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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

ANGEL DE JESUS ZEPEDA RIVAS,  
BRENDA RUBI RUIZ TOVAR, LAWRENCE  
KURIA MWAURA, LUCIANO GONZALO  
MENDOZA JERONIMO, CORAIMA  
YARITZA SANCHEZ NUÑEZ, JAVIER  
ALFARO, DUNG TUAN DANG,

Petitioners-Plaintiffs,

v.

DAVID JENNINGS, Acting Director of the  
San Francisco Field Office of U.S. Immigration  
and Customs Enforcement; MATTHEW T.  
ALBENCE, Deputy Director and Senior  
Official Performing the Duties of the Director  
of the U.S. Immigration and Customs  
Enforcement; U.S. IMMIGRATION AND  
CUSTOMS ENFORCEMENT; GEO GROUP,  
INC.; NATHAN ALLEN, Warden of Mesa  
Verde Detention Facility,

Respondents-Defendants.

**CASE NO. 3:20-CV-02731-VC**

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

**JUDGE VINCE CHHABRIA**

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**I. INTRODUCTION**

Defendants' Opposition ("Opp.", ECF 37) almost totally avoids the key issue established by Plaintiffs: *the impossibility of achieving proper social distancing in the crowded facilities at Mesa Verde and Yuba*. According to the unrebutted testimony of Dr. Greifinger, the existing configurations of these facilities, combined with the inadequate response of Defendants to date, make it inevitable that a COVID-19 outbreak will occur in both facilities (if it has not already) and that, when it does, many people will become sick and die. Defendants have failed to refute this claim, either on the merits or through their unavailing threshold defenses. The Court should grant Plaintiffs' motion to safeguard their due process rights and mitigate the spread of the virus.

**II. RESPONSE TO DEFENDANTS' EVIDENCE**

**A. Detainees at Mesa Verde and Yuba Face Unacceptable Risk of Illness and Death**

Defendants have not presented a single medical expert to rebut Plaintiffs' showing that Mesa Verde and Yuba, as currently configured and managed, "have a very high risk of infection, if there is not infection already." Greifinger, ECF 5-2 ¶ 58. Defendants do not even address Plaintiffs' medical experts' opinions, and barely mention the damning facts upon which the experts relied. Defendants fail to contest Plaintiffs' comprehensive showing that "ICE's response to the COVID-19 pandemic, both nationally and at ... the Mesa Verde and Yuba County ICE detention centers, is deficient," *id.* ¶¶ 44, 45-56; "or that these deficiencies, combined with "the limits of the infrastructure" of these facilities, mean that at current population levels COVID-19 presents a "grave and unacceptable risk of pervasive infections, leading to serious illness and death." *Id.* ¶ 59. Nor do Defendants contest that a COVID-19 outbreak would be catastrophic for detainees, staff and the surrounding communities, as "prison health is public health." Hernandez, ECF 35 ¶¶ 22-28.

**B. Defendants' "Pandemic Response Requirements" are Largely Suggestions That Cannot Be Implemented at Mesa Verde and Yuba**

Defendants tout ICE's April 10, 2020 "Pandemic Response Requirements" ("PRR") document (Bonnar, ECF 37-1, ¶ 7; Kaiser, ECF 37-3, ¶ 7), as though it could somehow solve the

problems created by the facilities' design and overcrowding. But Dr. Greifinger reviewed the PRR and concluded that its "protocols fall short of what is needed to address the threats" at Mesa Verde and Yuba. Greifinger, ECF 5-2 ¶ 46. Moreover, "guidance" documents are hardly self-executing, and many of the PRR's recommendations, including the most critical recommendations regarding social distancing, are not being followed. *Id.* ¶¶ 46, 47. Many of the measures outlined in the PRR are mere recommendations to be implemented "whenever possible" or "if practicable," and they are "impossible to carry out given the limits of the infrastructure." *Id.* ¶¶ 47, 47(b). Defendants' response to this testimony is deafening silence.<sup>1</sup>

Defendants boast that there are no "suspected or confirmed" cases in either Mesa Verde or Yuba. Opp. at 1. But this claim is meaningless because ICE concedes that "many individuals infected with COVID-19 do not display symptoms" (PRR at 11), and because Defendants admit they have tested only *two* detainees. Bonnar, ECF 37-1 ¶ 12; Kaiser, ECF 37-3 ¶ 11. Besides, this claim assumes, contrary to settled law, that Plaintiffs are not entitled to relief unless they can demonstrate an active outbreak is underway. *See Helling v. McKinney*, 509 U.S. 25, 33 (1993).

### C. Defendants Are Not Reducing Detainee Populations

Defendants' claim that "ICE has taken affirmative steps to reduce the number of detainees" at Mesa Verde and Yuba (Opp. at 4, 6) is contradicted by their own declarants. Mr. Bonnar and Ms. Kaiser state that the current number of detainees in both facilities is 427 (283 at Mesa Verde and 144 at Yuba) (ECF 37-1 ¶ 8; ECF 37-3 ¶ 8). This is an imperceptible decline of 1.4% since these declarants stated a total of 436 detainees on April 2 (286 at Mesa Verde and 150 at Yuba).<sup>2</sup> This de minimis reduction reflects that, when forced through litigation to release detainees, Defendants often make new arrests to refill empty beds. Dr. Greifinger has testified without contradiction, moreover, that the 75% threshold suggested in the PRR is arbitrary and inadequate. Greifinger, ECF 5-2 ¶ 48(a). *Defendants have not tried to prove—nor could they—*

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<sup>1</sup> Powerful evidence against the efficacy of ICE's guidance is provided by ICE's own daily tracking of "confirmed cases" inside its detention facilities nationwide. Declaration of Hayden Rodarte, submitted herewith, at ¶ 2 and Ex. 1. The case count, which stood at 2 on March 27, was at 61 on the date the PRR was issued and in the last two weeks has *quintupled* to 317. *Id.*

<sup>2</sup> See Exs. B and C to Rodarte at ¶ 2 (Bonnar) and ¶ 2 (Kaiser).

that merely reaching 75% of total capacity in the aggregate will actually enable detainees to achieve the necessary social distancing.<sup>3</sup>

**D. Social Distancing—the Critical Tool to Limit the Risk of Infection—Is Not Currently Achievable at Mesa Verde or Yuba and the other Half Measures Taken by Defendants Are Insufficient**

As Dr. Greifinger states, “the importance of social distancing in preventing the spread of COVID-19 is unparalleled;” it is “the single most critical tool to limit risk of COVID infection” and, without it, “other mitigation measures are markedly less effective in halting or slowing the spread of disease.” Supplemental Declaration of Greifinger, submitted herewith, ¶ 6; *see also* Greifinger, ECF 5-2 ¶ 30. This requires detainees to maintain a distance of at least ten feet from each other while sleeping and six feet from each other at all times, including while eating, bathing, recreating, and engaging in any other activities. Greifinger, ECF 5-2, ¶¶ 43, 35.

Defendants have done little to enable social distancing. Ms. Kaiser is unable to identify *any steps whatsoever* taken at Yuba to implement *any* form of social distancing. At Mesa Verde, the *only* claimed change in practice involves “staggering” some bunks in Dorms A and B. Bonnar, ECF 37-1 ¶ 11(f).<sup>4</sup> Mr. Bonnar says that “the same will be done in the remaining dormitories “when space permits” (*id.*), but cannot explain when “space” will ever “permit,” since ICE appears to have no plan to further reduce the population at Mesa Verde. Dorm C, for example, may continue to operate at 98% - 100% of capacity. Alfaro, ECF 6-6 ¶ 16; Dang, ECF 6-7 ¶ 11. And at Yuba, many sleeping quarters will remain filled to capacity with fully occupied bunk beds. Ruiz Tovar, ECF 6-2 ¶ 14; Mwaura, ECF 6-3 ¶ 9; Zepeda, ECF 6-1 ¶ 15.

Defendants point to *no actions* taken in either facility to make social distancing possible when detainees are eating, recreating, or using bathrooms. Detainees are “inches apart” when they line up for and eat food, and distancing remains impossible in bathrooms. Dang, ECF 6-7 ¶¶ 14, 17-18; Sanchez Nunez, ECF 6-5 ¶¶ 12, 14; Zepeda, ECF 6-1 ¶ 16; Alfaro, ECF 6-6 ¶ 22.

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<sup>3</sup> Moreover, Defendants’ aggregation of population data masks extreme overcrowding in certain sleeping quarters. For example, as noted below, at least Dorm C at Mesa Verde currently operates at 98-100% of capacity.

<sup>4</sup> This vague claim leaves many questions unanswered, *inter alia*: Are detainees still sleeping in top and bottom bunks? How many bunks have actually been “staggered”?

Defendants belatedly have taken some steps in response to the pandemic but, as Dr. Greifinger has shown, without social distancing none of these measures are effective in curbing the spread of COVID-19. For example, Defendants claim to have distributed masks to detainees, but even if true, “[t]he cloth face cover is not a substitute for social distancing.”<sup>5</sup>

In sum, the record reflects that Defendants have done remarkably little to mitigate the risk of COVID-19. Moreover, they have persistently refused to take the necessary step of reducing the populations of both facilities so that proper social distancing can be achieved.

### III. ARGUMENT

#### A. **The Court Has Jurisdiction to Hear this Petition**

The Court should reject Defendants’ argument that it lacks jurisdiction because Plaintiffs are physically detained outside of this District. *See Opp.* at 12-13. As a threshold matter, the Court need not reach the habeas immediate custodian issue, because Plaintiffs also brought their claims under 28 U.S.C. § 1331, and the Court therefore has independent jurisdiction over Plaintiffs’ claims for declaratory and injunctive relief. *See Complaint* ¶ 13. *See also, e.g., Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 697-99, nn.18-19 (1949); *Ex Parte Young*, 209 U.S. 123, 145 (1908). Defendants have not disputed that § 1331 jurisdiction over named Defendants is proper and that venue lies in this District. Given the irreparable harm facing Plaintiffs every day, Plaintiffs urge this court to avoid wading into the issue of habeas jurisdiction, and simply proceed under § 1331.

Should the Court reach the issue, habeas jurisdiction is proper.<sup>6</sup> This Court has ruled that where, as here, “a petitioner is held in a facility solely pursuant to a contract, rather than by the state or federal government itself,” the petitioner should sue a federal immigration official, not the detention facility’s warden. *Saravia v. Sessions*, 280 F.Supp.3d 1168, 1185 (N.D. Cal. 2017),

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<sup>5</sup> <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>

<sup>6</sup> Defendants’ insistence that the only proper respondents are located in the Eastern District is based on *Rumsfeld v. Padilla*, 542 U.S. 426, 437 (2004), but *Padilla* expressly reserved the question whether its rule applies in the immigration detention context. *Id.* at 435 n.8. Numerous judges in this District subsequently held that *Padilla*’s immediate custodian rule does not apply to immigration detainees. *See, e.g., Carmona v. Aitken*, No. 14-CV-05321-JSC, 2015 WL 1737839, at \*4 (N.D. Cal. 2015); *Sales v. Johnson*, 323 F.Supp.3d 1131, 1138 (N.D. Cal. 2017).

*aff'd*, 905 F.3d 1137 (9th Cir. 2018). The ICE Field Office Director (“FOD”) is a proper respondent because he “has full authority to direct the local warden to release petitioner.” *Zabadi v. Chertoff*, No. C05-01796 WHA, 2005 WL 1514122 at \*3 (N.D. Cal. June 17, 2005); *see also Khodr v. Adduci*, 697 F.Supp.2d 774, 776 (E.D. Mich. 2010) (same); *Roman v. Ashcroft*, 340 F.3d 314, 320-222 (6th Cir. 2003) (same). This is consistent with governing regulations, which provide that the Field Office Director is responsible for making custody determinations. *See* 8 C.F.R. §§ 236(d), 241.4(d).

Defendants argue that this Court’s decision in *Saravia* dictates that Assistant Field Office Directors Fishburn and Pham are the proper respondents because they are “most directly responsible for overseeing” Mesa Verde and Yuba. *See Opp.* at 14. But *Saravia* defines the “official with most immediate control over the facility” as the “official tasked with ensuring that [the detention facility] complies with the requirements of its contract.” *Saravia*, 280 F.Supp.3d at 1186. Here, Defendants’ own evidence shows that the San Francisco Field Office is responsible for oversight of Mesa Verde and Yuba, and that it directs the implementation of processes in response to COVID-19 at these facilities. *See Bonnar* ¶¶ 1-2, 6, 10, 14; *Kaiser* ¶¶ 1-2, 6, 11. No evidence in the record suggests that Pham and Fishburn are ultimately responsible for the contracts with these facilities.

Moreover, as this Court has recognized, the ICE Field Office Director may be a proper respondent particularly where, as here, “it is difficult to discern who has oversight responsibility with respect to a given contract facility.” *Saravia*, 280 F.Supp.3d at 1187 n.9. ICE publicly identifies the San Francisco Field Office as controlling Mesa Verde and Yuba and directs all comments and complaints regarding these facilities to be filed with the FOD in San Francisco.<sup>7</sup> Thus, even if it could be said that individuals in the Eastern District technically have some oversight over Mesa Verde and Yuba, habeas petitioners cannot be expected to know how the Field Office has internally divided such responsibilities. *See Saravia*, 280 F.Supp.3d at 1187 n.9;

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<sup>7</sup> *See* <https://www.ice.gov/detention-facility/mesa-verde-ice-processing-facility> and <https://www.ice.gov/detention-facility/yuba-county-jail> (Apr. 25, 2020) (identifying each facility as controlled by the “San Francisco Field Office” and specifically directing “Feedback or Complaints” to the San Francisco Field Office Director).

*Hensley v. Municipal Court*, 411 U.S. 345, 350 (1973) (“we have consistently rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements”). Accordingly, at a minimum, David Jennings is a proper respondent to Plaintiffs’ habeas petition.

**B. This Action Should Not Be Stayed**

This action should not be stayed due to the injunction issued in *Fraihat, et al. v. U.S. Immigration and Customs Enforcement, et al.* Plaintiffs respectfully refer to the Court to their accompanying Opposition to Motion to Stay.

**C. Plaintiffs Have Established That They Are Entitled to Injunctive Relief**

**1. Plaintiffs are Likely to Succeed on the Merits**

Defendants’ first argument on the merits—that the government is prohibited by statute from releasing persons subject to “mandatory detention”—is easily refuted. Courts regularly release such persons when their continued detention violates the Constitution. *See, e.g., Doe v. Barr*, No. 20-cv-02141-LBR, 2020 WL 1820667, at \*9-10 (N.D. Cal. Apr. 12, 2020) (release from Yuba of Petitioner detained under 8 U.S.C. § 1226(c)); *Bent v. Barr*, No. 19-cv-06123-DMR, 2020 WL 1812850 at \*4-6 (N.D. Cal. Apr. 9, 2020) (same from Mesa Verde); *Bahena Ortuño v. Jennings*, No. 20-cv-02064-MMC, 2020 WL 1701724, at \*3-5 (N.D. Cal. Apr. 8, 2020) (four people under different detention authorities released from Mesa Verde and Yuba).

Nor can Defendants refute Plaintiffs’ evidence that their failure to accommodate social distancing violates the Fifth Amendment. Defendants argue that “[t]he COVID-19 outbreak does not change [the constitutional] analysis or weaken the government’s legitimate interest in plaintiffs’ detention pending removal.” Opp. at 16. Clearly, however, the pandemic *does* change the analysis because, as Plaintiffs’ unrebutted expert testimony demonstrates, it renders the conditions of Plaintiffs’ confinement “excessive” in relation to the government’s interests. *Jones v. Blanas*, 393 F.3d 918, 932 (9th Cir. 2004). Defendants fail to explain how, in the midst of the pandemic, continuing to detain the entire Plaintiff class serves their objective of ensuring attendance at immigration hearings, especially when they concede the efficacy of “alternative,



less harsh” substitutes for detention. Opp. at 16; *see Jones* at 393. Moreover, while Defendants claims Plaintiffs pose a danger, they fail to articulate what the danger is, who poses it, and why conditions of release could not mitigate it. *See Mot.*, ECF 5 at 16-17.

Defendants cite *Bahena Ortuño*, where Judge Chesney granted emergency release from Mesa Verde and Yuba to Plaintiffs with medical vulnerabilities while denying, without prejudice, emergency relief for other detainees whose medical vulnerabilities were a matter of dispute. Opp. at 17. But Judge Chesney expressly reserved the issue “whether, during the COVID-19 pandemic, it is unconstitutional for respondents to detain in crowded facilities persons who are not at such increased risk.” *Bahena Ortuño v. Jennings*, No. 20-cv-2064-MMC, 2020 WL 1701724, \*3 n.4 (N.D. Cal. Apr. 8, 2020). Two federal courts have answered the question reserved by Judge Chesney in the affirmative. *See Roman v. Wolf*, 2020 WL 1952656, \*8-9 (issuing preliminary injunction and ordering release of hundreds of individuals to enable social distancing)<sup>8</sup>; *Savino v. Souza*, 2020 WL 1703844, \*9 (D. Mass. Apr. 8, 2020) (certifying class of detainees). Based on Plaintiffs’ uncontested evidence regarding the facility conditions and population levels, the same answer holds here.

## 2. The Remaining Equities Tip Sharply in Plaintiffs’ Favor

Defendants’ assertion that Plaintiffs’ claim of unconstitutional conditions is “speculative” is belied by an extensive factual record. In any event, the law does not require that Plaintiffs wait for an outbreak to happen to face a serious risk of irreparable harm. *See Helling v. McKinney*, 509 U.S. 25, 24. And a violation of constitutional rights, without more, constitutes irreparable harm. *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (*quoting Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

Finally, defendants argue that carrying out the immigration laws is in the public interest, but fail to acknowledge, much less rebut, Plaintiffs’ evidence that continued detention at high levels harms not only Plaintiffs but also the general public. *Hernandez*, ECF 35 ¶¶ 23-31.

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<sup>8</sup> Plaintiffs note that on April 26, a Ninth Circuit motions panel granted the government a temporary administrative stay of the district court’s preliminary injunction decision, pending a decision whether to grant a further stay pending appeal. *Hernandez-Roman v. Wolf*, 9th Cir. No. 20-55436 (Dkt. No. 5).

Defendants' interests can be served through other measures, but Plaintiffs' injuries can be remedied in no other way. The balance of equities thus tips sharply in Plaintiffs' favor.

**D. The Relief Requested by Plaintiffs is Appropriate**

Contrary to Defendants' assertion (Opp. at 27), Plaintiffs' proposed order creating an individualized review process does not create a scheme that "permits class counsel to determine the order of applications for release." Rather, it leaves it to the Court to determine the order of the release applications it wishes to consider. A similar scheme to the one proposed by Plaintiffs was recently adopted in *Savino v. Souza* in relation to a less populous ICE contract facility, with the court reviewing a subgroup of 10 class members each day. *See e.g.*, No. 20-cv-10617-WGY, 2020 WL 1703844, ECF 77 (April 10, 2020); *Id.* at ECF 86 ("[T]he Court will continue, on an individual basis, to work through the difficult issues of bail in the present crisis."). Regarding Defendants' third through seventh objections to logistical aspects of Plaintiffs' proposed order (Opp. at 27-29), while there is insufficient space to refute each one here, Plaintiffs are agreeable to reasonable amendments on the condition that they can be identified quickly and do not delay the process of releasing class members during this public health emergency.<sup>9</sup>

In the alternative, Plaintiffs would find workable, with some modifications, Defendants' proposal "that the Court order defendants to reduce the population at MVDF and YCJ to numbers that permit social distancing." Opp. at 29. A similar remedy was recently ordered in *Roman v. Wolf*, requiring the defendants "to immediately reduce the detainee population at [the Adelanto ICE Processing Center] to such a level that would allow the remaining detainees to maintain a social distance of 6 feet from each other *at all times and at all places*, including while sleeping, eating, showering, and going about other daily activities, except where there is a medical necessity or a safety emergency." *Roman v. Wolf*, ED cv-20-768-TJH (PVCx), ECF 55 at 2 (C.D. Cal. Apr. 23, 2020) (emphasis added). Such an order would be workable here.

To achieve this, Defendants would have to reduce the population in *each dorm and unit at each facility*; the aggregate numbers Defendants have used in this litigation obscure whether

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<sup>9</sup> For example, requiring individual detainees to mail information to class counsel would introduce unreasonable delay.

the reductions have been concentrated in certain dorms, such that others remain too crowded for social distancing. Additionally, the Court should order that no one be exempt from consideration simply because of their statutory detention authority or their criminal history.

Without more information, Plaintiffs cannot assess precisely how many individuals must be released, but as a starting point, Plaintiff Sanchez Nuñez has stated that in her dorm, it is impossible to practice social distancing with 48 of the 100 beds occupied. *See* Sanchez Nuñez, ECF 6-5 ¶ 12; *see also* Greifinger Supp. ¶ 20. The Court need not set an endpoint to begin a systemic release process; rather, since current populations are far above safe levels, the Court can issue an order effectuating reduction in the population levels while setting periodic reporting. In such reporting, Defendants would need to present evidence specifically detailing how social distancing has become possible within each section of the facility.

Plaintiffs strenuously oppose Defendants' proposed additional conditions of release. First, it is too early to predict when facilities of confinement will become safe relative to the moment when California may make a politically influenced decision to relax or end shelter-in-place. As Dr. Hernandez explains, even at that point, congregate settings like detention centers will remain inherently dangerous for the spread of infectious disease "even if things improved somewhat outside the detention facilities." Hernandez ¶ 33. Second, Defendants should not be able to re-detain—without judicial review—any Plaintiff who they contend violates a condition of release or is removable. *See Bahena Ortuño*, Order Re: Joint Statement Regarding Release Conditions, ECF 43 at 2 ("If respondents are of the view that a petitioner has violated a condition of release or it obtains a travel document for a petitioner . . . , they may move the Court for reconsideration of the order of release."). Prior to any Plaintiff being forced to return to either facility, the Court should require a hearing to determine whether there is justification for their return, and whether such re-detention would be constitutional. *Cf. Morrissey v. Brewer*, 408 U.S. 471 (1972); *Ortega v. Bonnar*, 415 F.Supp.3d 963, 970 (N.D. Cal. 2019). Third, aside from the requirements to abide by the shelter-in-place orders and obey all laws, the other conditions set forth by Defendants are unduly burdensome and unnecessary.

**E. Interim Relief in This Case Should Take Whatever Form Is Most Likely to Lead to Reductions in the Populations of Mesa Verde and Yuba**

In response to the Court's order (ECF 33), Plaintiffs recognize the Court's discretion to fashion the relief it deems appropriate. Plaintiffs propose that the form of the order should correlate to the scope of the relief. If the interim relief is narrow and contemplates a series of steps that the Court wishes to assess over time, a TRO is appropriate. If, on the other hand, the interim relief is more sweeping (such as the alternative relief proposed by Defendants), then it should be more durable in the form of a preliminary injunction.

**IV. CONCLUSION**

For the foregoing reasons, the Court should enter an order providing the interim relief requested by Plaintiffs.

Dated: April 27, 2020

Respectfully submitted,

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**CASE NO. 3:20-CV-02731-VC**

**SUPPLEMENTAL DECLARATION  
OF ROBERT B. GREIFINGER, MD  
IN SUPPORT OF MOTION FOR  
TEMPORARY RESTRAINING  
ORDER**

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**Supplemental Declaration of Robert B. Greifinger, MD**

I, Robert B. Greifinger, declare as follows:

1. I am a physician who has worked in health care for prisoners for more than 30 years. I have managed the medical care for inmates in the custody of New York City (Rikers Island) and the New York State prison system. I have been an independent consultant on prison and jail health care since 1995. My clients have included the U.S. Department of Justice, Division of Civil Rights (for 23 years) and the U.S. Department of Homeland Security, Section for Civil Rights and Civil Liberties (for six years). I am familiar with immigration detention centers, having toured and evaluated the medical care in approximately 20 immigration detention centers, out of the several hundred correctional facilities I have visited during my career. I currently monitor the medical care in three large county jails for Federal Courts.

2. I provided an earlier declaration in this case, dated April 19, 2020, and now provide this supplemental declaration after reviewing materials provided by the Defendants to the Court concerning the adequacy of ICE's response to the coronavirus pandemic at Mesa Verde Detention Center and Yuba County Jail.

3. In addition to the documents I reviewed previously, I have reviewed the following declarations filed on April 24, 2020: the declaration of Erik Bonnar concerning Mesa Verde ("Bonnar Declaration"), the declaration of Polly Kaiser concerning Yuba County Jail ("Kaiser Declaration"), and the two declarations of Capt. Jennifer Moon dated March 26, 2020 ("Moon Declarations").

4. From the evidence I have reviewed, it is my opinion that ICE has failed to adequately comprehend and respond to the COVID-19 pandemic for those detained in ICE custody at Mesa Verde and Yuba County Jail.

5. The importance of social distancing in preventing the spread of COVID-19 is unparalleled. Social distancing is the most critical tool to limit risk of COVID infection. Without proper social distancing in all aspects of the detainee's experience at the facility, other mitigation measures are markedly less effective in halting or slowing the spread of disease.

6. The Bonnar and Kaiser Declarations hardly mention social distancing. As with ICE's April 10 Pandemic Response Requirements, ICE continues to describe social distancing as aspirational. The Bonnar Declaration, for instance, describes that more distance between bunks will be provided at Mesa Verde "when space permits." Social distancing in the middle of this unprecedented pandemic cannot be dependent on "resources" or "availability." Social distancing is a necessity. Moreover, the more time which passes before the implementation of social distancing, the greater the risks of an outbreak at the facility and the greater the likely effects on those at the facility. The fact that a detention center has the "capability" to implement protective measures is irrelevant if those measures are not actually implemented.

7. The Kaiser Declaration does not mention any measures at all to increase social distancing at Yuba. The Bonnar Declaration describes only limited changes at Mesa Verde which purport to increase social distancing, but these can only be described as experimental or piecemeal. Specifically, the Bonnar Declaration vaguely describes "staggered" beds in two of the units at Mesa Verde. This is inadequate for various reasons. First, the two Mesa Verde units with staggered sleeping house a minority of those detained at the detention facility. From the reports of Plaintiffs, and from the Bonnar Declaration, even staggering beds would be impossible in units C and D, which remain effectively at capacity. There is no evidence that ICE is taking steps to release the number of people required to allow even staggered sleeping arrangements to be a possibility elsewhere in the facility. Second, staggering beds such that they are six feet apart does not guarantee that individuals will remain six feet apart in the dormitory. Even getting in and out of beds that are six feet apart from one another would mean that individuals come within the zone of six feet. Third, when considering prolonged contact in confined spaces such as cells and dormitories, six feet of distancing is not enough. Fourth, sleeping arrangements are only one part of the puzzle; social distancing must be guaranteed not just for sleeping, but also for eating, recreation, using the restroom, and all other aspects of a detainee's day. From the declarations of Plaintiffs in this case, even in the units which have staggered sleeping arrangements, there remains inadequate social distancing not just in sleeping but in other aspects of the days of detained individuals. The Bonnar Declaration's only other reference to social distancing, aside



from the staggered sleeping arrangements in two of the units, is an effort to ensure social distancing in the medical unit. This is wholly insufficient.

8. Instead of identifying necessary steps taken to ensure meaningful social distancing, the Bonnar and Kaiser Declarations emphasize other reforms such as the introduction of masks, increased education, and (at Yuba) the taking of detainees' temperatures. These reforms are not a substitute for social distancing, and each has very limited effect without meaningful social distancing.

9. In particular, surgical and cloth masks specifically are intended to help contain infectious droplets in infected people, but they offer no protection to vulnerable people who may breathe in the droplets that are released despite the masks. For this reason, the CDC is clear that masks are not a substitute for social distancing.<sup>1</sup>

10. Similarly, educating detainees about COVID-19 without ensuring that they have the capacity to implement social distancing in their daily lives is inadequate. In a detention center, individual detainees have limitations on their ability to control where, when and how they sleep, eat and go about their lives. Without reforms to ensure that individuals can protect themselves from COVID-19, education has an inherently limited effect.

11. The Kaiser Declaration notes that Yuba County Jail is taking the temperature of detainees on a daily basis. Taking the temperature of detainees neglects the significance of asymptomatic and pre-symptomatic people who are both infected and able to transmit the infection.

12. Testing for COVID-19 at Mesa Verde and Yuba is clearly inadequate from reports that only two people at both facilities have been tested in the months since COVID-19 has been a known risk. If ICE is not testing people, they do not know if there is already an infection, and they cannot take measures to decrease the risk to others. Without substantial

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<sup>1</sup> See, e.g., CDC, "Recommendation Regarding the Use of Cloth Face Coverings, Especially in Areas of Significant Community Based Transmission," revised Apr. 3, 2020, at <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html> (last accessed Apr. 25, 2020) ("It is critical to emphasize that maintaining 6-foot social distancing remains important to slowing the spread of the virus. CDC is additionally advising the use of simple cloth face coverings to slow the spread of the virus and help people who may have the virus and do not know it from transmitting it to others.").

testing, I do not consider credible the suggestion that the lack of confirmed cases at either facility means that there is no virus that causes COVID-19 at these facilities.

13. The Declarations affirm the “capability” of testing but note that testing will be conducted when a detainee “experienc[es] symptoms consistent with COVID-19.” The CDC identifies as symptoms of COVID-19 fever, cough, shortness of breath or difficulty breathing, chills, repeated shaking with chills, muscle pain, headache, sore throat, and new loss of taste or smell.<sup>2</sup> The Plaintiffs in this case have reported that they and others have experienced such symptoms but have not been tested. Moreover, in any population of more than 400 people over a weeks-long period, such symptoms would be expected among a significant number of people. This leads me to conclude that the screening for symptoms that require testing is severely lacking.<sup>3</sup>

14. Further, the Declarations of Kaiser and Bonnar state that the facilities “have the capability to conduct on-site testing of COVID-19.” That is doubtful and indicates a lack of understanding of how testing is accomplished. More likely, the facilities may have the capability to obtain samples and to then send those samples to a laboratory for testing, assuming they have the appropriate swabs and collection vials for transportation to the laboratory.

15. In my opinion, the Moon Declarations presented in this case are of limited utility in evaluating the effectiveness of ICE’s COVID-19 response at Mesa Verde and Yuba. Since Capt. Moon appears to be the most senior person identified by Defendants as having responsibility for ensuring the health and safety of detainees at Mesa Verde and Yuba, the gaps and omissions in her declarations are particularly troubling.

16. It is now almost one month since the Moon Declarations were signed, which is an extraordinarily long time in terms of this fast-moving pandemic. The fact of continued reliance on month-old declarations is telling about the inadequacy of ICE’s response to COVID-19; the

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<sup>2</sup> CDC, “Symptoms of Coronavirus,” revised Mar. 20, 2020, at <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html> (last accessed Apr. 25, 2020).

<sup>3</sup> Even the two people tested at Yuba County Jail were not tested because they were symptomatic but because of the possibility that they were exposed prior to their entry into the Yuba County Jail population. Kaiser Declaration ¶ 11.

failure of the Bonnar and Kaiser Declarations to identify more significant changes at these two facilities over the past month is highly concerning.

17. The Moon Declarations are also vague and not provided by anyone who has a direct role in managing the facilities or the health of detainees. As Captain Moon writes, the ICE Health Service Corps (IHSC) provides “oversight” and “monitor[s]” the medical care at these sites, but IHSC does not provide care or have a management, supervision, implementation or enforcement role at the facilities.

18. Some of the additional flaws of the Moon Declarations are:

- a. The Moon Declarations state that ICE “follow[s] guidance issued by the Centers for Disease Control” without referring to any particular guidance. As elaborated above and in my prior declaration in this case, ICE does not seem to be adhering to CDC guidance in preventing the spread of COVID-19 at these two facilities.
- b. Most glaringly, the Moon Declarations do not acknowledge, let alone explain, how ICE is addressing the need for all detainees and staff to practice social distancing. The failure to ensure meaningful social distancing is a fatal flaw in any policy addressing COVID-19 in a congregate setting.
- c. The Moon Declarations miss the mark in analyzing whether an individual has possible exposure to COVID-19. In considering whether a detainee has possible exposure, ICE’s focus on “close contact” with “laboratory-confirmed COVID-19” cases results in a dramatic undercounting of people who may be exposed to COVID-19 by contact with asymptomatic individuals or even symptomatic individuals who have not been tested; or people who have been in contact with individuals with confirmed COVID-19 but without their knowledge.
- d. The Moon Declarations, like the Bonnar and Kaiser Declarations, do not adequately recognize the risk posed by staff, vendors and

contractors who come to and go from the facility.

- e. The isolation and quarantine procedures outlined in the Moon Declarations do not comply with best practice. Among other things, as noted previously, the CDC identifies “cohorting” as a suboptimal practice of group quarantining. Where cohorting can be an effective mitigation strategy in the absence of sufficient space for medical isolation, it requires adequate space for appropriate groupings, and there is no evidence that that exists or is being marshalled for this purpose at either of these facilities.

19. In light of these recognized failures, it is my expert opinion that the response to the threat of COVID-19 in Mesa Verde and Yuba is wholly insufficient to the crisis at hand.

20. It is my professional opinion that the only way to achieve meaningful social distancing in these facilities is to significantly decrease their population levels. Detainees who have provided declarations in this case have described the absolute inability to practice social distancing in sleeping, eating, recreating and using the restroom. This is true even in units that are apparently only at around 50% capacity, and months into the pandemic. This leads me to conclude that the population levels, even at 50% of capacity, are insufficient to permit social distancing. The fact that the mitigation measures are so inadequate months into the pandemic leads me to conclude that ICE will not ensure that the protection the health of detainees and the broader communities from the threat of COVID-19 without external intervention.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 26<sup>th</sup> day of April 2020 in New York City, New York.



Robert B. Greifinger, M.D.

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

ANGEL DE JESUS ZEPEDA RIVAS,  
BRENDA RUBI RUIZ TOVAR, LAWRENCE  
KURIA MWAURA, LUCIANO GONZALO  
MENDOZA JERONIMO, CORAIMA  
YARITZA SANCHEZ NUÑEZ, JAVIER  
ALFARO, DUNG TUAN DANG,

Petitioners-Plaintiffs,

v.

DAVID JENNINGS, Acting Director of the  
San Francisco Field Office of U.S. Immigration  
and Customs Enforcement; MATTHEW T.  
ALBENCE, Deputy Director and Senior  
Official Performing the Duties of the Director  
of the U.S. Immigration and Customs  
Enforcement; U.S. IMMIGRATION AND  
CUSTOMS ENFORCEMENT; GEO GROUP,  
INC.; NATHAN ALLEN, Warden of Mesa  
Verde Detention Facility,

Respondents-Defendants.

**CASE NO. 3:20-CV-02731-VC**

**DECLARATION OF HAYDEN  
RODARTE IN SUPPORT OF  
MOTION FOR TEMPORARY  
RESTRAINING ORDER**

**JUDGE VINCE CHHABRIA**

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\*Motion for Admission *Pro Hac Vice* Forthcoming

I, Hayden Rodarte, declare as follows:

1. I am an attorney admitted to practice in California and a member of the bar of this Court. I am a Justice Catalyst fellow and attorney employed at the Lawyers' Committee for Civil Rights of the San Francisco Bay Area and co-counsel for Petitioners-Plaintiffs in this action. I submit this declaration in support of Petitioners-Plaintiffs' Motion for Temporary Restraining Order. I have personal knowledge of the facts stated in this declaration.

2. Attached as Exhibit A hereto are a table of data and an accompanying line graph showing the number of COVID-19 cases among individuals in U.S. Immigration and Customs Enforcement ("ICE") detention per day, as reported by ICE at <https://www.ice.gov/coronavirus> (click on "Confirmed Cases"). This webpage is updated on a nearly daily basis, sometimes multiple times per day, and ICE provides a date- and time-stamp each time it updates this data. I have verified all of the historical data for dates prior to April 24, 2020 using a search tool located at [www.web.archive.org](http://www.web.archive.org), popularly referred to as the "wayback machine." The accompanying line graph correctly represents the data appearing in the table.

3. Attached as Exhibit B to this declaration is a true and correct copy of the declaration of Erik Bonnar filed at ECF No. 29-1 in *Bahena Ortuño v. Jennings*, No. 3:20-cv-02064-MMC (N.D. Cal.) ("*Bahena Ortuño*").

4. Attached as Exhibit C to this declaration is a true and correct copy of the declaration of Polly E. Kaiser filed at ECF No. 29-2 in *Bahena Ortuño*.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 26th day of April 2020 in Oakland, California.

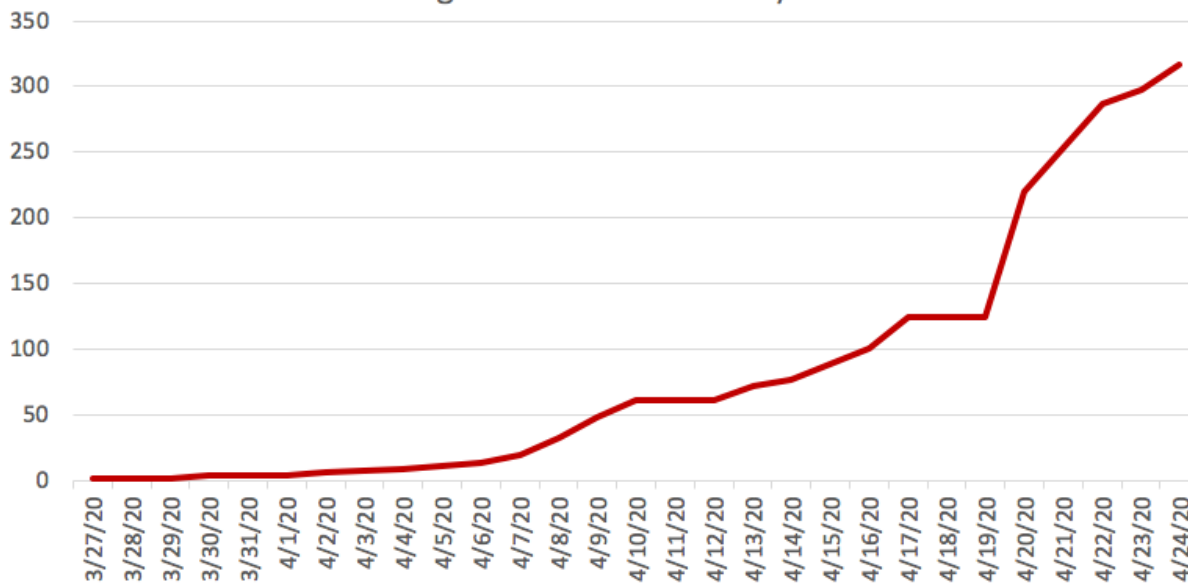
\_\_\_\_\_/s/ Hayden Rodarte

Hayden Rodarte

Date	Number of Confirmed COVID-19 Cases Among ICE Detainees
3/27/20	2
3/28/20	2
3/29/20	2
3/30/20	4
3/31/20	4
4/1/20	4
4/2/20	6
4/4/20	8
4/6/20	13
4/7/20	19
4/8/20	32
4/9/20	48
4/10/20	61
4/11/20	61
4/12/20	61
4/13/20	72
4/14/20	77
4/15/20	89
4/16/20	100
4/17/20	124
4/18/20	124
4/19/20	124
4/20/20	220
4/21/20	253
4/22/20	287
4/23/20	297
4/24/20 (last checked 4/26/20 12:11 PST)	317



Confirmed COVID-19 Cases  
Among ICE Detainees Per Day



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8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
10 SAN FRANCISCO DIVISION  
11

12 ORTUNO, *et al.*, ) No. 20-2064 MMC  
13 )  
Petitioners, ) **SUPPLEMENTAL DECLARATION OF**  
14 ) **ERIK BONNAR IN SUPPORT OF**  
v. ) **RESPONDENTS' OPPOSITION TO**  
15 ) **MOTION FOR TEMPORARY**  
16 JENNINGS, *et al.*, ) **RESTRAINING ORDER**  
Respondents. )  
17 )

18 I, Erik Bonnar, declare as follows:

- 19 1. I make this declaration to supplement and update the declaration I submitted in this case March  
20 30, 2020. The facts in this declaration are based on my personal knowledge, consultation with  
21 other ICE personnel, and review of official documents and records maintained by the agency and  
22 Department and other relevant sources obtained during the regular course of business. I provide  
23 this declaration based on the best of my knowledge, information, belief, and reasonable inquiry  
24 for the above captioned case.
- 25 2. From March 11, 2020 to present, ICE has reduced the MVDF detainee population from 355 to  
26 286, approximately twenty percent. At present, MVDF houses 56 female ICE detainees in one  
27 dormitory unit (with the capacity to hold 100 detainees) and 230 male ICE detainees divided into  
28


1 three separate dormitory units depending on their criminal history risk classification levels, and 3  
2 male detainees housed in separate units due to COVID-19 protective screening measures. ICE  
3 will continue to evaluate cases that may be high-risk for COVID-19, and as more relevant  
4 specific information is provided on any particular detainee, release may be appropriate provided  
5 they are not mandatory custody, a danger to the community, or deemed a flight risk where  
6 measures for alternatives to detention are inappropriate.

7 3. ICE ERO management staff, including myself, conference daily over MVDF and issues  
8 stemming from COVID-19. Additionally, my staff is in daily contact with the Facility  
9 Administrator and his staff, including medical, at MVDF over the health and safety of detainees.  
10 Given the ICE protocols, MVDF staff and ICE officers are taking appropriate measures to ensure  
11 the health safety of detainees and will continue to do so. My staff is on-site daily and can  
12 address any issues, as presented or direct, to ensure the ICE protocols are in place and to report  
13 back any issues they may observe that need to be addressed by me or my staff.

14 4. As the IHSC declaration of Jennifer Moon reflects, MVDF has implemented ICE COVID-19  
15 screening protocols, including the 14-day quarantine for new detainees who may be  
16 asymptomatic but traveled to certain areas at high-risk for COVID-19. At present, MVDF has  
17 three detainees who meet that criteria and are currently quarantined from the general population.  
18 MVDF medical staff is also medically screening for COVID-19 during intake and 14-day  
19 physical exams. MVDF medical staff will examine any detainee who submits a request to see  
20 medical due to symptoms consistent with COVID-19. MVDF has the capability to conduct on-  
21 site testing of COVID-19; to date, MVDF medical staff has not conducted any testing for  
22 COVID-19 since they have not encountered any detainee experiencing symptoms consistent with  
23 COVID-19.

1 5. On April 2, 2020, Plaintiff Roxana Del Carmen Trigueros-Acevedo was released on parole from  
2 ICE custody after posting bond in the amount of \$4,000.00. Ms. Espinoza Ayala was also  
3 released on parole from ICE custody after posting bond in the same amount.

4 I declare under penalty of perjury that the foregoing is true and correct. Executed on April 2,  
5 2020, at San Francisco, California.

6   
7 \_\_\_\_\_  
8 ERIK BONNAR

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11

12 ORTUNO, *et al.*, ) No. 20-2064 MMC  
13 )  
Petitioners, ) **SUPPLEMENTAL DECLARATION OF**  
14 ) **POLLY E. KAISER IN SUPPORT OF**  
v. ) **RESPONDENTS' OPPOSITION TO**  
15 ) **MOTION FOR TEMPORARY**  
JENNINGS, *et al.*, ) **RESTRAINING ORDER**  
16 )  
17 Respondents. )

18 I, Polly E. Kaiser, declare as follows:

- 19
- 20 1. I make this declaration to supplement and update the declaration previously submitted on March  
21 30, 2020. The facts in this declaration are based on my personal knowledge, consultation with  
22 other ICE personnel and review of official documents and records maintained by the agency and  
23 Department and other relevant sources obtained during the regular course of business. I provide  
24 this declaration based on the best of my knowledge, information, belief and reasonable inquiry  
25 for the above referenced case.  
26  
27  
28

1 2. From March 11, 2020 to present, in addition to ICE reducing its YCJ detainee population by  
2 approximately ten percent, YCJ county population has been significantly reduced as well and  
3 YCJ continues to significantly reduce its overall population. At present, there are 9 female ICE  
4 detainees and 141 male ICE detainees at YCJ. Of the 150 ICE detainees, four ICE detainees,  
5 who have pre-existing conditions and deemed high-risk for COVID-19 based on CDC  
6 guidelines, have been removed from general population as a preventive measure and relocated to  
7 another facility where they are more closely monitored 24/7, including having their temperatures  
8 taken twice a day. The four ICE detainees are asymptomatic for COVID-19. In addition, one  
9 male ICE detainee is housed separately in the YCJ medical unit and monitored 24/7 due to his  
10 recent medical procedure unrelated to COVID-19. ICE will continue to evaluate cases that may  
11 be high-risk for COVID-19, and as more relevant specific information is provided on any  
12 particular detainee, release may be appropriate provided they are not mandatory custody, a  
13 danger to the community, or deemed a flight risk where measures for alternatives to detention are  
14 inappropriate.

15 3. YCJ has continued to implement processes and protocols to protect the detainee population.  
16 YCJ has added instructions on hand washing, sanitizing common surfaces and other health and  
17 wellness information by video for detainees. YCJ is ensuring the entire facility, to include the  
18 housing units, are sanitized twice daily. Additional cleaning supplies have been offered to  
19 detainees who have been educated on how to sanitize the phones for common use before and  
20 after each use. YCJ has added two handwashing stations within the facility to encourage and aid  
21 in recommended handwashing. YCJ continues to identify additional ways to safeguard ICE  
22 detainees and are working on a social distancing protocol. ICE ERO management staff,  
23 including myself, conference daily over YCJ and any issues stemming from COVID-19.  
24 Additionally, my staff is in daily contact with YCJ management to include medical over the  
25 health and safety of detainees. Given the ICE protocols, YCJ staff and ICE officers are taking  
26 appropriate measures to ensure the health and safety of detainees and will continue to do so. My  
27 staff is on-site daily and is able to address issues as presented and report back any issues they  
28 may observe that need to be addressed by my staff or by me.

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4. As the IHSC declaration of Jennifer Moon reflects, YCJ has implemented ICE COVID-19 screening protocols, including a 14-day quarantine for new book-ins unless the individual was transferred from another detention facility and had been in custody 14 days or longer. At present, YCJ has no ICE detainees who meet that criteria and none are currently quarantined from the general population for that reason. As mentioned above, four ICE detainees have been removed from general population and transferred to another facility to be more closely monitored 24/7 due to their pre-existing medical conditions which makes them at high-risk for COVID-19. YCJ medical staff is also screening for COVID-19 during all in-take and 14 day physical exams. YCJ is also affirmatively taking the temperatures of all detainees on a daily basis in every housing unit. Should an individual have a temperature of 100.4, or above, they will immediately be sent to the medical unit for additional assessment and will be housed separately in the medical unit, continue to be monitored and be provided care as appropriate to their condition. In addition, YCJ medical staff will examine any detainee who submits a medical request due to symptoms consistent with COVID-19. YCJ has the capability to conduct on-site testing of COVID-19; to date, YCJ medical staff has not conducted any testing for COVID-19 since they have not encountered any individual experiencing symptoms consistent with COVID-19.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 2, 2020, at San Francisco, California.

  
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POLLY E. KAISER