SUPREME COURT
FILED

MAY 13 2020

Jorge Navarrete Clerk

Deputy

S261829

IN THE SUPREME COURT OF CALIFORNIA

En Banc

CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE et al., Petitioners,

v.

GAVIN NEWSOM, as Governor, etc., Respondent;

XAVIER BECERRA, as Attorney General, etc., Respondent.

This mandate proceeding, like others that have recently come before this court, raises urgent questions concerning the responsibility of state authorities during the current pandemic to protect the health and safety of inmates under their supervision and control in light of the spread of the novel coronavirus that causes COVID-19. The current proceeding arises from respondents' role in the transfer of noncitizen state prisoners and county jail inmates to federal immigration authorities, which may lead to detention in facilities that, according to the petition, do not follow safe practices or otherwise take reasonable steps to prevent transmission of the virus.

On March 23, 2020, the Centers for Disease Control and Prevention issued guidance observing that conditions in correctional and detention facilities present "unique challenges for control of COVID-19 transmission among incarcerated/detained persons, staff, and visitors." (Centers for Disease Control and Prevention, Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities (Mar. 23, 2020) p. 2.) Petitioners contend that respondents, the Governor and the Attorney General, have violated their constitutional rights by failing to take action to prevent state and local authorities with custody over noncitizen inmates from facilitating their transfer to federal immigration authorities, which may lead to detention in one of five federal immigration detention facilities in California with knowledge of or reckless indifference to the risk that detention in these facilities will cause them, facility employees, and members of the surrounding communities to become infected with the novel coronavirus. Petitioners allege, with supporting declarations, that these facilities do not practice appropriate social distancing, do not maintain sanitary conditions in dorms and common areas, do not provide adequate medical care to inmates with possible symptoms of

infection, and do not provide inmates with masks or supplies for basic hygiene, such as soap or hand sanitizer. Petitioners further allege that state authorities are aware of the dangerous conditions at these detention facilities but nonetheless failed to take action to prevent the transfer of noncitizen inmates to these facilities. Petitioners contend that respondents' conduct violates their right to due process. Respondents contend that the duty to remedy any violations rests with federal officials in charge of the detention facilities, that pending federal litigation provides an adequate alternative remedy, and that petitioners have failed to identify any clear ministerial duty that could be remedied by issuance of a writ of mandate. They note, among other things, that California law provides that local law enforcement officials have discretion to cooperate with federal immigration authorities "only" where permitted by the California Values Act (Gov. Code, § 7284 et seq.) and "if doing so would not violate any federal, state, or local law, or local policy." (*Id.*, § 7282.5, subd. (a).) Outside of these limitations, respondents argue, the law preserves substantial discretion for state and local custodial officials to consider multiple factors in determining whether to provide assistance to federal immigration authorities in any particular case.

The petition establishes no clear and mandatory duty on the part of the Governor and the Attorney General to take the requested action. The petition for writ of mandate is therefore denied. The denial is, however, without prejudice to the institution of any action for writ of mandate or prohibition against responsible authorities with respect to conduct that may unnecessarily expose inmates in their custody to significant risks to their health and safety. Such claims may be brought in the superior courts of appropriate counties.

For any such filing, the superior court should be mindful of a range of procedural tools to achieve prompt and effective resolution of the matter. Those tools include the authority to:

- join all parties necessary for full inquiry into the issues raised and for development and implementation of any appropriate relief (Code Civ. Proc., § 389, subd. (a));

- consolidate the action with any similar actions pending in the court, in the interest of efficiency and in light of public health concerns (Code Civ. Proc., § 1048, subd. (a));

- transfer and consolidate matters across counties upon a motion by any party when such transfer and consolidation would promote efficient utilization of judicial resources and otherwise satisfy applicable standards (Code Civ. Proc., §§ 403, 404.1);

- assign a single bench officer or appoint one or more referees or special masters to bring swift and focused attention to the issues raised (Cal. Rules of Court, rule 3.734; Code Civ. Proc., §§ 638, 639);

- facilitate discussion among all parties to achieve a negotiated resolution that is responsive to local conditions and avoids protracted litigation;
- order interim relief, as appropriate, during the pendency of the action; and
- give the matter expedited consideration for evidentiary hearings, briefing, and any joint discussions for resolution.

In all such matters, the superior court is to proceed as expeditiously as possible and to be mindful that conditions associated with COVID-19 in detention facilities and local communities are continually evolving. Given the dynamic nature of the pandemic, yet cognizant of the ongoing federal litigation targeting alleged deficiencies at immigration detention facilities, the denial of the petition is without prejudice to the filing of a new petition in this court raising similar claims if circumstances warrant.

The request for judicial notice is granted as to exhibits 19, 25, 82, and 89.

The request for judicial notice regarding "government records" is granted as to exhibits 1, 2, 4, 6, 7, 9, 11, 12, 15 through 18, 39, 41, 52-1, 54-1, 54-4, 66, 68, 76, 79, 80-1, 80-2, 80-3, 80-4, 80-5, 80-6, 80-7, 80-9, 80-10, and 88. Judicial notice is granted only concerning the existence, but not the accuracy, of factual allegations or findings made in these documents.

The request for judicial notice regarding "court filings" is granted as to exhibits 27, 29, 30, 31, 37, 42, 50, 52-2, 61, 90 through 94. Judicial notice is granted only concerning the existence, but not the accuracy, of factual allegations or findings made in these documents.

The request for judicial notice regarding various newspaper articles is granted as to exhibits 10, 20, 21, 24, 28, 33, 35, 36, 40, 43, 44, 47, 48, 49, 62, 84, and 86. Judicial notice of these materials is granted concerning only the fact that these materials were published and not concerning the factual statements contained therein.

CANTIL-SAKAUYE
Chief Justice

DISSENTING STATEMENT

BY LIU, J.

Petitioners in this mandamus proceeding allege that respondents, the Governor and the Attorney General, have acted with deliberate indifference to the health and safety of California's prison and jail inmates by allowing the ongoing transfer of inmates to federal

immigration detention facilities during the COVID-19 pandemic. According to petitioners, these facilities have unsanitary conditions, do not allow for social distancing, and lack resources to treat infected inmates who become seriously ill. Petitioners seek a writ of mandate ordering respondents to impose a moratorium on all such transfers.

Article VI, section 10 of the California Constitution grants this court original jurisdiction in mandamus. As a prudential matter, we exercise such jurisdiction "only in cases in which 'the issues presented are of great public importance and must be resolved promptly.' " (*San Francisco Unified School Dist. v. Johnson* (1971) 3 Cal.3d 937, 944.) If there is any case where exercising our mandamus jurisdiction is appropriate, this is it. The petition alleges time-sensitive, critical health concerns on behalf of persons in state and local custody, and raises legal issues of obvious statewide importance. Since we received this petition on April 24, 2020, a detainee at the Otay Mesa Detention Center in San Diego County became the first person in federal immigration custody to die of COVID-19 complications. (Santana & Shoichet, *First ICE detainee dies from coronavirus* (May 6, 2020) CNN.) If petitioners' allegations are true, more deaths will surely follow. We should retain this matter, issue an order to show cause, appoint a factfinder if necessary, and promptly resolve the issues presented.

The 1,900 pages of exhibits and declarations accompanying the petition include detailed documentation of the United States Immigration and Customs Enforcement's (ICE) failures in providing basic protections against COVID-19 at its five detention facilities in California. Petitioners allege that social distancing, which is critical to preventing the spread of COVID-19, is impossible given the physical confines of the facilities and the number of individuals detained in them. According to petitioners, the facilities house dozens of detainees in a single dormitory-style unit with bunk beds no more than one meter apart. Detainees are often required to be in close proximity with one another as they share dining areas, bathrooms, recreational spaces, and medical units.

Moreover, petitioners allege that ICE has taken no meaningful action to reduce its detention center populations and continues to defy the guidance of federal health authorities. (See U.S. Centers for Disease Control and Prevention, Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities (Mar. 23, 2020) (CDC Guidance).) In multiple facilities, detainees have no regular access to gloves, masks, hand sanitizer, or even soap. At the Otay Mesa Detention Center, petitioners allege, officials withheld facemasks from detainees unless they signed a waiver releasing the officials from responsibility if they contracted COVID-19. Many who have experienced COVID-19 symptoms have not been treated. Meanwhile, ICE continues to book new detainees into custody and to transfer detainees between detention centers without recommended quarantine procedures or protocols to screen detainees and staff for symptoms of COVID-19.

Respondents acknowledge that these allegations are "serious and alarming." In fact, they have raised the same concerns themselves. In an April 13, 2020 letter to the

U.S. Department of Homeland Security (DHS), the Attorney General urged the agency to release detainees who pose no risk to public safety and to "halt the introduction of new detainees to immigration detention facilities" in California. (Atty. Gen. Xavier Becerra, letter to Acting Secretary of Homeland Security Chad F. Wolf, April 13, 2020, p. 4 (Attorney General Letter).) Based on "comprehensive reviews" of these facilities, the Attorney General "encountered many individuals whose medical conditions place them at a higher risk for developing serious illness from COVID-19." (*Id.* at p. 1.) In the words of the Attorney General: "I am aware that the physical plants, custody and staffing patterns, and health care systems in immigration detention do not allow for social distancing practices and that additional practices such as improved sanitation, screening, and halting the admission of new detainees are needed to prevent transmission of the virus. Further, the facilities in question in California do not appear to have the healthcare resources required to treat infected detainees who become seriously ill. Failure to use your discretion to decrease the detainee population as much as possible and improve sanitation and COVID-19 screening practices for those detainees that remain will not only harm civil immigration detainees, but will overwhelm community hospitals to which those detainees will necessarily be transferred for treatment. . . . Urgent action is required to prevent our country's immigration detention system from causing countless unnecessary deaths." (*Ibid.*)

And yet, according to petitioners, state and local officials continue to notify ICE of inmate release dates and to facilitate the transfer of inmates to ICE from state prisons and county jails, populating the very detention centers that the Attorney General has called on ICE to depopulate. By some evidence, California's prisons and jails have become the primary source of new detainees to some of these facilities in California, as ICE has limited the intake of detainees from other sources during the pandemic. These transfers continue, petitioners allege, even as the CDC has specifically urged the "restrict[ion of] transfers of incarcerated/detained persons to and from other jurisdictions and facilities unless necessary for medical evaluation, medical isolation/quarantine, clinical care, extenuating security concerns, or to prevent overcrowding." (CDC Guidance, *supra*, at p. 9.)

A writ of mandate may be issued "by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station." (Code Civ. Proc., § 1085.) Respondents' primary argument is that a writ of mandate cannot issue to control the Governor's or the Attorney General's exercise of discretion in a particular manner. They contend that petitioners have identified no ministerial duty on the part of the Governor or Attorney General to impose a moratorium on the transfer of California inmates to federal immigration detention centers. Today's order denies the petition based on an assertion that "[t]he petition establishes no clear and mandatory duty on the part of the Governor and the Attorney General to take the requested action."

But that assertion does not address the crux of petitioners' claim or the scope of this court's mandamus authority. It is true that a writ of mandate will "usually" issue to compel an official to perform a ministerial duty. (*Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 539–540.) And I agree that the relief petitioners seek is likely not grounded in any ministerial duty, meaning "an obligation to perform a specific act in a manner prescribed by law whenever a given state of facts exists, without regard to any personal judgment as to the propriety of the act." (*People v. Picklesimer* (2010) 48 Cal.4th 330, 340.) But that is not the limit of our mandamus authority. We may also issue the writ "to compel a public agency's performance or correct an agency's abuse of discretion whether the action being compelled or corrected can itself be characterized as 'ministerial' or 'legislative.' " (*Woodside*, at p. 540; see *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 442 (*Common Cause*) ["[M]andamus will lie to correct an abuse of discretion by an official acting in an administrative capacity."]; *Landsborough v. Kelly* (1934) 1 Cal.2d 739, 744; *Inglin v. Hoppin* (1909) 156 Cal. 483, 491; see also 8 Witkin, Cal. Procedure (5th ed. 2020) Writs § 95, [use of mandamus to control abuse of discretion].) On numerous occasions, this court and the Courts of Appeal have found it appropriate to issue a writ of mandate to control abuses of discretion by public officials. (See e.g., *Clean Air Constituency v. Cal. State Air Resources Bd.* (1974) 11 Cal.3d 801, 819; *In re Veterans' Industries, Inc.* (1970) 8 Cal.App.3d 902, 925–927; *Baldwin-Lima-Hamilton Corp. v. Superior Court* (1962) 208 Cal.App.2d 803, 824; *Munns v. Stenman* (1957) 152 Cal.App.2d 543, 551.)

Moreover, we have signaled that official acts or omissions in violation of constitutional limits will constitute an abuse of discretion. For example, in *Wilson v. Eu* (1991) 54 Cal.3d 471 (*Eu*), this court exercised its original jurisdiction to issue an alternative writ of mandate appointing three special masters to hold hearings and recommend a reapportionment plan to the court if the Governor and Legislature failed to resolve their impasse and enact a plan in time for the 1992 election. (*Id.* at pp. 473–475.) We found it appropriate to issue the writ to " ' "[e]nsure the electorate equal protection of the laws." ' " (*Id.* at p. 473; see *Jolicoeur v. Mihaly* (1971) 5 Cal.3d 565, 570, fn. 2 ["Mandamus is . . . appropriate for challenging the constitutionality or validity of statutes or official acts."].) Our decision implied that the Governor's and Legislature's failure to enact a reapportionment plan would constitute an abuse of discretion by denying Californians their constitutional right to equal representation. (*Eu*, at p. 473.)

The relevant question, therefore, is not whether the Governor and Attorney General have a ministerial duty to order a moratorium on ICE transfers. It is whether the Governor and Attorney General have abused their discretionary authority over California prisons and jails by demonstrating deliberate indifference to the health and safety of inmates in allowing their continued transfer to ICE detention centers.

The due process clause of the Fourteenth Amendment to the United States Constitution prohibits state officials from acting with deliberate indifference to a detained

individual's health and safety. (*Lemire v. Cal. Dept. of Corrections and Rehabilitation* (9th Cir. 2013) 726 F.3d 1062, 1075; see *Farmer v. Brennan* (1994) 511 U.S. 825, 843 (*Farmer*) [Eighth Amendment is violated when "prison officials, acting with deliberate indifference, expose[] a prisoner to a sufficiently substantial 'risk of serious damage to his future health' "]; *Castro v. County of Los Angeles* (9th Cir. 2016) 833 F.3d 1060, 1067 [due process rights of civil detainees are at least as great as Eighth Amendment rights of prisoners].) State officials can be liable for deliberate indifference if they place or leave an individual " 'in a situation that was more dangerous than the one in which they found him.' " (*Kennedy v. City of Ridgefield* (9th Cir. 2006) 439 F.3d 1055, 1062, quoting *Munger v. City of Glasgow Police Dept.* (9th Cir. 2000) 227 F.3d 1082, 1086.) Placing an individual who is under the government's control into objectively unsafe conditions created by a third party constitutes deliberate indifference to the individual's health and safety. (See *Hernandez v. City of San Jose* (9th Cir. 2018) 897 F.3d 1125, 1138 [police action "shepherd[ing] [people] into a violent crowd of protesters" and blocking off other exits is sufficient to establish deliberate indifference]; *Doe ex rel. Johnson v. S.C. Dept. of Soc. Services* (4th Cir. 2010) 597 F.3d 163, 175 [due process prohibits state agency from "mak[ing] a foster care placement that is deliberately indifferent to the child's right to personal safety and security"]; *Cortes-Quinones v. Jimenez-Nettleship* (1st Cir. 1988) 842 F.2d 556, 560 (opn. of Breyer, J.) [prison official acted with deliberate indifference to inmate's safety under Eighth Amendment when he transferred a mentally ill inmate to a crowded jail that was known for violence].) And an official may be held liable for acquiescing to the constitutional violations of those over whom the official has supervisory control. (See *Starr v. Baca* (9th Cir. 2011) 652 F.3d 1202, 1208 [sheriff could be held liable for knowing acquiescence to the unconstitutional prison policies and customs of the county]; *Dubner v. City & County of San Francisco* (9th Cir. 2001) 266 F.3d 959, 968 [similar].)

At the core of the question presented is whether the Governor or Attorney General, as opposed to the custodians of state prisons or county jails who are directly responsible for making ICE notification and transfer decisions, owe any legal duty to the prison or jail inmates who are subject to those decisions. Petitioners contend that respondents' duty arises from their supervisory authority. With respect to prison inmates, the Governor has "complete authority" over the California Department of Corrections and Rehabilitation during the current state of emergency. (Gov. Code, § 8627.) With respect to county jail inmates, petitioners point to article V, section 13 of the California Constitution, which says: "The Attorney General shall have direct supervision over every district attorney and sheriff and over such other law enforcement officers as may be designated by law, in all matters pertaining to the duties of their respective offices . . . ." Further, in their informal opposition, respondents acknowledge they have broad authority to direct state and local agencies under the Emergency Services Act (Gov. Code, § 8550 et seq.). According to petitioners, the Governor and Attorney General have ample authority to direct how custodial officials make ICE notification and transfer decisions — yet respondents, by allowing transfers to continue unabated during this public health

crisis, have failed to give adequate consideration to the grave risks posed by such transfers in violation of due process of law.

The Governor and Attorney General counter that their broad authority in this context does not give rise to any corresponding legal duty and, further, that due process requires "a complex balancing of competing interests." According to respondents, "there are a number of case-specific factors that may be relevant to the necessary balancing of interests, including the conditions and practices at a specific detention facility, the State's particular interest in assisting with federal immigration enforcement efforts, the detainee's health and medical history, and the amount of time the detainee is likely to spend at the detention facility." But respondents do not indicate whether they are *actually* considering a number of competing interests when making such decisions or how they *actually* go about balancing such interests. There is no mention of official or unofficial criteria, the process actually used, or which officials at what level make the decisions. Most telling, respondents make no assertion that state or local officials are actually considering, as one of the competing interests, the risk that inmates will contract the virus and become seriously ill in ICE detention facilities — a risk that the Attorney General has recognized as serious enough to "caus[e] countless unnecessary deaths." (Attorney General Letter, *supra*, at p. 1.)

So, even if the court is correct that respondents have no clear duty to grant petitioners' requested relief (i.e., a moratorium on transfers), the analysis does not end there. Petitioners' central claim is that respondents' present conduct amounts to deliberate indifference to inmates' health and safety in violation of due process. If this claim succeeds, nothing would prevent us from ordering appropriate relief. (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1113 ["As a general matter, the nature of the relief warranted in a mandate action is dependent upon the circumstances of the particular case, and a court is not necessarily limited by the prayer sought in the mandate petition but may grant the relief it deems appropriate."].) An appropriate remedy could recognize that although respondents have discretion to balance competing interests in their approach to transfers, it is an abuse of discretion not to consider COVID-19 risk as one important factor, and mandamus will lie to "correct [that] abuse of discretion." (*Common Cause*, *supra*, 49 Cal.3d at p. 442.) Such a mandate would not impermissibly control the exercise of lawful discretion; it would instead require state officials to "exercise [their discretion] under a proper interpretation of the applicable law." (*Ibid.*) Although consideration of COVID-19 risk might make a difference to transfer decisions in certain cases, that consideration could be outweighed in other cases, including cases where public safety considerations support transfer of dangerous individuals. This court is fully capable of crafting a proper mandate that does not intrude on the lawful discretion of the Governor and Attorney General.

But we need not get ahead of ourselves. At this stage, we have a petition, an informal response, a reply, and a formidable submission of exhibits and declarations in

support of the claim that respondents have demonstrated deliberate indifference to the health and safety of California's jail and prison inmates. There is a substantial legal question as to whether respondents, in light of their supervisory authority over state and local officials, have a corresponding duty to ensure that ICE notification and transfer decisions are made in conformity with due process of law. At this point, I cannot confidently say what the answer is. What I can say is that the question is urgent and important, and this court should answer it, whatever the answer may be.

Accordingly, I would issue an order directing respondents to show cause why they have not acted with deliberate indifference to the health and safety of California inmates in allowing the continued transfer of those inmates to ICE detention centers. To the extent that factual development is needed, this court may appoint a referee or special master. (See, e.g., *Eu*, *supra*, 54 Cal.3d at p. 473.) Unlike the factual inquiry we recently considered in *National Association of Criminal Defense Lawyers v. Newsom*, petition denied May 4, 2020, S261827, which involved conditions at scores of jails and juvenile facilities in 15 or more counties, the factual inquiry in this case principally concerns the conditions at the five ICE facilities in California, which seems a manageable task.

Respondents' contention that they are "poorly situated to substantiate or contest Petitioner's factual allegations" is unpersuasive. In his April 13, 2020 letter to DHS, the Attorney General detailed serious concerns about conditions in ICE facilities "[b]ased on the California Department of Justice's comprehensive reviews of six facilities and tours of all other detention facilities in California where immigrants are held pending their immigration proceedings." (Attorney General Letter, *supra*, at p. 1.) This appears to be a reference to the Attorney General's comprehensive 147-page review of conditions in ICE facilities, published in February 2019. (Dept. of Justice, Review of Immigration Detention in California (Feb. 2019).) The Attorney General conducted this review pursuant to Government Code section 12532, which requires the Attorney General to periodically inspect, make findings, and publicly report on immigration detention facilities in California, including "the conditions of confinement" and "the standard of care . . . provided." (Gov. Code, § 12532, subd. (b)(1)(A), (B).) This statute further states: "The Attorney General, or his or her designee, shall be provided all necessary access for the observations necessary to effectuate reviews required pursuant to this section, including, but not limited to, access to detainees, officials, personnel, and records." (*Id.*, subd. (c).) The Attorney General has successfully defended his prerogatives under this provision as to subdivisions (b)(1)(A) and (b)(1)(B) against arguments that they violate intergovernmental immunity and federal preemption. (*U.S. v. California* (9th Cir. 2019) 921 F.3d 865, 873.) In light of his positions in federal court and in public, it is quite remarkable that the Attorney General now purports to be at a loss as to "how Respondents should go about verifying these wide-ranging allegations in this suit." If anything, respondents are in a better position than petitioners to obtain access to the facilities, detainees, officials, and documents that are relevant to this petition.

Instead of affording the parties a full opportunity to be heard, the court today denies the petition on the ground that respondents have no clear duty to halt all transfers. "The denial is, however, without prejudice to" the filing of similar claims "against responsible authorities" "in the superior courts of appropriate counties." This disposition leaves much to be desired for several reasons.

The first is the undeniable urgency and statewide importance of the issues presented. (See *California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 253 ["We will invoke our original jurisdiction where the matters to be decided are of sufficiently great importance and require immediate resolution."].) Simply put, it is our job to decide issues like the ones presented in this petition — not only whether respondents have a duty to impose a moratorium on transfers, but more fundamentally whether respondents have a duty in this context to act without deliberate indifference to inmates' health and safety. To the extent there is some question whether petitioners' claims are cognizable in an original mandamus action, that is not an obstacle to our thorough and swift consideration of the matter. (See *Vandermost v. Bowen* (2012) 53 Cal.4th 421, 441 & fn. 15 [original mandate proceeding in which the court's order to show cause "established an extremely expedited briefing schedule" and "expressly reserv[ed] resolution of the threshold question of jurisdiction for our eventual written decision"].) We are in a state of emergency. We can and should, without delay, give all sides a full hearing and provide a reasoned opinion answering the questions presented.

Second, I do not see why it makes sense to refer these claims to "the superior courts of appropriate counties" when the main factual issues concerning the five ICE detention facilities in California would be the same no matter where the claims are filed. This seems like a recipe for duplicative litigation. Moreover, in light of current public health conditions and the urgency of petitioners' claims, I am doubtful that the superior courts, which have been heavily impacted and burdened by the pandemic, are better positioned than this court to resolve the matter now before us.

Third, to the extent that today's order suggests we should wait and see what happens in "ongoing federal litigation targeting alleged deficiencies at immigration detention facilities," this misunderstands petitioners' claims. Petitioners and other advocates are litigating on all fronts, to be sure. But whatever relief they may obtain against federal officials in terms of improving conditions at ICE facilities, their principal claim here is that *California's* approach to ICE notification and transfers exacerbates the COVID-19 risk in those facilities and does not meet constitutional standards. Indeed, California's ongoing transfer of inmates to ICE facilities may well undermine any relief that the federal courts provide.

I fear that today's order will unnecessarily delay resolution of issues with potentially dire consequences for inmates, correctional staff, the health care system, and our state as a whole. In response to the pandemic, the Judicial Council has said that "[t]he continuous operation of our courts is essential for our constitutional form of

government, for providing due process and protecting the public." (Judicial Council of California, Statewide Emergency Order (Mar. 30, 2020).) In order to serve these vital purposes, it is incumbent upon us not only to maintain continuous operation but also to fully engage and resolve claims as important as those asserted in this petition.

Finally, it bears mention that "[t]he courts . . . have a special obligation to protect the rights of prisoners." (*Hudson v. Palmer* (1984) 468 U.S. 517, 557 (conc. & dis. opn. of Stevens, J.); see *Turner v. Safley* (1987) 482 U.S. 78, 84 ["Prison walls do not form a barrier separating prison inmates from the protections of the Constitution."].) "The Constitution 'does not mandate comfortable prisons,' but neither does it permit inhumane ones . . . ." (*Farmer*, *supra*, 511 U.S. at p. 832, citation omitted; see *id.* at p. 833 ["[H]aving stripped [inmates] of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course."].) The deliberate indifference standard does not require a petitioner "seeking 'a remedy for unsafe conditions [to] await a tragic event . . . before obtaining relief.' " (*Id.* at p. 845.) These observations carry particular force during the present state of emergency, as it is evident that the burdens of the pandemic do not fall equally upon all.

The warning signs could not be more clear. (See Winton, *70% of inmates test positive for coronavirus at Lompoc federal prison*, L.A. Times (May 9, 2020).) We should act with an urgency that befits the current crisis. Petitioners contend that the Governor and Attorney General bear responsibility for the substantial risk of serious harm that ICE transfers pose to persons in state and local custody; respondents disclaim any legal duty to mitigate that risk. We owe it to the parties and the public to resolve the heart of this matter.

LIU, J.