UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

HERAUD ST. LOUIS, et al.,
Petitioners-Plaintiffs,

v.

Case No. 2:20-cv-349

JIM MARTIN, et al.,
Respondents-Defendants.

Reply in Support of Verified Petition for Writ of Habeas Corpus and Complaint

Pursuant to this Court's May 13 order (ECF 4) and May 21 endorsed order (ECF 23), Plaintiffs-Petitioners ("Petitioners") file this reply to Defendants-Respondents' ("Respondents") Response ("Resp.") (ECF 34) to the Petition for Writ of Habeas Corpus and Complaint (ECF 1, "Compl.").

As the record before the Court reveals, Respondents' efforts to "prevent the introduction and spread of COVID-19," Resp. at 4, have thus far failed and, in key respects, remain far below acceptable standards—including their own. Respondents' response to COVID-19 remains constrained by their persistent lack of physical capacity, testing supplies, and oversight tools. Thus, maintaining Petitioners in custody will increase their risk of exposure to disease and death for the foreseeable future. Under these circumstances, release is the only remedy.

I. Facts

Respondents have failed to prevent the introduction and spread of COVID-19.

On March 23, 2020, the Centers for Disease Control and Prevention ("CDC") issued COVID-19 guidance to "help facilities prevent spread of COVID-19 from outside the facility to inside" by "intensifying cleaning/disinfection practices" and—as "critical" to "prevent[] further transmission"—by "reinforcing good hygiene practices" and "implementing social distancing strategies." Ex. 6 to ECF 1-15 (CDC DG) at 5, 8. On April 10, Respondent U.S. Immigration and

Customs Enforcement ("ICE") issued the Pandemic Response Requirements ("PRR"), which "set[] forth specific mandatory requirements . . . as well as best practices" for all facilities to comply with CDC guidance. Ex. 1 (PRR) at 3.[1]

Despite issuing the PRR 54 days ago, Respondents have failed to prevent the introduction and spread of COVID-19 in their facilities. On April 20, there were two confirmed cases among detained persons, and eight among employees, at the Krome Service Processing Center ("Krome"), with none at Respondents' other facilities in Florida. *See Gayle v. Meade*, No. 20cv21553, ECF 53-1 (S.D. Fla. Apr. 21, 2020); *id*. ECF 33-1 (S.D. Fla. Apr. 16, 2020). But as of June 3, amongst detainees, there are at least 16 confirmed cases at Krome, 20 confirmed cases at the Broward Transitional Center ("BTC"), and 17 confirmed cases at Glades County Detention Center ("Glades"). *ICE Guidance on COVID-19: ICE Detainee Statistics*, U.S. Immigration & Customs Enf't (last visited June 3, 2020), https://www.ice.gov/coronavirus. There are now 12 confirmed cases among staff at Krome. ECF 34-3 (Krome Castano Decl.) ¶ 12. At Glades, where just one Sheriff's deputy was infected one week ago, there are now at least six confirmed cases among ICE contractors, and 320 detained persons at the facility remain under group quarantine as a result. ECF 34-4 (May 31 Castano Decl.) ¶ 5.[2] In addition, while Respondents report reducing their detained populations in accordance with the PRR, *see, e.g.*, May 31 Castano Decl. ¶ 6,[3] these measures have failed to achieve the necessary social distancing, as Petitioners continue to regularly sleep, eat, and bathe within less than six feet of other detainees, *Id*. ¶ 8.[4]

[1] The PRR is nonetheless "entirely inadequate to prevent or mitigate the rapid transmission of COVID-19 in" Respondents' detention facilities. ECF 1-2 (Amon Decl.) ¶ 32.
[2] In fact, such "cohorting" is counterproductive in this context. Amon Decl. ¶ 39.
[3] Respondents report the facilities' population to capacity on a specific date. Such numbers may be misleading since they fail to reveal periodic variations in each facility's population due to frequent transfers of detainees between facilities, as well as the distribution of detainees across dorms in each facility where Respondents are dedicating some dorms or other spaces to group quarantines. *See* Smith Decl. ¶ 12; May 22 Glades Castano Decl. ¶ 11.
[4] ECF 34-2 (May 22 Castano Decl.) ¶¶ 15-16; Ex. 2 (Suppl. Bucknor Decl.) ¶¶ 4, 6; Ex. 3 (Suppl. Wilson Decl.) ¶¶ 4-5; Ex. 4 (Suppl. Robinson Decl.) ¶¶ 4-5; Ex. 5 (Suppl. Montaque Decl.) ¶¶ 3-4; Ex. 6 (Suppl. Dorival Decl.) ¶ 3.

Respondents have failed to implement acceptable standards, including their own.

Respondents' failure to faithfully implement CDC guidance, the PRR, and related standards have persisted for several weeks, despite Petitioners' repeated complaints. The PRR directs people in detention centers to avoid "congregating in groups of 10 or more." PRR at 13. The CDC also recommends "[r]earrang[ing] seating in the dining hall so that there is more space between individuals," and "[r]estrict[ing] transfers . . . unless necessary . . . to prevent overcrowding." CDC DG at 9, 11. The PRR also directs detention staff to "make all possible accommodations until transfer occurs to prevent transmission of other infectious diseases to" medically-vulnerable individuals when they are placed in group quarantines (for example, by "allocat[ing] more space for a higher-risk individual within a shared isolation room"). PRR at 15.

But Respondents have continued to place detained persons, including Petitioners, inches apart at meals and within feet during lengthy transfers.[5] Respondents transfer detainees frequently, even though transfers to Glades and Baker have *resulted* in overcrowding and further inability to socially distance.[6] And Respondents have failed to adopt measures to accommodate Petitioners during group quarantines. Suppl. Robinson Decl. ¶ 9; ECF 1-3 (Conlin Decl) ¶ 18; *see also* Amon Decl. ¶ 32 ("lack of specific attention to date in ICE's guidance on COVID-19 indicates that they do not plan to establish special protections for high-risk patients").

In guidance on testing, the CDC has made clear that "[r]esidents in long-term care facilities or other congregate living settings, including prisons and shelters, with symptoms" such as fever or cough, are priorities for COVID-19 testing (*Evaluating and Testing Persons for Coronavirus Disease 2019* (May 3, 2020), https://www.cdc.gov/coronavirus/2019-nCoV/hcp/clinical-criteria.html). But Respondents are failing to test most detainees who develop

[5] Supp. Bucknor Decl. ¶¶ 3-4; Supp. Wilson Decl. ¶¶ 3-4; ECF 1-9 (Bucknor Decl.) ¶ 10.
[6] Supp. Bucknor Decl. ¶ 2; *accord* ECF 34-1 (Smith Decl.) ¶ 15.

such symptoms after intake.[7]

Moreover, Respondents have been required by court order to provide face masks to all detained persons at Glades and Krome on a weekly basis. *Gayle v. Meade*, 20-cv21553, 2020 WL 2086482, at *7 (S.D. Fla. Apr. 30, 2020). Yet they have failed to consistently replace, or consistently require the wearing of, such masks at Glades, as well as Baker.[8] Public health experts have also long warned of the obvious dangers posed, especially to medically-vulnerable persons, by detention staff who fail to wear protective equipment, and by symptomatic individuals being housed in close proximity, ECF 1-1 (Graves Decl.) ¶¶ 25, 30; but, also in this context, Respondents have failed to adopt measures to accommodate Petitioners, Supp. Wilson Decl. ¶ 8, and, at Baker, staff continue to not consistently wear protective equipment, Supp. Bucknor Decl. ¶ 9.

Respondents are also failing to provide "no-cost, unlimited access to supplies for hand cleansing," and "to ensure continual cleaning of [common] areas throughout the day" and of shared surfaces and objects "several times a day." PRR at 9, 10; CDC DG at 9; *see also* Suppl. Bucknor Decl. ¶¶ 5-7; Suppl. Wilson Decl. ¶¶ 3, 6; Suppl. Robinson Decl. ¶ 3, 6.

II. Under any standard, Respondents' conditions and practices violate Petitioners' due process rights and mandate their release.

A. Petitioners' detention constitutes unconstitutional punishment.

Under the Due Process Clause, civil detainees like Petitioners may not be subject to *any* conditions that amount to punishment. *McMillian v. Johnson*, 88 F.3d 1554, 1564 (11th Cir. 1996). This Court may infer an impermissible "intent to punish" where Respondents impose conditions that are not "reasonably related to a legitimate governmental objective." *Bell v.*

[7] Suppl. Bucknor Decl. ¶ 11; Suppl. Wilson Decl. ¶ 8; Suppl. Robinson Decl. ¶ 7; *see also* Krome Castano Decl. ¶ 12 (only 38 detainees have been tested at Krome, which has only "a limited number" of test kits).
[8] Supp. Bucknor Decl. ¶ 8; Supp. Wilson Decl. ¶ 10; Supp. Robinson Decl. ¶ 8.

Wolfish, 441 U.S. 520, 538–39 (1979); *Jacoby v. Baldwin Cty.*, 835 F.3d 1338, 1345 (11th Cir. 2016); *Magluta v. Samples*, 375 F.3d 1269, 1273 (11th Cir. 2004).

Respondents argue that "*any* conditions incident to [Petitioners'] detention" serve a legitimate purpose, Resp. at 7 (emphasis added). This extreme argument proves too much. Although Respondents may have a legitimate interest in ensuring Petitioners' appearance at immigration proceedings, *id.*, lethal petri-dish conditions are not reasonably related to that end. Petitioners' declarations reveal the deadly conditions under which Respondents have detained them for weeks: crowded and unsanitary eating, bathing, and sleeping quarters making it impossible to socially distance; masks not being provided or worn consistently; lack of adequate hand sanitizer and soap; and visibly-ill detainees not being tested.[9] Even with the "steps" Respondents claim to have taken, Resp. at 8-9, these conditions create a recipe for a COVID-19 outbreak—one that puts Petitioners at a grave risk of serious illness and death, in violation of their Due Process rights.[10] *See Helling v. McKinney*, 509 U.S. 25, 35 (1993); *Tittle v. Jefferson Cty. Comm'n*, 10 F.3d 1535, 1543–44 (11th Cir. 1994) (Kravitch, J., concurring). Although Respondents allege that Petitioners' continued detention is required by the immigration statutes, Resp. at 2-4, as a result of which Petitioners have received no individualized flight risk or public safety determinations, those statutes cannot authorize unconstitutional detention. *See* Part II.D. *infra*. In a deadly global pandemic that has reshaped every aspect of society, alternative monitoring practices *are* reasonably related to the government's purported goal. *See, e.g.*, *Robenson J. v. Decker*, No. 20-5141 (KM), 2020 WL 2611544, at *7 (D.N.J. May 22, 2020); *Thakker v. Doll*, 2020 WL 1671563, at *8 (M.D. Pa. Mar. 31, 2020) (finding "no rational

[9] Supp. Wilson Decl. ¶¶ 3-7, 10; Supp. Robinson Decl. ¶¶ 3-6, 8; Supp. Bucknor Decl. ¶¶ 2-8.
[10] The increased risk that these conditions and the greater likelihood of a COVID-19 outbreak pose to facilities' staff and families, as well as the surrounding community's limited medical resources, underscore that the present conditions are not reasonably related to any legitimate governmental aim. *See* ECF 17 at 24.

relationship between a legitimate government objective and keeping Petitioners detained in unsanitary, tightly-packed environments," particularly when "ICE has a plethora of means *other than* physical detention at their disposal by which they may monitor civil detainees and ensure that they are present at removal proceedings, including remote monitoring and routine check-ins") (emphasis in original).

Respondents rely on *Matos v. Lopez Vega*, 2020 WL 2298775, at *10–*11 (S.D. Fla. May 6, 2020), to support their argument that detaining medically vulnerable persons does not amount to punishment. To the extent *Matos* suggests that the threat of serious illness or death is simply an unfortunate but acceptably inherent feature of detention, it is incorrect. *See Gayle*, 2020 WL 2086482, at *4 (conditions at Glades and Krome amount to punishment because of heightened risk of contracting COVID-19 and dying). Moreover, the illnesses it references in this context are inapposite; the common cold is not nearly as lethal as COVID-19, and there exists a vaccine for tuberculosis, but no vaccine or treatment exists for COVID-19. *Contra Matos*, 2020 WL 2298775, at *10. Furthermore, whereas the petitioners in *Matos* were all expected to be deported within the month, Petitioners will be subjected to these unlawful conditions for the foreseeable future, with no end in sight. *See* Supp. Robinson Decl. ¶ 12; Supp. Bucknor Decl. ¶ 13. *Contra Matos*, 2020 WL 2298775, at *10. Lastly, *Matos* was decided a month ago, when "[m]ost significantly" there were no COVID-19 cases in the facility in question (where, unlike Petitioners, detainees allegedly received hand sanitizer and had staggered dinner arrangements). *Contra id.* at *4. There are now at least 20 cases amongst those detainees.

And while touting a lack of confirmed COVID-19 cases among *detainees* in some facilities, Resp. at 5, there *are* confirmed cases among detainees at most facilities at issue here. *ICE Guidance on COVID-19: ICE Detainee Statistics*, *supra* (last visited June 3, 2020).

Moreover, Respondents fail to explain what percentage of detainees have been tested and appear to only be testing *some* symptomatic detainees and zero asymptomatic detainees. Supp. Wilson Decl. ¶ 8 (feverish and coughing detainees did not receive tests); Supp. Robinson Decl. ¶ 7 (same); Supp. Bucknor Decl. ¶ 11 (same); Monique O. Madan, *ICE admits to transferring detainees with COVID-19, says it can't test everybody*, Miami Herald (May 27, 2020), https://amp.miamiherald.com/news/local/immigration/article243031176.html; *see also Coreas v. Bounds*, 2020 WL 1663133, at *6, *11 (D. Md. Apr. 3, 2020) ("[I]t is impossible to point to any confirmed cases ... when Respondents have not conducted any COVID-19 tests").

B. *Youngberg* applies to civil detainees like Petitioners.

Respondents suggest that the professional-judgment standard of *Youngberg v. Romeo*, 457 U.S. 307, 322–23 (1982), only applies to so-called "mental patients." Resp. at 7 n.3. Despite Petitioners' citations, *see, e.g.*, Compl. at 31, Petitioners-Plaintiffs' Motion for Temporary Restraining Order ("TRO") (ECF 17) at 13, Respondents repeatedly ignore that the Eleventh Circuit has explicitly applied *Youngberg* applies to "civil detainees." *Hood v. Dep't of Children & Families*, 700 F. App'x 988, 990 n.1 (11th Cir. 2017). Like the detainee in *Hood*, Petitioners are civil detainees who have served their time for any crimes, yet are being temporarily held in civil detention for some other purpose. Their conditions of confinement cannot constitute "such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Corpus v. Lamour*, No. 2:16-cv-620-FtM-38MRM, 2018 WL 5221241 (M.D. Fla. Oct. 22, 2018) (quoting *Youngberg*, 457 U.S. at 323). Petitioners incorporate their earlier arguments and evidence that "no professional judgment was exercised in permitting the conditions that endanger Plaintiffs to exist," TRO at 13, and that Respondents' failure "to exercise appropriate

professional judgment regarding social distancing and hygiene" "does not comport with standard professional assessments of the needs of those who are medically vulnerable" and does not "comport—even remotely—with the CDC guidelines for correctional and detention facilities, which take pains to accommodate the practical realities that burden facility administrators to the detriment of detainees' health," *id.* at 14. The newest evidence confirms this. *See supra, infra*.

C. Petitioners are deliberately indifferent to Petitioners' health and safety.

Assuming *arguendo* that the punishment standard does not apply, if a condition of confinement violates prisoners' rights under the Eighth Amendment, it necessarily violates the rights of civil detainees as well. *See Hamm v. DeKalb Cty.*, 774 F.2d 1567, 1573–74 (11th Cir. 1985). Evidence to support deliberate indifference can include knowledge of serious health risks and failure to address them, or simply delays or inadequacies in addressing them. *See Baez v. Rogers*, 522 F. App'x 819, 821 (11th Cir. 2013) (citing *McElligott v. Foley*, 182 F.3d 1248, 1255 (11th Cir. 1999)). The government acts with deliberate indifference when it "ignore[s] a condition of confinement that is sure or very likely to cause serious illness." *Helling*, 509 U.S. at 33. There can be little question that, given the significant likelihood that medically vulnerable detainees will die of COVID-19, this case involves an objectively serious health risk. And Respondents' shortcomings reflect subjective deliberate indifference, too.

The recent opinion in *Swain v. Junior*, 958 F.3d 1081 (11th Cir. 2020), does not counsel a different result. *Swain* focused on two key points: (1) the Court criticized mere reliance on the harms of COVID-19 as "proof" of deliberate indifference; and (2) it relied on an expert report "commend[ing]" the steps the jail was taking. *Id.* at 1089. Here, of course, there is no neutral, court-appointed expert extolling Respondents' actions. Moreover, Petitioners need not rely merely on the deadly conditions. Instead, as laid out in Part I *supra*, Respondents (1) are aware,

through ICE and CDC guidance, that holding medically vulnerable detainees like Petitioners in their facilities exposes them to serious health risks, (2) are aware that steps deemed "critical" or "priorities" by the CDC to mitigate suck risks are not (and in some cases cannot) be adequately taken, and (3) have adopted measures aimed at maintaining detained persons in custody even when, as laid out in Part II.A *supra*, alternatives to detention would meet their goal and better protect Petitioners. The record makes clear that Petitioners are unable to socially distance; to sufficiently practice adequate hygiene through frequent disinfecting, handwashing, or hand sanitizing, and wearing a mask; or to obtain sufficient testing for COVID-19 at their facilities. See Part I.A *supra*. Respondents have had actual knowledge of these conditions for weeks; yet they continue to detain Petitioners in these conditions, despite alternatives. That is all that is needed to establish deliberate indifference here.

D. As the record reflects, release is the only remedy.[11]

This is not simply an unconstitutional conditions case. Respondents have not cured the constitutional violation at issue here—nor can they. The number of confirmed COVID-19 cases continue to rise at Krome and Glades, notwithstanding purported efforts by Respondents. It is true that conditions have created the high risk of infection and attendant risks of serious illness and death Petitioners currently face. But those conditions are inherent to Glades, Baker, and Krome, all of which are designed to hold many bodies in close proximity and require people to eat, wash, and sleep close to one another. Numerous courts have rejected the argument that

[11] Respondents contend that Petitioner Heraud St. Louis' claims should be dismissed as moot because he was recently transferred into the custody of the Lee County Sheriff's Office based on an outstanding warrant. Resp. at 5. However, Respondent ICE has signaled its intent to either retain or resume at the first opportunity its custody of Mr. St. Louis, by lodging a detainer with the Sheriff while his removal proceedings are still pending. May 22 Glades Castano Decl. ¶ 27. Therefore, Mr. St. Louis's claims are not moot. *See Christian Coalition v. Cole*, 355 F.3d 1288, 1291 (11th Cir. 2004) ("Only when the defendant can demonstrate that there is no reasonable expectation that the wrong will be repeated are federal courts precluded from deciding the case on mootness grounds") (quotations omitted); *cf. Roberts v. INS*, 372 F. App'x 921, 924 (11th Cir. 2010) (detainer was found not to establish custody for habeas purposes because removal proceedings had not been initiated).

individuals seeking release from ICE detention because of their susceptibility to contracting COVID-19 are bringing conditions claims, instead holding that the cases are properly analyzed as habeas petitions justifying release.[12]

In the alternative, Petitioners have alleged that this Court has jurisdiction under 28 U.S.C. § 1331. Compl. at 4; *see also Matos*, 2020 WL 2298775, at *6 (finding subject matter jurisdiction). Precedent does not prohibit release as a remedy for conditions claims when no "discontinuance of any improper practices" and no "correction" can cure those conditions. *See Gomez v. United States*, 899 F.2d 1124, 1126 (11th Cir. 1990). Because the conditions creating a high risk of infection cannot readily be cured, release is the only adequate remedy at this time.

Courts around the country have also rejected the argument that the immigration statutes justify detention and prohibit release even in light of COVID-19. These courts have in fact ordered the release of medically vulnerable detainees, including individuals with significant criminal histories, recognizing that a statute cannot authorize unconstitutional detention.[13]

Moreover, in practice, ICE regularly releases individuals with serious health conditions who are subject to mandatory detention under INA § 236(c). *See, e.g.*, Unopposed Brief of the American Immigration Council as Amicus Curiae, *Hope v. Doll*, No. 20-1784 (3d Cir. May 11, 2020), Dkt. 42 (detailing several such specific cases).

Conclusion

The petition, and the complaint's request for injunctive relief, should be granted.

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[12] *See, e.g.*, *Dada v. Witte*, No. 1:20-CV-00458, 2020 WL 2614616, at *1 (W.D. La. May 22, 2020) (ordering release of petitioners, including one who had been transferred to detention in Florida); *Juan E. M. v. Decker*, No. 20-4594 (KM), 2020 WL 2214586, at *5 (D.N.J. May 7, 2020); *Vazquez Barrera v. Wolf*, _ F. Supp. 3d _, 2020 WL 1904497, at *4 (S.D. Tex. Apr. 17, 2020); *Bent v. Barr*, _ F. Supp. 3d _, 2020 WL 1812850, at *2–*3 (N.D. Cal. Apr. 9, 2020); *Malam v. Adducci*, _ F. Supp. 3d _, 2020 WL 1672662, at *3–*4 (E.D. Mich. Apr. 6, 2020); *Basank v. Decker*, _ F. Supp. 3d _, 2020 WL 1481503, at *4 (S.D.N.Y. Mar. 26, 2020).

[13] *See, e.g.*, *Medeiros v. Martin*, No. 20-178 WES, 2020 WL 2104897, at *5 (D.R.I. May 1, 2020); *Pimentel-Estrada v. Barr*, No. C20-495 RSM-BAT, 2020 WL 2092430, at *17 (W.D. Wash. Apr. 28, 2020); *Bent*, 2020 WL 1812850, at *7; *Castillo v. Barr*, No. CV 20-00605 TJH (AFMx), 2020 WL 1502864, at *5 (C.D. Cal. Mar. 27, 2020).

Dated: June 3, 2020

Respectfully Submitted,

/s/ Amien Kacou

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** Admitted pro hac vice.*
*** Admitted pro hac vice; not admitted in DC; practice limited to federal court.*
**** Motion to appear pro hac vice forthcoming; not admitted in DC; practice limited to federal court.*

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing via the Court's ECF filing system and via email courtesy copy to the office of the United States Attorney for the Middle District of Florida.

Dated: June 3, 2020

/s/ Amien Kacou
Amien Kacou