UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

JANET MALAM, Petitioner-Plaintiff, and QAID ALHALMI, et al., Plaintiff-Intervenors - against - ROBERT LYNCH,[1] et al., Respondent-Defendants.	No. 5:20-cv-10829-JEL-APP Hon. Judith E. Levy Mag. J. Anthony P. Patti

MOTION FOR LEAVE TO FILE THIRD AMENDED AND SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF, TO ADD ADDITIONAL NAMED PLAINTIFFS, AND TO APPOINT ADDITIONAL CLASS REPRESENTATIVES

[1] Individual Respondent-Defendants sued in their official capacity have been automatically substituted for their predecessors. *See* Fed. R. Civ. P. 25(d).

Petitioner-Plaintiffs ("Plaintiffs") move pursuant to Federal Rules of Civil Procedure 15, 20, 21, 23, and 24:

1. For leave to file a Third Amended and Supplemental Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief (the "Third Amended and Supplemental Complaint");
2. To add Eduars Jacquin, Dzemal Pujagic, Fredy Martinez-Mojica, Edwar Joa Sanchez-Gonzalez, Manuel Castillo-Torres, Juan Guerrero Bernardez, Rene Hernandez-Vergara, Nazariy Kmet, and Daniel Martinez-Saavedra as Named Plaintiffs; and,
3. For the Court to appoint Jacquin, Pujagic, Martinez-Mojica, and Sanchez as additional representatives of the class, and to appoint Jacquin and Pujagic as additional representatives of the medically vulnerable habeas litigation group.

In support of this motion, Plaintiffs submit the accompanying brief, and their proposed amended and supplemental pleading as Exhibit A[2] pursuant to Local Rule 15.1.

In accordance with Local Rule 7.1(a), Plaintiffs' counsel contacted counsel for the Respondent-Defendants ("Defendants") to seek their consent to this motion. Counsel for Defendants indicated that they consent to the dismissal of Count III

[2] The Third Amended and Supplemental Complaint that Plaintiffs will file if leave to amend is granted could be slightly revised from that in Exhibit A to reflect any necessary updates, such as to detained Plaintiffs.

without prejudice. Defendants do not consent to the addition of Count IV. As for amended allegations for Counts I and II and additional class representatives, Defendants indicated that they do not concur at this time, but will indicate in their response to the motion if there are items to which they do not object.

WHEREFORE, Plaintiffs respectfully request that the Court permit Plaintiffs to file the Third Amended and Supplemental Complaint which adds the additional named plaintiffs, and further request that the Court appoint the additional class representatives.

Dated: October 4, 2024

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

JANET MALAM,

Petitioner-Plaintiff,

and

QAID ALHALMI, et al.,

Plaintiff-Intervenors,

- against -

ROBERT LYNCH, et al.,

Respondent-Defendants.

No. 5:20-cv-10829-JEL-APP

Hon. Judith E. Levy

Mag. J. Anthony P. Patti

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE THIRD AMENDED AND SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF, TO ADD ADDITIONAL NAMED PLAINTIFFS, AND TO APPOINT ADDITIONAL CLASS REPRESENTATIVES

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INTRODUCTION

Petitioner-Plaintiffs ("Plaintiffs") are a class of noncitizens civilly detained by United States Immigration and Customs Enforcement ("ICE") at the Calhoun County Correctional Center ("Calhoun") in Battle Creek, Michigan. During the height of the COVID-19 pandemic, because the medical conditions of certain class members put them at greater risk of serious illness or death, this Court found that detention at Calhoun constituted punishment in violation of their Fifth Amendment rights and established a process for considering release on bail. After evaluating each individual's facts, the Court found no flight risk or danger and ordered them released under supervision. Those released have been reunited with their loved ones and reintegrated into their communities for over three to four years, all while complying with conditions of release and participating in removal proceedings. Meanwhile, the world has emerged from the worst phases of the COVID-19 pandemic with the scientific breakthroughs of life-saving vaccines and antiviral medication.

Given these medical advancements and the successful reintegration of those released into their communities, a settlement that reflected these developments should have been possible. Unfortunately, after three years of negotiations, Respondent-Defendants ("Defendants") suddenly pulled out of the settlement process. In the ensuing months, even limited discovery has revealed that Defendants have provided *no* COVID-19 vaccines or antiviral treatments at Calhoun, and very

limited testing, contrary to well-established medical and public health practices for the treatment and prevention of COVID-19. And, despite the lack of any legitimate government interest, Defendants seek to revoke the bail orders of eight released class members, rip them away from their families, and redetain them without any process.

Plaintiffs now move under Federal Rules of Civil Procedure 15, 20, 21, 23, and 24 for leave to file a Third Amended and Supplemental Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief ("Third Amended and Supplemental Complaint") (Exhibit A), which:

- Amends Counts I and II to reflect the current scientific understandings of COVID-19, and the fact—uncovered during the recent round of limited discovery—that Calhoun has provided **zero** COVID-19 vaccines and **no** antiviral medication to detained people since at least May 2023, and has also failed to provide adequate or prompt testing. Plaintiffs continue to allege that Defendants are violating the due process rights of noncitizens detained at Calhoun (Count I) and of medically vulnerable noncitizens detained at Calhoun (Count II) by acting with deliberate indifference in failing to provide adequate medical care and recklessly failing to mitigate an unreasonable risk to a serious medical need, and by subjecting them to punitive conditions;
- Removes Count III as the named plaintiffs who brought claims under *Zadvydas v. Davis*, 533 U.S. 678 (2001), have chosen to dismiss them;

- Supplements with a new Count IV alleging that redetaining class members who were released based on the Court's individualized determinations that they are not a flight risk or danger, and who have lived in the community for over three to four years, violates their due process rights unless Defendants can establish, by clear and convincing evidence at a pre-deprivation hearing, that their detention is now necessary to protect the public or prevent flight;
- Names additional plaintiffs currently detained at Calhoun who challenge their conditions of detention and seek to serve as additional class representatives on Counts I and II;
- Names as additional plaintiffs those who, in addition to two named plaintiffs, are raising the new Count IV described above; and
- Removes named plaintiffs who were removed, who won immigration relief, whose redetention this Court has authorized, or whose release was not based on an order of this Court.

These amended and supplemental pleadings are appropriate at this stage of the case. Plaintiffs seek to update the complaint to reflect changed circumstances: changes in the COVID-19 landscape, facts regarding Calhoun recently uncovered in discovery, and Defendants' express threat to redetain people whom this Court determined are not a flight risk or danger. The timing of this motion is the result of Defendants' own actions and the complex history of this litigation. For similar

reasons, Defendants will not be unduly prejudiced, especially as they have had notice of the existing conditions claims, and the redetention claim is based on this Court's bail orders and shares a nexus with existing claims regarding the constitutionality of Plaintiffs' civil detention. Because this Court has already examined the facts of every released individual and Plaintiffs could otherwise file a new, related case, allowing for amendment and supplementation, and for the addition of new named plaintiffs, is the most efficient way to proceed. Finally, it is appropriate to appoint additional people who are currently detained as class representatives for Counts I and II, which challenge Defendants' failure to ensure the safety of class members at Calhoun.

BACKGROUND

At bottom, this case has always been about two things: (1) the legality of the government's civil detention of certain noncitizens, and (2) protecting detained people from COVID-19. Because there was no set of conditions that could protect medically vulnerable class members from COVID-19 at Calhoun at the start of the pandemic, the Court released more than 50 named plaintiffs and class members on bail over the span of a year in 2020-2021. The parties then attempted in good faith to settle this case, negotiating over the subsequent three years, during which the landscape for COVID-19 prevention and care evolved, certain plaintiffs won their cases or were deported, and those released rebuilt their lives with their families.

Without any explanation, Defendants pulled out of settlement negotiations in April 2024. Defendants are now threatening to redetain eight people, even though this Court already found them not to be a flight risk or danger and they have been living successfully in the community for multiple years. *See* ECF No. 621.[1] Moreover, limited recent discovery has revealed that COVID-19 vaccines and antivirals are not being provided at all at Calhoun, and that testing is very limited.

ARGUMENT

I. Leave to Amend or Supplement Is to Be Freely Granted.

Rule 15(a)(1) allows a party to amend a complaint more than 21 days after service with the court's leave and provides that "[t]he court should freely give leave when justice so requires." Under Rule 15(d), courts may also "permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." "[T]he same standard of review and rationale apply" to a motion to amend under Rule 15(a) and a motion to supplement under Rule 15(d). *Bormuth v. Whitmer*, 548 F. Supp. 3d 640, 646 n.4 (E.D. Mich. 2021) (citing *Spies v. Voinovich*, 48 F. App'x 520, 527 (6th Cir. 2002)).

[1] ICE would only agree to the continued release of 22 people, but would not stipulate to continued release of ten individuals. Two had their bail orders revoked, which Plaintiffs did not oppose. Their redetention is not at issue. Plaintiffs' new Count IV is brought on behalf of seven of the remaining individuals and may include the other remaining individual at a later date if retained to do so.

Courts in the Sixth Circuit apply a liberal policy for Rule 15 motions to "ensure the determination of claims on their merits" rather than the technicalities of pleadings. *Marks v. Shell Oil Co.,* 830 F.2d 68, 69 (6th Cir. 1987); *see also Newberry v. Silverman*, 789 F.3d 636, 645 (6th Cir. 2015) ("[I]t should be emphasized that the case law in this Circuit manifests 'liberality in allowing amendments to a complaint.'" (citation omitted)). Thus, a motion to amend or supplement should be denied only where there has been "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed,[2] undue prejudice to the opposing party . . . [or] futility of amendment . . . ." *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Bormuth*, 548 F. Supp. 3d at 646 n.4.

Plaintiffs should be allowed to file the Third Amended and Supplemental Complaint because none of those factors apply: (1) this motion is timely and does not unduly prejudice Defendants; (2) this motion is not the product of bad faith; and (3) amending and supplementing would not be futile. Moreover, allowing this motion would promote judicial economy by keeping Plaintiffs' claims—which could otherwise be litigated in a new, related case—with the Court that is most familiar with the facts and whose prior orders are highly relevant, particularly on Count IV.

[2] The Court has not identified any deficiencies in previous amendments, so this factor is not relevant here.

II. Defendants Cannot Show Undue Delay or Prejudice.

"Delay alone, regardless of its length[,] is not enough to bar [amendment] if the other party is not prejudiced." *Moore v. Paducah*, 790 F.2d 557, 560 (6th Cir. 1986) (alteration in original). A delay that is "neither intended to harass nor causes any ascertainable prejudice is not a permissible reason in and of itself to disallow an amendment of a pleading." *Tefft v. Seward*, 689 F.2d 637, 639 n.2 (6th Cir. 1982). In other words, courts deny Rule 15 motions only where "delay [has] become 'undue,' placing an unwarranted burden on the court, or [has] become 'prejudicial,' placing an unfair burden on the opposing party." *Morse v. McWhorter*, 290 F.3d 795, 800 (6th Cir. 2002) (citing *Adams v. Gould*, 739 F.2d 858, 863 (3d Cir. 1984)). For instance, in *Tefft*, the Sixth Circuit reversed denial of amendment even where there was a four-year delay because there was no prejudice to defendants nor undue delay in light of the litigation history of the case. 689 F.2d at 639-40. In weighing delay and prejudice, courts consider the emergence of new facts and circumstances, *Lipa v. Asset Acceptance, LLC*, 572 F. Supp. 2d 841, 855 (E.D. Mich. 2008), and the procedural history and complexity of the case, *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 625 (6th Cir. 2016). "What the Federal Rules seek to prevent is a party surprising an opposing party . . . on the eve of trial, not to prevent a party from adding [facts] . . . learned over the course of litigation." *Conceivex, Inc. v. Rinovum Women's Health, Inc.*, No. 15-CV-14239, 2017 WL 3484497, at *2 (E.D.

Mich. Aug. 15, 2017) (Levy, J.). Thus, the Sixth Circuit considers notice to be a part of the prejudice analysis. *See Wade v. Knoxville Utilities Bd.*, 259 F.3d 452, 458-59 (6th Cir. 2001).

Here, Plaintiffs have moved expeditiously to amend and supplement their complaint in light of intervening developments, new facts, and the complicated course of this litigation. There is thus no undue delay or prejudice to Defendants.

A. This Motion Is Timely.

The state of the COVID-19 pandemic has, of course, changed drastically since 2021, when the parties entered settlement negotiations. During that time, COVID-19 vaccines and antiviral treatment have become widely available. With adequate access to vaccines and antiviral treatments, COVID-19 no longer necessarily results in a high risk of severe illness or death.

Throughout settlement negotiations, Plaintiffs relied on Defendants' representations that they were providing COVID-19 vaccines and treatment at Calhoun. When forced to return to active litigation, Plaintiffs hoped discovery would confirm those representations so as to satisfy Class Counsel and the Court that the conditions claims (Counts I and II) could be resolved. Unfortunately, discovery revealed the opposite: **Calhoun has provided *zero* vaccines and *no* antiviral treatment since at least May 1, 2023. The facility's medical care policies and procedures have not been updated since November 2020, and still state that no**

COVID-19 vaccines or antiviral medications are available. Plaintiffs now must amend Counts I and II to reflect this new information.

Because Plaintiffs received relevant conditions discovery only in August 2024,[3] Plaintiffs could not have amended the complaint any sooner. *See Lipa*, 572 F. Supp. 2d at 855 ("Delay may be excused in the case of newly discovered evidence[.]"); *Mote v. City of Chelsea*, 252 F. Supp. 3d 642, 655-56 (E.D. Mich. 2017) (no substantial delay where plaintiffs sought to amend after close of discovery, because they moved to amend three months after learning of a new defendant); *Slenczka v. Central States, Southeast & Southwest Areas Pension Funds*, No. 03-74257, 2005 WL 1862345, at *2 (E.D. Mich. Aug. 4, 2005) (any potential prejudice to defendants from delay did not outweigh plaintiffs' need to add a claim based on new evidence).

Nor can Plaintiffs be faulted for seeking to settle the case after vaccines and antivirals became available. The parties engaged in extensive negotiations for over three years, between March 2021, when the Court referred this case for settlement negotiations, and April 2024, when Defendants broke off those talks. Based on the positive progress of negotiations and the fact that ICE settled very similar cases around the country, Plaintiffs believed resolution without litigation was likely.

[3] Discovery has been very limited. Yet even the facts uncovered so far show that continued litigation of the conditions claims is unavoidable absent settlement.

Indeed, discovery was paused for this entire period. *See, e.g.*, *Litt v. Midland Credit Mgmt.*, No. 13-CV-12393, 2014 WL 1977137, at *3 (E.D. Mich. May 14, 2014) (allowing amendment despite delay caused by settlement negotiations); *Gooding v. EquityExperts.org, LLC*, No. 17-12489, 2020 WL 13441663, at *1-2 (E.D. Mich. Jan. 9, 2020) (allowing amendment despite two-year delay caused by several settlement conferences and stipulated stay pending disposition of a similar case before the Sixth Circuit). After Defendants suddenly and without explanation ended negotiations, Plaintiffs have moved diligently, including seeking limited, expedited discovery on COVID-19 conditions at Calhoun—information they had no opportunity to probe since settlement negotiations began in spring 2021.

Plaintiffs now seek to amend their complaint to reflect the newly discovered fact that Defendants are failing to provide any vaccines or antivirals—the most basic protections today against COVID-19. In addition, new, currently detained individuals are added as named plaintiffs on Counts I and II.[4] They seek to be appointed as additional representatives for the class and habeas litigation group.[5]

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[4] Where a proposed amendment to a complaint involves adding or removing a party, "the same basic standard . . . will apply whether the pleader moves under Rule 15(a) or Rule 21." Wright & Miller, Fed. Prac. & Proc. § 1474; *see, e.g.*, *Kunin v. Costco Wholesale Corp.*, No. 10-11456, 2011 WL 6090132, at *2 (E.D. Mich. Dec. 7, 2011) (citing *Dura Global Techs., Inc. v. Magna Donnelly Corp.*, No. 07-CV-10945, 2011 WL 4532875, at *2 n.1 (E.D. Mich. Sept. 30, 2011)) ("[T]he standard is the same[.]"). Rules 20 and 24 provide additional bases for adding the new plaintiffs.

[5] Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). There are two criteria for

Similarly, Plaintiffs move to supplement now that Defendants have placed certain released class members at risk of redetention. Throughout settlement negotiations, those released were protected by this Court's bail orders and the parties were negotiating over terms that would extend those protections. Now, Defendants—after an order by the Court, over strenuous objections—have filed a notice stating that they will only agree to the continued release of 22 people, but will not stipulate to continued release for eight others. *See supra* n.1. There is no legitimate justification for treating this group differently from the others: they were all found not to be a flight risk or danger and have all reintegrated into the community. Nor is there any evidence that Defendants conducted an individualized review for whether anyone they seek to redetain poses a present flight risk or danger.

Rule 15(d) specifically contemplates that parties may supplement their pleadings with "any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." Fed. R. Civ. P. 15(d). There is no delay when Plaintiffs acted six weeks after being apprised that Defendants seek to redetain certain individuals. *See, e.g.*, *United States ex rel. Lynn v. City of Detroit*, No. 17-

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adequate representation: class representatives must (1) have common interests with unnamed members of the class, and (2) vigorously prosecute the interests of the case through qualified counsel. *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 524-25 (6th Cir. 1976). Plaintiffs Jacquin, Pujagic, Martinez-Mojica, and Sanchez have common interests with the class, and Plaintiffs Jacquin and Pujagic have common interests with the medically vulnerable habeas litigation group. The new plaintiffs are committed to vigorously prosecuting this case with the assistance of Class Counsel.

14168, 2022 WL 163616, at *3 (E.D. Mich. Jan. 18, 2022) (finding no delay despite four-year period between original complaint and motion to amend and supplement where government's actions contributed to the timing). Plaintiffs' Third Amended and Supplemental Complaint adds a new Count IV asserting that redetention absent finding of flight risk or danger violates due process, and adds as named plaintiffs those individuals released as part of the habeas litigation group who are now at risk of redetention.

Lastly, there is no undue delay here considering this case's complexity and procedural history. Courts recognize that "[w]hen a dispute is complicated and protracted, and a new complaint the likely alternative, allowing supplemental pleadings before a court already up to speed is often the most efficient course." *Ne. Ohio Coal. for the Homeless*, 837 F.3d at 625. As illustrated above, the unforeseen complexities of this case—including Defendants' twelfth-hour exit from settlement negotiations after three years—reaffirms that the mere passage of time does not constitute undue delay. For instance, in *In re Flint Water Cases*, this Court allowed plaintiffs to file a fourth amended complaint to add factual allegations, noting that the case was "far from routine" given its complex procedural history and claims and the number of plaintiffs involved. 384 F. Supp. 3d 802, 833, 839 (E.D. Mich. 2019), *aff'd and remanded*, 960 F.3d 303 (6th Cir. 2020). This Court reasoned that the "less than straightforward procedure must be considered" as weighing in the plaintiffs'

favor in granting amendment, and also pointed to the defendants' role in delaying the process, which limited the prejudice against them. *Id*. Granting amendment and supplementation here would be consistent with courts across the Sixth Circuit that factor in case complexity and procedural history. *See, e.g.*, *City of Detroit*, 2022 WL 163616, at *3 (allowing amendment and supplementation despite four-year delay, pointing to procedural history).

B. Amending and Supplementing the Complaint Will Not Unduly Prejudice Defendants.

Courts in the Sixth Circuit require "at least some significant showing of prejudice" to overcome the "liberality in allowing amendments to a complaint." *Moore*, 790 F.2d at 562. To be cognizable, the "prejudice" must be more than just the inconvenience of having to defend against a claim, especially when additional work resulting from amendment is "inherent in the nature of complex litigation." *Counts v. Gen. Motors, LLC*, No. 16-CV-12541, 2018 WL 2717484, at *6 (E.D. Mich. June 6, 2018) ("Every time a plaintiff seeks to add a new claim or party, the defendants will face the 'prejudice' of defending the suit on its merits. A defendant must necessarily identify some other type of prejudice sufficient to justify denial of a motion for leave to amend."). Here, Defendants cannot show a "significant showing of prejudice" because Plaintiffs are merely seeking to update the complaint's conditions claims based on intervening factual developments and newly

discovered evidence, and to supplement with a redetention claim that is connected to the prior claims and the Court's orders in this litigation.

As to Counts I and II, Defendants have been on notice of Plaintiffs' conditions claims since at least June 2020, when Plaintiffs moved for class-wide relief based on the conditions of confinement at Calhoun that violated their due process rights to reasonable health and safety and freedom from punishment. While the science of what constitutes adequate protection from unreasonable risk of serious harm from COVID-19 has changed, the crux of Plaintiffs' legal claims has not: Plaintiffs continue to assert, on behalf of the whole class, that Defendants are acting with deliberate indifference in failing to act reasonably to address a serious medical need, and subjecting them to punitive conditions; and Plaintiffs still assert the same for the group of medically vulnerable class members, who require a higher standard of care due to their higher risk of serious illness or death from COVID-19.

Thus, because Counts I and II are still fundamentally about conditions of immigration detention and COVID-19, "Plaintiffs have not changed their allegations so much that [D]efendants will need to overhaul their strategy." *In re Flint Water Cases*, 384 F. Supp. 3d at 839 (distinguishing *Prather v. Dayton Power & Light Co.*, 918 F.2d 1255, 1259 (6th Cir. 1990)). Defendants suffer no prejudice where they have knowledge of and access to all the relevant conditions at Calhoun to defend against these claims, and, moreover, were the ones who *chose* to return to active

litigation over these claims. As discussed above, Plaintiffs could not have amended these claims earlier while parties were in settlement negotiations; they have no alternative other than to do so now because they have been forced back into active litigation and because limited discovery has revealed that Defendants completely failed to ensure access to COVID-19 vaccines and antivirals at Calhoun for at least the last year-and-a-half, and do not provide adequate vaccine education or testing. Just as there is no undue delay for amending these claims, there is also no undue prejudice to Defendants.[6] *See Morse*, 290 F.3d at 800-01 (accepting plaintiffs' explanation for not seeking leave to amend earlier and finding no prejudice to nonmoving party, especially "in light of the discovery stay"); *Counts*, 2018 WL 2717484, at *3-5 (rejecting arguments of undue delay and prejudice by analyzing complex nature of the case).

The Court should also allow supplementation of Count IV because it relates to the original due process claims challenging Plaintiffs' civil detention and to the Court's prior release orders in this case. Because a motion to supplement seeks to add allegations pertaining to events arising *after* the original complaint, "Rule 15(d) contemplates that the supplemental factual allegations may give rise to new legal theories." *Goldman v. Elum*, No. 19-CV-10390, 2019 WL 3289819, at *5 (E.D.

[6] Defendants also cannot assert prejudice where Plaintiffs are narrowing the issues to be litigated by voluntarily dismissing Count III and named plaintiffs who are no longer subject to removal, were voluntarily released, or have been deported.

Mich. July 22, 2019) (citing *Griffin v. Cnty. Sch. Bd. of Prince Edward Cnty.*, 377 U.S. 218, 227 (1964)). While the supplemental claims need not arise out of the same transaction or occurrence as the original claims, "there must be some connection between the claims as filed and the supplemental ones." *Id*. (citations omitted). For instance, in *Northeast Ohio Coalition for the Homeless*, the court affirmed the decision to grant supplementation where both the original complaint and supplemental complaint challenged state election laws governing absentee and provisional ballots. 837 F.3d at 625. The court reasoned that even though the supplemental complaint challenged a new set of state laws, "the 'focal points' of both complaints are the same: ensuring all ballots . . . are not unfairly excluded and left uncounted due to illegal voter identification rules.'" *Id*. *See also Bormuth*, 548 F. Supp. 3d at 649 (sufficient connection between the original and new complaint, which added a new defendant, new legal argument related to new factual allegations, and a new cause of action, because the "crux of [the plaintiff's] lawsuit" remained the same).

Supplementation is warranted because Count IV is directly related to the Court's previous legal and factual findings, including the finding that release was appropriate because those individuals posed no flight risk or danger. Defendants now seek to detain people whom the Court has determined are able to live safely in the community, and whom the government therefore has no legitimate reason to detain. Because civil immigration detention must be predicated on flight risk and danger,

Defendants lack any legitimate basis to detain people whom this Court found are not a flight risk or danger. If Defendants redetain them absent procedural protections, that would not only allow ICE to incarcerate people who are not a danger or flight risk, but would effectively enable ICE to overturn this Court's past findings about danger and flight risk. Count IV is directly related to the Court's past orders.

Moreover, Plaintiffs' original complaint centered on whether Defendants' civil detention of certain noncitizens was consistent with their due process rights and what, if any, conditions would avoid punishment in detention. Because the Court found conditions to be too dangerous (and therefore punitive) during the early stages of the COVID-19 pandemic, the Court released certain medically vulnerable individuals on bail after carefully considering their bail applications and finding each person not to pose a flight risk or danger. The supplemental Count IV focuses on a subset of those individuals and raises whether the same Defendants could lawfully subject them to redetention after this Court has already found them not to pose a flight risk or danger, and what procedures are necessary prior to redetention. The heart of the two pleadings lies in the Due Process Clause and both the substantive and procedural protections it affords to noncitizens facing civil detention. *See City of Detroit*, 2022 WL 163616, at *4 (granting motion promotes judicial economy where, "while there are new factual allegations, the nature of the action and underlying conduct at issue remains the same").

Finally, because Count IV pertains to the same individuals whose release on bail Defendants had previously opposed and who report regularly to ICE, Defendants are already on notice as to the relevant facts. Defendants also cannot claim no notice as to this claim when the due process interests of released class members were a crucial subject of the parties' settlement negotiations for the past three years. Conversely, Plaintiffs could not have raised the legal claim until Defendants abandoned settlement negotiations and, just six weeks ago, identified those for whom ICE would not stipulate to continued release.

In short, because Defendants—whose actions contributed to the timing of this motion—were well aware that they have continuing obligations to protect the health and safety of the people they detain, and of Plaintiffs' concerns with the unlawful redetention of those released, the Court should find no undue delay or prejudice.

III. Defendants Cannot Show Bad Faith.

There can be no suggestion of bad faith, much less any "firm evidence" of bad faith. *Blumberg v. Ambrose*, No. 13-CV-15042, 2015 WL 1737684, at *1 (E.D. Mich. Apr. 16, 2015). Plaintiffs here negotiated in good faith for over three years, waiting patiently for the government to respond to settlement proposals through its multi-level decision-making process. Plaintiffs only resumed active litigation when confronted with no other options after Defendants unilaterally and without explanation pulled out of settlement negotiations. Moreover, Plaintiffs have been

willing to move quickly with a fast-tracked discovery and briefing schedule. *See, e.g.*, *Congregation Shema Yisrael v. City of Pontiac,* No. 09-CV-13718, 2011 WL 3624772, at *1 (E.D. Mich. Aug. 17, 2011) (rejecting arguments of bad faith for three-year delay where parties had mutually agreed to suspend litigation for settlement negotiations); *Counts*, 2018 WL 2717484, at *5-6 (same for two-year delay where plaintiffs sequenced events to avoid unnecessary litigation). Thus, for the same reasons Defendants cannot show undue delay or prejudice, Defendants also cannot assert bad faith here. *See, e.g.*, *Gooding*, 2020 WL 13441663, at *1-2.

IV. Amending and Supplementing the Complaint Would Not Be Futile.

Courts find futility only where the proposed pleading would fail to state a claim under Federal Rule of Civil Procedure 12(b)(6). *See Beydoun v. Sessions*, 871 F.3d 459, 469 (6th Cir. 2017). Accordingly, the proposed amended pleading need only "raise a right to relief above the speculative level" and "state a claim to relief that is plausible on its face." *Hensley Mfg. v. ProPride, Inc.*, 579 F.3d 603, 609 (6th Cir. 2009). The amended and supplemental claims easily clear this low bar.

A. The Complaint States Plausible Claims That Plaintiffs Have Failed to Safeguard Their Health and Safety.

The limited discovery Plaintiffs have had on current conditions at Calhoun shows that Defendants have completely failed to provide vaccines and antiviral treatments. The availability of COVID-19 vaccines and antivirals changed the course of the pandemic. Both the Centers for Disease Control and Prevention

("CDC") and ICE's own COVID-19 protocols recognize the importance of vaccines and antivirals to preventing the spread of COVID-19 and lowering the risk of serious illness or death, especially for those with certain medical factors.[7] Thus, courts analyze vaccination and treatment policies in considering whether defendants are taking reasonable measures to mitigate the risk that people in congregate settings face from COVID-19. *See, e.g.*, *Romero-Lorenzo v. Koehn*, 665 F. Supp. 3d 1056, 1082-86, 1088-89 (D. Ariz. 2023) (denying defendants' summary judgment motion where there were questions of fact as to whether prison offered boosters to pretrial detainees, identified and targeted at-risk detainees for vaccines, and stocked and prescribed antiviral treatments for eligible COVID-positive patients); *Maney v. Brown*, 516 F. Supp. 3d 1161, 1178 (D. Or. 2021) (concluding that the COVID-19 vaccine is a "serious medical need").

Here, Plaintiffs have had the opportunity to engage only in limited, expedited discovery, yet even the limited discovery revealed major gaps in Defendants' COVID-19 protocols: since at least May 2023, *no* vaccines and *no* antivirals have been provided at Calhoun, despite their availability and despite the continued

[7] *See, e.g.*, *Underlying Conditions and the Higher Risk for Severe COVID-19*, CDC (July 30, 2024), https://www.cdc.gov/covid/hcp/clinical-care/underlying-conditions.html; *Post Pandemic Emergency COVID-19 Guidelines and Protocols Version 3.0*, ICE ERO (Aug. 2, 2024), https://www.ice.gov/doclib/coronavirus/eroCOVID19PostPandemicEmergencyGuidelinesProtocol_08022024.pdf.

dangers of COVID-19. It is well established that Defendants have "a duty to assume some responsibility for [the] safety and general well-being" of those taken into their custody. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989). Because Plaintiffs are civil detainees, their detention is governed by the Fifth Amendment and may not "amount to punishment." *Bell v. Wolfish*, 441 U.S. 520, 535-36 (1979). Thus, the government fails to meet its constitutional duty if it is deliberately indifferent to COVID-19 risks, a serious medical need, *see Helling v. McKinney*, 509 U.S. 25, 35 (1993); *Grote v. Kenton Cnty.*, 85 F.4th 397, 405 (6th Cir. 2023); *Greene v. Crawford Cnty.*, 22 F.4th 593, 607 (6th Cir. 2022); *Hernandez Roman v. Wolf*, 829 F. App'x 165, 172 (9th Cir. 2020), or subjects detainees to punitive conditions, *see Youngberg v. Romeo*, 457 U.S. 307, 322 (1982). Based on the complete lack of vaccines and antiviral treatments, and completely inadequate COVID-19 education and testing at Calhoun, Plaintiffs allege both theories.

Based on the new facts alleged and law set out in their amended complaint, Plaintiffs state plausible claims regarding the unconstitutionality of their detention conditions. The amended pleading is therefore not futile.

B. The Complaint States a Plausible Claim That Redetention of Released Plaintiffs Violates Due Process.

Likewise, Plaintiffs state a plausible claim in their supplemental Count IV that redetaining released class members—whom this Court has found not to pose a risk of flight or danger, and who have been reintegrated into their families and

communities for over three to four years—would violate their Fifth Amendment due process rights without certain procedural protections.

Immigration detention, like all civil detention, is subject to greater constitutional constraints than criminal incarceration. *See Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (civil detainees "may not be punished"). Thus, immigration detention is valid only "where a special justification . . . outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Zadvydas*, 533 U.S. at 690. The Supreme Court has identified only two legitimate government interests that can justify immigration detention: to prevent flight risk or danger to the community. *See id.*; *Rosales-Garcia v. Holland*, 322 F.3d 386, 411 (6th Cir. 2003). To ensure detention is "reasonably related" to its purposes of preventing flight or danger, it must be accompanied by procedures to ensure that detention is actually serving those purposes. *See Zadvydas*, 533 U.S. at 690-99; *Rosales-Garcia*, 322 F.3d at 411. Moreover, the Supreme Court has also recognized that redetaining a person who has been released inflicts a "grievous loss" and requires a pre-deprivation hearing before that individual can be reincarcerated. *Morrisey v. Brewer*, 408 U.S. 471, 482 (1972); *see also Young v. Harper*, 520 U.S. 143, 145, 152-53 (1997); *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973).

Here, Defendants seek to lock up certain people in immigration detention—detention that must be justified based on flight risk or danger—where this Court has

specifically found that those individuals are not a flight risk or danger. That violates the bedrock substantive due process principle that civil detention is permissible only where there is a sufficiently strong "special justification." *Zadvydas*, 533 U.S. at 690. Moreover, an analysis under the three factors of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), makes clear that procedural protections are needed. The private interest affected is the weightiest there is: human liberty. The risk of erroneously depriving people who are not a flight risk or danger of their liberty is great; after all, this Court has already determined they could live safely in the community, which they have now been doing for years. Finally, the government has no legitimate interest in detaining people who are not a flight risk or danger. As many courts have recognized, detention or redetention that lacks procedural protections to ensure it is reasonably related to legitimate governmental purposes violates the Due Process Clause. *See*, *e.g.*, *Black v. Decker*, 103 F.4th 133, 155 (2d Cir. 2024); *German Santos v. Warden Pike Cnty. Corr. Facility*, 965 F.3d 203, 214 (3d Cir. 2020); *Ortega v. Bonnar*, 415 F. Supp. 3d 963, 969 (N.D. Cal. 2019); *Jorge M.F. v. Jennings*, 534 F. Supp. 3d 1050, 1054 (N.D. Cal. 2021).

In sum, Plaintiffs plausibly state a claim for relief that would survive a motion to dismiss, and supplementing the complaint with this claim would not be futile.

V. Amending and Supplementing Will Promote Judicial Economy.

Lastly, allowing Plaintiffs to amend their existing conditions claims and supplement with their redetention claim in the same case is the most efficient course of action. "The interest of judicial economy, although not necessarily enough in and of itself, [can] militate[] in favor of allowing supplemental pleadings." *Ne. Ohio Coal. for the Homeless*, 837 F.3d at 625. "When a dispute is complicated and protracted, and a new complaint the likely alternative, allowing supplemental pleadings before a court already up to speed is often the most efficient course." *Id*. *See also Bormuth*, 548 F. Supp. 3d at 649 (supplemental complaint "would 'avoid piecemeal litigation between essentially the same parties on substantially identical issues'" (citation omitted)).

Thus, courts regularly allow amendment and supplementation to avoid duplicative cases. *See, e.g.*, *Vella v. Adell Broad. Corp.*, No. 13-CV-10061, 2014 WL 12923402, at *2 (E.D. Mich. Nov. 7, 2014) (Levy, J.) ("judicial efficiency and the equities favor allowing the amendment" because if the plaintiff's motion were denied, then they would file these claims in a separate complaint); *Hall v. U.S. Cargo & Courier Serv. LLC,* No. 16-CV-330, 2017 WL 9434017, at *1 (S.D. Ohio Nov. 1, 2017) (because additional plaintiffs could file a separate action asserting collective claims if leave to amend is denied, "the filing of a separate action would not be less burdensome on [the defendant] and would not conserve judicial resources").

As discussed above, Plaintiffs seek to amend and supplement claims that are substantially similar to and directly connected to the ones already pled in this case. The amended Counts I and II update the science and reflect the current lack of vaccines, testing, and antivirals at Calhoun, but continue to challenge the legality of Defendants' COVID-19 protocols and conditions on behalf of the same class of detained noncitizens. The supplemental Count IV pertains to seven people whom this Court has already evaluated and released after finding no risk of flight or danger to the community. The new claim alleges that it would also violate their due process rights to redetain them absent procedural protections. If denied amendment or supplementation, Plaintiffs could file new litigation and relate it to this one as a companion case under Local Rule 83.11(b)(7). Because this Court is "already up to speed" with the relevant parties, facts, and legal theories, allowing the amended and supplemental pleadings here would be "the most efficient course." *Ne. Ohio Coal. for the Homeless*, 837 F.3d at 625.

CONCLUSION

For the foregoing reasons, the Court should grant leave to file the Third Amended and Supplemental Complaint, which adds the additional named plaintiffs, and should appoint additional class representatives, as set out in Plaintiffs' motion, to represent the class and habeas litigation group on Counts I and II.

Dated: October 4, 2024

Respectfully submitted,

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