UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MARIA ALEJANDRA CELIMEN SAVINO and JULIO CESAR MEDEIROS NEVES,	)	
Petitioners-Plaintiffs,	)	
v.	)	20-cv-10617 WGY
THOMAS HODGSON, et al.,	)	
Respondents-Defendants.	)	

DEFENDANTS' SUPPLEMENTAL BRIEF

At a hearing yesterday, April 2, 2020, the Court indicated its intention to "provisionally certify" a class and to grant release from detention to multiple sub-groups within the class. Defendants are filing this Supplemental Brief because:

(i) The detainees do not fit neatly into five sub-classes and must be analyzed individually;

(ii) The issue of the Court's authority to provide class-wide relief under the Immigration and Nationality Act has not been fully addressed; and

(iii) There is no basis for declaring a class on the present record.

With great respect for both the gravity of the coronavirus pandemic and this Court's thoughtful efforts to respond rapidly to Plaintiffs' concerns, Defendants urge the Court to reconsider.[1]

[1] There are additional issues, not repeated again here, raised in Defendants' original Opposition. These included that Plaintiffs lack Article III standing, they have failed to demonstrate a Constitutional harm that the Court can redress via a writ of habeas corpus, and, finally, that the alleged harm is not and would not be caused by Defendants.

A. The Threat of an Uncontrolled Outbreak Is Speculative

The Court's view, as articulated at the most recent hearing, is that there is a significant risk of the COVID-19 virus infecting one or more detainees. To date, no detainee or inmate at the Bristol County House of Corrections has tested positive for, or is showing symptoms of, infection. The Court's proposed order(s) would release certain groups of ICE detainees so as to lessen the risk of the anticipated infection spreading among the remaining detainees. The Court would thus provide the relief requested by the Plaintiffs, i.e., release, to benefit not those who are released but to benefit those who are *not* released.[2] In doing so, the Court is essentially taking the position that the steps taken by BCHOC and ICE to protect the detainees are inadequate. Defendants submit that this is incorrect.

Defendants have submitted highly detailed evidence regarding the extensive measures taken at BCHOC to prevent, and contain, any COVID-19 infection. In opposition, Plaintiffs and amicus curiae have submitted vague and general statements about prisons generally. Other than detainee letters and declarations, which contain demonstrably inaccurate statements of fact, Plaintiffs have not submitted reliable evidence regarding the *actual* conditions at BCHOC. Defendants understand that the potential risk of a widespread outbreak weighs heavily on the Court, but urge the Court to separate speculation from Plaintiffs as to what *might* happen from the reality at BCHOC. That reality is no detainee or inmate has a confirmed, or even suspected,

[2] The current factual record does not establish that the released detainees would be at a lower risk of COVID-19 infection. The rate of infection in the general populace is much greater than within BCHOC (8,966 positive cases in Massachusetts as of April 2, 2020 and 0 positive cases in BCHOC as of the same date, https://www.mass.gov/doc/covid-19-cases-in-massachusetts-as-of-april-2-2020/download (accessed 4/2/20). Moreover, the factual record is completely devoid of detail regarding how and where any released detainees will obtain medical care on release, nor what the conditions of their home confinement will be, such as who else is living there, what sort of physical proximity is likely, etc.

COVID-19 infection. That stands in great contrast to the situation in the community into which the detainees may be released.[3]

B. Other Courts Have Recognized the Risk but Declined to Release Detainees

In *Sacal-Michal v. Longoria*, (S.D. Tx. March 27, 2020)(copy attached), the court rejected a civil immigration detainee's request to be released in light of his health issues and COVID-19. The court noted that a habeas petition can address the fact or duration of detention, but that "allegations that challenge rules, customs, and procedures affecting conditions of confinement are properly brought in civil rights actions." *Id., citing Schipke v. Van Buren*, 239 F. App'x 85, 85–86 (5th Cir. 2007). The court concluded that plaintiff was challenging the conditions of his confinement.

> Sacal alleges that Respondents cannot prevent the COVID-19 virus from infecting the detention center where he is detained. … He contends that he will be exposed to COVID-19 via the medical staff or other detainees. And he alleges that because of his failing health, "[c]ontinued detention . . . presents a clear and present danger to his fundamental right to life." Sacal effectively alleges that ICE's inability to isolate him successfully, the movement of individuals within the detention facility, and the absence of adequate testing to identify carriers of the virus, all render it a certainty that he will contract the illness if maintained in custody. Those factors focus on the conditions of his confinement. A detention facility's protocols for isolating individuals, controlling the movement of its staff and detainees, and providing medical care are part and parcel of the conditions in which the facility maintains custody over detainees.

Id. A detainee can establish a constitutional violation based on inadequate conditions of his confinement. But to do so, he must demonstrate that the officials acted with

[3] Plaintiffs have not sought, and there is no basis for, the Court inserting itself into the operations of BCHOC. By focusing on the density of the detainee population, and prejudging the absence of any alternatives to release to address the Court's concerns, the Court has substituted its judgment for that of ICE and BCHOC on how best to deal with the coronavirus, however.

deliberate indifference to his medical needs or his safety. In language that is applicable to this case, the court in *Sacal-Michal* stated that Plaintiff was unlikely to prove this:

> Here, the record does not demonstrate that Sacal is substantially likely to prove that ICE has acted with deliberate indifference with respect to Sacal's health. On the contrary, the record reflects that ICE has provided constant medical attention to Sacal, and has implemented preventative measures to reduce the risk of Sacal contracting COVID-19. Those measures may ultimately prove insufficient. But the implementation of those measures preclude a finding that ICE has refused to care for Sacal or otherwise exhibited wanton disregard for his serious medical needs. In other words, Sacal has not demonstrated that the conditions in which ICE maintains him in custody arise to the level of a constitutional violation. In addition, Sacal has not demonstrated a substantial likelihood of success on his fundamental argument—i.e., that the detention facility is incapable of protecting him from contracting COVID-19 or providing appropriate medical attention should he be infected. For these propositions, Sacal offers only conclusory arguments based on general articles regarding the highly-contagious nature of COVID-19 and its impact on the elderly and individuals with certain underlying medical conditions.
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> In essence, Sacal contends that a high likelihood exists that many detainees in the Port Isabel Detention Center will contract COVID-19, and that for those who are elderly or suffer from underlying medical conditions that render them prone to the more serious aspects of the virus, the risk of death is significant. Sacal offers no evidence to support these propositions other than conclusions extrapolated from general information. And accepting Sacal's reasoning would logically require the release of all individuals currently detained who are elderly or suffer from certain underlying medical conditions. The law does not require such a generalized result. The decisions by other district courts considering similar requests demonstrate the fact-specific nature of the analysis.
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> The Court recognizes that the COVID-19 pandemic presents an extraordinary and unique public-health risk to society, as evidenced by the unprecedented protective measures that local, state, and national governmental authorities have implemented to stem the spread of the virus. And it is possible that despite ICE's best efforts, Sacal may be exposed and contract the virus.

> Moreover, Sacal's age and medical condition render him particularly vulnerable to serious complications from the virus. But the fact that ICE may be unable to implement the measures that would be required to fully guarantee Sacal's safety does not amount to a violation of his constitutional rights and does not warrant his release. Sacal has not demonstrated his likelihood of proving that ICE has failed to take reasonable measures to guarantee his safety.

Id.

Presently, there is no legal basis to justify an alien's release based solely on COVID-19. *See Dawson v. Asher*, 2020 WL 1304557 (W.D. Wash. March 19, 2020). The court in *Dawson* found that there is no legal authority to justify an immediate release of an alien based on COVID-19. The court ruled that appropriate relief would be to order the agency to ameliorate any alleged violative conditions within the facility.

Outside of the immigration arena, courts have found that the threat of COVID-19 is not sufficient to justify release. For example, the court in *U.S. v. Jones* found that health risks are not the sole determinant of whether detention is appropriate, and every decision must include an individualized assessment of the existing standards for release eligibility. *See U.S. v. Jones*, 2020 WL 1323109, (D. MD. March 20, 2020).[4]

In *United States v. Martin*, United States District Court, D. Maryland, Southern Division, March 17, 2020 (2020 WL 1274857), the court stated:

> Finally, while the record confirms that Martin has disclosed that he suffers from asthma, high blood pressure, and diabetes, this alone is insufficient to rebut the proffer by the Government that the correctional and medical staff at CDC are implementing precautionary and monitoring practices sufficient to protect detainees from exposure to the COVID-19 virus. For all the above reasons, I reach the same conclusion as Chief Magistrate Judge

[4] However, a separate court ruled that COVID-19 could establish changed circumstance to permit a redetermination of a defendant's bail based on new flight risk factors arising out of COVID-19. *See U.S. v. Stephens*, 2020 --- F. Supp.3d.---, 2020 WL 1295155 (S.D.N.Y. March 19, 2020). This is, of course, very different than court-ordered release.

> Gesner. Martin has failed to rebut the presumption of detention, and the Government has established by clear and convincing evidence that he must continue to be detained for the protection of the community. Therefore, his appeal is DENIED.

In *United States of America v. Teon Jefferson,* United States District Court, D. Md. March 23, 2020 (2020 WL 1332011), the court rejected the plaintiff's contention that his asthma constituted an unacceptable health risk that should result in release to home confinement with location monitoring. The court noted that no third-party custodian had been identified and that location monitoring is a particularly scarce. resource under the current conditions. *Id.*

In another COVID-19 release case, *United States v. Hamilton,* (E.D.N.Y. March 20, 2020), 2020 WL 1323036, the court rejected the plaintiff's argument that in light of his advanced age and medical conditions, the ongoing COVID-19 pandemic constitutes "another compelling reason" to permit his temporary release under 18 U.S.C. 3142(i)(4). According to the court:

> While the court is mindful of Mr. Hamilton's concerns, it does not believe that the COVID-19 outbreak—at this point in time—constitutes a sufficiently compelling reason to justify release under the circumstances of this case. Mr. Hamilton does appear to fall within a higher-risk cohort should he contract COVID-19; however, he does not suffer from any pre-existing respiratory issues and his medical conditions appear to have been well managed over the course of the past fourteen months of incarceration. Further, and perhaps most importantly, as of this writing, there have been no reported incidents of COVID-19 within MDC, and the Bureau of Prisons is taking system-wide precautions to mitigate the possibility of infection within its facilities. As such, given the risks that Mr. Hamilton's release would pose, the court concludes that the possibility of an outbreak at MDC is not a "compelling circumstance" justifying his release.

Id.

United States v. Gileno, (D. Conn. March 19, 2020), 2020 WL 1307108, is to similar effect: "The Court takes judicial notice of the fact that public health recommendations are

rapidly changing. But at this time the Court cannot assume that the Bureau of Prisons will be unable to manage the outbreak or adequately treat Mr. Gileno should it emerge at his correctional facility while he is still incarcerated." *Id. Accord Nikolic v. Decker*, (S.D.N.Y. March 19, 2020), 2020 WL 1304398 (in a case not subject to the restrictions of 8 U.S.C. § 1252(f), court noted that a federal court should grant bail to a habeas petitioner only in unusual cases).

C. <u>There Is No Class Which May Be Certified</u>

There is a lack of commonality among the purported class members, even as subdivided by the Court. The appropriate solution is to make individual determinations and not to certify a class.

Plaintiffs have sought certification of a single class made up of all persons presently detained at BCHOC or whomever will be so detained, from now until the end of time. *See* TRO Memorandum at p. 5. They have not demonstrated, nor could they, that the members of this virtually infinite class share key attributes such as similar criminal history, similar risk of flight, similar medical conditions, similar situations for home release, or many other potentially relevant variables.[5] Thus, there is no commonality of the purported class members which is *required* for class certification.

> The party seeking certification must establish the elements necessary for class certification: the four requirements of 23(a) and one of the several requirements of Rule 23(b). Whether the movant has carried that burden is a question the district court must resolve through a "rigorous analysis" of Rule 23's requirements. That analysis may entail some overlap with the merits of the plaintiff's underlying claim. But the overlap must necessarily be limited, for Rule 23 grants courts no license to engage in free-ranging merits

[5] The Court did not request that the parties address risk of flight in the list of current detainees. The annotated list also does not address the home situation of any detainee upon release nor factors other than criminal convictions, which should be taken into account in any release determinations. Examples of the application of some of these factors will be presented to the Court in a letter outlining ICE's proposed resolution of the category 1 detainees.

> inquiries at the certification stage. Instead, merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.

Kenneth R. ex rel. Tri-Cty. CAP, Inc./GS v. Hassan, 293 F.R.D. 254, 263 (D.N.H. 2013)(internal quotation marks and citations omitted); *Amgen Inc. v. Connecticut Ret. Plans and Trust Funds*, 521 U.S. 591 (2013); *In re Relafen Antitrust Litig.*, 218 F.R.D. 337, 341 (D.Mass.2003) (*citing Smilow v. Southwestern Bell Mobile Sys*., 323 F.3d 32, 38 (1st Cir.2003)). The Supreme Court has cautioned against jumping to the relief before determining certification:

> The predominance requirement stated in Rule 23(b)(3), we hold, is not met by the factors on which the District Court relied. The benefits asbestos-exposed persons might gain from the establishment of a grand-scale compensation scheme is a matter fit for legislative consideration, but it is not pertinent to the predominance inquiry. That inquiry trains on the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement.

Amchem Prod., Inc. v. Windsor, 622–23 (1997). The Supreme Court rejected the district court's approach in *Amchem* because it put the benefit to the purported class members ahead of the determination of whether there truly was a certifiable class in the first place. Should it certify a class on this record, the Court would improperly do that in this case.

In this one-class, class action complaint, with a very limited record, the Court has determined that there are five relevant "sub-classes" of detainees based on only two variables: criminal history and CDC-recognized comorbidities for COVID-19. Defendants object to creation of sub-classes. Plaintiffs' have not sought them, and Rule 23(c)(5) requires that there be a class first before subclasses are created. The Court's proposal in this case improperly skips to the second step. As stated in *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 621 (1997): "Federal courts, in any case, lack authority to substitute for Rule 23's certification criteria a

standard never adopted—that if a settlement is "fair," then certification is proper." The need for sub-classes demonstrates that the entire group of detainees cannot and should not be designated as a class because ***each*** detainee presents unique factors which cannot be dealt with on a class-wide basis – even as subdivided.

Moreover, there is no evidence at this time that any of the class members of the purported sub-classes has consented to representation by Plaintiffs counsel or seeks to join the class. The Court has: (i) created five sub-classes as to which no one has requested certification; (ii) without first certifying a class; (iii) with the sub-classes made up of persons who have not agreed to be class members; (iv) so non-released sub-class members can benefit by the reduced density of the remaining detainee population. This is so notwithstanding that the ICE detainee facilities at BCHOC are well below capacity and the Court has not made a finding that a specific level of population reduction will ameliorate the Court's perception that the facility is overcrowded.[6]

At this point, we do not know if any of the potential class members wish the resolution the Court proposed. *See* Rule 23(d) and (e)(requiring notice to class members of proposed steps, including ultimate relief, opt-out options, objection rights, etc.); *See, e.g. Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 612, 117 S. Ct. 2231, 2244, 138 L. Ed. 2d 689 (1997).

Rule 23(a)(3) of the Federal Rules of Civil Procedure requires that the claims of the representative parties are typical of the claims of the class. Here, the named representatives are *not* representative because the Court has specifically sub-divided the class into five groups. Since the two named Plaintiffs are, at most, representative of only two of the Court's groups,

[6] The Court made reference at yesterday's hearing to beds being one to two feet apart at the facility, but not every bed is filled and the minimal distance is believed to be between ends, not the long sides of beds. Again, the factual record is insufficiently developed for the Court to make a finding and ought to be supplemented prior to the Court taking the extraordinary step of ordering the release of dozens of detainees.

they cannot represent the interests of all purported class members. There are no representatives of at least three of the sub-classes.

Rule 23(a)(4) further requires that the representatives fairly and adequately protect the interests of the class. Here, the representative parties cannot do so because they are unlikely to be released, under the Court's proposal, and other members of the class will be released. Plaintiffs seeking class certification must, among other things, (1) avoid framing common questions so generally that they encompass myriad, distinct claims; (2) provide significant proof that "there exists a common policy or practice ... that is the alleged source of the harm to [the] class members," *M.D. v. Perry*, 294 F.R.D. 7, 28–29, 2013 WL 4537955, at *14 (S.D.Tex. August 27, 2013); (3) identify common questions of fact or law that can be "answered either 'yes' or 'no' for the entire class," that is, identify central questions whose answers " 'will not vary by individual class members,' " *Raposo v. Garelick Farms, LLC*, 2013 WL 3733461, at *3 (D.Mass. July 11, 2013) (*quoting Donovan v. Philip Morris, USA, Inc.*, 2012 WL 957633, at *21 (D.Mass. Mar. 21, 2012)); and (4) show that "dissimilarities in the proposed class" do not "impede the generation of common answers." *Wal–Mart*, 131 S.Ct. at 2551. Plaintiffs have done none of that.

> To satisfy Rule 23(a)(2)'s commonality requirement, the class claims must depend upon a "common contention" that is "capable of classwide resolution — which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011). Questions are common if they can "each be answered either 'yes' or 'no' for the entire class" and "the answers will not vary by individual class member."

Walker v. Osterman Propane LLC, 411 F. Supp. 3d 100, 108 (D. Mass. 2019).

D. <u>The Court Lacks Authority to Issue a Class-Wide Injunction</u>

"Regardless of the nature of the action or claim . . . no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of [8 U.S.C. §§ 1221-1232], other than with respect to the application of such provisions to an individual alien against whom proceedings . . . have been initiated." 8 U.S.C. § 1252(f).

This issue was briefed in the Defendants' Opposition to the Motion for a Temporary Restraining Order. The Court did not specifically address its authority to certify a class and issue relief in an immigration case. This Court lacks jurisdiction to enjoin the normal operation of 8 U.S.C. § 1226(c).[7] The Supreme Court has instructed that the provision is a bar on "classwide injunctive relief against the operation of §§ 1221-1231" with a carve out that applies to "individual cases." *Reno v. Am. Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481-82 (1999) (emphasis added). The Court in *Jennings v. Rodriguez*, indicated that section 1252(f)(1) would apply to constitutional claims like those raised by Plaintiffs because they seek to enjoin the ordinary application of section 1226(c) as unconstitutional. *See* No. 15-1204, --- U.S. ---, 138 S. Ct. 830, 852 (recognizing that the Ninth Circuit had found that section 1252(f)(1) did not bar its jurisdiction over the statutory claims but concluding that "[t]his reasoning does not seem to apply to an order granting relief on constitutional grounds"). This provision is entitled "limit on injunctive relief," and it unquestionably prohibits class-based injunctions while preserving individual access to a habeas writ and all forms of equitable relief. The Sixth Circuit recently echoed this sentiment, stating it was "skeptical" that "Petitioners would prevail" on whether § 1252(f)(1) bars declaratory relief. *Hamama v. Adducci*, 912 F.3d 869, 880 n.8 (6th Cir. 2018). It

[7] Defendants recognize that district courts have authority to issue a writ of habeas corpus to address constitutional wrongs in individual cases. That is not what the Court has proposed, and, more importantly, it is not what Plaintiffs have sought. It is not for the Court to recast Plaintiffs' theory of recovery (i.e., the broadest class possible) nor the legal basis upon which it stands.

stated that, while "[i]t is true that 'declaratory relief will not always be the functional equivalent of injunctive relief,' … in this case, it is the functional equivalent." *Id*. (citing *Alli v. Decker*, 650 F.3d 1007, 1014 (3d Cir. 2011)). "The practical effect of a grant of declaratory relief as to Petitioners' detention would be a class-wide injunction against the detention provisions, which is barred by § 1252(f)(1)." *Id*. *Hamama v. Homan*, No. 17-2171, 2018 WL 6722734, (6th Cir. Dec. 20, 2018), the Sixth Circuit held that the District court correctly held that 8 U.S.C. § 1252(g) divested it of jurisdiction as a matter of federal statutory law. Id. at *4. However, as the Sixth Circuit explained, the District Court then "erred by finding that it could still exercise jurisdiction because 'extraordinary circumstances' created an as-applied constitutional violation of the Suspension Clause. This [was] a broad, novel, and incorrect application of the Suspension Clause." Id. The Sixth Circuit held that the Suspension Clause did not apply because "Congress has provided an adequate alternative [remedy]."

The Sixth Circuit's prior decision in *Hamama v. Adducci*, 912 F.3d 869, 878–79 (6th Cir. 2018), is also instructive: "Nevertheless, we find that 8 U.S.C. § 1252(f)(1) bars the district court from entering class-wide injunctive relief for the detention-based claims. In our view, *Reno* [525 U.S. 471] unambiguously strips federal courts of jurisdiction to enter class-wide injunctive relief for the detention-based claims. Petitioners disagree and raise three objections. We are not alone in our interpretation of § 1252(f)(1). Other courts, following *Reno*'s guidance, have determined that they do not have jurisdiction under § 1252(f)(1) to issue class-based injunctive relief against the removal and detention statute," *citing Van Dinh v. Reno*, 197 F.3d 427, 433 (10th Cir. 1999); *Pimentel v. Holder*, 2011 WL 1496756, at *2 (D.N.J. Apr. 18, 2011); *Belgrave v. Greene*, 2000 WL 35526417, at *4 (D. Colo. Dec. 5, 2000) (explaining that § 1252(f)(1) does not bar detainees from seeking habeas relief from detention, but it does "require[ ] that those challenges be brought

on a case-by-case basis"). The Sixth Circuit continued:

> Second, the claim that "the district court was not enjoining or restraining the statutes" is implausible on its face. The district court, among other things, ordered release of detainees held "for six months or more, unless a bond hearing for any such detainee is conducted"; created out of thin air a requirement for bond hearings that does not exist in the statute; and adopted new standards that the government must meet at the bond hearings ("shall release ... unless the immigration judge finds, by clear and convincing evidence, that the detainee is either a flight risk or a public safety risk"). If these limitations on what the government can and cannot do under the removal and detention provisions are not "restraints," it is not at all clear what would qualify as a restraint. The district court did not have jurisdiction to enter class-wide injunctive relief on Petitioners' detention-based claims.

Id., at 879-880.

E. <u>The Action the Court Proposes Taking Is Not Readily Reversible</u>

Another concern that arises from the Court's proposed partial grant of the motion for a temporary restraining order is that the relief is not readily reversible. If the Court orders the release of ICE detainees without an individualized analysis of flight risk, then it is highly likely that should the Court determine subsequently, after discovery, that its preliminary relief ought to be rescinded, it may be too late. The released detainees will have a significant incentive to disappear, particularly if they know the preliminary relief is not permanent.

CONCLUSION

The risks presented by the coronavirus pandemic are grave. The solution sought by Plaintiffs is extraordinary, it runs afoul of 8 U.S.C. § 1252(f), and it is unnecessary given the current situation at BCHOC. Moreover, there is no assurance that it will decrease the risk to either the released detainees or the detainees remaining in custody. The Defendants urge the Court to take additional time, through this weekend at least, before deciding if the Court has the authority to issue class-wide relief and whether such an order is warranted here. Defendants

believe it is not.

Respectfully submitted,

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April 3, 2020

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ Thomas E. Kanwit
Thomas E. Kanwit

Dated: April 3, 2020

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

JAIME SACAL-MICHA,	§	
	§	
Petitioner,	§	
VS.	§	CIVIL ACTION NO. 1:20-CV-37
	§	
JOSE GARCIA LONGORIA JR, *et al.*,	§	
	§	
Respondents.	§	

OPINION AND ORDER

On March 22, 2020, Petitioner Jaime Sacal-Micha (Sacal) filed a Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief (Doc. 1), requesting that the Court order his immediate release from immigration detention pending the resolution of his claim under the United Nations Convention Against Torture.[1] Sacal is elderly and has serious underlying medical conditions. He seeks release based on the possibility of a COVID-19 outbreak within the detention center in which he is being held, and the facility's alleged inability to protect him from contracting the virus or providing him with adequate medical attention should he do so.

On March 24, 2020, the Court held a telephonic conference regarding the request for a temporary restraining order. The Court has reviewed the briefing and the exhibits submitted by the parties, as well as the applicable law.[2] For the following reasons, the Court denies the application for a temporary restraining order.

I. Procedural and Factual Background

Sacal is a sixty-nine-year-old wealthy Mexican citizen with significant real estate

[1] Sacal brings suit against Jose Garcia Longoria, Jr. (Officer in Charge, Port Isabel Detention Center), Chad Wolf (Acting Secretary of the Department of Homeland Security), and the United States of America (collectively, the "Respondents").

[2] The Court grants Sacal's Motion for Leave to File Exhibit "M" in Support of Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief (Doc. 15) and his Motion for Leave to File Exhibits "N" and "O" in Support of Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief (Doc. 16). The Court considers the exhibits attached to those two motions as part of the record.

holdings. He claims he fled Mexico because family members seeking to obtain control of his real estate used their influence to have the government file false criminal charges against him, accusing him of a violent crime against one of his granddaughters. The Mexican government issued an arrest warrant for Sacal's arrest. (Arrest Warrant, Doc. 10)

Sacal vigorously denies the criminal charges, but chose to leave Mexico to avoid arrest and to fight the charges from afar. He planned to reside in his apartment in New York City. On December 2, 2019, he presented himself at a United States port of entry and sought admission with his nonimmigrant visa. (Record of Deportable/Inadmissible Alien, Doc. 9-1) The inspecting officer with United States Customs and Border Protection (CBP) determined that the United States Department of State had revoked Sacal's visa based on the outstanding Mexican arrest warrant. (*Id.*; TECS Record, Doc. 9-2) CBP issued Sacal a Notice of Expedited Removal, charging him as inadmissible under 8 U.S.C. § 1182(a)(7)(A)(i)(I). As Sacal had expressed a fear of return to Mexico, he was transferred to the custody of United States Immigration and Customs Enforcement (ICE), which detained him at the Port Isabel Detention Center. (Notice of Expedited Removal, Doc. 9-3; Record of Determination/Credible Fear Worksheet, Doc. 9-4)

On December 6, an Asylum Officer conducted the credible-fear interview and concluded that Sacal did not present a credible fear of persecution or torture if returned to Mexico. (Record of Determination/Credible Fear Worksheet, Doc. 9-4) Sacal sought review by an Immigration Judge, who vacated the Asylum Officer's decision and placed Sacal in regular removal proceedings under 8 U.S.C. § 1229a. (Record of Negative Credible Fear Finding/Request for IJ Review, Doc. 9-5) According to Sacal, the Immigration Judge indicated that Sacal could seek relief under the United Nations Convention Against Torture (CAT). (Petition, Doc. 1, ¶ 9)

Sacal then requested that ICE release him on parole. (Emails, Doc. 2, 11-12) On February 11, 2020, ICE decided to not release Sacal based on two key findings, both premised on

the outstanding arrest warrant. First, ICE concluded that Sacal represented a danger to the community. (Record of Determination, Doc. 9-8, 4) Second, the outstanding arrest warrant created "exceptional, overriding factors (e.g., law enforcement interests or potential foreign policy consequences)" that precluded parole. (ICE Decision Ltr., Doc. 9-8, 2)

On March 18, 2020, Sacal's counsel again requested that ICE release him due to his poor health and the COVID-19 pandemic. (Emails, Doc. 2, 2) Sacal's counsel noted that the CAT proceedings would continue for many months, and that Sacal suffers from serious medical conditions. (*Id.*; *see also* Sacal's Medical Records, Doc. 11-1 (diagnosing several health conditions)) Two days later, after an exchange of communications and information, ICE again denied the request: "We have carefully considered your request, and based on the totality of the facts in this case, [] we are denying your request at this time." (Emails, Doc. 2, 1)

The parties agree that during most of Sacal's time in detention, he has been held in the infirmary. (Petition, Doc. 1, ¶ 15; Response, Doc. 8, 7) Sacal does not allege that he has received inadequate care for his current medical conditions.

As of March 24, ICE had not confirmed any cases of COVID-19 in the Port Isabel Detention Center, including the infirmary in which Sacal has received care. (Decl. of Dr. Maribel Cantu, Doc. 9-9) Respondents submit evidence of the protective measures that ICE has implemented to reduce the risk of detainees contracting COVID-19. (*Id.*)

II. Applicable Standard

Sacal seeks a temporary restraining order requiring his immediate release so that he may reside at a local shelter where he would receive ongoing medical care and have minimal contact with others. (Petition, Doc. 1, ¶ 1) He bases the request for emergency injunctive relief on his petition for writ of habeas corpus and a cause of action under the Administrative Procedure Act.

A temporary restraining order is an equitable remedy that may be granted only if the movant satisfies four requirements: "(1) a substantial likelihood of success on the merits; (2) a

substantial threat that the movant will suffer irreparable injury if the injunction is denied; (3) that the threatened injury outweighs any damage that the injunction might cause the defendant; and (4) that the injunction will not disserve the public interest." *Sunbeam Products, Inc. v. West Bend Co.*, 123 F.3d 246, 250 (5th Cir. 1997); *see also Parker v. Ryan*, 960 F.2d 543, 545 (5th Cir. 1992) ("[T]he requirements of rule 65 apply to all injunctions.") (citing FED. R. CIV. P. 65). Failure to establish any of these elements results in the denial of the motion for injunctive relief. *Guy Carpenter & Co. v. Provenzale*, 334 F.3d 459, 464 (5th Cir. 2003) (citation omitted). Such relief is an extraordinary remedy that requires the applicant to unequivocally show the need for its issuance. *See Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1050 (5th Cir. 1997) (citation omitted).

III. Analysis

Based on the record before it and the applicable law, and for the following reasons, the Court concludes that Sacal has failed to demonstrate a substantial likelihood of success on either of his claims.[3]

A. Petition for Writ of Habeas Corpus

An individual may seek habeas relief under 28 U.S.C. § 2241 if he is "in custody" under federal authority "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c). The "sole function" of a habeas petition is to "grant relief from unlawful imprisonment or custody." *Pierre v. United States*, 525 F.2d 933, 935–36 (5th Cir. 1976). The Fifth Circuit follows a bright-line rule: "If a favorable determination . . . would not automatically entitle [the detainee] to accelerated release, . . . the proper vehicle is a [civil rights] suit." *Carson v. Johnson*, 112 F.3d 818, 820–21 (5th Cir. 1997) (internal citations omitted).

[3] In light of the Court's conclusion with respect to the first factor, the Court will not reach the remaining factors for a temporary restraining order. In addition, Respondents argue that Sacal lacks standing because his "claim of future injury is hypothetical". (Response, Doc. 8, 7) The Court also does not reach this issue, but notes that Sacal need not await an actual injury (or illness, in this case) before bringing suit, but must show only that he faces an "unreasonable risk of serious damage to [his] future health". *Farmer v. Brennan*, 511 U.S. 825, 843 (1994) (citation omitted).

A district court possesses inherent authority to grant bail based on a petition for habeas relief, if doing so is required to protect the court's ability to consider the petitioner's claim that has been properly brought before it. But such authority is limited and reserved for unusual circumstances. The petitioner must demonstrate that the habeas petition raises substantial claims and that "extraordinary circumstances exist that make the grant of bail necessary to make the habeas remedy effective." *Mapp v. Reno*, 241 F.3d 221, 230 (2d Cir. 2001). Respondents contest that such authority exists in this case, arguing that Sacal "may only be released from § 1225(b) custody if the Secretary of the Department of Homeland Security (DHS) determines 'on a case-by-case basis' that 'urgent humanitarian reasons or significant public benefit' warrant the alien's release on parole." (Response, Doc. 8, 12 (citing 8 U.S.C. § 1182(d)(5)(A) and 8 C.F.R. § 235.3(b)(2)(iii))) But Respondents' argument misses the source of the authority. As applied to the present matter, this Court would not order Sacal's release by finding that the Secretary of DHS should have done so under Section 1182, but only by finding that releasing Sacal is necessary to meaningfully consider Sacal's Petition for Writ of Habeas Corpus and to maintain the possibility of providing effective habeas remedy, should the Court decide that such a remedy is warranted. Such inherent authority does not infringe on the Secretary of DHS's discretion under Section 1182, but rather protects the Court's power to provide meaningful relief based on a claim properly before it.

Still, to obtain emergency injunctive relief, a petitioner must satisfy the controlling requirements, including demonstrating a substantial likelihood of success on the merits of his claims. As a result, as applied to the present case, Sacal must demonstrate that his Petition for Writ of Habeas Corpus presents substantial claims on which Sacal possesses a substantial likelihood of succeeding, and that extraordinary circumstances exist that require his release to make any habeas remedy effective. He fails to meet this exacting standard.

Sacal in his Petition does not present substantial claims on which he is likely to succeed. Importantly, "allegations that challenge rules, customs, and procedures affecting conditions of confinement are properly brought in civil rights actions." *Schipke v. Van Buren*, 239 F. App'x 85, 85–86 (5th Cir. 2007) (citing *Spina v. Aaron,* 821 F.2d 1126, 1127–28 (5th Cir. 1987)). "Typically, habeas is used to challenge the fact or duration of confinement, and 42 U.S.C. § 1983 is used to challenge conditions of confinement." *Poree v. Collins*, 866 F.3d 235, 243 (5th Cir. 2017). District courts have applied these principles to deny a habeas petition based solely on alleged inadequate conditions of incarceration. *See, e.g., Sarres Mendoza v. Barr*, No. CV H-18-3012, 2019 WL 1227494, at *2 (S.D. Tex. Mar. 15, 2019) (denying a Honduran detainee's motion for leave to amend because the proposed claims on "conditions of confinement may not be brought in a habeas corpus proceeding, and are actionable, if at all, in a civil rights action"); *Morales-Corbala v. United States*, No. P-11-CV-00025-RAJ, 2011 WL 13185995, at *3 (W.D. Tex. July 19, 2011), *aff'd*, 498 F. App'x 467 (5th Cir. 2012) (explaining that a habeas petition was improper as the plaintiff was not challenging the "constitutionality of his detention and [did] not ask the Court to release him from [the defendant's] custody").

At the core of his allegations, Sacal challenges the conditions of his confinement. Sacal alleges that "Respondents cannot prevent the Covid-19 virus from infecting" the detention center where he is detained. (Petition, Doc. 1, ¶ 16) He emphasizes that the Constitution requires the Respondents to provide "*other safe conditions of confinement*" (emphasis in original), and that they cannot do so. (*Id.* (quoting *Bos. v. Lafayette Cty., Miss.*, 743 F. Supp. 462, 469 (N.D. Miss. 1990))) He contends that he will be exposed to COVID-19 via the medical staff or other detainees. (Supp. Reply, Doc. 13, 6) And he alleges that because of his failing health, "[c]ontinued detention . . . presents a clear and present danger to his fundamental right to life." (*Id.*)

Sacal effectively alleges that ICE's inability to isolate him successfully, the movement of individuals within the detention facility, and the absence of adequate testing to identify carriers of the virus, all render it a certainty that he will contract the illness if maintained in custody. Those factors focus on the conditions of his confinement. A detention facility's protocols for isolating individuals, controlling the movement of its staff and detainees, and providing medical care are part and parcel of the conditions in which the facility maintains custody over detainees.

Sacal argues that his case does not present the typical challenge to conditions of confinement because ICE cannot implement *any* set of protective measures to protect him from contracting and possibly dying from COVID-19. (Supp. Reply, Doc. 13, 3 (emphasis in original)) In his case, he argues, the impossibility of the detention center being able to protect him amounts to a violation of his constitutional due process right to be safe when detained by the government.

A detainee can establish a constitutional violation based on inadequate conditions of his confinement. But to do so, he must demonstrate that the officials acted with deliberate indifference to his medical needs or his safety. *See, e.g.*, *Gobert v. Caldwell*, 463 F.3d 339, 345 (5th Cir. 2006) (applying the deliberate indifference standard to a cruel and unusual punishment claim); *Baughman v. Garcia*, 254 F. Supp. 3d 848, 868–69 (S.D. Tex. 2017), *aff'd sub nom. Baughman v. Seale*, 761 F. App'x 371 (5th Cir. 2019) (applying the deliberate indifference standard to a due process claim). "Deliberate indifference is shown only when 'the official knows of and disregards an excessive risk to inmate health or safety . . . .'" *Estate of Henson v. Krajca*, 440 F. App'x 341, 344 (5th Cir. 2011) (quoting *Calhoun v. Hargrove,* 312 F.3d 730, 734 (5th Cir. 2002)). Officials disregard a risk to an inmate when they have "refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs." *Domino v. Tex. Dep't of Criminal Justice*, 239 F.3d 752, 756 (5th Cir. 2001).

Here, the record does not demonstrate that Sacal is substantially likely to prove that ICE has acted with deliberate indifference with respect to Sacal's health. On the contrary, the record reflects that ICE has provided constant medical attention to Sacal, and has implemented preventative measures to reduce the risk of Sacal contracting COVID-19. Those measures may ultimately prove insufficient. But the implementation of those measures preclude a finding that ICE has refused to care for Sacal or otherwise exhibited wanton disregard for his serious medical needs. In other words, Sacal has not demonstrated that the conditions in which ICE maintains him in custody arise to the level of a constitutional violation.

In addition, Sacal has not demonstrated a substantial likelihood of success on his fundamental argument—i.e., that the detention facility is incapable of protecting him from contracting COVID-19 or providing appropriate medical attention should he be infected. For these propositions, Sacal offers only conclusory arguments based on general articles regarding the highly-contagious nature of COVID-19 and its impact on the elderly and individuals with certain underlying medical conditions. (*See* Petition, Doc. 1, ¶ 16 (citing Staff Report, *2nd travel-related COVID-19 case in RGV confirmed in Harlingen*, Valley Morning Star, Mar. 21, 2020, Doc. 2, 20); *id.* (citing Howard J. Luks, M.D., *Covid-19 Update: 3/14/2020. A Message from Concerned Physicians*, Howard J. Luks, M.D. Orthopedic Surgeon, Mar. 16, 2020, Doc. 2, 22-38); *Coronavirus Reported in US Immigration Prisons*, Associated Press, Mar. 26, 2020, Doc. 15-1, 2-9) But none of the exhibits concern the Port Isabel Detention Center, or even suggest that the measures ICE has implemented there are insufficient.

In addition, Respondents submit evidence of the protective measures they have undertaken to protect Sacal and other detainees. (*See* Decl. of Dr. Maribel Cantu, Doc. 9-9 (explaining that ICE has instituted applicable provisions of a pandemic workforce plan, suspended social visits in all detention facilities, and followed the testing guidelines of the Centers for Disease Control and Prevention (CDC))) Sacal presents no evidence that those

measures are insufficient or deviate materially from CDC's guidelines for institutions that detain individuals. *See Interim Guidance on Management of Coronavirus Disease 2019 (Covid-19) in Correctional and Detention Facilities*, Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html (last updated March 23, 2020).

In essence, Sacal contends that a high likelihood exists that many detainees in the Port Isabel Detention Center will contract COVID-19, and that for those who are elderly or suffer from underlying medical conditions that render them prone to the more serious aspects of the virus, the risk of death is significant. Sacal offers no evidence to support these propositions other than conclusions extrapolated from general information. And accepting Sacal's reasoning would logically require the release of all individuals currently detained who are elderly or suffer from certain underlying medical conditions. The law does not require such a generalized result. The decisions by other district courts considering similar requests demonstrate the fact-specific nature of the analysis. *See Vasif "Vincent" Basank, et al., v. Thomas Decker, et al.*, No. 20 Civ. 2518 (S.D.N.Y. Mar. 26, 2020), ECF No. 11 (ordering release of ten immigration detainees held in a county jail with confirmed cases of COVID-19); *Calderon Jimenez v. Wolf*, No. 18 Civ. 10225 (D. Mass. Mar. 26, 2020), ECF No. 507 (ordering release of a detained immigrant held in a county jail with a confirmed case of COVID-19); *United States of America v. Barry Allen Gabelman*, No. 2:20-CR-19 JCM (NJK), 2020 WL 1430378, at *1 (D. Nev. Mar. 23, 2020) (denying motion to reconsider: "The court acknowledges that the spread of COVID-19 may be acutely possible in the penological context, but the court cannot release every detainee at risk of catching COVID-19 because the court would be obligated to release every detainee."); *Dawson v. Asher*, No. C20-0409JLR-MAT, 2020 WL 1304557, at *3 (W.D. Wash. Mar. 19, 2020) (denying request for temporary restraining order: "Plaintiffs do not show that 'irreparable injury is likely

in the absence of an injunction.' [] The 'possibility' of harm is insufficient to warrant the extraordinary relief of a TRO.").[4]

The Court recognizes that the COVID-19 pandemic presents an extraordinary and unique public-health risk to society, as evidenced by the unprecedented protective measures that local, state, and national governmental authorities have implemented to stem the spread of the virus. And it is possible that despite ICE's best efforts, Sacal may be exposed and contract the virus. Moreover, Sacal's age and medical condition render him particularly vulnerable to serious complications from the virus. But the fact that ICE may be unable to implement the measures that would be required to fully guarantee Sacal's safety does not amount to a violation of his constitutional rights and does not warrant his release. *See Farmer v. Brennan*, 511 U.S. 825, 832 (1994) ("Prison officials must provide humane conditions of confinement and must take reasonable measures to guarantee the safety of inmates."). Sacal has not demonstrated his likelihood of proving that ICE has failed to take reasonable measures to guarantee his safety.

For these reasons, the Court finds that Sacal has not shown a substantial likelihood of success on the merits of his Petition for Writ of Habeas Corpus.

B. Administrative Procedure Act

Sacal alleges that ICE's denial of his request to be released from detention was "arbitrary, capricious, and an abuse of discretion", in violation of the APA. (Petition, Doc. 1, 8) Respondents argue that the statute itself precludes review by this Court because ICE acted within its discretion under 8 U.S.C. § 1182(d)(5).

The APA allows courts to set aside executive agency action that is arbitrary, capricious, or an abuse of discretion. *See* 5 U.S.C. § 706(2)(A). An agency runs afoul of this standard "if the

[4] Sacal also references an Order from the United States Court of Appeals for the Ninth Circuit, in which the court *sua sponte* ordered the release of an immigration detainee. (Order, Doc. 7, 2) In that case, however, the circuit court appears to have been acting within its statutory jurisdiction in an appeal from a ruling by the Board of Immigration Appeals. And the circuit court provided no explanation for its Order. As a result, although the Order shows that courts recognize the threat that COVID-19 represents to detained individuals, it does not provide sufficient information to determine whether the facts of that matter bear resemblance to those before this Court.

agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Tex. Oil & Gas Ass'n v. U.S. E.P.A.*, 161 F.3d 923, 933 (5th Cir. 1998) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). The agency must "examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Assn.*, 463 U.S. at 43.

"If the agency's reasons and policy choices conform to minimal standards of rationality, then its actions are reasonable and must be upheld." *Tex. Oil & Gas Ass'n*, 161 F.3d at 934. While a court can review an agency's decision to determine whether it is arbitrary and capricious, the court "is not to substitute its judgment for that of the agency," and should "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas–Best Freight System, Inc.*, 419 U.S. 281, 286 (1974); *see also F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009).

Section 702 of the APA waives the Government's sovereign immunity in certain circumstances. First, the plaintiff "must identify some 'agency action' affecting him in a specific way, which is the basis of his entitlement to judicial review." *Alabama-Coushatta Tribe of Tex. v. United States*, 757 F.3d 484, 489 (5th Cir. 2014) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990)). Second, the plaintiff must establish that he "suffered legal wrong because of the challenged agency action." *Lujan*, 497 U.S. at 883. A plaintiff advancing such a claim seeks review "pursuant only to the general provisions of the APA." *Alabama-Coushatta Tribe of Texas*, 757 F.3d at 489. In such an action, "[t]here must be 'final agency action' for a court to conclude that there was a waiver of sovereign immunity". *Id.* (citing *Lujan,* 497 U.S. at 882). "If there is no final agency action, a federal court lacks subject matter jurisdiction." *Qureshi v. Holder*, 663 F.3d 778, 781 (5th Cir. 2011) (citation omitted).

But judicial review under the APA is unavailable when other statutes "preclude judicial review" or when "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a); *Texas v. United States*, 787 F.3d 733, 755 (5th Cir. 2015). Both limitations apply in this case. As a result, Sacal has not demonstrated a substantial likelihood of success on his cause of action under the APA.

Subsection 1252(a)(2)(B)(ii) of the REAL ID Act expressly precludes judicial review of ICE's decision whether to grant parole to an immigration detainee: "Notwithstanding any other provision of law (statutory or nonstatutory) . . . , no court shall have jurisdiction to review" any decision placed in the discretion of the Attorney General. The Fifth Circuit has applied this statutory language to preclude a district court's jurisdiction to review a parole decision for an immigration detainee: "Congress, however, has denied the district court jurisdiction to adjudicate deprivations of the plaintiffs' statutory and constitutional rights to parole." *Loa-Herrera v. Trominski*, 231 F.3d 984, 990-91 (5th Cir. 2000); *see also Palacios v. Dep't of Homeland Sec.*, 407 F. Supp. 3d 691, 698 (S.D. Tex. 2019) ("[T]his court lacks jurisdiction to review denials of parole under the Immigration and Nationality Act because these actions are committed to agency discretion by law.") (quotations omitted).

In addition, Title 8, United States Code, Section 1182(d)(5)(A) places the decision of granting parole within the discretion of DHS. *See Ramirez-Mejia v. Lynch*, 794 F.3d 485, 491 n.1 (5th Cir. 2015). "Regulations provide further requirements and procedures" that DHS considers. *Palacios,* 407 F. Supp. 3d at 698 (citing 8 C.F.R. § 212.5). For example, to be paroled, an alien must present "neither a security risk nor a risk of absconding". 8 C.F.R. § 212.5(b). In the present case, Respondents submit the internal documentation evidencing ICE's exercise of its discretion with respect to Sacal. (*See* ICE Decision, Doc. 9-8). Because the applicable statute places this decision solely within DHS discretion, this Court lacks jurisdiction to review it.

During the hearing on Sacal's request for a temporary restraining order, his counsel argued that ICE did not deny parole based on Section 1182(d)(5)(A), but under ICE's inherent authority to release those within its custody. Under this argument, according to Sacal's counsel, the APA's jurisdictional limitation in Section 701 would not apply, because no statute expressly removes the jurisdiction of federal district courts for decisions that ICE makes based on its inherent, as opposed to its statutory, authority. Respondents counter that outside of Section 1182, no authority exists for ICE to grant or deny parole to Sacal. The Court agrees. Sacal has not specified the source of the alleged authority on which ICE acted, and has not controverted ICE's argument that the agency acted under Section 1182.

In addition, even if the Court possessed jurisdiction under the APA to review ICE's decision, the Court would conclude that Sacal has not demonstrated a substantial likelihood of proving that ICE's decision was arbitrary, capricious, or an abuse of discretion. In this matter, ICE exercised its discretion and declined to release Sacal based on two key findings, both premised on the uncontested facts that Sacal currently faces serious criminal charges in Mexico and that an arrest warrant remains pending against him in that country.[5] Based on those uncontested facts, ICE concluded that Sacal represented a danger to the community. (ICE Decision-Form 71-013 (12/09), Doc. 9-8, 2) In addition, ICE found that the arrest warrant raised "law enforcement interests or potential foreign policy consequences" that represented "exceptional, overriding factors" militating against parole. (*Id.*) The Court concludes that in reaching its decision, ICE considered factors that Congress intended it to consider.

Sacal argues that the ICE officer failed to comply with the APA because in his final communication, he provided only the cursory conclusion that based on the "totality of the facts in this case", ICE was denying the request for release. (Emails, Doc. 2, 2) But this argument ignores the entirety of the communications between ICE and Sacal's counsel, and the internal

[5] As previously indicated, Sacal vigorously denies those charges. He also presents evidence supporting his contention that family members have used their influence to persuade the Mexican government into pursuing false charges against him. But Sacal does not deny that the charges exist and that the arrest warrant remains outstanding.

documentation detailing the factors that ICE considered. As a result, the fact that the final e-mail from ICE did not detail all of its rationale does not render the decision arbitrary, capricious, or an abuse of discretion.

IV. Conclusion

Based on the record before it, the Court concludes that Petitioner Jaime Sacal-Micha has not demonstrated a substantial likelihood of success on the merits on any of his claims. As a result, the Court declines to issue the requested temporary restraining order.

SIGNED this 27th day of March, 2020.

Fernando Rodriguez, Jr.
Fernando Rodriguez, Jr.
United States District Judge