[Docket Number Pending]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BHARATKUMAR G. THAKKER, et al.,
Plaintiffs-Appellants,

v.

CLAIR DOLL, in his official capacity as Warden of York County Prison, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
For the Middle District of Pennsylvania
D.C. No. 1:20-cv-000480
District Judge: Hon. John E. Jones III

EMERGENCY MOTION FOR STAY PENDING APPEAL

Will W. Sachse, Esq. (PA 84097)
Thomas J. Miller, Esq. (PA 316587)
Kelly Krellner, Esq. (PA 322080)
Carla G. Graff, Esq. (PA 324532)
DECHERT, LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104
T: 215-994-4000
E: will.sachse@dechert.com
E: thomas.miller@dechert.com
E: kelly.krellner@dechert.com
E: carla.graff@dechert.com

David C. Fathi (WA 24893)
Eunice H. Cho (WA 53711)

Witold J. Walczak (PA 62976)
Vanessa L. Stine (PA 319569)
Muneeba S. Talukder (CA 326394)
Erika Nyborg-Burch (NY 5485578)
AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA

247 Ft. Pitt Blvd., 2d Fl.
Pittsburgh, PA 15222
T: 412-681-7864
E: vwalczak@aclupa.org

P.O. Box 60173
Philadelphia, PA 19102
T: 215-592-1513
E: vstine@aclupa.org
E: mtalukder@aclupa.org

AMERICAN CIVIL LIBERTIES UNION FOUNDATION, NATIONAL PRISON PROJECT
915 15th St. N.W., 7th Floor
Washington, DC 20005
T: 202-548-6616
E: dfathi@aclu.org
E: echo@aclu.org

Michael Tan (NY 4654208)
Omar C. Jadwat (NY 4118170)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION, IMMIGRANTS' RIGHTS PROJECT
125 Broad Street, 18th Floor
New York, NY 10004
T: (212) 549-2600
E: mtan@aclu.org
E: ojadwat@aclu.org

E: enyborg-burch@aclupa.org

Cecillia Wang (CA 187782)
Stephen Kang (CA 292280)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111
T: (415) 343-0774
E: cwang@aclu.org
E: skang@aclu.org

INTRODUCTION

On April 27, 2020, the District Court granted in part and denied in part Plaintiffs-Petitioners' ("Plaintiffs") motion for a preliminary injunction, ordering the re-detention of medically-vulnerable individuals in the custody of U.S. Immigrations and Customs Enforcement ("ICE"). Memorandum & Order, ECF No. 89 (Apr. 27, 2020). Plaintiffs are immigration detainees who are over age 55 and/or have one of more pre-existing medical conditions that puts them at about a 15% risk of death if they contract COVID-19, and a much higher risk of needing hospitalization and intensive care. At this unprecedented time in history, not only does re-detention violate Plaintiffs' constitutional rights, re-detention puts them at significant risk of serious illness and death from COVID-19. The stakes could not be higher.

On March 31, 2020, the District Court issued a temporary restraining order, ordering the release of at-risk individuals from ICE detention at York County Prison, Clinton County Correctional Facility, and Pike County Correctional Facility. *Thakker v. Doll*, No. 1:20-cv-480, 2020 WL 1671563 (M.D. Pa. Mar. 31, 2020). Recognizing that "it would be heartless and inhumane not to recognize [Plaintiffs'] plight" in the face of global pandemic with "unprecedented and ghastly" results, *id.* at *9, the Court found that the conditions at all three facilities included "overcrowding that makes social distancing impossible." *Id.* at *6. The Court found "no rational relationship between legitimate government objective and keeping [Plaintiffs] detained in unsanitary, tightly-packed environments—

doing so would constitute a punishment" in violation of the Fifth Amendment. *Id.* at *8.

Despite these findings, on April 27, 2020, the District Court found that a preliminary injunction was not appropriate for the continued release of several of the individuals, notably those from the Clinton County Correctional Facility and York County Prison, concluding that the conditions had improved at those facilities and there were few if any confirmed cases of COVID-19. ECF No. 89 at 18-19. The District Court, however, reached an erroneous decision—based on an incomplete record, a misunderstanding of the science behind the disease, and legal errors. *See* ECF No. 89 at 1 n.1; ECF No. 62. But the absence of confirmed positive tests does not mean there is no virus, which is especially true given that Defendants have conducted few if any tests. The proof of this takes the form of Plaintiff Adebodum Idowu, one of the Plaintiffs originally ordered to report today at 4:00.[1] Indeed, just days after his release on March 31 from Clinton County Correctional Facility, he required emergency medical attention and has remained hospitalized for COVID-19 for the past three weeks, for a time in intensive care. Plaintiffs submitted an expert declaration by an infectious diseases physician who states that Mr. Idowu "almost certainly" contracted COVID-19 while he was detained. Mr. Idowu's story makes clear that these facilities are not COVID-19-

[1] The district court granted reconsideration as to Mr. Idowu and one other plaintiff who has symptoms consistent with COVID-19 illness. *See* ECF No. 92.

free as Defendants aver. Failing to test for illness does not mean that the illness is not present. Returning medically-vulnerable plaintiffs to these Facilities would be reckless and potentially catastrophic. The stakes are literally life and death here.

For the reasons detailed below, an emergency stay pending appeal is imperative to protect the lives of these vulnerable detainees.

ARGUMENT

In deciding whether to stay habeas proceedings pending appeal, appellate courts "follow the general standards for staying a civil judgment." *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987).

> [T]he factors regulating the issuance of a stay are generally the same: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; and (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.[2]

Id. at 776.

As demonstrated below, every factor favors Plaintiffs' request for an emergency stay. But an emergency stay is *necessary* to protect Plaintiffs' lives. Employing this Court's "sliding-scale" approach, a stay is appropriate because Plaintiffs "demonstrate[] irreparable harm that decidedly outweighs any potential

[2] Plaintiffs' motion also complies with the requirements set forth in Federal Rule of Appellate Procedure 8. In its motion for reconsideration, Plaintiffs sought, in the alternative, a stay pending appeal. *See* ECF No. 90. Moreover, given the highly time-sensitive nature of the order requiring re-detention *today*, immediate action before this Court is necessary. *See* Fed. R. App. P. 8(a)(2).

harm to [Defendants]," as well as "at a minimum, serious questions going to the merits." *In re Revel AC, Inc.*, 802 F.3d 558, 570 (3d Cir. 2015) (internal quotation marks and citations omitted). Accordingly, Plaintiffs address the irreparable harm factor first.

I. Irreparable Harm In the Form of Serious Illness or Death Will Result Absent an Emergency Stay.

As the District Court already found, Plaintiffs are "members of high-risk groups." *Thakker*, 2020 WL 1671563, at *6. Each Plaintiff "has an underlying medical condition that heightens their risk of serious COVID-19 effects, among them asthma, diabetes, heart conditions, hepatitis, and immunocompromising conditions such as leukemia and organ transplants." *Id.* Plaintiffs remain "particularly vulnerable due to age and underlying medical conditions." *Id.* at *3. As Plaintiffs further explained in their Amended Complaint, which was filed prior to the district court's order but apparently not considered in the preliminary injunction ruling:

> Outcomes from COVID-19 vary from asymptomatic infection to death. Individuals who are at low risk may experience mild symptoms, while high-risk individuals may suffer respiratory failure from the disease. Amon-New Decl. at ¶ 6 [ECF No. 62-1]. In the highest risk populations, the fatality rate is about 15 percent, meaning that out of 100 vulnerable people infected, fifteen will die. Golob Decl. at ¶ 4 (ECF 2-2). In other words, more than one in every seven people in this high-risk group are likely to die, and an even higher percentage will suffer serious illness.
>
> Those who do not die may experience long-term harm. COVID-19 can severely damage lung tissue, which requires an extensive period of rehabilitation, and in some cases, can cause a permanent loss of respiratory capacity. *Id.* at ¶ 9.

Am. Compl. ¶¶ 34-35. COVID-19 can cause long-term damage to vital organs, including the heart, lungs, and kidneys. *Id.* at ¶¶ 36-37. There remains no vaccine, treatment, or antiviral medication for COVID-19. *Id.* at ¶ 39. The only way to protect vulnerable individuals is to prevent their infection, and social distancing is the most effective way to do so. *Id.* at ¶ 41; *Thakker*, 2020 WL 1671563, at *8 ("Social distancing and proper hygiene are the *only* effective means by which we can stop the spread of COVID-19."). Defendants do not dispute these realities.

The factor that changed the district court's view that some petitioners could be safely returned to detention was that one facility, York County Prison, had only one confirmed positive case, while the other, Clinton County Correctional Facility, had no reported confirmed tests. As explained in Plaintiffs' request for reconsideration and a stay, ECF No. 91, the absence of confirmed tests is meaningless because there is no indication in the record that Defendants are testing. The rate of confirmed COVID-19 infections in Pennsylvania continues to grow, but statistics fail to account for the unconfirmed, untested cases. Indeed, there is a deficit of information about testing in detention facilities, and neither publicly-available information nor Defendants' declarant Mr. Dunn indicate how many people have been tested, quarantined or isolated, all of which are necessary metrics for assessing risk.[3] ICE's own statistics indicate that nationwide, it has

[3] Pike is the only one of the three facilities that has issued any public information about testing or infection rates in recent weeks, with no updates from York since

tested very few detainees, only 400 people out of more than 32,000 in ICE detention. *See* ECF 76-4 (Ex. 51). This strikingly low-test rate means that ICE has only tested about 1.25% of the people it holds in custody for COVID-19. Without adequate testing, "a lack of proven COVID-19 cases . . . is functionally meaningless for determining if there is a risk for COVID-19 transmission in a community or institution." March 23 Declaration of Dr. Jonathan Golob ("Golob Decl.") at ¶ 7 (ECF No. 2-2); April 27 Declaration of Dr. Judd Walson at ¶ 15 ("in a congregate setting such as the Clinton Correctional Facility, without universal and periodic testing, there may be many more cases of COVID-19 infection that have remained undetected") (ECF No. 91-4).

Scientific studies confirm Plaintiffs' risk. A study released yesterday modeling the spread of COVID-19 at ICE detention facilities shows that, once introduced at a facility, 72% to 80% of the detainee population can be expected to become infected within ninety days, with 15.1% hospitalized. *See* Irvine *et al.*, *Modeling COVID-19 & Impacts on U.S. Immigration & Enforcement (ICE) Detention Facilities, 2020*, J. Urban Health (2020) (forthcoming) (attached as MTS-Exhibit 7). It may also take a long time to reach the peak at a facility, with

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April 4 or Clinton since March 31. ICE's COVID-19 webpage only reports the number of COVID-19-positive ICE employees, but York, Pike, and Clinton have county employees and have not provided information about how many staff (or detained individuals) have COVID-19 for weeks. *See* FACC (ECF No. 62). Pike County Prison's last update is from April 6, 2020. *See* ECF 61-3. York County Prison's last update is from April 4, 2020. *See* York County Prison News Report, (ECF No. 87-3). Clinton County Correctional Facility's last public update is from March 31, 2020. *See* March 31, 2020 Clinton News Report (ECF No. 87-4).

more populated facilities, like the York facility, taking closer to 70 days or longer. *Id.* Researchers demonstrate that unmitigated spread of the virus within detention centers will overwhelm local hospitals with COVID-19 patients from these facilities. *Id.* at 7.

Furthermore, Defendants have repeatedly confirmed that it has *no intention* of testing staff or detained individuals unless they are symptomatic. *See* Amon New-Decl. ¶ 37(a), (d) (ECF No. 62-1) (describing how ICE's current protocols of a verbal screening and temperature check are insufficient given that the "entire state of Pennsylvania is listed as having "widespread" community transmission and that effective screening of staff would have to be "frequent (daily) tests," which seems unlikely given costs and test shortages).

Because individuals may be infected and act as vectors spreading the virus for days or even weeks while exhibiting mild symptoms or no symptoms at all, awaiting the development of symptoms before acting is a recipe for mass outbreak—which we have already seen at Pike and is virtually guaranteed if Defendants continue to maintain their defiance of basic epidemiological consensus. *See* Walson Decl. ¶¶ 13, 15. *See, e.g.*, *Bent v. Barr*, No. 4:19-cv-06123, 2020 WL 1812850, at *3 (N.D. Cal. Apr. 9, 2020) ("Given the exponential spread of the virus [and] the ability of COVID-19 to spread through

asymptomatic individuals . . . effective relief for [petitioners] may not be possible if they are forced to wait until their particular facility records a confirmed case.").[4]

Unfortunately, the case of Petitioner Idowu is proof of the reality that the absence of confirmed tests does not mean the virus is not inside the facility. Mr. Idowu had a cough at the time of release from Clinton but was not tested while at the facility. *See* Ms. Idowu Decl. ¶ 4. Given the timing of the onset of his symptoms, he almost certainly was infected while detained at Clinton, and only tested positive after he was released and hospitalized. Walson Decl. ¶ 12. He remains hospitalized, has an active lung infection, and is receiving oxygen. Ms. Idowu Decl. ¶ 11. Mr. Idowu remains at high risk for potential deterioration and need for invasive ventilation. Walson Decl. ¶ 14. A medical expert reviewing Mr. Idowu's situation indicated that he simply could not be returned to a detention facility:

> In light of Mr. Idowu's reported current condition, it is impossible for him to surrender for re-detention. He is currently on oxygen and is at high risk for potential deterioration and need for invasive ventilation. He is also at high risk of other complications of COVID-19 and will require careful clinical monitoring and care. In addition, patients with COVID-19 continue to shed virus for extended periods (weeks) and he may be a potential transmission risk to other patients and staff.

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[4] *See also Ixchop Perez v.Wolf*, 5:19-cv-05191, 2020 WL 1865303, at *12 (N.D. Cal. Apr. 14, 2020) ("The mere fact that no cases have been reported in [a particular facility] is irrelevant—it is not a matter of ***if*** COVID-19 will enter the facility, but ***when*** it will be detected there.") (emphasis in original)); *Ortuño v. Jennings*, No. 3:20-cv-02064, 2020 WL 1701724, at *2 (N.D. Cal. Apr. 8, 2020); *Christian A.R. v. Decker*, 2:20-cv03600-MCA, slip op. at 3 (D.N.J. Apr. 12, 2020); *Bent*, 2020 WL 1812850, at *3 (holding that temperature screening "is of limited benefit").

Id. at ¶ 14. His critical health condition lays bare the stark consequences of deficiencies at the facilities. Inadequate testing cannot mask this reality.

II. Plaintiffs Are Likely to Succeed on the Merits of Their Claims.

The conditions of confinement at York and Clinton remain unconstitutional. The conditions are unsafe in the face of the COVID-19 pandemic and Plaintiffs' medical vulnerabilities, imposing punitive punishment not reasonably related to the government's interest in enforcing immigration laws and violating Plaintiffs' Fifth Amendment rights. *See E. D. v. Sharkey*, 928 F.3d 299, 307 (3d Cir. 2019).

In denying the preliminary injunction with respect to Clinton and York, the District Court gave great weight to Defendants' improved conditions and new protocol to address COVID-19. ECF No. 89 at 11-14. But courts around the country—and in this Circuit—have repeatedly found that such practices remain inadequate to protect detainees who are particularly vulnerable to COVID-19. *See, e.g.*, *Durel B. v. Decker*, No 2:20-cv-03430, 2020 WL 1922140, at *8 (D.N.J. Apr. 21, 2020) ("While Respondents have undertaken significant measures to try and prevent COVID-19 from further spreading throughout the facility, those measures appear insufficient to protect Petitioner whose allegedly compromised immune system puts him at greater risk of severe illness"); *Jeferson V. G. v. Decker*, No. CV 20-3644, 2020 WL 1873018, at *8 (D.N.J. Apr. 15, 2020) ("Although Respondents have delineated the numerous measures they have

undertaken to prevent the spread of COVID-19 in HCCC, those measures are insufficient to protect Petitioner whose asthma puts him at higher risk of severe illness from COVID-19."); *see also Hernandez Roman v. Wolf*, No. 20-cv-768, 2020 WL 1952656, at *7-8 (C.D. Cal. Apr. 23, 2020) (finding insufficient measures by the government where class members are not required, or even given an opportunity, to socially distance at all times).

III. The Balance of Equities Favors Plaintiffs.

Any potential harm to Defendants may face is eclipsed by the serious irreparable injury Plaintiffs face. In assessing any risk of harm to Defendants or the public, Plaintiffs' status as civil immigration detainees is of critical importance. Individuals with criminal histories, have already served the sentences required by a criminal conviction, if any. *Zaya v. Adducci*, No. 5:20-cv-10921, 2020 WL 1903172, at *6 (E.D. Mich. Apr. 18, 2020) (granting temporary restraining order directing detainee's release and noting "critically for this case . . . [for a petitioner who has several drug related convictions, as well as convictions for murder and domestic violence], Petitioner has completed his sentences for each of these convictions").

Petitioners have been at liberty for nearly a month, and all have complied with their release conditions. They know and understand that failure to do so will be fatal to any chance they have of winning their underlying immigration cases. They remain at their respective homes, where they pose no public safety risk. On the other hand, returning them to detention facilities where their risk of contagion

is high could be a death sentence. The balance of the equities tips decidedly in favor of issuing a stay until such time as this Court resolves the appeal.

Dated: April 28, 2020

Respectfully Submitted,

/s/ Will W. Sachse
Will W. Sachse, Esq. (PA 84097)
Thomas J. Miller, Esq. (PA 316587)
Kelly Krellner, Esq. (PA 322080)
Carla G. Graff, Esq. (PA 324532)
DECHERT, LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104
T: 215-994-4000
E: will.sachse@dechert.com
E: thomas.miller@dechert.com
E: kelly.krellner@dechert.com
E: carla.graff@dechert.com

David C. Fathi (WA 24893)
Eunice H. Cho (WA 53711)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION, NATIONAL PRISON PROJECT
915 15th St. N.W., 7th Floor
Washington, DC 20005
T: 202-548-6616
E: dfathi@aclu.org
E: echo@aclu.org

Michael Tan (NY 4654208)
Omar C. Jadwat (NY 4118170)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION, IMMIGRANTS' RIGHTS PROJECT
125 Broad Street, 18th Floor
New York, NY 10004
T: (212) 549-2600

/s/ Witold J. Walczak
Witold J. Walczak (PA 62976)
Vanessa L. Stine (PA 319569)
Muneeba S. Talukder (CA 326394)
Erika Nyborg-Burch (NY 5485578)
AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA

247 Ft. Pitt Blvd., 2d Fl.
Pittsburgh, PA 15222
T: 412-681-7864
E: vwalczak@aclupa.org

P.O. Box 60173
Philadelphia, PA 19102
T: 215-592-1513
E: vstine@aclupa.org
E: mtalukder@aclupa.org
E: enyborg-burch@aclupa.org

Cecillia Wang (CA 187782)*
Stephen Kang (CA 292280)*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111
T: (415) 343-0774
E: cwang@aclu.org
E: skang@aclu.org

E: mtan@aclu.org
E: ojadwat@aclu.org

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Dated: April 28, 2020

/s/ Witold J. Walczak
Witold J. Walczak

Counsel for Plaintiffs-Appellants