 3525196, at *3 (S.D. Miss. May 18, 2020), *report and recommendation adopted*, No. 5:20-CV-98-DCB-MTP, 2020 WL 3520312 (S.D. Miss. June 29, 2020) (finding in a COVID-19 due process case that "[i]f the Court granted Petitioner's requested relief, it would result in his immediate release. The undersigned finds that the Petitioner has brought a habeas matter because the requested relief challenges the fact or duration of his confinement."); *Dada v. Witte*, No. 1:20-CV-00458, 2020 WL 2614616, at *1 (W.D. La. May 22, 2020) (finding that despite "Respondent's best efforts to convince this court that this case is a conditions of confinement case rather than a fact of confinement case," the court had jurisdiction over petitioners COVID-19 habeas release claims.); *Njuguna v. Staiger,* No. 6:20-CV-00560, 2020 WL 3425289, at *5 (W.D. La. Jun. 3, 2020); *report and recommendation adopted,* No. 6:20-CV-00560, 2020 WL 3421889 (W.D. La. June 22, 2020); *Vazquez Barrera v. Wolf,* 455 F. Supp. 3d 330, at 337 (S.D. Tex. 2020) (holding that "[b]ecause Plaintiffs are challenging the fact of their detention as unconstitutional and seek relief in the form of immediate release, their claims fall squarely in the realm of habeas corpus"). The court need not depart from its prior rulings, particularly since "any ambiguities in the controlling

substantive law must be resolved in the plaintiff's favor." *Lewis v. Fresne*, 252 F.3d 352, 357 (5th Cir. 2001).

Plaintiffs argue that when "an otherwise valid basis for detention no longer applies, substantive due process requires the state to release the detained person" and cite to authority in support of that proposition. Pet. ¶87. Contrary to Defendants' contentions, substantive due process requires release of civil detainees once detention becomes punitive. *See Foucha v. Louisiana*, 504 U.S. 71, 86 (1992) (ordering Plaintiff's release from commitment to mental institution because there was no longer any evidence of mental illness); *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001) (ordering release of immigration detainees after detention became unlawfully prolonged); *Kansas v. Hendricks*, 521 U.S. 346, 363-64 (1997) (upholding statute requiring civil confinement for sex offenders in part because it provided for immediate release once an individual no longer posed a threat to others). The only precedential decisions Defendants cite for the proposition that a release is not an appropriate remedy for a violation of Defendants' due process rights involves petitions by prisoners attempting to shorten jail sentences because of life threatening prison conditions. *See* Defs.' Mem. at 14; *Spencer v Bragg*, 310 F. App'x 678, 679 (5th Cir. 2009); *Cook v. Hanberry*, 596 F.2d 658, 659–60 (5th Cir. 1979). As those cases were analyzed under the Eighth Amendment rather than the Fifth Amendment, which inherently examines the cause of detention in relation to conditions, those cases are inapplicable here. Because a favorable ruling on Plaintiffs' Fifth Amendment claims would result in their release, this Court has jurisdiction to consider those claims pursuant to the habeas statute.

This Court is likewise authorized to issue an order for inspection, pursuant to its habeas authority; such request does not divest the court of habeas jurisdiction. Plaintiffs' inspection

request comes pursuant to the courts inherent *habeas* powers determine if the ultimate relief of release is justified, or to otherwise preserve its jurisdiction over the habeas claims. *See Harris*, 394 U.S. at 291; *United States v. N.Y. Tel. Co*., 434 U.S. 159, 173 (1977); *El-Banna v. Bush*, No. Civ.A. 04-1144 (RWR), 2005 WL 1903561 (D.D.C. 2005).

In addition, when a habeas petitioner makes a prima facie case for relief, a court "may use or authorize the use of suitable discovery procedures . . . reasonably fashioned to elicit facts necessary to help the court to 'dispose of the matter as law and justice require.'" *Harris*, 394 U.S. at 290 (quoting 28 U.S.C. § 2243). Further, the All Writs Act ("AWA"), which merely codifies the court's underlying equitable habeas power, also authorizes the limited relief Plaintiffs seek, in order to preserve the court's jurisdiction to adjudicate the claims before it – claims that are jeopardized by the Defendants' failure to safeguard Plaintiffs' lives. *See* 28 U.S.C. § 1651(a) (authorizing courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law"); *see also F.T.C. v. Dean Foods Co.*, 384 U.S. 597, 603-04 (1966). As explained in *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1102 (11th Cir. 2004), the AWA authorizes a court to enjoin almost any conduct "which, left unchecked, would have . . . the practical effect of diminishing the court's power to bring the litigation to a natural conclusion" (internal quotation and citation omitted). The power includes issuance of discovery orders. *See United States v. N.Y. Tel. Co*., 434 U.S. 159, 173 (1977); *El-Banna v. Bush*, No. Civ. A. 04-1144 (RWR), 2005 WL 1903561, at *1–3 (D.D.C. July 18, 2005) (ordering the government to "preserve and maintain all evidence, documents and information relating or referring to" habeas petitioners).

The habeas claim ultimately amounts to the following: "Plaintiffs seek relief from detention conditions that cannot be remediated or improved" and "the only available remedy in

these circumstances is release." Pet. ¶ 91. Therefore, as Plaintiffs request immediate release from detention, this Court has jurisdiction over their claims.

Finally, Plaintiffs argue that the imminence of their risks of contracting COVID-19 makes release necessary. *See* Pet. ¶¶15, 93. In short, amelioration of conditions at ACDC may theoretically be possible, but that amelioration likely would come too late to protect Plaintiffs. *See* Pet. ¶ 93. Only release can do that. As such, resolution of the Fifth Amendment question in Petitioners' favor would compel their release. As Plaintiffs argue that their conditions of confinement created by Defendants and the COVID-19 pandemic render the fact of their confinement unconstitutional and compel their release, their claims lie at the core of habeas.

III. This Court has Jurisdiction over Plaintiffs' Alternative Claim for Improved Conditions.

Defendants are quite right that the Court should treat Plaintiffs' habeas claims and "extraneous claims" separately. Defs.' Mem. at 12. Apart from Plaintiff's release claims, they also seek "a health inspection of ACDC at the earliest possible date and order Respondent to order Defendants to immediately reform conditions at ACDC through a plan to be implemented pursuant to the results of that inspection." Pet. at 16. These reforms can be implemented following the requested inspection – which the court has the independent power to authorize under Federal Rule of Civil Procedure 34. Pet. at 35.

This Court has subject matter jurisdiction over that claim under 28 U.S.C. § 1331, as federal courts enjoy equitable authority to fashion injunctive relief to remediate unconstitutional governmental action. *See Bell v. Wolfish*, 441 U.S. 520, 526 n.6 (1979); *Armstrong v. Exceptional Child Center, Inc*., 135 S. Ct. 1378, 1383 (2015); *Ex Parte Young*, 209 U.S. 123 (1908). That authority includes, independent of habeas, issuing "orders placing limits on a prison's population" to remediate unconstitutional conditions. *Brown v. Plata*, 563 U.S. 493, 511

(2011). The Ninth Circuit recently explained in *Roman v. Wolf*, No. 20-55436, 2020 WL 5683233, at *5 (9th Cir. Oct. 13, 2020), that jurisdiction over those plaintiffs' COVID-19 overcrowding claims were appropriate because they "invoked 28 U.S.C. § 1331, which provides subject matter jurisdiction irrespective of the accompanying habeas petition." *Id.* at 5. As in *Roman*, Plaintiffs here both invoked 28 U.S.C. § 1331 and requested declaratory and injunctive relief requesting inspection. *Id.*; Pet. at ¶¶ 9, 16. As such, the Court has jurisdiction to decide this Plaintiffs' inspection claim.

IV. Respondents Violate Plaintiffs' Due Process Rights.

A. The Court Should Apply the Reasonable Relation Test in Determining Whether Defendants Violated Plaintiffs' Fifth Amendment Rights.

Civil detainees can bring Fifth Amendment challenges in two ways: "as an attack on a "condition of confinement" or as an "episodic act or omission." *See Hare v. City of Corinth, Miss.,* 74 F.3d 633, 644–45 (5th Cir.1996). A condition may be a de facto policy, as evidenced by a pattern of acts or omissions "sufficiently extended or pervasive, or otherwise typical of extended or pervasive misconduct by [jail] officials, to prove an intended condition or practice." *Id. at* 645. For example, "a *de facto* jail policy of failing properly to treat inmates with chronic illness" is a "conditions" claim rather than an "episodic act or omission." *Shepherd v. Dallas Cty*., 591 F.3d 445, 453 (5th Cir. 2009). An "episodic act of omission" by contrast, "faults specific jail officials" for their discrete acts or omissions. *Id.* at 452. If a petitioner challenges a condition of confinement, a court must analyze if the condition is " reasonably related to a legitimate goal" whereas is if "the focus of the claim is one individual's misconduct" the court must determine if "officials 'acted or failed to act with deliberate indifference to the detainee's needs.'" *Id. at* 452 (citing *Hare,* 74 F.3d at 648).

In *Espinoza*, this Court analyzed similar claims regarding Defendants' purported

violations of Plaintiffs' Due Process rights at ACDC under the "reasonable relation" test. 2020 WL 2949779, at *3. In another analogous case, the Western District of Louisiana reasoned that "Petitioners' claims challenge extended, pervasive circumstances that they claim are – by act, omission, or plain necessity – prevalent in ICE detention facilities, including the facilities housing them" and that therefore "Petitioners' claims are subject to the reasonable relationship test, not the deliberate indifference standard." *Dada v. Witte*, No. 1:20-CV-00458, 2020 WL 5510706, at *10, (W.D. La. Apr. 30, 2020), *report and recommendation adopted in part, rejected in part*, No. 1:20-CV-00458, 2020 WL 2614616 (W.D. La. May 22, 2020),; *see also Vazquez Barrera*, 455 F. Supp. 3d at 339 (applying the reasonable relationship standard); *Njuguna*, 2020 WL 3425289, at *6 (same).

Plaintiffs do not at all challenge Defendants' discrete acts or omission, but rather their "extended or pervasive" policies of refusing to abide by well-known disease mitigation guidelines. *Hare,* 74 F.3d at 645. Plaintiffs' petition identifies Defendants' de facto social distancing, hygiene, testing, transfer, and isolation policies and explains why they fall short of established guidelines and subject Plaintiffs to an unconstitutional risk of harm. *See* Pet. ¶¶ 47-49, 60-66. Therefore, this case is most properly analyzed under the reasonable relation test.

B. Plaintiffs Successfully Pled a Violation of the Fifth Amendment Under the Reasonable Relation Test.

Under the reasonable relationship test, "if 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" civil detainees. *Wolfish*, 441 U.S at 539. Therefore, whether conditions violate due process "depends on whether they are rationally related to a legitimate nonpunitive governmental purpose and whether they appear excessive in relation to that purpose." *Id.* at 561.

Most of Defendants' arguments that Plaintiffs' continued detention is not excessive in relation to the government's interests in this case are the factual assertions that they seek to introduce at the motion to dismiss stage. *See* Defs.' Mem. at 20; *Walker v. Beaumont Indep. Sch. Dist.*, 938 F.3d at 735. Defendants' remaining reasonableness argument is that the "Supreme Court for over a century has affirmed detention as a 'constitutionally valid aspect of the deportation process." Def's Mem. at 20. They are not incorrect on this point as detention is permissible for the legitimate government interests of ensuring the immigrant's participation in their removal proceedings, to prevent flight, and to otherwise protect the community. *See Zadvydas,* 533 U.S. at 690 (2001); *Demore v. Kim*, 538 U.S. 510, 528 (2003). However, Defendants' argument makes no attempt to engage in the balancing required by *Wolfish*.

The Fifth Circuit's decision in *Duvall v. Dallas Cty., Tex.*, is instructive here. 631 F.3d 203 (5th Cir. 2011). In that case, defendants were "aware of the high MRSA infection risks in the jail" and "the Sheriff knew that the few measures that the jail did take in an attempt to control the rate of infection had been ineffective." *Id.* at 209. However, despite the serious health risk of MRSA, "the jail had refused to install the necessary hand washing and disinfecting stations and had failed to use alcohol-based hand sanitizers, which are the recommended means of hand disinfection, especially in a jail setting where much contact occurs in the cell block." and "the County failed to take the well-known steps needed to control the infection." *Id.* As a result, the Fifth Circuit affirmed the district court's decision that defendants unconstitutionally punished plaintiff because he established that:

> (1) "a rule or restriction or ... the existence of an identifiable intended condition or practice ... [or] that the jail official's acts or omissions were sufficiently extended or pervasive";
> (2) which was not reasonably related to a legitimate governmental objective; and
> (3) which caused the violation of [his] constitutional rights.

Id. at 207. Here, the Plaintiffs pled that Defendants' acts and omissions are both extended and pervasive. For example, Plaintiffs specifically challenge the sufficiency of Defendants' testing and tracing policies. *See* Pet. ¶¶63-65. Plaintiffs also point to multiple sources to support their contention that Defendants continue to transfer large groups of people into ACDC. *Id.* ¶¶58, 60, 62, 66. Finally, Plaintiffs allege not only episodic failures of Defendants to properly enable social distancing, provide hygiene products, and education, but that those failures are the norm at ACDC. *Id.* ¶¶47-48, 60, 65-66.

These conditions of their confinement are not reasonably related to the government's interest in continuing their detention. No indication exists at this stage that Plaintiffs present any particular danger or flight risk. Further, if the government's interest in this case is to prevent flight, it could do so by "using alternatives available to them to supervise Plaintiffs." Pet. ¶15. Indeed, ICE has stated that it will use alternatives to detention programs to decrease jail population because of COVID-19 risk. *Id.* ¶68. The government itself, in public reports, have boasted attendance rates in these programs of over 90 percent.[6] Yet, Respondents continue to Plaintiffs in ACDC while outbreaks rage inside and out.

Finally, Defendants' policies are the cause of the violation of Plaintiffs' constitutional rights. The current conditions at ACDC constitute a "pervasive pattern of serious deficiencies" that subjects Plaintiffs to the risk of serious injury, illness or death and therefore "amounts to [unconstitutional] punishment." *Shepherd,* 591 F.3d at 454. Plaintiffs' continued detention in ACDC, would be unconstitutional, even if it were "not alleged that the likely harm would occur immediately and even though the possible infection might not affect all of those exposed."

[6] *See Immigration: Progress and Challenges in the Management of Immigration Courts and Alternatives to Detention Program*, U.S. Government Accountability Office, Sep. 18, 2018, https://www.gao.gov/products/GAO-18-701T; *Alternatives To Detention: Improved Data Collection and Analyses Needed to Better Assess Program Effectiveness*, U.S. Government Accountability Office, Nov. 13, 2014, https://www.gao.gov/products/GAO-15-26.

Helling v. McKinney, 509 U.S. 25, 33 (1993) (citing *Hutto v. Finney*, 437 U.S. 678, 682 (1978)). As such, Plaintiffs' detention is clearly excessive in relation to any purported government goal and amounts to unconstitutional punishment.

C. Even if the Court Applied the Deliberate Indifference Test, Plaintiffs Successfully Plead a Fifth Amendment Violation.

Even under the deliberate indifference standard, the Court should deny this motion to dismiss. An official is deliberately indifferent when an "objectively intolerable risk of harm" exists and the official "(1) was 'aware of facts from which the inference could be drawn that a substantial risk of serious harm exists'; (2) subjectively 'dr[e]w the inference' that the risk existed; and (3) disregarded the risk." *Valentine v. Collier*, 956 F.3d 797, 801 (5th Cir. 2020); *application to vacate stay denied Valentine v. Collier*, 140 S. Ct. 1598 (2020) (citations omitted). An official disregards risk when the official acts with a recklessness. *See Hernandez ex rel. Hernandez v. Texas Dep't of Protective & Regulatory Servs.*, 380 F.3d 872, 881 (5th Cir. 2004).

Though the deliberate indifference is a difficult standard to meet, the Eastern District of Louisiana's decision to deny a motion to dismiss in *Venerella v. Harahan Police Dep't* is instructive here. No. CV 05-0696, 2006 WL 8456073, at *2 (E.D. La. Sept. 29, 2006). In that case, the court denied the motion even though the petition was "not *replete* with factual support or detail" because "it arguably was reasonably foreseeable" that the defendant in that case acted with deliberate indifference. *Id*; *see also Farmer v. Brennan*, 511 U.S. 825 (1994) (noting that deliberate indifference standard my met using "inference from circumstantial evidence"). Likewise, in *Gomes v. US Dep't of Homeland Sec., Acting Sec'y*, one district court denied defendants' motion to dismiss because that "at least some petitioners" demonstrated that lack of COVID-19 precautions amounted to deliberate indifference. No. 20-CV-453-LM, 2020 WL

3258627, at *3 (D.N.H. June 16, 2020). Similarly, in *Prieto Refunjol v. Adducci,* a court found in an analogous case that:

> Respondents have acted more like the idle doctor than the mistaken one. They have not done enough in the sense that they have stood idly by while Morrow staff fecklessly monitor the condition of the Additional Petitioners. They have not acted based on medical judgment. In fact, those who have acted are mostly correctional officers, who are incapable of acting with any medical judgment at all. Putting Additional Petitioners' health and safety almost exclusively in the hands of nonmedical professionals is reckless and irresponsible under the circumstances of the current pandemic and Morrow's large number of infected detainees. This demonstrates that Respondents have acted with deliberate indifference.

No. 2:20-CV-2099, 2020 WL 2487119, at *25 (S.D. Ohio May 14, 2020); *see also Malam v. Adducci*, 455 F. Supp. 3d 384, 393 (E.D. Mich. 2020) ("[A]ny response short of authorizing release from [immigration detention] for this Petitioner, whose underlying health conditions expose her to a high risk of an adverse outcome if infected by COVID-19, demonstrates deliberate indifference to a substantial risk."); *Gayle v. Meade*, No. 20-21553-CIV, 2020 WL 2086482, at *4 (S.D. Fla. Apr. 30, 2020) ("ICE fully understands the benefit of reducing the detainee population. Thus, to the extent that ICE fails to commit to addressing the conditions complained of, ICE has demonstrated deliberate indifference.").

The objectively known risks from COVID-19 have produced daily front-page news, guidance from the CDC and ICE, and more than 193,000 deaths when the petition was filed. *See* Pet. ¶¶2, 56-62, 66. Defendants know that this highly infectious disease spreads rapidly in packed, congregate settings such as ACDC. They know that Plaintiffs' medical conditions make them at particularly high risk to suffer serious complications or die if infected. *Id*. ¶¶22-24, 32, 38, 41. Defendants are on notice that release is recommended to protect them. *Id*. ¶¶70, 72 Whatever measures Defendants have enacted are patently ineffective or entirely lacking, as evidenced by their steadily increasing case count.

An official cannot defeat deliberate indifference by treating a gunshot wound with an aspirin. This is exactly what Defendants have done here. While the CDC and other experts have openly and regularly called for social distancing, hygiene, limited transfers, testing, isolation, and release, Defendants have packed Plaintiffs into dorms in which social distancing is impossible, continued regular transfers, and only intermittently provided masks, soap, and cleaning supplies. *Id.* ¶¶13, 47-48, 53, 60, 65-66, 111. They continue to disregard known risks by allowing their employees to not wear masks. *Id.* ¶¶47, 66. Defendants' testing regime fails to detect the spread and they do not trace or effectively isolate symptomatic people. *Id.* ¶¶63, 65. Most importantly, Defendants have steadfastly and dangerously refused to release Plaintiffs despite being under injunctions expressly ordering them to consider the release of high risk detained people. *See* Pet. ¶¶70, 72; Order Granting in Part and Denying in Part Plaintiffs' Motion to Enforce April 20, 2020 Preliminary Injunction, *Fraihat v. U.S. Immigration and Customs Enforcement*, No. EDCV 19-1546 JGB (SHKx), ECF No. 240 (C.D. Cal Oct. 7, 2020).[7] In sum, Defendants have taken almost none of the medically recommended steps known to decrease the risk of imminent, serious harm from COVID-19. As such, they have recklessly disregarded the risk of harm to Plaintiffs and therefore were deliberately indifferent to their basic human needs.

V. Plaintiffs Have Stated Claims for Relief Under the Rehabilitation Act.

Plaintiffs have clearly alleged that they are disabled within the meaning of the Rehabilitation Act and that ACDC, a program receiving federal financial assistance, has discriminated against them because of their disabilities by denying them reasonable accommodations to participate fully in their removal process.

[7] Attached at Exhibit 2.

Section 504 of the Rehabilitation Act requires that "[n]o otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794. Defendants do not contest that ACDC receives federal financial assistance and therefore must comply with the Rehabilitation Act. Rather, first, without any factual support, they question whether Plaintiffs have qualifying disabilities entitling them to accommodations. Next, they argue that ACDC has complied with the law because Plaintiffs' harms do not occur "solely'" as a result of their disabilities and because the accommodations they seek require a fundamental alteration of Defendants' programs. Defendants are wrong on all counts.

A. Petitioners' Physical Illnesses Qualify as Disabilities.

The Rehabilitation Act uses the definitions of disability found in Title II of the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. A disability is any "physical or mental impairment that substantially limits one or more major life activities of such individual." 42 U.S.C. § 12102(1)(A). A major life activity includes the operation of a major bodily function or simply caring for oneself. 42 U.S.C. § 12102(2)(A). Plaintiffs have plausibly alleged that they collectively suffer from thyroid disorder, obesity, hypertension, high cholesterol, psoriasis, asthma, pre-diabetes, and an endocrine disorder, which all impact how they care for themselves and their major bodily functions. The court must accept these allegations as true at this stage of litigation, and in any case, Defendants have offered no factual or other direct challenge to the allegations. Plaintiffs are disabled under 42 U.S.C. § 12102 and entitled to the protections of the Rehabilitation Act.

B. Plaintiffs Have Plausibly Alleged that Defendants Are Denying Them Reasonable Accommodations Because of Their Disabilities.

The thrust of Defendants' argument is that Plaintiffs cannot demonstrate that they were denied accommodations *because of* their disabilities. But the Fifth Circuit has held that the Rehabilitation Act "impose[s] upon public entities an affirmative obligation to make reasonable accommodations for disabled individuals" regardless of causation. *Silver v. City of Alexandria*, No. 1:20-CV-00698, 2020 WL 3639696, at *3 (W.D. La. July 6, 2020) (citing *Bennett-Nelson v. La. Bd. of Regents*, 431 F.3d 448, 454-55 (5th Cir. 2005)). "Where a public entity has an affirmative obligation to make reasonable accommodations for a disabled individual but fails to meet that obligation, "the cause of that failure is irrelevant." *Bennett-Nelson*, 431 F.3d at 454-55. All that Plaintiffs must show is that ACDC knew of the disability and its consequential limitations, either because the plaintiff requested an accommodation or because the nature of the limitation was "open, obvious, and apparent.". *Windham v. Harris County, Texas*, 875 F.3d 229, 236 (5th Cir. 2017) (citing *Taylor v. Principal Fin. Grp., Inc.*, 93 F.3d 155, 164 (5th Cir. 1996)). Plaintiffs have clearly alleged, and of course ACDC and ICE clearly knew, that the COVID-19 pandemic posed a significant threat to detained individuals with disabilities like those Plaintiffs. Pet. ¶¶ 21-24, 38-44.

Defendants wrongly state that the accommodations Plaintiffs seek – release from detention to pursue their removal cases – require a "fundamental alteration in the nature of the program." Defs.' Mem. at 21. This allegation is without basis. Detention facilities regularly and routinely release individuals to pursue their removal cases. 8 U.S.C. 1226(a); 8 CFR § 212.5. Such release is a routine feature, not a fundamental alteration, of ICE's programs.

Nor is it "preferential treatment" to provide an accommodation that would prevent Plaintiffs from suffering severe complications or even death should they contract COVID-19. Numerous detention, jail and prison facilities have released individuals with underlying

disabilities to address the COVID-19 crisis, and ICE has been aware that conditions at ACDC and other detention facilities pose a severe threat of harm to individuals with certain underlying health conditions. Pet. ¶¶ 55-72; *Dada*, 2020 WL 2614616, at *3; *Vazquez Barrera*, 455 F. Supp. 3d at 339; *Malam v. Adducci*, 455 F. Supp. 3d at 389-90. There is no basis to characterize the prevention of severe illness or death as "preferential treatment" for the detained individuals for whom ICE is obliged to provide care. Similarly, the alternative remedies that Plaintiffs – widespread testing, improved hygiene, and a site inspection – have been conducted by numerous facilities, and ACDC itself has conducted widespread testing. These actions cannot be deemed fundamental alterations of ICE's programs and activities.

Defendants' citation to *Wragg v. Ortiz*, No. 20-9456, 2020 WL 2745247 (D.N.J., May 27, 2020), a case seeking release of a class of persons from the custody of the Bureau of Prisons ("BOP"), does not support their argument. In that case, the court assumed that individuals with greater susceptibility to severe disease if they contracted COVID-19 *could* be considered disabled and eligible for reasonable accommodations. 2020 WL 2745247 at *26. The *Wragg* court ruled against Petitioners because the Rehabilitation Act claims for the class were "indistinguishable" from their claims for the "entire population" of the facility. Thus their "bold request to release any and all inmates who may have any disability is simply not a reasonable accommodation within the meaning of the Rehabilitation Act. It is an all or nothing approach that deprives the prison from conducting an independent analysis of each inmate's individual circumstances and an accommodation that may address the inmate's needs." *Id.*, at *27. Here, by contrast, Plaintiffs seek remedies for themselves and only themselves, arguing that release is the only reasonable accommodation for their specific disabilities, allowing the court to make individualized determinations as to their needs. In fact, the BOP facility in *Wragg* was already

conducting mass testing and offering release to home confinement in individual cases as an accommodation to those at high risk of contracting COVID-19.[8]

Plaintiffs have plausibly alleged that they have qualifying disabilities. They seek reasonable accommodations that do not fundamentally alter the nature of ICE's programs and are indeed routine features of the removal and detention regime. Defendants' motion to dismiss Plaintiffs' Rehabilitation Act claims must be denied.

CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully submit that Defendant's Motion to Dismiss should be denied.

Dated: October 27, 2020

Respectfully submitted,

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[8] Defendants' additional citations are inapposite. In *Brown v. Pennsylvania Department of Corrections*, 290 F. App'x 463 (3d Cir. 2008), the court did not fully address the pro se petitioner's ADA claims. In *Jenkins v. Glover*, Civil Case No. 09-2145(FSH), 2009 WL 2391278 at *5-6 (D.N.J. Jul. 30, 2009), the plaintiff failed to allege facts showing he had a qualifying disability.

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CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2020, I electronically filed the foregoing document and accompanying exhibits with the Clerk of the 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.

Dated: October 27, 2020

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