

Campbell et al. v. Barnes
Orange County Superior Court
Civil Complex Center
Case No. 30-2020-1141117

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

DEC 11 2020

DAVID H. YAMASAKI, Clerk of the Court

BY: _____, DEPUTY

ORDER ON WRIT OF HABEAS CORPUS AND WRIT OF MANDATE

The Petition

Petitioners Cynthia Campbell, Monique Castillo, Sandy Gonzalez, Cecibel Caridad Ortiz, Mark Trace and Don Wagner, on behalf of themselves and all others similarly situated, filed their Verified Petition for Writs of Mandate and Habeas Corpus and Complaint for Injunctive Relief on June 2, 2020. The respondent is Don Barnes, in his official capacity as Sheriff of Orange County, California. The petition was filed as a class action.

Pursuant to a Stipulation filed August 20, 2020, Petitioners Cynthia Campbell and Sandy Gonzalez, on behalf of themselves and all others similarly situated, and Monique Castillo, Cecibel Caridad Ortiz and Mark Trace filed their Verified Amended Petition for Writs of Mandate and Habeas Corpus and Complaint for Injunctive and Declaratory Relief, against Respondent Don Barnes, in his official capacity as Sheriff of Orange County, California. The Verified Amended Petition (hereinafter simply "Petition") was again filed as a class action. The Petition is supported by four volumes of documentary evidence, including expert declarations, as discussed more fully herein.

Motion Practice and Order To Show Cause

The Court on October 29, 2020 denied Respondent's motion to dismiss or stay, and overruled Respondent's demurrers, for the reasons more fully discussed on the record during the hearing and as set forth in the Court's October 29, 2020 Minute Order. As reflected in the Minute Order, the Court further found as follows:

"Having reviewed the Unredacted Verified Amended Petition for Writs of Mandate and Habeas Corpus and Complaint for Injunctive and Declaratory Relief (ROA 107) filed September 9, 2020, along with the documents filed in support thereof (ROAs 147 through 151), as well as the documents filed in support of and in opposition to the motions ruled on today (including the documents attached to Petitioners' request for judicial notice (ROA 169)), the Court finds that Petitioners have made a prime facie showing that they are entitled to relief. Accordingly, the Court hereby issues an Order to show cause, pursuant to CRC rule 4.551(c)."

The Minute Order further specified dates for the filing and service of the Return, and the filing and service of the Denial. The Minute Order also provisionally set a date for an evidentiary hearing, on December 7, 2020.

Although not addressed in the Minute Order, the Court also ordered that the expedited hearing was being set only for the Habeas petition, and that the Court would not attempt to apply/follow class action procedures on the same expedited basis. As further discussed hereunder, the class action claims are not at issue in this decision, but both Petitioners and Respondent have requested that the Court rule not only on the Habeas petition but also on the petition for writ of mandate.

Respondent's Return and Petitioners' Denial (Traverse)

Respondent duly filed his Return to Order to Show Cause re-Petition for Writ of Habeas Corpus; Opposition to Writ of Mandate, Injunctive and Declaratory Relief on November 16, 2020. Respondent also filed, in support of the Return, a declaration of Joseph Balicki, a declaration of C. Hsien Chiang, M.D, and Exhibits A through P.

Petitioners filed their Denial in Response to Respondent-Defendant Don Barnes' Return to Order to Show Cause on November 30, 2020. On the same date Petitioners also filed their Request for Judicial Notice in Support of Petitioner's Denial, a Memorandum of Points and Authorities in Support of Plaintiffs-Petitioners' Denial, the declaration of Michelle C Nielsen, and four volumes of supporting evidence including three expert declarations and numerous fact witness declarations (as discussed in more detail hereunder).

The Court held a status conference on December 2, 2020. As will be more fully reflected in the record of that hearing, and as summarized in the Court's December 2, 2020 Minute Order, the Court discussed with counsel whether either side contended that an evidentiary hearing was necessary to determine any disputed fact(s). Petitioners and Respondent had taken the position in their respective briefs that no evidentiary hearing was necessary, and both sides reiterated that position at the hearing. Based on the Court's review of the Petition, Return, and Denial, and their respective supporting papers, the Court was likewise of the view that it did not appear that Petitioners' entitlement to relief depended on the resolution of any issues of fact. Accordingly, the Court ruled that there would not be an evidentiary hearing on December 7, 2020, but that oral argument on the petition, specifically on the petition for a writ of habeas corpus and the petition for a writ of mandate, would be heard on that date at 10 a.m. By agreement with the parties, the matter was set for hearing via CourtCall.

The Court heard oral argument on December 7, 2020 and took the matter under submission.

Discussion and Findings

Having considered the Petition, the Return and Denial, and all papers filed in support and opposition, the arguments of counsel, and the applicable law, the Court now finds as follows.

No Evidentiary Hearing Is Necessary

The Petition alleges the facts cited below, with footnoted references to the supporting evidence. (The footnote references are omitted in the citations below.)

Except as expressly noted below, Respondent has failed in his Return to allege any facts, or in most instances even to address argument, in response to these facts alleged by Petitioners. This notwithstanding the requirement that "[t]he factual allegations of a return must also respond to the allegations of the petition that form the basis of the petitioner's claim that the confinement is unlawful. (Citations omitted.) In addition to stating facts, the return should also, 'where appropriate, . . . provide such documentary evidence, affidavits, or other materials as will enable the court to determine which issues are truly disputed. (Citation omitted.)'" *People v. Duval*, (1995) 9 Cal.4th 464, 476.

Thus, the following holding in *In re Ivan Von Staich*, 56 Cal.App.5th 53 (hereinafter *Von Staich*) is particularly apposite:

"[T]hese statements are conclusions the Attorney General has failed to support with any factual allegations contradicting petitioner's allegations that reduction of the San Quentin population by at least half is essential to protect inmates' health, much less evidence supporting such allegations. It is respondents' burden to "allege additional facts that contradict" the allegations of the petition and "where appropriate, . . . provide such documentary evidence, affidavits, or other materials as will enable the court to determine which issues are truly disputed." (*People v. Duvall* (1995) 9 Cal.4th 464, 476, 483 (*Duvall*)). When the state offers "nothing more in support of their claim that petitioner's confinement is lawful than a general denial of his [factual] allegation[s]," then "[b]y alleging only a conclusionary statement of ultimate fact in their return, the People have indicated a willingness to rely on the record." [Citation.] . . . '[And] the merits of petitioner's claim can be reached without ordering an evidentiary hearing.'" (*Duvall*, at p. 479, quoting *In re Lewallen* (1979) 23 Cal.3d 274, 278; accord, Pen. Code, § 1485.5.)"

Id. at 67-68.

The Allegations of the Petition

The relevant facts alleged by Petitioners, and not challenged by Respondent (except to the extent specifically noted below), include the following:

"This petition seeks urgent habeas and mandamus relief to protect medically vulnerable people and people with disabilities detained at the Orange County Jail, all of whom are at imminent risk of serious illness and death from COVID-19." Petition at 3:1-3.

"We are in the midst of the most dangerous pandemic in generations." Petition at 3:8.

"COVID-19 is a novel communicable virus that has proved unusually fatal. Many have been sickened, and many have died. Individuals like the Petitioners/Plaintiffs, with certain underlying conditions and/or of advanced age are at increased risk of COVID-19-related complications and death." Petition at 4:1-4.

"There is no vaccine or cure for COVID-19. The virus is highly contagious. Additionally, congregate settings, like jails, pose heightened problems because of poor ventilation and close living quarters where detained individuals cannot practice social distancing, the "cornerstone of reducing transmission of respiratory diseases such as COVID-19." This is true at the Orange County Jail, where detained individuals cannot isolate and have no ability to maintain safe social distance. The Commander of Custody Operations of the Orange County Jail concedes that the "[t]he Sheriff's jail facilities do not allow for spacing of six feet between incarcerated people." Petition at 4:5-12

"The dangerous conditions at the Orange County Jail pose a particular threat to Petitioners/Plaintiffs and other medically vulnerable individuals. They are among a list of approximately 500 detainees whom Respondent identified as medically vulnerable and at heightened risk of serious infection and death, but not released." Petition at 4:13-5:1

"Public health expertise counsels that aggressive measures, including reducing the jail population, are our last and best chance to slow the growth of new infections in the jail and in the surrounding community. Jails are not closed off from the communities around them; every day, custody, medical, and support staff and contractors who have direct contact with detainees enter and leave the facility, along with detainees who are newly booked into the jail, leave and return for court hearings, and leave upon release. For this reason, an outbreak in the jail can spread easily to the surrounding community, often through jail staff who become infected and bring the virus home." Petition at 5:17-6:3

"Petitioner/Plaintiff Sandy Gonzalez is a 27-year-old woman who is currently being held at the Central Women's Jail. Ms. Gonzalez is pre-trial and is charged with two felony second-degree robbery charges and a misdemeanor charge for possession of a controlled substance in case 20NF0814. She is also charged with two

additional misdemeanor charges in case 20CF0617. On April 23, 2020, the Court ordered that her bond in the felony case would remain at \$50,000.00, but lowered her bond in the misdemeanor case to \$1.00. The case summary notes indicate that she appeared via video on both cases on May 13, 2020. Like the other named women Petitioners/Plaintiffs, Ms. Gonzalez was housed in P-13. She is medically vulnerable and has Type 2 diabetes and a history of smoking. She was exposed to her cellmate Ms. Ortiz, who developed COVID-19 symptoms on May 11. Ms. Gonzalez was tested for COVID-19 on the evening of May 14, 2020. The following day, on May 15, 2020, after the results confirmed her illness, Ms. Gonzalez was moved to a disciplinary isolation cell as a result of her COVID-19 diagnosis. Ms. Gonzalez is a protected individual for purposes of California Government Code section 11135." Petition at 11:4-17

"Plaintiff Mark Trace is a 53-year-old man who was formerly held in the Central Men's Jail. He pled guilty to one count of possession of a controlled substance with intent to sell in 19WF2586 and was sentenced to one year and four months at the Jail. Before being transferred to the Central Men's Jail, he was held at the Theo Lacy Facility until March 10. Mr. Trace is medically vulnerable. He has multiple, significant underlying health conditions. These include sclerosis of the liver, Hepatitis C and D, asthma, tuberculosis, valley fever, and seizures. He was housed in a Module D-20, in a single person cell that had open bars and shared air with the approximately 12 other individuals in his module. He was unable to consistently practice social distancing during his time in custody, and his access to medical care slowed after the COVID-19 outbreak began. He missed his medication on March 20 and April 13, and went several days without an inhaler. Mr. Trace resides in Orange County, and is a protected individual for purposes of California Government Code section 11135." Petition at 13:10-21

Respondent addresses this allegation only by pointing out that plaintiff Mark Trace is now again being held in the Orange County Jail for alleged probation violations. Response, 1:16-17.

"The novel coronavirus that causes COVID-19 has led to a global pandemic. As of September 5, 2020, there were more than 26,468,030 reported COVID-19 cases throughout the world and more than 187,000 deaths in the United States. Projections indicate that as many as 300,000 people in the U.S. will die from COVID-19 by December 1, 2020, accounting for existing interventions." Petition at 4:16-20

"The virus is known to spread from person to person through respiratory droplets, close personal contact, and contact with contaminated surfaces and objects. There is no vaccine against COVID-19 and no known medication to prevent or treat infection. Social distancing—deliberately keeping at least six feet of space between persons to avoid spreading illness—and a vigilant hygiene regimen, including washing hands frequently and thoroughly with soap and water, are the only known effective measures for reducing the transmission of COVID-19. Because

the coronavirus spreads among people who do not show symptoms, staying away from people is the best way to prevent contracting the virus." Petition at 15:1-8

"The risk of illness or death from COVID-19 is increased for older populations. A recent analysis found that mortality rates for individuals age 65-74 and 75-84 are respectively 90 times and 220 times higher than for individuals age 18-29. And in a February 29, 2020 preliminary report, individuals age 50-59 had an overall mortality rate of 1.3%, while those age 70-79 had an 8% mortality rate." Petition at 15:13-16:2

"People of any age who have certain underlying medical conditions, including lung disease, heart disease, chronic liver or kidney disease (including hepatitis and dialysis patients), diabetes, epilepsy, hypertension, compromised immune systems (such as from cancer, HIV, or autoimmune disease), blood disorders (including sickle cell disease), inherited metabolic disorders, stroke, developmental disabilities, and asthma, also have an elevated risk. Early reports estimate that the mortality rate for those with cardiovascular disease was 13.2%, 9.2% for diabetes, 8.4% for hypertension, 8.0% for chronic respiratory disease, and 7.6% for cancer. People with any of these conditions are people with disabilities protected under California disability rights laws." Petition at 16:3-11

"People in congregate environments where they live, eat, and sleep in close proximity are at increased danger of contracting COVID-19, as already evidenced by the rapid spread of the virus across the country in jails, in cruise ships and nursing homes. In particular, it is virtually impossible for people who are confined in crowded prisons, jails, and detention centers to engage in the necessary social distancing and hygiene required to mitigate the risk of transmission. For example, dramatic outbreaks have taken hold in the Cook County Jail in Chicago and San Quentin State Prison in Northern California, the latter of which has seen more than two-thirds of the prison population become infected. The CDC also warns of "community spread" where the virus spreads easily and sustainably within a community where the source of the infection is unknown." Petition at 18:15-19:8

"Correctional settings further increase the risk of contracting COVID-19 due to the high numbers of people with chronic, often untreated, illnesses housed in a setting with minimal levels of sanitation, limited access to personal hygiene, limited access to medical care, presence of many high-contact surfaces, and no possibility of staying at the necessary distance from others." Petition at 19:9-12

"Numerous public health experts, including Dr. Gregg Gonsalves, Ross MacDonald, Dr. Marc Stern, Dr. Oluwadamilola T. Oladeru and Adam Beckman; Dr. Anne Spaulding, Dr. Homer Venters, Jaimie Meyer, the faculty at the Johns Hopkins schools of nursing, medicine, and public health, and Josiah Rich have all strongly cautioned that people booked into and held in jails are likely to face serious, even grave, harm due to the outbreak of COVID-19." Petition at 21:1-6

"The CDC is a federal agency that is part of the U.S. Department of Health and Human Services. It serves as the national focus for developing and applying disease prevention and control, environmental health, and health promotion and health education activities designed to improve the health of the people of the United States. The CDC is responsible for controlling the introduction and spread of infectious diseases, and provides consultation and assistance to other nations and international agencies to assist in improving their disease prevention and control, environmental health, and health promotion activities. It also provides program expertise and assistance in responding to Federal, State, local, and private organizations on matters related to disease prevention and control activities." Petition at 21:7-22:2

"Because of the extraordinary danger that COVID-19 will spread in jails and prisons, the CDC issued specific guidance for dealing with correctional and detention facilities, including local jails, published on March 23, 2020. The guidance acknowledges that incarcerated people are forced to exist "within congregate environments" that "heighten[] the potential for COVID-19 to spread once introduced," especially given that "[t]here are many opportunities for COVID-19 to be introduced into a correctional or detention facility," including "daily staff ingress and egress" as well as "high turnover" of "admit[t]ed new entrants." Petition at 22:3-9

Respondent addresses this allegation only by noting that the CDC guidelines are constantly being updated. Return, 3:10-18.

"The CDC directs that detention facilities medically isolate confirmed and suspected cases and quarantine of contacts. According to the CDC, "[f]acilities should make every possible effort to place suspected and confirmed COVID-19 cases under medical isolation individually." Further, quarantined individuals should be "housed separately, in single cells with solid walls . . . and solid doors that close fully." Cohorting should only be considered as a last resort, and even then all incarcerated people must have enough room to retain at least 6 feet of space between each other at all times. If a facility has no option but to implement cohorting, it must do so while following several strict precautions. These precautions include mandating that individuals wear face masks at all times, ensuring that individuals with laboratory-confirmed cases are not mixed with individuals who have not tested positive, and ensuring that individuals with respiratory problems are not cohorted "unless no other options exist." Petition at 22:10-20

"Respondent has not ensured social distancing at the Jail. The Orange County Jail consists of four physically separate facilities that operate as a single system. There is constant movement of staff and incarcerated people among each of the four facilities, widening the circles of potential outbreak and exposure. These facilities include the Men's Central Jail, the Women's Central Jail, the Theo Lacy Facility, and the Intake and Release Center. Each of these facilities is configured

differently and has a different type of housing. The rated capacity of each facility is determined on a biannual basis by the California Board of State and Community Corrections (BSCC), an independent statutory agency that, inter alia, inspects local correctional facilities in California for compliance with Title 15 regulations, which set minimum standards for these facilities. The rated capacity of a facility means the maximum number of incarcerated occupants for which a facility's cells or dormitories, except those dedicated for health care or disciplinary separation housing, were planned and designed in conformity to Title 15 regulations (maintained by BSCC) and Title 24 regulations (maintained by the California Building Standards Commission)." Petition at 24:3-16

These allegations are unchallenged, save only that it is now undisputed that the Women's Central Jail has closed, so that inmates formerly housed there are now housed elsewhere within the Orange County Jail.

"In the last BSCC inspection, the Orange County Jail was found out of compliance with Title 24 requirements in multiple housing units, including Theo Lacy barracks A through H, because these units contained additional bunks that were used on a regular basis and that resulted in the Jail being unable to meet the BSCC's minimum per-person square footage requirements in its current configuration. Theo Lacy has a rated capacity of 2,080 occupants. It is composed of a large number of barrack style dorms, seven module units where people are housed in two-person cells that share common day rooms and shower facilities, and two module units where people are housed in single-person cells that share common day rooms and shower facilities. The Men's Central Jail has a rated capacity of 1,219 occupants. It is composed primarily of module units where people are housed in cells that vary in size from four to eight occupants; occupants share toilet and shower facilities. There are also dormitory style units where occupants share common day rooms, shower, and toilet facilities. The Women's Central Jail has a rated capacity of 274 occupants. It is composed primarily of dormitory style units which sleep up to 30 occupants in one unit, where occupants share toilet and shower facilities. There is also one unit where people are housed in single cells and share shower facilities. The Intake and Release Center has a rated capacity of 407 occupants. It is composed primarily of module units where people are housed in single-person cells that share common day rooms and shower facilities. Collectively, the Orange County Jail has a total of 51 medical isolation cells. Petitioners Campbell and Gonzalez and putative class members are held in each of these facilities." Petition at 25:1-26:2

Respondent addresses this allegation only by pointing out that petitioner Campbell has now been released from the Orange County Jail. Return, 1:7-9. And, as noted above, the Women's Central Jail is now closed.

"Given the current population, social distancing in these facilities is not possible. It was clear from the site inspection on July 15, 2020 that "many parts of the jails remain very crowded." People in the Orange County jail are regularly

housed in group barracks or in multiple-person cells (often containing as many as 8 bunks in each cell) that share dayrooms with other cells. The largest number of people are housed in the Theo Lacy facility, which consists largely of large barrack-style dorms. People in barracks sleep in bunk beds in close proximity to each other, much closer than six feet apart. People in multi-person cells sleep in similarly close proximity. Even persons who are detained in single or double bunked cells often remain constantly in close proximity and air space with others in their modules. Indeed, the Commander of Custody Operations of the Orange County Jail has conceded unequivocally that the "[t]he Sheriff's jail facilities do not allow for spacing of six feet between incarcerated people." Petition at 26:13-27:6

"Housing units in jails generally lack adequate ventilation, a factor that facilitates the likelihood of airborne transmission of COVID-19. Some cells have open bars and many open directly into communal day rooms. Detainees congregate in groups in the day rooms, often in numbers too large for social distancing. They share phones "basically shoulder to shoulder with each other," and share communal shower spaces. Many detainees must also share communal toilets. They are forced to line up close together to receive mail." Petition at 27:7-28:2

"Like the incarcerated staff, OCSO staff with the virus who travel the jail facilities are another source of infection. Respondent has provided documents indicating that at least 27 correctional and health staff at the Jail tested positive for COVID-19 between March 27, 2020 and June 25, 2020. Infected staff worked in every one of the four facilities at the jail, including the Intake Release Center, Men's Central Jail, Women's Central Jail, and Theo Lacy, and worked in a range of positions involving close contacts with detainees, including as contract physicians, pharmacy technicians, institutional cooks, and deputy sheriffs in the jails, bailiff department, transportation bureau and civil process center. In the last week for which Respondent provided data, June 18 through June 25, 12 staff tested positive." *Id.*, at 29:5-13

"Although Respondent has increased testing, the testing still falls short of the CDC recommendation for sentinel monitoring of asymptomatic individuals in congregate living settings. Detection of asymptomatic and mildly symptomatic individuals is critical because those individuals can transmit the disease; in fact, in recent testing, approximately 88 percent of inmates who tested positive were asymptomatic. Both California and the federal government have identified testing of all individuals in jails as a priority. Without knowing who in the Jail has COVID-19, Respondent cannot effectively track close contacts. Respondent has failed to provide for adequate contact tracing, a "priority" in congregate settings and a "key strategy for preventing further spread of COVID-19." Petition at 33:5-13

Respondent responds to this allegation only by confirming that testing on staff is conducted only when requested by the staff (Chiang Decl., para. 14), and testing of inmates is done only for new intakes (Chiang Decl. para. 14),

for “inmates who report or exhibit symptoms consistent with COVID-19,” (*id.*) and for asymptomatic quarantined inmates upon leaving quarantine. *Id.*

“Respondent has further failed to follow the CDC’s guidance with respect to isolation of suspected cases and its use of cohorting. Only after people test positive for COVID-19 are they removed from their barrack or modular housing and transferred to isolation. Respondent is not making “every effort to quarantine close contacts of COVID-19 cases individually,” increasing the risk that others will be infected. People who have been exposed to positive cases have not always been quarantined and are themselves often still in group settings, where new individuals are added.” Petition at 33:14-34:3

“The Disability Subclasses include everyone in the Medically-Vulnerable classes who is vulnerable because of a disability, as defined under California law. This includes everyone in the Medically-Vulnerable classes except those vulnerable solely because of age or pregnancy status. All other conditions that increase risk for COVID-19 complications or death—including lung conditions, asthma, heart conditions, obesity, diabetes, kidney disease, liver disease, HIV, immune dysfunction, autoimmune disorders, cancer treatment, and history of organ or bone marrow transplantation—are disabilities under California disability rights laws. People in the Orange County Jail who have any of these conditions are medically-vulnerable people with disabilities protected by California Government Code section 11135, in addition to being protected by the state constitutional provisions that protect all medically-vulnerable subclass members.” Petition at 37:3-13.

Respondent’s Return, and Petitioners’ Traverse

It appears from the Return, and was confirmed during oral argument, that Respondent has effectively ignored the factual allegations above (and the documentary and other evidence underpinning them) because of Respondent’s overarching contention that, whatever the facts, he has taken reasonable and adequate steps to create as safe an environment as is reasonably possible within the jails under his jurisdiction.

Respondent has identified his measures to address the COVID-19 pandemic, and their impact, to include the following. (As with the recitation of Petitioners’ allegations above, the Court here omits the internal citations to supporting evidence, which can be found in the Return itself.)

“At the earliest part of the pandemic, the Sheriff exercised his discretionary authority under Government Code section 8568 to release inmates, lowering the population by almost 50% at one point to maximize possibilities for social distancing.” Return, 2:1-3.

“At the very outset, the Sheriff released thousands of inmates to allow for social distancing, developed a thorough testing/quarantine protocol, provided personal protective equipment (“PPE”), enhanced medical screening for anyone

entering the Jail, suspended nonessential visits, and dramatically increased access to hygiene and cleaning supplies." Return, 3:19-22.

"All public visiting has been suspended since March 13, 2020. Anyone entering the Jail is temperature screened. Arrestees that enter the Jail are screened for COVID-19 and are isolated for 14 days to ensure there is no transmission within the jail. They are tested upon the end of their 14-day isolation period before entering general inmate population. Once in general population, they have PPE, unlimited soap and hand sanitizer. The cleaning and disinfection regimen is second to none. Inmates only program with their cohort to prevent cross-exposure within the jail, even when there are no active cases. In other words, once a cell block is COVID-free—much as seen in New Zealand—that group may interact within normal jail operating rules (with, of course, PPE and distancing) because they are not at risk of infecting each other." Return, 4:5-15.

"The Sheriff's Department's Herculean response drove down the inmate infection numbers from a daily rate from a 7-day average positivity rate of 50.6 percent on May 1, to a current 7-day average positivity rate of 1.2 percent. The current total of infected individuals across all custodial institutions at the Orange County Jail is six ("6"). Of that, 5 are new bookings, not under the control of the Orange County Sheriff. Society is experiencing a third wave, but the jail has barely had spiked [sic] in contagion." Return, 3:27-4:4.

"The best demonstration of what is to come is to look at what has been happening. The trend line is extremely positive and in the direction of inmate and staff safety. Every indication is that this will continue in that direction, notwithstanding record COVID-19 infection rates in in the community and a third wave of COVID-19 striking at society generally. The injunction by the federal district court has been stayed since August 5, 2020 (*Ahlman v. Barnes* 591 U.S. __ (2020), No. 20A19.) the Orange County Jail COVID-19 numbers have continued to precipitously fall without any court injunction, oversight, or orders." Return, 19:15-22.

Further particulars, generally in support of what is noted above, are contained in the Declaration of Joseph Balicki, dated November 16, 2020, and the declaration of Doctor Chiang, dated November 16, 2020.

Petitioners' Denial responds in detail to the allegations of the Return, including through numerous additional declarations and other supporting documentary evidence.

In summary, the Denial:

1. Points out that the Return "fails entirely to controvert the allegations at the heart of their Complaint: Respondent has failed to maintain the Orange County Jail at a level that allows for social distancing, or to consider medically vulnerable detainees for removal to a location where social distancing is possible. Respondent further offers no evidence or facts

to dispute Petitioners' factual or legal allegations regarding disability discrimination." Denial at 3:8-13.

2. Argues that Petitioners' uncontroverted evidence shows that Respondent's measures are insufficient to protect incarcerated people from COVID-19 because the Jail has failed to reduce its population to levels advised by the County's own health authority, ensure social distancing, provide universal or surveillance COVID-19 testing, and enforce universal mask usage, among other failures. Denial at 10:4-8.

As noted, the Denial attaches numerous additional declarations, along with other documentary evidence. The declarations demonstrate not the absence of measures alleged by Respondent, but rather their inconsistent application. These declarations are consistent with those filed in support of the Petition. Because Respondent did not have an opportunity (other than at oral argument) to respond to the Denial, the Court is not basing its findings herein on any contested issues in the later declarations.

By way of example, the Court's finding that mask usage by deputies is inconsistent and not strictly enforced is not based on the declarations filed by Petitioners, but on the deposition testimony of Respondent's own staff.

Request for Judicial Notice

Petitioners' unopposed Request for Judicial Notice is granted, with the exception of Ex. 56.

The Facts Established By The Evidence

The following facts have been proven by Petitioners by a preponderance of the evidence, either because they are alleged, with proper foundation, and not challenged by Respondent, or because they are expressly conceded by Respondent, or because they are established via Judicial Notice.

1. All the facts alleged in the section of this ruling entitled The Allegations of the Petition above, some of which are repeated, in summary form, below.
2. COVID-19 is a deadly public health crisis. Petition at 3:8-14.¹
3. COVID-19 is highly contagious. Petition at 4:5. The virus is known to spread from person to person and through respiratory droplets, close personal contact, and contact with contaminated surfaces and objects. Petition at 15:1-2.
4. COVID-19 can be transmitted by asymptomatic carriers. Petition 15:7-8. Respondent's Ex. C, CDC Guidelines as of March 23, 2020, at p. 8 ("Because many individuals infected with COVID-19 do not display symptoms, the virus could be present in facilities before cases are identified."). Respondent's Ex. F,

¹ When citing to the Petition, the Court is including the citation to the evidence identified there, for example, in this instance, the unchallenged declaration of expert witness Doctor Joe Goldenson.

- CDC Guidelines updated as of October 21, 2020, tenth page under "Prevention." (Same). Balicki Decl., Petition Appendix 624:23-625:8.
5. Absent a vaccine or other effective treatment, the best way to slow and prevent the spread of the virus is through social or physical distancing, which involves avoiding human contact, and staying at least 6 feet away from others. *Von Staich*, at 70. The cornerstone of reducing transmission of respiratory diseases such as COVID-19 is social distancing. Petition 4:8. Social distancing - deliberately keeping at least 6 feet of space between persons to avoid spreading illness - and a vigilant hygiene regimen, including washing hands frequently and thoroughly with soap and water, are the only known effective measures for reducing the transmission of COVID-19. Petition 15:3-6.
 6. The risk of illness or death from COVID-19 is increased for older populations. A recent analysis found that mortality rates for individuals age 65-74 and 75-84 are respectively 90 times and 220 times higher than for individuals age 18-29. Petition 15:13-15.
 7. People of any age who have certain underlying medical conditions, including lung disease, heart disease, chronic liver or kidney disease (including hepatitis and dialysis patients), diabetes, epilepsy, hypertension, compromised immune systems (such as from cancer, HIV, or an autoimmune disease), blood disorders (including sickle cell disease), inherited metabolic disorders, stroke, developmental disabilities, and asthma, also have an elevated risk. Petition 16:3-7.
 8. At current population rates in the Jail, social distancing is not possible. Erin Winger Deposition, Denial Appendix 361:12-15.
 9. Under current practices, social distancing is also not possible while inmates are being transported to court, or while inmates are being held at court. Capt. Martin Ramirez Deposition, Denial Appendix 274:3-16, 275:21-25.
 10. Staff behavior away from work is not governed or monitored, making it impossible for Respondent to evaluate the risk of staff contracting the virus while away from work, or of introducing the virus into the jail. Captain Martin Ramirez Deposition, Denial Appendix 309:15-310:13; Capt. Patrick Rich Deposition, Denial Appendix 328, Depo. p. 22-25, and Depo. p. 144:25-145:3.
 11. Staff are not tested except when they themselves request it. Staff are expected to self-report symptoms. The only "imposed" check regarding staff health is via temperature checks. Even if staff have symptoms, tests are not mandatory for them. Joanne Lim Deposition, Denial Appendix 268:11-21; Capt. Martin Ramirez Deposition, Denial Appendix 303:1-19; Lisa Von Nordheim Deposition, Denial Appendix 349:21-350:2.
 12. Staff are provided masks and other PPE. There is no strict enforcement that they actually wear the masks. The Balicki declaration states that staff are provided masks and other PPE, but avoids stating that they are consistently required to wear them. 11/16/2020 Balicki Decl., para. 16. ("All deputies who

- are working in quarantine or medical isolation areas or are otherwise exposed to potential COVID-positive inmates are provided full Personal Protective Equipment (PPE), including goggles, face masks, gowns, and N95 masks. All deputies who have contact with inmates are provided masks and gloves.”) See, also, Joanne Lim Deposition, Denial Appendix 253a 13-16 regarding the absence of discipline for a failure to wear a mask; Capt. Martin Ramirez, Denial Appendix 290:5-292:5 (same); Lisa Von Nordheim Deposition, Denial Appendix 347:1-3 (same).
13. Hundreds of staff members interact with the inmates on a daily basis. See, for example, Capt. Martin Ramirez Deposition, Denial Appendix 313:16-19 (“Q. Okay. Approximately how many total staff enter the IRC on a typical day? A. There could be as many as 350 people a day walking in and out.”)
 14. In deciding precisely where to house an inmate, Respondent does not take medical vulnerability into account. Sgt. Dallas Hennessey Deposition, Denial Appendix 236:24-237:1, 237a:10-13; Dr. Chiang Deposition, Denial Appendix 230:2-7.
 15. Similarly, where a disability renders an inmate medically vulnerable, the disability/medical vulnerability is/are not taken into account in deciding where to house the inmate. *Id.*
 16. Petitioner Sandy Gonzalez is a 27-year-old woman currently held in the Orange County Jail. She is medically vulnerable and has Type II diabetes and a history of smoking. She was exposed to, and tested positive for, COVID-19 while in the Orange County Jail. She is a protected person under Government Code § 11135. Petition 11:4-17.
 17. Petitioner Mark Trace is a 53-year-old man currently held in the Orange County Jail. He is medically vulnerable with significant underlying health conditions including sclerosis of the liver, hepatitis C and D, asthma, tuberculosis, valley fever and seizures. He is a protected person under Government Code § 11135. Petition 13:10-21.

The Applicable Law re Habeas Petition

The California Constitution guarantees the right to habeas corpus. (Cal. Const., Art. I, § 11; *In re Reno* (2012) 55 Cal.4th 428, 449.) The availability of the writ is implemented by Penal Code section 1473, subdivision (a), which provides: “A person unlawfully imprisoned or restrained of his or her liberty, under any pretense, may prosecute a writ of habeas corpus to inquire into the cause of his or her imprisonment or restraint.”

Habeas corpus may be used to address violations of inmates’ rights while in confinement, including challenges to the conditions of confinement. (*In re Bittaker* (1997) 55 Cal. App. 4th 1004, 1010 [the writ may be used by one lawfully in custody to obtain a declaration and enforcement of rights in confinement]. Moreover, the

statutory grounds for habeas corpus are non-exhaustive. Penal Code § 1473(d) expressly provides that "[t]his section does not limit the grounds for which a writ of habeas corpus may be prosecuted or preclude the use of any other remedies."

Habeas corpus applies to anyone who is in actual or constructive custody. (Pen. Code §§ 1472(a), 1474(2); *In re Catalano* (1981) 29 Cal. 3d 1, 8 [on probation]; *In re Sturm* (1974) 11 Cal. 3d 258, 265 [on parole]; *In re Geer* (1980) 108 Cal. App. 3d 1002, 1004 fn. 2 [on bail]; *In re Azurin* (2001) 87 Cal. App. 4th 20 [writ of habeas corpus available to one on parole, probation, bail, or a sentenced prisoner released on his own recognizance pending hearing on the merits; "The thrust of these cases is that a person is in custody constructively if he may later lose his liberty and be eventually incarcerated"].)

Here, there is no dispute that Petitioners Sandy Gonzalez and Mark Trace are currently in the custody of Respondent. Each may properly allege a habeas corpus claim.

In exercising habeas jurisdiction, the courts " 'must abide by the procedures set forth in ... [Penal Code] sections 1473 through 1508.' " (*People v. Romero* (1994) 8 Cal.4th 728, 737, quoting *Adoption of Alexander S.* (1988) 44 Cal.3d 857, 865.) Those procedures include a verified petition alleging unlawful restraint, naming the custodian, specifying the facts on which the claim is based, and including reasonably available documentary evidence supporting the claims. (Pen. Code §§ 1474–1475; *People v. Duvall* (1995) 9 Cal.4th 464, 474; *Romero, supra*, at 737.) Additionally, the petition must state whether any prior application has been made and the result of those proceedings and must allege that the petition is timely or demonstrate good cause for delay. (Pen. Code § 1475; *In re Robbins* (1998) 18 Cal.4th 770, 780–781, 805; *In re Clark* (1993) 5 Cal.4th 750, 783, 798, fn. 35.) The petition must comply with the content and form required by Cal. Rules of Court, Rules 8.40(b) to (c) relating to document covers and Rule 8.204(a) to (c). (Cal. R. Ct. 8.384(a)(1).)

The Petition complies with these requirements.

"As a matter of equal protection, conditions of confinement which violate the rights of sentenced prisoners also violate those of pretrial detainees, absent any justification for differential treatment." *Inmates of the Riverside County Jail v. Clark* (1983) 144 Cal.App.3d 850, 858.

While Petitioners rely on article I, section 7 of the California Constitution, with respect to pre-trial inmates, and article I, section 17 of the California Constitution, with respect to post-conviction inmates, both sides appear to agree that on the facts presented here, the Court must find that Respondent acted with "deliberate indifference" for there to be a constitutional violation.

As was recently held in *In Re Von Staich*:

"The Eighth Amendment to the United States Constitution and article I, section 17 of the California Constitution both require correctional officials to provide inmates adequate medical care. (*Estelle v. Gamble*, *supra*, 429 U.S. at p. 103; *Inmates of the Riverside County Jail v. Clark*, *supra*, 144 Cal.App.3d at p. 859.) In order to prevail on a constitutional claim of inadequate care, a prisoner must establish that the responsible prison official treated him with "deliberate indifference to serious medical needs." (*Estelle*, at p. 104.) "Deliberate indifference" is established where the challenged deficiency is "sufficiently serious," and prison officials "know[] that inmates face a substantial risk of serious harm and disregard that risk by failing to take reasonable measures to abate it." (*Farmer*, *supra*, 511 U.S. at p. 847.) Prison officials may not be "deliberately indifferent to the exposure of inmates to a serious communicable disease" (*Helling v. McKinney* (1993) 509 U.S. 25, 33), and the placement of inmates in places to which infectious diseases could easily spread constitutes a constitutional violation. (*Hutto v. Finney*, *supra*, 437 U.S. at p. 682.) Deliberate indifference may be proven by circumstantial evidence and it may be inferred from "the very fact that the risk was obvious." (*Farmer*, at p. 842.)"

Id. at 68-9.

See also, *Gordon v. County of Orange* (9th Cir. 2018) 888 F.3d 1118, 1125 [for pre-trial detainees, deliberate indifference requires that (1) defendant made an intentional decision with respect to the conditions under which the plaintiff was confined; (2) those conditions put the plaintiff at substantial risk of suffering serious harm; (3) the defendant did not take reasonable available measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high degree of risk involved; and (4) by not taking such measures, the defendant caused the plaintiff's injuries]; *Cortez v. Skol* (9th Cir. 2015) 776 F.3d 1046, 1052 [for post-conviction detainees, an additional showing that the public official was "subjectively aware of the risk involved" but nonetheless "acted with deliberate indifference to" safety is required].

Importantly, deliberate indifference does not require improper motive or an intent to harm. *Farmer v. Brennan*, (1994) 511 U.S. 825, 842-3. At oral argument, Respondent's counsel argued that the Court should not find deliberate indifference because Petitioners had not demonstrated a deliberate intent to harm. That is not the standard.

What is shown here is that COVID-19 is indeed deadly serious, and that Respondent was and is fully aware of the dangers and risks presented by the virus. Respondent's own papers fully concede as much, and it is for that very reason that Respondent has put in place the many measures he describes. If those measures,

taken together, do not constitute reasonable measures to abate the risk, deliberate indifference has been established.

Here, the facts compellingly demonstrate that the measures taken lack the very cornerstone of a successful abatement plan, namely a sufficient reduction in Jail population to enable proper social distancing.

In his Return, Respondent himself identifies a significant reduction in inmates as one of the measures he took to address the pandemic. Return, 1:23-2:3. ("Even as the CDC was issuing interim guidelines . . . The Sheriff's Department was releasing inmates, and (largely through its Correctional Health Services unit) implemented its own broad slate of inmate and staff precautions, mirroring the guidance issued by the CDC. At the earliest part of the pandemic, the Sheriff exercised his discretionary authority under Government Code section 8568 to release inmates, lowering the population by almost 50% at one point to maximize possibilities for social distancing.")

As reflected in a March 27, 2020 email from Erin Winger, the Deputy Agency Director at Correctional Health Services, containing the "Recommendations for Social Distancing in Jail," of herself and Doctor C. Hsien Chiang, the Administrative Manager for Correctional Health Services, the recommendations to Respondent included the following:

"As you are aware, social distancing is the cornerstone of reducing transmission of COVID-19; therefore, CHS strongly recommends the Sheriff's department to promote or enhance social distancing in all housing areas through population management of each housing location."

"In our opinion, the ideal scenario in the jail to promote social distancing, is that all congregate living areas reduce population by 50%. This includes all dormitory and barracks style housing and multi-person cells."

"Reduce the population by 50% of all CJX dorms, prioritized by the size of the housing capacity. i.e. prioritize reduction to the largest dorms followed by smaller dorms."

"Reduce the population by 50% of all TL barracks prioritized by the size of the housing capacity. i.e. prioritize reduction to the largest barracks followed by smaller ones."

"Reduce population by 50% of all multi-person cells in all facilities, prioritized by the size of the cell capacity. i.e. 8 bunk cell > 6 bunk cell > etc."

"CHS stands ready to assist in population reduction through identifying and prioritizing individuals with the highest risk factors for complications from COVID-19."

Exhibit 1 to Balicki Depo, Denial Appendix 363-4.

As noted, consistent with these recommendations, Respondent reduced inmate population, and himself highlights that fact in his Response. What Respondent's Return completely fails to address, however, is how the social distancing aspect of his remedial measures could continue once the population started to increase, to its present over capacity levels, or what now renders social distancing less necessary.

During oral argument, Respondent's counsel purported to address this issue by explaining that where multiple persons were housed together, or were otherwise in constant contact with each other, they were all COVID-19 free, and were therefore not a danger to each other. What that explanation entirely fails to address is that the inmate population comes into contact with hundreds of members of Respondent's staff on a daily basis, any one whom may be an unwitting carrier of the virus. The explanation also fails to address the crowded conditions experienced during transportation to and from court, and while housed at court.

There is, and can be, no dispute that if the virus is transmitted to one person in the group setting of a barracks or dormitory, nothing would prevent its transmission to all others in the group. That is precisely Petitioner's contention, supported by expert testimony, and the contention goes wholly unanswered.

As stated in *Von Staich*:

"Respondents' contention that the measures they have taken constitute a reasonable response to the risk posed by COVID-19 misconstrues the petition. Petitioner and the scientists he relies upon do not say the measures respondents took to combat the outbreak of COVID-19 at San Quentin are unreasonable *in and of themselves*, but only because they are unaccompanied by a dramatic reduction of the prison population, which is a sine qua non of any reasonable remedial effort. The target of the petition is not what respondents have done but what they refuse to do. None of the commendable steps respondents have taken to contain the spread of COVID-19 will be effectual, petitioner and his experts maintain, unless considerable room is made for inmates to physically distance themselves from one another effectively because, in the absence of a vaccine, physical distancing is now by far the most effective way of limiting transmission of COVID-19."

Id. at 70.

That is the situation here. Respondent has taken many commendable steps to combat the virus, and deserves credit for the reduction in infections within the Orange County Jail. But it is not a reasonable part of the overall strategy simply to cling to the hope that the virus will not be introduced into the non-socially distancing jail population via staff, the manner and frequency of transportation to and from court, and the holding cell protocols at the court.

During closing argument, Respondent's counsel argued that nowhere was safer than in the Orange County Jail, where Respondent had created a "COVID bubble." As he further noted, they were hoping desperately the bubble didn't pop.²

That is more or less precisely the point here.

Without appropriate social distancing, Respondent cannot predict or control when the bubble might be popped by the introduction of COVID-19 into the jail population. It appears unreasonable, and no one is suggesting, that Respondent's staff can themselves be quarantined or improperly dictated to in their private lives. The logistical complications of transporting inmates to and from court, and housing them at court while awaiting their respective hearings, means all risk of COVID-19 infections/transmission cannot be eliminated. Precisely because Respondent cannot be expected to achieve measures that *eliminate* the risk of COVID-19 entering the jail, reasonable measures must be taken to ensure that if the virus enters, it is an isolated or otherwise manageable transmission, and not one able to run rampant through a significant portion of the jail.

Again, as found in *Von Staich*:

"The Urgent Memo states, and the Attorney General does not provide conflicting factual allegations or evidence, that more than half of the 800 inmates who live in the north and west blocks, which have cells with open-grills and poor ventilation, have at least one COVID-19 risk factor, and an alarming 300 have four or more such risk factors, so that an outbreak in those housing units "could easily flood—and overwhelm—San Quentin as well as Bay Area hospitals." The statement in the Urgent Memo that a 50 percent reduction of the population "will allow every cell in North and West Blocks to be single-room occupancy" indicates that the current reduction of the prison population to about 100 percent of capacity required double-celling, which itself necessarily prevents physical distancing.

The Urgent Memo also points out, and again it is factually undisputed, that approximately "500 inmates are currently living in the Reception Center," (footnote omitted) and that the gymnasium has been converted into a dormitory with "little to no ventilation," "creating high risk for a catastrophic super spreader event." The Urgent Memo states, in bolded and underlined print, that "**[t]his unit should be**

² Regrettably, since the December 7th hearing the bubble has popped, as further discussed in footnote 3 on page 28. Because these recent events confirm, and do not in any way alter, the Court's conclusions herein, they are not discussed further.

prioritized for closure as a dorm, once sufficient population reduction has been achieved through release." Dormitories provide congregate living space, which is inimical to physical distancing."

Id. at 71-2. (Emphasis in original.)

Here, exactly the same risk is identified in the unchallenged declaration of Dr. Joe Goldenson:

Close living quarters and often overcrowded conditions in jails, prisons, and detention centers facilitate the rapid transmission of infectious diseases, particularly those transmitted by airborne droplets through sneezing or coughing. In these congregate settings, large numbers of people are closely confined and forced to share bunk rooms, bathrooms, cafeterias, and other enclosed spaces. They are physically unable to practice social distancing, which the CDC has identified as a "cornerstone of reducing transmission of respiratory diseases such as COVID-19. (Citation omitted.) Within these facilities, space and resource limitations - and the resulting inability of inmates and employees to practice social distancing (citation omitted) - make it extremely difficult to effectively quell the explosive growth of a highly contagious virus.

While jails are often thought of as closed environments, this is not the case. A large number of custody, medical, and other support staff and contractors who have direct contact with detainees enter and leave the facility throughout the day. New arrestees arrive daily and detainees are released every day. Since there is no effective way to screen for newly infected or asymptomatic individuals, they can unknowingly transmit COVID-19 to the jail population. Detainees are often transferred to other facilities, and to and from Court. They are routinely transferred in crowded and enclosed vehicles like buses with social distancing is not possible.

To minimize the risk of COVID-19 in the Orange County Jail the following minimum conditions are required: incarcerated persons must be able to [maintain] distance of 6 feet or more from each other at all times, including in communal areas; there are no barracks style dormitories and sharing of cells is minimized; there are adequate numbers of medical isolation cells for any inmate with confirmed or suspected infection, as well as quarantined cells for close contacts of symptomatic cases and new arrivals

The risk is further described in the unchallenged declaration of Doctor Daniel Parker as follows:

This disease has the capability of spreading quickly, exhibiting exponential growth. The doubling times during the beginning of the epidemic in Orange County was around 3 days, with total confirmed cases doubling in their

account every three days. In a close quarters situation, where individuals are unable to practice social distancing, this doubling time could be even higher. (Emphasis added.)

Because of the close quarters and low-hygiene conditions inside of the jail, it could easily become a reservoir for the virus. Since there is traffic in and out of the jails from incoming incarcerated individuals, visitors, and workers, it may not be possible to keep the disease prevalence from being high.

Doctor Parker inspected the Orange County Jail on July 15, 2020 and in his declaration dated September 7, 2020 (Petition Appendix 630-637), he reported and opined as follows:

"Based on my observations, I believe there are two central issues for COVID-19 epidemiology in the Orange County Jail:

1.) Risk of importation: This can occur via new inmates, visitors to the jail, detainees leaving and returning to the jail for court, or through deputies or other workers at the jail. Dr. Chiang noted that recently there has been an increase in workers who have tested positive which is not surprising given the heavy burden of disease in Orange County.

Although the changes that the Department has made likely reduce the risk of importation (e.g., temperature checks and screening at intake), it is my conclusion that a significant risk of importation remains. Importation may still occur due to lag time between contagiousness and the appearance of symptoms, which is currently estimated to be two days; because some individuals with the disease will remain asymptomatic; because of contact with staff who travel in and out of the facility; because of contact with other individuals in transport and in court; and because of human error (e.g., as shown by the inadvertent early release of a COVID-19 positive individual from medical isolation, as referenced in Defendants' July 10, 2020 compliance report.) See <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7081172/> (incubation period is roughly 5 days); <https://www.cdc.gov/mmwr/volumes/69/wr/mm6914e1.htm> (presymptomatic transmission likely occurring 2 days before onset of symptoms).

Because of these factors and others, even if Defendants takes other steps towards stemming the risk of importation, I believe that the jails will never be a fully closed system. (Emphasis added.)

2.) Risk of spread if/when importation occurs: Although the overall jail population has decreased from before the COVID-19 outbreak, it was clear from the inspection that many parts of the jails remain very crowded. The

dorm and barrack-style housing (in contrast to the modular-style housing) presents the greatest risk of COVID-19 spread when importation occurs. The dorm-style units I observed were densely populated, and these are the areas that are primed for a severe outbreak if the disease is introduced into the sector. Those sectors are akin to a tinderbox, waiting for a spark. (Emphasis added.)

Questions remain about whether or not this disease can spread via airborne transmission. Transmission between modular cells will be unlikely if the disease is not airborne. On the other hand, if the disease can spread via airborne transmission then the shared ventilation between cells and sectors may pose a danger. Assuming there is no airborne transmission, the greatest risk of spread is therefore for inmates housed in dorm and barrack-style housing and for individuals in modular housing who share communal dayrooms.

Testing symptomatic persons, quarantining all of their contacts, and practicing hygiene (providing face coverings, hand soap, hand sanitizer) is necessary. Checking all incoming persons to the jail is necessary, including quarantine of all incoming inmates. Keeping the jail population at a minimum, and keeping inmates in modular rather than dorm or barrack-style housing, is also necessary to prevent massive outbreaks from spreading from individual cases. (Emphasis added.)

As previously noted, Respondent does not challenge any of these findings, except indirectly by his factually unsupported contention that social distancing is rendered unnecessary by the other measures taken. The only declarations filed in support of Respondent's Return are the declarations of Commander Joseph Balicki and Doctor C. Hsien Chiang.

Commander Balicki identified the previous reduction in inmate population in positive terms, noting that "[t]his decrease in jail population not only allowed us to achieve proper social distancing between inmates pursuant to CDC guidelines and free up modular housing, but now we can preemptively quarantine all new bookings for 14 days prior to introducing new inmates to the jail population." Balicki Dec. 3:21-24.

The rest of his declaration entirely fails to address the impact of the subsequent *increase* in jail population

Dr. Chiang entirely avoids discussing his specific recommendation to Respondent concerning reduction in jail population, except as follows:

"CHS has provided the Orange County Sheriff's Department mitigation strategies (consistent with the CDC Guidance) that contain recommendations based on the various housing unit configurations to promote social distancing to minimize the transmission and spread of COVID-19."

At his deposition, he confirmed his recommendation, in the following terms:

“Q. Okay. And could you elaborate, why was it important to make space?

A. Well, if you want to create social distancing, effective social distancing, that, you know, is defined as 6 feet apart, then you need that space to be able to do so.

Q. I see. And in order to achieve that space then, in your opinion, was it necessary to reduce the population of living areas by 50 percent?

A. Yes, that was my opinion.”

Dr. Chiang entirely fails to address whether any of the “recommendations . . . to promote social distancing” were or continue to be implemented, or, critically, why his recommendations should no longer apply.

“Deliberate indifference” is established where the challenged deficiency is “sufficiently serious,” and prison officials “know[] that inmates face a substantial risk of serious harm and disregard that risk by failing to take reasonable measures to abate it.” *Von Staich*, 56 Cal.App.5th at 69. (Internal citations omitted.)

That is precisely the situation the Court finds proven here.

Disability Discrimination

The facts found proven above also demonstrate disability discrimination in violation of Government Code section 11135.

In addition to Petitioners Gonzalez and Trace, who remain in Respondent’s custody, Petitioner Campbell is also entitled to pursue declaratory and injunctive relief. The California Supreme Court has held that release does not prevent a habeas petitioner from seeking relief on behalf of similarly situated others when, as here, the conduct at issue is “capable of repetition, yet evading review.” *In re Robin M.*, (1978) 21 Cal. 3d 337, 341 fn. 6 (1978) (citation omitted).

Respondent is failing to meet his obligations to Petitioners and similarly situated incarcerated people under state disability rights laws. As the uncontroverted evidence here shows, many people who are medically vulnerable to COVID-19 are vulnerable because of chronic health conditions that are also disabilities. People with these conditions—including lung conditions, asthma, diabetes, HIV, cancer treatment, kidney disease, liver disease—are people with disabilities protected by the California Constitution and also by California disability rights laws.

Petitioners Gonzalez, Trace and Campbell allege that they have disabilities protected by Section 11135. Respondent does not contest this, nor does he contest

that no special consideration is given to those disabilities in terms of protection against potential COVID-19 exposure.

Section 11135 grants protections to people with disabilities that are at least as strong as the protections provided by Title II of the Americans with Disabilities Act and its implementing regulations. Gov't Code § 11135(b); see *Bassilios v. City of Torrance, CA*, 166 F. Supp. 3d 1061, 1074 (C.D. Cal. 2015).

Disability" is defined broadly, to include, inter alia, a "physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(1)(A). "Major life activity" is itself broadly defined, and includes "the operation of a major bodily function," such as "functions of the immune system, normal cell growth . . . neurological, brain, respiratory, circulatory, [or] endocrine" systems. 42 U.S.C. § 12102(2)(B).

Several conditions in the proposed disability subclass, including Petitioner Gonzalez's disabilities, are expressly identified in regulations as presumptively protected disabilities. 28 C.F.R. § 35.108(d)(2)(iii) ("it should easily be concluded" that "diabetes substantially limits endocrine function . . . epilepsy . . . substantially limits neurological function . . . (HIV) infection substantially limits immune function"). As noted above, Section 11135 is at least coextensive with the protections of the ADA.

Respondent's obligations under Section 11135 include an affirmative duty to make reasonable modifications to ensure that people with disabilities do not face greater harm than others in the jail. 28 C.F.R. § 35.130(b)(7)(i). Reasonable modifications may include changes to the jail's operations to protect disabled detainees—treating disabled and nondisabled people exactly alike can itself be disability discrimination. See *McGary v. City of Portland*, 386 F.3d 1259, 1265–67 (9th Cir. 2004).

Respondent's obligations under Section 11135 also include a responsibility to institute nondiscriminatory policies and methods of administration to avoid disability discrimination. 28 C.F.R. § 35.130(b)(3)(i)–(ii).

The uncontested facts found here include that conditions in the Jail do not permit proper social distancing, there is no mandatory testing of staff or asymptomatic detainees after intake, and no strictly enforced policy of requiring masks for all staff interaction with inmates. These conditions are calculated to cause disproportionate—potentially deadly—harm to disabled detainees.

The extent of Respondent's accommodation for medically vulnerable inmates, which include those with disabilities at issue here, appears to be as follows:

"The Sheriff has maintained a list of all medically vulnerable inmates housed at the Jail and routinely reviews the medically vulnerable list to see if there are sentenced inmates who have 6 months or less remaining on their sentence who qualify for early release. The Sheriff employs the same procedure for non-medically vulnerable inmates with 60 days or less remaining on their sentence." Return at 36:5-9.

This accommodation entirely fails to address the uncontested fact that for medically vulnerable inmates (including those with a qualifying disability) not released, the current conditions in the Jail place them at substantially greater risk of and from a COVID-19 infection than the inmate population at large. This is disability discrimination.

Petition for Writ of Mandate

Notwithstanding the expedited nature of these proceedings, Petitioners and Respondent have asked the Court to rule, on the papers and without the need for an evidentiary hearing, on Petitioners' request for a writ of mandate. Return, pp. 25-29, and 38:20-21; Denial 40:13-14.

The same facts found proven by Petitioners, discussed above, entitle Petitioners to a writ of mandate.

Petitioners' writ of mandate has two prongs. First, Petitioners contend that Respondent must exercise his duties in a manner that do not derogate the constitutional rights of others. Petition 45: 2-3. Second, Petitioners contend that Respondent's failure to release or transfer medically vulnerable and disabled individuals out of the Jail is an abrogation of his duties under Government Code section 8658 (erroneously cited in the Petition as 8686). Petition 45: 9-13.

Government Code section 8658 provides as follows:

"In any case in which an emergency endangering the lives of inmates of a state, county, or city penal or correctional institution has occurred or is imminent, the person in charge of the institution may remove the inmates from the institution. He shall, if possible, remove them to a safe and convenient place and there confine them as long as may be necessary to avoid the danger, or, if that is not possible, may release them. Such person shall not be held liable, civilly or criminally, for acts performed pursuant to this section."

As to the first prong, Respondent does not challenge the premise alleged, but contends that he has in all respects complied with his duties.

As to the second prong, Respondent agrees the pandemic is an emergency as defined in Government Code section 8658, but again he contends that he has properly exercised his discretion under that section. He further argues that section 8658 vests him with discretion to act, and that the Court cannot enjoin that discretion. Respondent concedes, however, that “[i]n a rare instance, a court may entertain a writ of mandate based on an abuse of discretion in a ‘quasi-legislative act,’ ‘but only if the action taken is so palpably unreasonable and arbitrary as to show an abuse of discretion as a matter of law; this test is highly deferential.’” *Carrancho v. California Air Resources Bd.* (2003) 111 Cal.App.4th 1255, 1265. (Emphasis in original.) Return 27:10-14.

As was also held in *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 540: .

“Mandamus is available 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.”

Respondent cites to *California Attorneys for Criminal Justice v. Newsom*, Supreme Court of California, En Banc, May 13, 2020, WL 2568388, for the proposition that “[t]he petition establishes no clear and mandatory duty on the part of the [Respondents] to take the requested action.” Return 26: 10-12. What Respondent omits, however, is that there the duty referred to was the alleged duty of the Governor and the Attorney General to take action to prevent state and local authorities with custody over noncitizen inmates from facilitating their transfer to federal immigration authorities. *Id.* at *1. The petition for writ of mandate was denied on that basis, with the Supreme Court further holding:

“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.”

Id. at *2.

Here, Respondent is without dispute the responsible authority over the inmates in his custody in the Orange County Jail.

For the reasons already stated, the Court concludes that Respondent is not exercising his duties in a manner that does not derogate the constitutional rights of others; instead Respondent’s acts, and failures to act, constitute “conduct that may

unnecessarily expose inmates in [his] custody to significant risks to their health and safety.” *Id.*

Regarding Government Code section 8658, it is not clear whether that section imposes merely a discretion, or a specific mandate. While it states that the person in charge “may remove the inmates from the institution” it goes on to provide, in relevant part, that “[h]e shall, if possible, remove them to a safe and convenient place and there confine them as long as may be necessary to avoid the danger, or, if that is not possible, may release them.”

Interpreting this section to give Respondent discretion, the Court finds as a matter of law that Respondent has abused his discretion in failing to consider for release all medically vulnerable inmates, including those with disabilities.

In *Von Staich* the Court of Appeal found that “Respondents thus have authority [under section 8658] to include all elderly inmates eligible for parole in the expedited release plans it has developed in response to the COVID-19 crisis, but have chosen not to do so despite such inmates’ heightened vulnerability to the virus and reduced risk of dangerousness to the public” and concluded, among other things: “We agree with petitioner that respondents’ failure to accompany the measures they are taking with a drastic reduction of the prison population is not reasonable.” *Von Staich*, 56 Cal.App.5th at 77, 79.

Here, too, Respondent has chosen not to include all medically vulnerable inmates in the expedited release plans he has developed in response to the COVID-19 crisis, notwithstanding that he has also failed to accompany the measures he has taken with a drastic reduction of the jail population.

Again, from *Von Staich*:

“As we have been at pains to emphasize, the immediate need is for a reduction of the San Quentin inmate population that will allow sufficient physical distancing among the inmates who remain. This might be accomplished by releasing or transferring the most vulnerable inmates, but it might also be accomplished by releasing or transferring other inmates so as to create the space necessary to protect the vulnerable at San Quentin.”

Id. at 82.

Because Respondent has failed to reduce jail population sufficiently to ensure appropriate social distancing, the abuse of discretion lies in his failure to then consider all medically vulnerable inmates, including those with disabilities rendering them medically vulnerable, for release under the authority granted by section 8658.

Disposition:³

The Court finds and declares as follows:

A. Respondent's deliberate indifference to the substantial risk of serious harm from COVID-19 infection to Petitioners Sandy Gonzalez, Mark Trace, and other medically vulnerable people in Respondent's custody violates their rights under the California Constitution, Article 1, sections 7 and 17.

B. Respondent's failure to provide reasonable accommodations to Petitioners and to other people in Respondent's custody who have disabilities that make them medically vulnerable to serious harm from COVID-19 infection violates their rights under Government Code section 11135.

C. Respondent has abused his discretion in failing to exercise his clear and present duty under Government Code section 8658 to consider for release Petitioners and all other incarcerated people who are medically vulnerable to COVID-19, whose lives are endangered by the COVID-19 emergency.

D. The Court has the power under Penal Code section 1484 to order habeas relief to Petitioners and to issue a general declaration of the rights of other incarcerated people similarly situated to the Petitioners.

E. The Court has the power under the Code of Civil Procedure section 1085 to issue a writ of mandate to compel Respondent to take corrective action, as

³ As ordered by the Court, on December 9, 2020 Petitioners filed a proposed Order addressing the proposed relief sought herein, and late on December 10, 2020 Respondent filed his Response thereto. The Response informs the Court that "[s]ince the hearing on December 7, 2020, circumstances have changed at the Orange County Jail (the 'Jail'). There is currently a COVID-19 outbreak occurring at the Jail, with 74 inmates currently COVID-19 positive. There remain 75 pending COVID-19 test results." Return 2:4-6. The Response further states: "Respondent is contact tracing and believes the incident occurred due to 2 inmates being exposed at court however at this time there is no way to be sure." Return 2:20-21.

This very unfortunate development confirms the need to take all reasonable steps to ensure that if an outbreak occurs at the Jail, that outbreak is contained to the fullest extent reasonably possible. As all experts appear to agree, social distancing is an essential aspect of those reasonable steps.

his conduct violates rights guaranteed by the Constitution, and his clear and present duty under Government Code section 8658 to protect incarcerated people whose lives are endangered by the COVID-19 emergency.

Accordingly, the Court hereby **ORDERS** as follows:

1. The petitions for writ of habeas corpus and writ of mandate are granted.
2. Petitioners Gonzalez and Trace shall immediately, and no later than 48 hours from this Order, be released⁴ or removed from the Orange County Jail by transfer to a facility that is able to provide the necessary physical distancing and other measures to protect against COVID-19, or to another placement meeting these criteria (collectively "transfer").
3. Respondent is Ordered to expedite the removal from the Orange County Jail, by means of release or transfer, of the number of inmates necessary to reduce the Orange County Jail population at least as follows: In all congregated living areas, reduce inmate population by 50%. This includes all dormitory and barracks style housing and multi-person cells. Specifically, reduce the population by 50% of all CJX dorms, reduce the population by 50% of all TL barracks, and reduce the population by 50% of all multi-person cells in all facilities.
4. The goal of the reduction Ordered in paragraph 3 above is to achieve proper social distancing and Respondent is Ordered to achieve reductions in excess of those specified in paragraph 3 if necessary to achieve this goal.

⁴ The Court uses the term "release" or "released" to mean the discharge of detained individuals from the physical confines of the Orange County Jail, not necessarily release from all forms of custody. Release options and conditions remain in the discretion of Respondent.

Nothing herein is intended to limit the rights and duties of Respondent under Govt. Code section 8658.

5. Respondent is Ordered, once the appropriate reductions are achieved, to maintain such reductions to the fullest extent necessary to continue to maintain proper social distancing, until the current COVID-19 emergency is declared terminated.

6. Respondent is Ordered to impose and maintain a strict policy of facemask wearing compliance by all staff at any time such staff are within 6 feet of any inmate.

7. Respondent is Ordered to file with the Court, and to serve on Petitioners, by not later than December 31, 2020, Respondent's Release Plan designed to effectuate paragraph 3 above.

8. The Release Plan shall also identify the specific order or direction of Respondent to all his staff concerning the mandatory use of facemasks, as required by paragraph 6 above.

9. The Release Plan shall identify all persons identified as medically vulnerable persons then in Respondent's custody, and the intended disposition of such persons under the Release Plan.

10. For all persons identified as medically vulnerable whom Respondent does not intend to release or transfer, the Release Plan shall identify in full the measures taken or to be taken to protect the health of such persons (regarding COVID-19), including but not limited to the manner by which social distancing will be assured.

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11. The Court hereby sets a status conference on January 8, 2021 at 1:30 PM in Department CX102. The parties are Ordered to file a joint status report concerning compliance with this Order, by not later than January 6, 2021.

IT IS SO ORDERED.

Date: December 11, 2020

A handwritten signature in black ink, appearing to be "P. J. Wilson", written over a horizontal line.

Hon. Peter J. Wilson
Judge of the Superior Court