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8
9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**
11 **EASTERN DIVISION**

12 JOSE ROBLES RODRIGUEZ;
13 CHARLESTON EDWARD DACOFF;
14 JOSE HERNANDEZ VELASQUEZ;
LUIS LOPEZ SALGADO; PAOLA
RAYON VITE; MARTIN VARGAS
ARELLANO,

15 Petitioners-Plaintiffs,

16 v.

17 CHAD F. WOLF, Acting Secretary, U.S.
Department of Homeland Security;
18 MATTHEW T. ALBENCE, Deputy
Director and Senior Official Performing
19 the Duties of the Director, U.S.
Immigration and Customs Enforcement;
20 DAVID MARIN, Director of the Los
Angeles Field Office, Enforcement and
21 Removal Operations, U.S. Immigration
and Customs Enforcement; and JAMES
22 JANECKA, Warden, Adelanto ICE
Processing Center,

23 Respondents-Defendants.
24
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26
27
28

Case No. 5:20-CV-00627-TJH-GJS

ADELANTO COVID

**PETITIONERS'-PLAINTIFFS'
REPLY IN SUPPORT OF
MOTION FOR TEMPORARY
RESTRAINING ORDER**

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20 **Pro hac vice* application forthcoming

21 ***Pro hac vice* application forthcoming; not admitted in D.C., practice limited to
22 federal courts

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1 **I. INTRODUCTION**

2 Four days ago, this Court granted a temporary restraining order requiring that
3 the Government immediately release two detainees at the Adelanto facility because of
4 the imminent danger to their health posed by COVID-19. *See Castillo v. Barr*
5 (“*Castillo TRO*”), No. CV2000605TJHAFMX, 2020 WL 1502864, at *6 (C.D. Cal.
6 Mar. 27, 2020). Just yesterday, the Court granted a second temporary restraining order
7 again requiring immediate release of a detainee at Adelanto. *Fraihat v. Wolf*, TRO and
8 Order to Show Cause (“*Fraihat TRO*”), No. ED-CV2000590-TJH, at *12 (C.D. Cal.
9 Mar. 30, 2020). In both orders, this Court explained that “[u]nder the Due Process
10 Clause, a civil detainee cannot be subject to the current conditions of confinement at
11 Adelanto.” *Castillo TRO* at *5, *Fraihat TRO* at *10. This Court specifically noted at
12 least four conditions that made detainees at Adelanto vulnerable to COVID-19: (1)
13 detainees were not kept “at least 6 feet apart from others at all times”; (2) they lived in
14 “sleeping rooms housing four or six detainees with shared sinks, toilets and showers”;
15 (3) they had “meal times” where they “line[d] up together, sometimes only inches
16 apart, in the cafeteria”; and (4) they were forced to interact with potentially infected
17 guards who “regularly rotate through the various holding areas several times a day”
18 without protective equipment. *Castillo TRO* at *5, *2; *Fraihat TRO* at *11, *4-5.

19 The Government does not dispute that *all* of these conditions remain exactly the
20 same at Adelanto as they did when this Court granted the TROs in *Castillo* and
21 *Fraihat*. Indeed, besides purporting to increase the number of sanitation supplies and
22 ramp up its “handwashing practices,” the Government points to nothing that has
23 changed—or even that it *intends* to change—at Adelanto since this Court issued those
24 decisions. And Plaintiffs’ expert explains why all of the Government’s proposed
25 countermeasures are woefully inadequate. *See generally* Supplemental Declaration of
26 Eric Robert B. Greifinger, M.D. (“*Supp. Greifinger Decl.*”). Plaintiffs are thus
27 identically situated to the petitioners for whom this Court has already granted relief,
28 and their applications should likewise be granted. If anything, Plaintiffs’ situation is

1 even more urgent because each has serious underlying medical conditions which make
2 them acutely vulnerable to death or permanent injury if they contract COVID-19.

3 This application is thus a matter of the gravest urgency. Given the
4 asymptomatic nature of transmission and nationwide dearth of testing kits, COVID-19
5 may already be running rampant at Adelanto. This Court’s immediate action could be
6 the difference between life and death. And even in the single day since Plaintiffs filed
7 their Motion, another court has joined the growing chorus of recognition that it
8 violates the Due Process Clause to keep noncitizens—particularly those with serious
9 medical conditions—detained in facilities where they face the risk of COVID-19
10 infection. *See Thakker v. Doll*, No. 1:20-cv-480-JEJ (Mar. 31, 2020) (granting TRO
11 releasing medically vulnerable immigration detainees from custody due to the dangers
12 of COVID-19).

13 The TRO should be granted.

14 **II. ARGUMENT**

15 **A. Plaintiffs Have Standing And Are Likely To Prevail On The Merits**

16 The Government’s standing and merits arguments essentially boil down to a
17 single argument: that Plaintiffs are not at increased risk while detained in Adelanto
18 because there is not (yet) a confirmed COVID-19 case in the facility and existing
19 procedures offer sufficient protection. But these unsupported assertions have been
20 squarely rejected by this Court in its *Castillo* and *Fraihat* orders. *See Castillo* TRO at
21 *4-*5; *Fraihat* TRO at *8-*9. This Court has already held that the existing conditions
22 at Adelanto violate the Fifth Amendment, and that petitioners who are identically
23 situated to Plaintiffs have standing to challenge their detention. *See Castillo* TRO at
24 *4-*5; *see also Thomas v. Ponder*, 611 F.3d 1144, 1151 n.5 (9th Cir. 2010); *Thakker*,
25 at *6 (rejecting government’s position that immigrant detainees have no standing
26 “until the pandemic erupts in our prisons” because “[a] remedy for unsafe conditions
27 need not await a tragic event” (citing *Helling v. McKinney*, 509 U.S. 25, 33 (1993))).

28 The Government does not *even try* to explain how the conditions faced by

1 Plaintiffs here are any different. To the contrary, the Government continues to believe
2 that it is not required to do—and has no intention of doing—anything more than
3 disinfecting surfaces and promoting better “handwashing practices.” *See* Opposition to
4 Temporary Restraining Order at 9. This Court has already recognized that those
5 measures alone are woefully insufficient to stop the spread of COVID-19. *See Castillo*
6 *TRO* at *5; *Fraihat TRO* at *11; *see also* Dkt. 20 at ¶ 41 (Plaintiffs’ medical expert
7 opining that at Adelanto “it will be very difficult irrespective of the amount of
8 sanitation and hygiene practices employed, to prevent spread in such a confined
9 densely populated space”).¹ Indeed, if such measures were remotely adequate,
10 government officials across the country would not have made the painful but
11 necessary decision to close high-density settings of all sorts—schools, workplaces,
12 government buildings, cultural institutions. Nor would people throughout California
13 and all over the nation be advised to stay home for all but the most essential
14 purposes.² The Government’s repeated insistence that better “handwashing practices”
15 are enough to protect detainees at Adelanto defies common sense and reflects a
16 callous disregard for detainees’ welfare.

17 The Government also, tellingly, reveals that it has no intention of testing guards
18 or detainees unless they are symptomatic, have had contact with a person with a
19 “laboratory-confirmed” COVID-19 case, or have “travelled from” a place “with
20 sustained community transmission.” *See TRO Opp.* at 10. That simply underscores the
21 degree to which ICE protocols are dramatically behind the curve: the *United States* is
22 a place with “sustained community transmission.” The virus long ago achieved

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24 ¹ The Government cites one new case out of the Southern District of Texas, in which
25 the court refused to release an immigration petitioner based on lack of evidence that
26 the facility was taking insufficient measures to address the pandemic. *TRO Opp.* at 2,
27 16, 20 (citing Opinion and Order, *Sacal-Micha v. Longoria*, No. 1:20-CV-37 (S.D.
28 Tex. Mar. 27, 2020) (ECF no. 17)). But as Plaintiffs have observed, numerous other
courts have found otherwise, *see TRO Mem.* at 13-14, and nothing in *Sacal* warrants
revisiting the reasoning of this Court’s decisions in *Castillo* and *Fraihat*.

² Alicia Lee, These States Have Implemented Stay-At-Home Orders. Here’s What
That Means for You., CNN (Mar. 26, 2020), available at
[https://www.cnn.com/2020/03/23/us/coronavirus-which-states-stay-at-home-
ordertrnd/index.html](https://www.cnn.com/2020/03/23/us/coronavirus-which-states-stay-at-home-ordertrnd/index.html).

1 community spread in California, which means new detainees, corrections officials,
2 medical staff, and many others coming and going from the facility are potential
3 carriers. *See* Schneberk Decl., Dkt. 20 ¶ 40. And, as this Court has explained, “[t]he
4 science is well established – infected, asymptomatic carriers of the coronavirus are
5 highly contagious.” *Castillo* TRO at *9. Individuals may be infected and spreading the
6 virus to others for days or even weeks while exhibiting mild symptoms or none at all.
7 *See id.* at *2. Awaiting the development of symptoms before acting is a recipe for an
8 outbreak—which is virtually guaranteed if the Government maintains its defiance of
9 the basic epidemiological consensus. *See also* Supp. Greifinger Decl., ¶¶ 10-11
10 (explaining why focusing on confirmed cases “undercounts risk”).

11 The Government also makes clear that it has *no intention* of engaging in even
12 rudimentary social distancing practices—which all experts agree is the only truly
13 effective protective measure. *See* Supp. Greifinger Decl. ¶¶ 9–10 (explaining why
14 social distancing measures are critical for lessening spread of COVID-19). Instead, the
15 Government asserts that social distancing is merely a “desirable strategy,” which
16 could perhaps be accomplished by “cancelling group activities” and “rearranging
17 chairs in the dining hall to increase distance between them.” TRO Opp. at 20. Once
18 again, the Government’s response is nothing less than frightening. It underscores just
19 how much the Government is underestimating the devastating threat posed by
20 COVID-19—and how little it intends to do to stop it at Adelanto. *Cf.* Supp. Greifinger
21 Decl. ¶ 3 (“Two weeks ago, the jail at Rikers Island in New York City had not had a
22 single confirmed COVID-19 case. Rikers now has a rate of infection that is far higher
23 than the infection rates of the most infected regions of the world.”).

24 Finally, the Government asserts repeatedly that social distancing does not
25 “mandate the *per se* shuttering of all congregate facilities.” TRO Opp. At 19. But
26 Plaintiffs do not request the “shuttering” of any facility—they ask only that they not
27 be forcibly exposed “to a serious, communicable disease . . . that is more than very
28 likely to cause a serious illness.” *Castillo* TRO at *9 (citing *Helling*, 509 U.S. at 32).

1 It is the Government that is asserting the false choice between the “shuttering [of] all
2 congregate facilities” and the patently inadequate status quo—where they do virtually
3 nothing to mitigate the spread of COVID-19. As this Court has explained, this is “an
4 unprecedented time in our nation’s history,” where institutions may have to change
5 the ways they have traditionally operated—but that makes it all the more important
6 that the most vulnerable are treated “with compassion and not apathy.” *Id.* at *6.

7 **B. The Other TRO Factors Weigh Decisively In Plaintiffs’ Favor**

8 **1. Plaintiffs Have Demonstrated Irreparable Harm**

9 This Court explained in *Castillo* that “[i]t is well established that the
10 deprivation of constitutional rights unquestionably constitutes irreparable injury.”
11 *Castillo* TRO at *6 (citing *Hernandez v. Sessions*, 872 F.3d 976, 994 (9th Cir. 2017)).
12 The Government has no response to that holding. Instead, the Government simply
13 asserts (yet again) that Plaintiffs have not shown “COVID-19 has actually spread to
14 Adelanto, or that the safeguards and precautions in place at Adelanto to prevent the
15 spread of COVID-19 are inadequate.” TRO Opp. at 22. For the reasons explained
16 above, it is irrelevant that COVID-19 has not yet been detected at Adelanto nor are the
17 current conditions remotely adequate.

18 Moreover, Plaintiffs are at *particular* risk of irreparable harm because they each
19 have conditions such as diabetes, HIV, and asthma, which put them at serious risk of
20 grave medical complications or even death if they contract COVID-19. *See* Dkt. 11-1
21 at 8 (describing Plaintiffs’ medical histories); Declaration of Robert B. Greifinger,
22 Dkt. 19, ¶ 13 (Dr. Greifinger explaining that Plaintiffs’ medical conditions put them at
23 “high risk of complications” if they are infected).

24 **2. The Balance of Equities and Public Interest Support Granting a 25 TRO**

26 The Government asserts that the balance of equities favors keeping Plaintiffs
27 detained in conditions where they risk serious injury or death, because “the
28 extensiveness and seriousness of [their] criminal history” makes them a danger to the

1 public. Opp at 23. But tellingly, the Government includes only the most generic
2 details of certain Plaintiffs' criminal histories, and thereby grossly mischaracterizes
3 the purported danger they pose.

4 For example, the government fails to reveal that Plaintiff Rayon Vite's child
5 endangerment conviction arose from an incident in which she took her youngest child
6 to a homeopathic healer rather than a doctor after he suffered an accidental fall.
7 Supplemental Declaration of Sarah Zelcer ¶ 5. Although she received an enhancement
8 applicable where the victim dies, the victim in fact did not die. *Id.* ¶ 7. In fact, Ms.
9 Rayon Vite maintains a close relationship with him, speaking to him regularly by
10 phone from Adelanto. *Id.* ¶ 10. Ms. Rayon Vite was released after serving 16 months
11 of her four-year sentence and completing numerous rehabilitative programs. *Id.* ¶ 9
12 and Exh. A.

13 As for Mr. Vargas Arellano, his 35-year-old conviction for lewd or lascivious
14 acts with a minor arose from conduct he engaged in with his younger stepsister when
15 he himself was only nine or ten years old. Supplemental Declaration of Margaret
16 Hellerstin ¶ 8. As the victim of repeated sexual abuse throughout his childhood, Mr.
17 Vargas Arellano did not realize at the time that his behavior was wrong. *Id.* at ¶ 9. He
18 has since come to terms with his own abuse and fully understands that his conduct
19 was inappropriate. *Id.* at ¶¶ 11, 14. He has not been convicted of a sex crime since
20 then. *Id.* at ¶ 12.

21 The other Plaintiffs' criminal histories, if any, consist of non-violent offenses.
22 Mr. Dacoff's supposedly "long record of serious crimes," TRO Opp. at 1, includes not
23 a single aggravated felony, crime involving moral turpitude, or crime against a person
24 whatsoever. Similarly, neither Mr. Lopez Salgado nor Mr. Robles Rodriguez have
25 ever been convicted of a violent crime. Dkt. 13 ¶ 12; Dkt. 15 ¶ 10. Finally, Mr.
26 Hernandez Velasquez has never been arrested or convicted of a crime. Dkt. 16 ¶ 13.

27 In any event, this Court has already made clear that past criminal history alone
28 is not an adequate basis to keep a detainee confined in Adelanto under the current,

1 extraordinary circumstances. Just yesterday, in *Fraihat*, this Court ordered the release
2 of a detainee with multiple criminal convictions, including a battery conviction and
3 several drug convictions for which the detainee spent a total of eight years in prison.
4 *Fraihat* TRO at *2. Emphasizing that the detainee had completed the sentences
5 imposed for those crimes, this Court ordered his release despite an immigration judge
6 twice finding that he posed a danger to his community. *Id.* at *2, 12. As explained
7 above, each of the Plaintiffs here have likewise completed the sentences imposed, and,
8 furthermore, there were significant mitigating factors making clear that they are each
9 highly unlikely to pose any danger to the community.³

10 **3. Adequate Conditions of Release Can Be Imposed**

11 As this Court explained in *Castillo*, “[t]he risk that” those released from
12 Adelanto “will flee, given the current global pandemic, is very low, and reasonable
13 conditions can be fashioned to ensure their future appearance at deportation
14 proceedings.” *Castillo* TRO at *5. Ignoring that finding, the Government asserts that
15 the TRO application here should be rejected because Plaintiffs “do not break down
16 how such reasonable conditions would actually be determined, applied, and
17 executed.” TRO Opp. at 24. But Plaintiffs’ Complaint clearly states that “ICE has a
18 range of highly effective tools at its disposal to ensure that individuals report for court
19 hearings and other appointments, including conditions of supervision.” Complaint at
20 18-19. As an example, the Complaint points to ICE’s conditional supervision
21 program, called ISAP (Intensive Supervision Appearance Program), which “relies on
22 the use of electronic ankle monitors, biometric voice recognition software,
23 unannounced home visits, employer verification, and in-person reporting to supervise
24 participants to ensure supervision.” *Id.* at 19. That program is so effective that a
25 “government-contracted evaluation . . . reported a 99% attendance rate at all
26 immigration court hearings.” *Id.* The Government provides no reason to believe such

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28 ³ The fact that some Plaintiffs may be subject to mandatory detention under 8 U.S.C. 1226(c) should not stand in the way of their release. *See Basank v. Decker*, No. 1:20-cv-02518, 2020 WL 1481503 at *6 n.4 (S.D.N.Y. Mar. 26, 2020).

1 monitoring would be ineffective here.

2 That is particularly so given that Plaintiffs all have serious medical conditions
3 which mean that any exposure to COVID-19 has a high probability of leading to death
4 or serious disability. The assertion that detainees with such serious conditions would
5 risk their lives to elude monitoring programs which—even under normal conditions—
6 have an almost flawless record of compliance is baseless.

7 Moreover, each Plaintiff has submitted declarations making clear that they will
8 “go to a specific identifiable location,” where they will be able to both be monitored
9 and practice safer social distancing. TRO Opp. at 24. Tellingly, the Government
10 points to no *specific* reason why any of the Plaintiffs would be ill-suited for
11 conditional supervision. Instead, the Government rests on the generic assertion that
12 “protecting the American public against danger” militates against conditional release.
13 *Id.* But that rationale would apply equally to *any* detainee at Adelanto. Yet this Court
14 has clearly—and rightly—recognized that supervision outside a detention facility
15 adequately protects the public when it granted relief in *Castillo* and *Frailhat*.

16 In short, given Plaintiffs’ limited criminal histories, deep ties in the community,
17 and acutely vulnerable medical condition, release conditioned upon supervision is
18 plainly warranted here.

19 **III. The Government’s Evidentiary Objections Are Meritless**

20 The government’s evidentiary objections are meritless. Dkt. 28-4-28-16. It is
21 well settled that a district court may consider hearsay and other otherwise inadmissible
22 evidence in considering whether to issue preliminary injunctive relief. *See Republic of*
23 *the Philippines v. Marcos*, 862 F.2d 1355, 1363 (9th Cir. 1988) (en banc) (“A district
24 court may . . . consider hearsay in deciding whether to issue a preliminary
25 injunction.”); *Flynt Distrib. Co. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984) (“The
26 trial court may give even inadmissible evidence some weight, when to do so serves
27 the purpose of preventing irreparable harm before trial.”); *see also Keep a Breast*
28 *Found. v. Seven Grp.*, No. 11-CV-00570 BEN WMC, 2011 WL 2940290, at *2 (S.D.

1 Cal. July 19, 2011) (“[C]ourts may consider otherwise inadmissible evidence for Rule
2 65 purposes.”). Consideration of hearsay is particularly appropriate here given the
3 urgency of the situation and the fact that it is the government’s own actions that have
4 made it impossible to communicate effectively with Plaintiffs. *See* Dkt. 11-1 at 4 n.6
5 (describing limitations on attorneys’ ability to communicate with clients at Adelanto).
6 And Defendants cannot seriously raise evidentiary objections when their own
7 declarants make numerous hearsay statements. *See, e.g.*, Dkt. 28-1, ¶¶ 6-7, 11; Dkt.
8 28-2 ¶¶ 5-9.

9 Defendants also object to portions of Dr. Golob’s testimony based on his
10 alleged lack of qualifications, yet his background and experience in infectious disease
11 speak for itself. *See* Dkt. 18, ¶ 1 & Ex. A.

12 In any event, the government does not contest that Plaintiffs have the medical
13 conditions described. To the contrary, Defendants *confirm* that ICE is aware of
14 Plaintiffs’ medical conditions, but, inexplicably, has determined—contrary to the
15 opinions of medical experts and the CDC, Dkt. 11-1 at 2—that Plaintiffs are “not in a
16 high-risk group for contracting COVID-19.” Dkt. 28-2 (Quevedo Decl.), *passim*.

17 **IV. CONCLUSION**

18 This Court should grant Plaintiffs’ motion for a temporary restraining order and
19 direct Plaintiffs’ immediate release from Adelanto.

20 Respectfully submitted,

21 Dated: March 31, 2020

22 /s/ Jessica Karp Bansal
23 JESSICA KARP BANSAL
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