

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

SEP 23 2020

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

KELVIN HERNANDEZ ROMAN;
BEATRIZ ANDREA FORERO CHAVEZ;
MIGUEL AGUILAR ESTRADA, on behalf
of themselves and all others similarly
situated,

No. 20-55436

D.C. No.
5:20-cv-00768-TJH-PVC

Plaintiffs-Petitioners-
Appellees,

MEMORANDUM*

v.

CHAD F. WOLF, Acting Secretary, U.S.
Department of Homeland Security; TONY
H. PHAM, Senior Official Performing the
Duties of the Director, U.S. Immigration and
Customs Enforcement; DAVID MARIN,
Director of the Los Angeles Field Office,
Enforcement and Removal Operations, U.S.
Immigration and Customs Enforcement;
JAMES JANECKA, Warden, Adelanto ICE
Processing Center,

Defendants-Respondents-
Appellants.

Appeal from the United States District Court
for the Central District of California
Terry J. Hatter, Jr., District Judge, Presiding

Argued and Submitted September 15, 2020

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

San Francisco, California

Before: Paul J. Watford, Michelle T. Friedland, and Eric D. Miller, Circuit Judges.

Concurrence by Judge MILLER

In this interlocutory appeal, the Government¹ challenges a preliminary injunction entered by the district court in response to Plaintiffs' claims that conditions at the Adelanto Immigration and Customs Enforcement Processing Center ("Adelanto"), where they were detained, placed them at unconstitutional risk of contracting COVID-19. We heard oral argument in the appeal last week. Yesterday evening, while we were preparing an opinion addressing the interlocutory appeal, we received an emergency motion from Plaintiffs explaining that, in the last week, 58 detainees and eight staff members had tested positive for COVID-19 at Adelanto, and over 300 detainees were still awaiting their test results. Nine detainees have been hospitalized since September 10. Plaintiffs allege that the Government was already aware of the outbreak by the time of oral argument but failed to mention it. We did not learn of the outbreak until

¹ Defendants-Appellants are Chad F. Wolf, Acting Secretary of Homeland Security; Tony H. Pham, Senior Official Performing the Duties of the Director, U.S. Immigration and Customs Enforcement ("ICE"); David Marin, Director of the Los Angeles Field Office for ICE's Enforcement and Removal Operations; and James Janecka, Warden of Adelanto. We refer to them collectively as "the Government." Pham has been automatically substituted for Matthew T. Albence, former Deputy Director and Senior Official Performing the Duties of the Director of ICE. Fed. R. App. P. 43(c)(2).

yesterday—more than a week later. The emergency motion asks us either to lift a stay pending appeal of the preliminary injunction, which had previously been imposed in an unpublished order by a motions panel of our court, or to clarify that the stay does not prohibit the district court from ordering protective measures in response to the changed circumstances presented by the developing outbreak. In light of the urgency of the situation, we issue this disposition affirming the preliminary injunction order in part, vacating it in part, and remanding so that the district court may immediately address current circumstances in Adelanto. A published version of this opinion will be forthcoming, together with any separate opinion.

I.

Plaintiffs brought this class action on behalf of noncitizens detained at Adelanto. These noncitizens are being held in civil detention in connection with various immigration proceedings, and many of them have no criminal record. Plaintiffs seek declaratory and injunctive relief, as well as habeas relief. Their Complaint alleges that, in light of the COVID-19 pandemic, Adelanto's failure to implement necessary protective measures—including social distancing, sanitation, and the provision of sufficient masks and soap—violates detainees' due process rights under the Fifth Amendment. The district court certified a class of 1,370 Adelanto detainees, and granted a preliminary injunction that, *inter alia*, imposed a

moratorium on Adelanto's receipt of new detainees, required specific sanitation measures, mandated compliance with guidance issued by the U.S. Centers for Disease Control and Prevention ("CDC"), and ordered the facility's detainee population to be reduced to a level that would enable social distancing. The district court left to the Government's discretion whether to achieve the requisite population reduction by deporting selected detainees, transferring selected detainees to other facilities, or releasing selected detainees with appropriate conditions of release. The court likewise allowed the Government to determine which detainees to release, deport, or transfer.

The Government timely appealed and sought an emergency stay of the preliminary injunction pending appeal, which a motions panel, in an unpublished order, granted, except to the extent the preliminary injunction "require[d] substantial compliance with guidelines issued by the [CDC] for correctional and detention facilities to follow in managing COVID-19."

We heard oral argument on September 15, 2020. The next day, in response to an inquiry from Plaintiffs' counsel, the Government revealed to Plaintiffs' counsel that 38 detainees had tested positive for COVID-19 at Adelanto.

In the district court, Plaintiffs filed an *ex parte* application for a temporary restraining order ("TRO") on September 16, 2020, seeking an order compelling the Government to test all Adelanto detainees (using rapid, point-of-care tests, if

possible) and to isolate all detainees who received positive test results. The Government filed a status report, which the district court construed as an opposition to the TRO application. The district court denied the application for a TRO on September 17, 2020, without specifying its reasoning.

The following day, Plaintiffs filed an *ex parte* application for reconsideration of the district court's denial of their motion for a TRO and sought a further TRO. Specifically, Plaintiffs requested that the district court order the Government to:

- (1) Test all detainees at Adelanto;
- (2) Isolate, in single occupancy cells, all detainees who have tested positive for COVID-19 and all detainees who are awaiting test results;
- (3) Prevent staff who worked in the West 5C and West 5D housing units from returning to work pending their COVID-19 test results, even if they are asymptomatic;
- (4) Suspend intake of new detainees into Adelanto; and
- (5) Provide daily status reports.

Plaintiffs acknowledged that the Government was already undertaking some of the measures requested but contended that the Government had neither adopted the isolation protocols proposed by Plaintiffs nor suspended its receipt of new detainees into Adelanto. The Government again opposed the motion.

In an order issued on September 22, 2020, the district court expressed concern about the adequacy of the Government's response to the outbreak, but it stated that its "hands have been tied by the Ninth Circuit's stay." The district court therefore denied reconsideration, but it instructed the parties to file a joint status

report “regarding Adelanto’s Covid-19 outbreak” with our court, which we received later that same afternoon.

The parties’ report informed us that, as of September 22, there were 58 confirmed cases among detainees and eight among staff members. More than half of the detainees who had received results tested positive. Twenty of the COVID-19-positive detainees belong to a medically vulnerable group at the greatest risk of suffering severe complications, and nine detainees were hospitalized. The Government has stated its intention to test all Adelanto detainees and staff. Just over half of the 774 detainees had been tested by September 20. Tests apparently take at least three days to return results, so the parties are awaiting results for hundreds of detainees.

We received an emergency motion from Plaintiffs on the evening of September 22, several hours after we received the parties’ status report, asking us to clarify or to partially lift the emergency stay imposed by the motions panel.² The emergency motion asserted that the Government had not imposed measures at Adelanto necessary to counter the developing outbreak. Among other things, Plaintiffs reported that the detainees in the housing unit with confirmed cases were being held “two per cell,” less than six feet apart; new detainees were continually being brought into the facility; and only some of the detainees had been tested for

² The Government indicated that it opposes the emergency motion.

the virus so far. Plaintiffs asked us to clarify that the emergency stay of the district court’s preliminary injunction did not “deprive[] [the district court] of authority to order appropriate isolation protocols and a temporary halt to new intakes” in light of the changed circumstances presented by the current outbreak. Plaintiffs requested, in the alternative, that we “lift the stay insofar as it prohibits the district court from responding to the current crisis.”³

II.

“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Where the government is a party to a case in which a preliminary injunction is sought, the balance of the equities and public interest factors merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). Further, where the “balance of hardships . . . tips sharply towards the plaintiff,” a plaintiff need only show “serious questions going to the merits,” rather

³ Intervening developments notwithstanding, the preliminary injunction is the only order presently before us for review in this appeal. The Government has filed a separate interlocutory appeal of procedural orders relating to bail applications—orders that were entered by the district court months after the preliminary injunction was issued and stayed. We will resolve that separate appeal by future order or opinion.

than likelihood of success on the merits, to warrant preliminary injunctive relief.

All. for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011)

(quotation marks and citation omitted). Injunctions that alter the status quo “are not granted unless extreme or very serious damage will result and are not issued in doubtful cases.” *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009) (quotation marks omitted).

We review a district court’s decision to grant or deny a preliminary injunction for abuse of discretion. *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc) (per curiam). We review the district court’s legal conclusions de novo and its factual findings for clear error. *K.W. ex rel. D.W. v. Armstrong*, 789 F.3d 962, 969 (9th Cir. 2015).

A district court’s decision regarding class certification is also reviewed for abuse of discretion. *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 984 (9th Cir. 2015).

III.

As a threshold matter, the parties dispute whether district courts have authority to order the types of relief in the preliminary injunction in response to habeas claims. Specifically, the Government argues that a district court on habeas review may not order detainee releases or any other injunctive relief to remedy unconstitutional conditions of confinement. We need not reach that issue to

resolve this appeal because, separately from their habeas petition, Plaintiffs brought a class action complaint for declaratory and injunctive relief seeking to remedy allegedly unconstitutional conditions at Adelanto. That action for declaratory and injunctive relief independently provided the district court jurisdiction to hear Plaintiffs' challenges and authority to grant the types of relief that Plaintiffs sought.

Courts have long recognized the existence of an implied equitable cause of action through which plaintiffs may seek equitable relief to remedy a constitutional violation. *See Sierra Club v. Trump*, 963 F.3d 874, 888 (9th Cir. 2020) (“Certain provisions of the Constitution give rise to equitable causes of action.”) (citing cases), *petition for cert. filed* (U.S. Aug. 7, 2020) (No. 20-138). Here, Plaintiffs' due process claims arise under the Constitution and Plaintiffs invoked 28 U.S.C. § 1331, which provides subject matter jurisdiction irrespective of the accompanying habeas petition. Moreover, an implied cause of action exists for Plaintiffs to challenge allegedly unconstitutional conditions of confinement. *See Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1230-32, 1236 (10th Cir. 2005) (observing that “[f]ederal courts have long exercised the traditional powers of equity, in cases within their jurisdiction, to prevent violations of constitutional rights,” and holding that federal courts have jurisdiction under 28 U.S.C. § 1331 over federal prisoners' constitutional claims for injunctive relief against prison

officials); *see also* *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862-63 (2017) (noting that, apart from *Bivens* or habeas relief, noncitizen detainees could seek injunctive relief to challenge their conditions of confinement); *Bell v. Wolfish*, 441 U.S. 520, 526 n.6 (1979) (declining to decide whether habeas is a proper vehicle for pretrial detainees in federal custody to challenge conditions of confinement because “jurisdiction would have been provided by 28 U.S.C. § 1331(a)”). Therefore, the district court had the authority both to entertain Plaintiffs’ constitutional challenges and to grant injunctive relief in response to them.

Further, the district court’s power to grant injunctive relief included the authority to order a reduction in population, if necessary to remedy a constitutional violation. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) (“Once a [constitutional] right and a violation have been shown, the scope of a district court’s equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.”). In *Brown v. Plata*, 563 U.S. 493 (2011), for example, the Supreme Court affirmed the conclusion of a three-judge district court that prison overcrowding had resulted in Eighth Amendment violations in California prisons, and, because no other relief would cure the violations, the Court agreed that an order limiting the prison population to a specific percentage of design capacity, which may have required state officials to release some prisoners, was an appropriate remedy. *Id.* at 500-02. Similarly,

Plaintiffs here argued that changes in sanitation conditions at Adelanto are necessary, but not sufficient, to cure the alleged Fifth Amendment violation and that a reduction in the facility's population was required for detainee safety. As in *Brown*, the district court in this case was permitted to order the reduction of Adelanto's population, which may require release of some detainees, if such a remedy was necessary to cure the alleged constitutional violations.

IV.

We hold that the district court did not abuse its discretion by entering a preliminary injunction in response to Plaintiffs' due process claims. The district court made detailed factual findings in support of the preliminary injunction, none of which the Government challenged in its brief on appeal as being clearly erroneous. For instance, the district court accepted as true Plaintiffs' declarations and other evidence that the following conditions were present at Adelanto: the Government had failed to impose social distancing because there were "too many detainees at Adelanto for its size"; newly arrived detainees were either mixed with the general population or housed with other new detainees who had arrived at different times, both of which undermined the ostensible 14-day quarantine period for new arrivals; staff were not required to wear gloves and masks; there was a lack of necessary cleaning supplies, resulting in cleaning of communal spaces that was "haphazard, at best"; there were only three functioning showers for 118 women;

there was inadequate access to hand sanitizer because dispensers were often empty and detainees had to wait for days to receive hand soap; and detainees were forced to sleep within six feet of each other due to the positions of their beds. In light of these factual findings, which the Government has not shown to be clearly erroneous, we agree with the district court that the conditions at Adelanto in April violated detainees' due process right to reasonable safety.⁴

The Fifth Amendment requires the government to provide conditions of reasonable health and safety to people in its custody. *See DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989); *Doe v. Kelly*, 878 F.3d 710, 714 (9th Cir. 2017). The government has violated this duty when “(i) [it] made an intentional decision with respect to the conditions under which the plaintiff was confined; (ii) those conditions put the plaintiff at substantial risk of suffering serious harm; (iii) the [government] 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 (iv) by not

⁴ Plaintiffs pursue two related Fifth Amendment due process theories. The first argues that the conditions at Adelanto are unconstitutionally punitive, *see Bell v. Wolfish*, 441 U.S. 520, 535-37 (1979), whereas the second argues that the Government violated Plaintiffs' right to reasonable safety while in the Government's custody, *see DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989). Because we hold that the district court was justified in granting preliminary relief based on the “reasonable safety” theory, we do not address the merits of the “punitive conditions” theory here.

taking such measures, the [government] caused the plaintiff's injuries." *Gordon v. County of Orange*, 888 F.3d 1118, 1125 (9th Cir. 2018). "With respect to the third element, the [government's] conduct must be objectively unreasonable, a test that will necessarily 'turn[] on the facts and circumstances of each particular case.'" *Castro v. County of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016) (en banc) (second alteration in original) (quoting *Kingsley v. Hendrickson*, 576 U.S. 389, 397 (2015)).

We agree with the district court that the Government likely failed to meet its constitutional duty to provide reasonably safe conditions to Plaintiffs. At the time the injunction issued, Adelanto was a facility so crowded that social distancing to combat the spread of the novel coronavirus was impossible, detainees had inadequate access to masks, guards were not required to wear masks, there was not enough soap or hand sanitizer to go around, detainees were responsible for cleaning the facility with only dirty towels and dirty water, and detainees were compelled to sleep with less than six feet of distance between them. The Government was aware of the risks these conditions posed, especially in light of high-profile outbreaks at other carceral facilities that had already occurred at the time, and yet had not remedied the conditions. Its inadequate response was objectively unreasonable. The district court therefore rightly concluded that Plaintiffs were likely to prevail on the merits. *Cf. Helling v. McKinney*, 509 U.S.

25, 35 (1993) (holding that the health risk posed by a prison inmate’s involuntary exposure to second-hand smoke could form the basis of a claim that the government was violating his right to reasonable safety).⁵ The district court was also correct in its conclusion that Plaintiffs were likely to suffer irreparable harm absent relief given COVID-19’s high mortality rate. Finally, the district court

⁵ We recognize that our sister circuits have reached differing conclusions when presented with cases about COVID-19 risks in carceral settings. *Compare Mays v. Dart*, --- F.3d ---, 2020 WL 5361651, at *1, *9 (7th Cir. 2020) (affirming in part a preliminary injunction that mandated sanitation measures and mask availability in a county jail), *and Valentine v. Collier*, 960 F.3d 707, 708 (5th Cir. 2020) (per curiam) (Davis, J., concurring in the judgment) (noting that “inmates are now being held under circumstances that seriously threaten their life”), *and id.* (Graves, J., specially concurring) (noting that the inmates were likely to succeed on the merits of their constitutional challenge to conditions of confinement), *with Wilson v. Williams*, 961 F.3d 829, 840-41 (6th Cir. 2020) (holding that inmates were unlikely to prevail on their deliberate indifference claim), *and Swain v. Junior*, 958 F.3d 1081, 1089 (11th Cir. 2020) (holding that pretrial detainees were unlikely to prevail on a deliberate indifference claim). Some of these cases arose in the context of criminal detention, and thus the deliberate indifference claims there, unlike due process challenges to civil detention conditions, required an analysis of prison officials’ subjective intent to harm. *E.g.*, *Wilson*, 961 F.3d at 840 (holding that while the objective prong was “easily satisfied,” the subjective prong would likely prevent plaintiffs’ success on the merits because officials responded reasonably). Moreover, each case must be evaluated on the specific factual record compiled by the district court because “objective reasonableness turns on the facts and circumstances of each particular case.” *Kingsley*, 576 U.S. at 397 (quotation marks and citation omitted). Here, the district court made specific factual findings that supported its conclusion that plaintiffs would likely succeed on the merits and that they would likely suffer irreparable harm. *Cf. Hope v. Warden York County Prison*, --- F.3d ---, 2020 WL 5001785, at *13 (3d Cir. 2020) (critiquing lack of “specific findings”); *id.* at *4 (critiquing district court for not permitting the government to offer evidence or giving it an opportunity to be heard before ordering injunctive relief).

rightly concluded that the equities tipped in Plaintiffs' favor, particularly in light of the lack of criminal records of many of the detainees and the alternative means available to prevent their absconding if they were released, such as electronic monitoring.

V.

We further hold that the district court did not err by provisionally certifying a class of all Adelanto detainees. The alleged due process violations exposed *all* Adelanto detainees to an unnecessary risk of harm, not just those who are release-eligible or uniquely vulnerable to COVID-19. The preliminary injunction afforded class-wide relief that would have remedied the constitutional violations as to all detainees, even though it would have entailed the release or transfer of only some of the detainees. The district court did not abuse its discretion in holding that Plaintiffs had satisfied the commonality, adequacy, and typicality requirements of Federal Rule of Civil Procedure 23(a) and the uniform remedy requirement of Rule 23(b)(2).⁶ *See Parsons v. Ryan*, 754 F.3d 657, 689 (9th Cir. 2014) (affirming class certification under Rule 23(b)(2) for an Eighth Amendment challenge to inmate medical care policies and explaining that “although a presently existing risk may ultimately result in different future harm for different inmates—ranging from no harm at all to death—every inmate suffers exactly the same constitutional injury

⁶ Defendants do not contest numerosity.

when he is exposed to a single statewide . . . policy or practice that creates a substantial risk of serious harm,” *id.* at 678); *cf. Brown v. Plata*, 563 U.S. 493, 502 (2011) (affirming a class-wide injunction imposing a “court-mandated population limit” in state prisons to remedy Eighth Amendment violations due to “severe and pervasive overcrowding,” which would require the release of only some inmates).

VI.

Although we affirm the portions of the preliminary injunction order concluding that the district court possesses the power to grant injunctive relief and that Plaintiffs are likely to prevail on the merits of their due process claims, we nonetheless vacate the provisions of the preliminary injunction that ordered specific measures to be implemented at Adelanto. The district court tailored those measures to respond to the circumstances at Adelanto as of mid-April. In the intervening five months, those circumstances have changed dramatically. For example, it now appears that Adelanto houses only 748 detainees, significantly fewer than the 1,370 detainees it held when the district court issued its preliminary injunction. More pressingly—and despite the reduced population level—the facility is experiencing a COVID-19 outbreak, which was not the case when the preliminary injunction issued. In response to the outbreak described in the emergency motion, it seems the Government is now in the process of testing *all* Adelanto detainees for COVID-19, and it has also purportedly adjusted its

procedures for “cohort[ing]” detainees within the last 48 hours. In short, the facts that motivated the district court’s preliminary injunction no longer reflect the current realities at Adelanto. The district court may have received further medical expert testimony or other evidence during the intervening months as well.

The conditions at Adelanto appear to be evolving rapidly. Unlike our court, the district court has been continually apprised of developments at the facility and is better situated to assess what relief current conditions may warrant. We therefore decline to speculate about which provisions of the preliminary injunction should still apply. We vacate the provisions of the injunction ordering specific reductions in the detainee population and specific changes in conditions at the facility and remand to the district court for further proceedings consistent with this disposition and with the latest facts. *See Valentine v. Collier*, 960 F.3d 707, 707 (5th Cir. 2020) (per curiam) (vacating preliminary injunction based on changed circumstances); *id.* at 707 (Davis, J., concurring in the judgment) (concurring “because conditions have dramatically changed in the prison since the preliminary injunction issued, and vacating the preliminary injunction allows the district court to expeditiously conduct factfinding to determine what relief is necessary under the current circumstances”).

We make some observations for the district court to consider on remand. First, we reiterate that the district court possesses broad equitable authority to

remedy a likely constitutional violation. If the district court determines, based on current facts, that particular measures are necessary to ensure that conditions at Adelanto do not put detainees at unreasonable risk of serious illness and death, it may require such measures. The district court may, for example, require the provision of sufficient cleaning supplies and hand sanitizer, or a reduction in the population to a level that would allow for six-foot social distancing, if it concludes those actions are necessary to bring the conditions to a constitutionally adequate level. And, of course, the district court has authority to remedy a constitutional violation by ordering measures that it determines are necessary to counter the spread of an outbreak, including mandating medical isolation of detainees who have tested positive for COVID-19 or who are awaiting test results, and imposing a temporary moratorium on Adelanto's receiving new detainees.

Second, although our court previously stayed the district court's preliminary injunction except to the extent it required compliance with the CDC's guidelines for correctional and detention facilities, we think developments since the stay have made clear that those guidelines do not provide a workable standard for a preliminary injunction. The guidance document spans 25 pages and makes hundreds of recommendations, many of which lack specificity. More fundamentally, it contains key caveats, such as that its recommendations "may need to be adapted based on individual facilities' physical space, staffing,

population, operations, and other resources and conditions.” Given the vagueness of that caveat, it is no surprise that the parties strongly disagree on whether the Government was complying with the CDC guidance even before this case was filed and have continued to disagree about what the CDC guidance means. The guidance document’s lack of specificity makes it a poor guidepost for mandatory injunctive relief. *See* Fed. R. Civ. P. 65(d)(1)(B), (C) (an injunction must “state its terms specifically” and “describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required”).

Third, the district court should, to the extent possible, avoid imposing provisions that micromanage the Government’s administration of conditions at Adelanto. Certain provisions in the preliminary injunction—such as the requirement that specific areas be cleaned “by a professionally trained cleaning staff,” rather than by detainees or facility employees with a mix of duties—wade into facility administration at a granular level beyond what is required to remedy the constitutional violation identified. These types of considerations are better left to the “professional expertise of corrections officials.” *Bell v. Wolfish*, 441 U.S. 520, 540 n.23 (1979).

Fourth, any new provisions of future injunctive relief should stem from medical evidence properly before the court. The district court should refrain from relying on declarations filed in other litigation, as it did when it ordered that

sleeping rooms or cells that contained toilets lacking integrated lids be limited to one person. *Cf. Hope v. Warden York County Prison*, --- F.3d ---, 2020 WL 5001785, at *9-10 (3d Cir. 2020) (criticizing reliance on evidence from prior case).

Finally, the injunction should, to the extent possible, reflect the scientific evidence about COVID-19 presented to the district court. For example, the preliminary injunction, as originally drafted, seemed to mandate that Adelanto staff must wear a mask even when working alone in an office, far away from detainees. We see no evidence in the current record that suggests wearing a mask in this specific situation would reduce COVID-19 transmission. If the district court determines on remand that scientific evidence supports ordering this measure, it should clearly identify the relevant evidence.

VII.

Based on the foregoing, the preliminary injunction order is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this disposition. Because the substantive provisions of the preliminary injunction are vacated, we dissolve forthwith the stay pending appeal of that order, and we deny Plaintiffs' emergency motion as moot. *See Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*, 482 F.3d 1157, 1174 n.7 (9th Cir. 2007).

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SEP 23 2020

Hernandez Roman v. Wolf, No. 20-55436

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MILLER, Circuit Judge, concurring in part and concurring in the judgment:

I concur in the court’s judgment in full, and I join all of its order except for Part IV. In that part, the court concludes, based on the record that was before the district court when it issued the preliminary injunction order in April, that “the Government likely failed to meet its constitutional duty to provide reasonably safe conditions to Plaintiffs.” Slip op. 14. The situation at Adelanto has changed considerably since April, and our decision to remand this case will allow the district court to determine, based on a new record, whether the government’s response has fallen short of constitutional standards. I therefore would not opine on the issues addressed in Part IV.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Form 10. Bill of Costs**

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form10instructions.pdf>

9th Cir. Case Number(s)

Case Name

The Clerk is requested to award costs to (*party name(s)*):

I swear under penalty of perjury that the copies for which costs are requested were actually and necessarily produced, and that the requested costs were actually expended.

Signature

Date

(use "s/[typed name]" to sign electronically-filed documents)

COST TAXABLE	REQUESTED <i>(each column must be completed)</i>			
DOCUMENTS / FEE PAID	No. of Copies	Pages per Copy	Cost per Page	TOTAL COST
Excerpts of Record*	<input style="width: 100%; height: 25px;" type="text"/>	<input style="width: 100%; height: 25px;" type="text"/>	\$ <input style="width: 100%; height: 25px;" type="text"/>	\$ <input style="width: 100%; height: 25px;" type="text"/>
Principal Brief(s) (<i>Opening Brief; Answering Brief; 1st, 2nd, and/or 3rd Brief on Cross-Appeal; Intervenor Brief</i>)	<input style="width: 60px; height: 25px;" type="text"/>	<input style="width: 60px; height: 25px;" type="text"/>	\$ <input style="width: 100%; height: 25px;" type="text"/>	\$ <input style="width: 60px; height: 25px;" type="text"/>
Reply Brief / Cross-Appeal Reply Brief	<input style="width: 60px; height: 25px;" type="text"/>	<input style="width: 60px; height: 25px;" type="text"/>	\$ <input style="width: 100%; height: 25px;" type="text"/>	\$ <input style="width: 60px; height: 25px;" type="text"/>
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Petition for Review Docket Fee / Petition for Writ of Mandamus Docket Fee				\$ <input style="width: 60px; height: 25px;" type="text"/>
TOTAL:				\$ <input style="width: 60px; height: 25px;" type="text"/>

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