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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 SERGIO ALBERTO BARCO MERCADO,
4 on his own behalf and on
5 behalf of others similarly
6 situated,

Plaintiff,

v.

25 Civ. 6568 (LAK)

7 KRISTI NOEM, Secretary of the
8 U.S. Department of Homeland
9 Security, in her official
10 capacity, et al.,

Video Conference

Defendants.

11 -----x

12 New York, N.Y.
13 August 12, 2025
10:00 a.m.

14 Before:

15 HON. LEWIS A. KAPLAN,

16 District Judge

17 APPEARANCES

18 WANG HECKER LLP
Attorneys for Plaintiff
19 BY: HEATHER C. GREGORIO
DANIEL E. MULLKOFF
20 ALICE G. REITER
MARIANN M. WANG

21 U.S. ATTORNEY'S OFFICE, SDNY
22 Attorneys for Defendants
23 BY: JEFFREY S. OESTERICH
24
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(Case called; appearances noted)

THE COURT: Ms. Gregorio, you may begin.

MS. GREGORIO: Thank you, your Honor.

We submitted extensive evidence describing in detail the inhumane and horrifying conditions at 26 Federal Plaza over the past several weeks and months. We've submitted 22 declarations showing that individuals being detained for several days and even weeks in what was meant to be a temporary daytime holding facility, which defendants acknowledged. While there they are not permitted any ability to communicate with their attorneys confidentially. There is no ability for their attorneys to reach them or schedule calls with them during a time when they are in particular need of legal counsel. They are granted only sporadic outgoing calls of a few minutes that are closely monitored. They are also being subjected to unsanitary and unsafe conditions, sleeping for days or weeks on a concrete floor with only an aluminum blanket, often with insufficient space to even lie down, often sleeping near the toilets. They are subjected to extreme temperatures. The rooms are either oppressively hot or freezing. They receive two, essentially inedible, small meals a day. They are not given the opportunity to shower, change clothes, or brush their teeth even if held for a week or longer. And they are denied necessary medications. They have access to only one or two toilets shared among 40 to 90 people, and the toilets are in

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1 open view of the room, so some have resorted to try to wrap
2 their aluminum sleeping blanket around themselves for privacy.
3 They are subjected to taunting and verbal and physical abuse by
4 the ICE officers.

5 These conditions are described in eight declarations
6 of individuals who have recently been detained and experienced
7 these conditions firsthand, and their descriptions are
8 remarkably consistent. We also submitted ten declarations from
9 attorneys who regularly represent clients in immigration
10 proceedings and who've attempted repeatedly to reach their
11 detained clients with no success.

12 We also received a supplemental declaration from our
13 client just this morning, and I apologize for the very
14 last-minute filing, but we only just received it from him
15 because his attorneys were able to speak with him. And he
16 describes he was detained at 26 Federal Plaza over the weekend.
17 He describes the same conditions. He describes the same
18 crowding, lack of food, lack of adequate sleeping conditions,
19 freezing temperatures, and smell of sewage. He also describes
20 dehumanizing treatment by the guards. He states that one guard
21 was holding up a water bottle and spraying it into the mouths
22 of the individuals who wanted water as if they were animals.

23 He also describes having been in great pain from a
24 tooth infection and not receiving treatment. And he describes
25 making a brief call to his attorney on Sunday night because he

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1 happened to have his phone number, which is often not the case,
2 of course. But that call was limited to one to two minutes.
3 There was a guard standing next to him, and he could hear a
4 second person breathing audibly on the line. So this is a far
5 cry from the confidential calls that defendants say they are
6 providing. These conditions have been extensively covered by
7 the press, including a video taken by a detained individual and
8 included in a New York Times article.

9 In the face of all of this evidence, the government
10 submits what is essentially a conclusory denial, similar to the
11 statements they have made to the press that flatly denies these
12 conditions are happening. Ms. Zanello doesn't say what her
13 knowledge is based on, stating simply that she has access to
14 ICE records concerning the facility. She doesn't attach
15 pictures. She doesn't say when she last visited the facility.
16 She notably doesn't deny a single, specific allegation from our
17 declaration. And her descriptions are all in the present
18 tense. Nor does the government justify any of the conditions
19 described in our declarations. They cite no authority for the
20 proposition that the conditions we've established would meet
21 the constitutional standards.

22 In light of our extensive, consistent evidence of
23 these plainly unconstitutional conditions and the government's
24 conclusory assertions that mostly just invoke their policies,
25 we submit that plaintiff has more than demonstrated a strong

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1 likelihood of success on the merits, and would respectfully ask
2 the Court to grant the proposed temporary restraining order or
3 preliminary injunction.

4 THE COURT: Thank you.

5 Mr. Oestericher.

6 MR. OESTERICHER: Thank you, your Honor.

7 I think we all agree that conditions at 26 Federal
8 Plaza need to be humane, and we obviously share that belief. I
9 think there is some factual disagreement. As a threshold
10 matter, 26 Federal Plaza is a holding facility, and it's
11 designed for short-term stays. And I think that's important
12 with regard to keeping in context the effects of some of these
13 conditions.

14 THE COURT: Here's what's important about it, I think.
15 Doesn't your argument, to the extent it relies on the fact that
16 the particular facility was intended for short-term use, boil
17 down to saying that unconstitutional conditions of confinement
18 are okay as long as they don't go on too long?

19 MR. OESTERICHER: I wouldn't put it that way, your
20 Honor. I think that --

21 THE COURT: I figured that.

22 MR. OESTERICHER: I think the standard is whether it
23 rises to the level of a constitutional violation, and I think
24 duration is a factor in considering whether it does. But we
25 take plaintiff's point that inhumane conditions are not

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1 appropriate and should not be tolerated, and the government
2 should not tolerate it. I think there are some factual
3 disagreements, certain things we agree on and some we don't.
4 And I think for purposes of the TRO, present conditions are
5 relevant. To the extent they are talking about overcrowding,
6 it does not appear presently that there is overcrowding at 26
7 Federal.

8 THE COURT: What is the history of the number of
9 people in these rooms over, say, the last three weeks, day by
10 day? You have that information, but you haven't provided it.

11 MR. OESTERICH: I don't have that information.
12 There are logs. I don't presently have that information, but
13 that information is available. There are logs that would be
14 able to answer that question. I just don't have that answer as
15 we sit here right now.

16 THE COURT: Okay. I have no reason to deny or to
17 discredit the affidavits that have been supplied by the
18 plaintiff as to numbers in some of these rooms being as high as
19 90 people in several hundred square feet at points in recent
20 history.

21 MR. OESTERICH: I have no present basis to deny.
22 Obviously, they're estimating. But correct, I can say
23 presently, for purposes of the TRO, there are 26 individuals
24 total in the four rooms combined.

25 THE COURT: Would it be a reasonable inference to

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1 suppose that after the video was published in the New York
2 Times a couple of weeks ago, I guess, and the likelihood of
3 litigation began to be reasonably foreseeable, that an effort
4 was made to clean things up, at least short term?

5 MR. OESTERICH: I'd like to take the fifth on the
6 inference, your Honor. I don't know whether that's a fair
7 inference or not. But for purposes of the legal matter, I
8 think that is what one would want to have happen. And I think
9 it can be considered for purposes of whether a TRO should be
10 granted if voluntary measures were taken to alleviate
11 conditions, that is a good thing. Whether they were born of
12 that video or otherwise, that is a positive step, and the fact
13 that there are only 26 individuals there is a positive step.
14 So I'm not sure about the inference, but to the extent that is
15 what happened, I think that is a positive development as
16 opposed to a negative development.

17 THE COURT: Well, but the Supreme Court has taught,
18 ever since *W.T. Grant* that the voluntary cessation of improper
19 behavior does not defeat an application for equitable relief
20 because the improper behavior, absent that relief, could resume
21 overnight or in short order.

22 MR. OESTERICH: I think we cite some cases in our
23 brief on this point, your Honor, and I think there are two
24 doctrines. But here for purposes of the TRO, that condition
25 just isn't there, and the inference that the government is then

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1 going to relapse into overcrowding is one that we, at least at
2 present, would reject.

3 THE COURT: Well, what is the government doing with
4 the numbers of people that a couple of weeks ago would have
5 been in 26 Federal now?

6 MR. OESTERICH: I think the concept is it's a
7 short-term processing facility, and they are finding beds. I
8 think more and more detention facilities are being made
9 available in this general tristate area, such as they are
10 trying to move people out within 72 hours as quickly as
11 possible to alleviate crowding conditions, be it crowding or
12 overcrowding.

13 THE COURT: Why don't I have affidavits about that?

14 MR. OESTERICH: Your Honor, frankly, we were just
15 short on time. The application was filed on Friday, late. The
16 initial order from Judge Woods said a schedule would be
17 established on Monday and then the schedule came down for
18 papers by 5:00 p.m. We would be happy to provide additional
19 information. We were just, frankly, short on time.

20 THE COURT: Anything else you want to add?

21 MR. OESTERICH: I would say that for some of the --
22 I think the hardest issue is the attorney access. I think for
23 conditions, I think some of them, to the extent there are
24 issues that the Court believe rises to the level of
25 constitutional violations, there are solutions: Mats, sleeping

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1 mats, if that is an issue. I think some of the issues in their
2 TRO are just not physically possible, such as bathrooms in a
3 separate room. The bathrooms are in the holding rooms, and it
4 would be extraordinarily difficult to have holding rooms
5 without bathrooms. I think legal visitation is really the most
6 difficult. In-person legal visitation, just based on the
7 layout, is not feasible. And the way it works, as I understand
8 it, is when an individual is brought into 26 Federal, they are
9 given a call at that time and that calls are available, albeit
10 in sort of an outside the holding room, not in a private room.
11 But calls are available such that that is how attorney access
12 is provided. And given the short-term stay, that that doesn't
13 rise to the level of a constitutional violation.

14 THE COURT: Well, I hear you, but I have an awful lot
15 of evidence before me that what you're suggesting isn't
16 happening in practice.

17 MR. OESTERICH: Understood, your Honor.

18 THE COURT: What are the points on which you say there
19 is no factual dispute?

20 MR. OESTERICH: I would say there is no factual
21 dispute that there are no beds in these holding rooms and that
22 they are not provided with sleeping mats. They are only
23 provided with blankets.

24 I think there is no dispute that they are provided two
25 meals instead of three.

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1 I think there's no dispute that the bathrooms are
2 within the room.

3 THE COURT: What are you feeding them?

4 MR. OESTERICH: I don't presently have the answer
5 beyond it's two meals per day, not three. And I'm told it's
6 two nutritious meals. But as far as the specifics whether it's
7 military meals, I don't have the specifics on that.

8 THE COURT: Go ahead.

9 MR. OESTERICH: I think there is agreement about
10 medication.

11 I think there is agreement that visitation is not
12 in-person visitation. In-person visitation does not occur,
13 based on the layout.

14 And I think there is disagreement about the online
15 detainee location. So those are the issues. There is
16 agreement and disagreement.

17 THE COURT: All right. Ms. Gregorio, anything else
18 you want to add?

19 MS. GREGORIO: Sure. I would just make a few points.
20 In all of our declarations we have not heard anything about
21 calls being made outside of the room. The experiences
22 described by all of the declarants are that there is one place
23 to make calls, and the guards are hovering there and hurrying
24 them along. Our client reports that happening as recently as
25 this weekend.

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1 He also reported crowding as recently as this weekend.

2 In terms of the statement that people are generally
3 being moved out in 72 hours or less, I would note that the
4 72-hour waiver was passed back in June. And of the eight
5 declarations that we have collected since then, six people were
6 held significantly longer than that. One person was held for
7 nine days, one for ten days, one for 15. But we are skeptical
8 that even if the policy changes, that we would be able to rely
9 on that, given the fact that there have been policies in place
10 and they have not been adhered to. So I would just add in
11 terms of the concept of voluntary cessation, obviously we are
12 happy to hear if conditions are improving, but we are extremely
13 skeptical that that will continue without some level of
14 enforcement and court oversight. You know, the standard for
15 defendant's burden to show voluntary compliance is called
16 "stringent" and "formidable," and they must make "absolutely
17 clear that the allegedly wrongful behavior could not reasonably
18 be expected to occur." So we feel strongly that a court order
19 is necessary and oversight is necessary to ensure compliance
20 with anything that the government says it is going to do or
21 change.

22 THE COURT: I don't know whose device is causing that,
23 but please stop it.

24 You are going to hear my printer cranking for a
25 minute, just bear with me on that.

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1 Let me address the question of what kind of relief is
2 appropriate, assuming relief is appropriate. I've given some
3 thought to whether a population limitation based on square
4 footage would make sense. You can't have more than X detainees
5 in one of these rooms, unless the room is big enough in square
6 footage, discounting the toilet area, to give 50 square feet
7 per person. Is that a problem?

8 MR. OESTERICH: I would say, your Honor, if the
9 Court orders it, it is not a problem. The government will
10 comply. Is it a logistical problem? My math is not good
11 enough to compute how many individuals that is.

12 THE COURT: Well, the biggest room in your affidavit
13 or your papers indicated was 800 square feet. I don't know how
14 much to hive off for the toilet area, but roughly 15 people.

15 MR. OESTERICH: Right. It's certainly not a problem
16 presently. And if that is what the Court deems necessary,
17 obviously we will comply. There is an 800 -- two smaller rooms
18 that would probably only accommodate three people each, if I'm
19 doing the math right and a fourth room that is larger.

20 THE COURT: Ms. Gregorio, what's your thought about
21 that?

22 MS. GREGORIO: I believe that that would be a
23 reasonable -- one aspect of the solution which is why we
24 requested it in conjunction with other remedies.

25 THE COURT: Okay. Thank you.

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1 Bedding mats, sleeping mats, any reason that can't be
2 provided?

3 MR. OESTERICHER: No, your Honor. I just think we
4 would need some short period of time to acquire them.

5 THE COURT: Understood. What about all these problems
6 that I'm told about in the plaintiff's affidavits concerning
7 soap, towels, toilet paper, oral hygiene products, feminine
8 supplies? There seems to be quite a gap between the ICE
9 standards, indeed, and what's really happening, including a
10 20-year-old, I gather, who was menstruating for five days and
11 couldn't get any supplies and what was supplied for a room full
12 of people were two items?

13 MR. OESTERICHER: I read that as well, your Honor. I
14 don't have a basis to comment, but we totally agree that
15 necessary hygiene products should be available.

16 THE COURT: All right. Probably the hardest problem
17 is access to lawyers. And I'm inclined to require that you
18 folks do quite a different and better job of this, including
19 telephone access for legal calls, shortly after they arrive at
20 the facility, and then promptly thereafter, and privacy. And
21 if that means taking people out of the rooms to a private
22 telephone, I have that in mind. And requiring the dedication
23 of a certain number of telephone lines for the purpose of legal
24 calls.

25 Why shouldn't I do that, Mr. Oestericher? That is the

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1 most serious constitutional problem here, I think.

2 MR. OESTERICH: I think the reason not to do it,
3 your Honor, is that individuals in detention are provided a
4 call upon arrival, and their stay is short. And they are able
5 to make calls upon request thereafter. And given the
6 short-term nature, because it's a holding and not a detention
7 facility, that that suffices, and it is not a constitutional
8 violation.

9 THE COURT: Well, okay. I think, at least
10 preliminarily, we are going to have to agree to disagree about
11 that. I understand that there may be a logistical question,
12 and if there is logistical question, that's what I'm most
13 interested in at the moment and how to solve it.

14 MR. OESTERICH: Understood, your Honor. I would
15 need to discuss with the client the logistics in making that
16 happen to the extent the Court ordered it.

17 I just wanted to add, to the extent the Court has
18 other questions that I was unable to answer, if the Court wants
19 those answers, and, of course, if the Court orders it, we will
20 provide that information.

21 THE COURT: Well, there is going to be a preliminary
22 injunction to be heard. And it will be on a reasonable
23 schedule. So you will have an opportunity to do that, and it
24 would be very much in your interest to do that.

25 Now, I read the declaration or affidavits you

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1 submitted. And there are lists of things that are said to be
2 available if only somebody asks. Put aside the question of
3 whether requests that are made are actually fulfilled, which I
4 gather there is some disagreement about, how do these people
5 know about all the wonderful things they can get on request,
6 like clean clothing and the like?

7 MR. OESTERICH: I'm not aware of how that's
8 communicated. But that obviously could be corrected with some
9 kind of posting, if necessary.

10 THE COURT: Okay.

11 MS. GREGORIO: Your Honor, may I ask one thing about
12 the legal calls?

13 THE COURT: Yes.

14 MS. GREGORIO: I would just request that attorneys be
15 permitted to schedule legal calls with their clients just
16 because often they don't know their attorney's phone numbers.
17 So if there could be a phone number that could be called and
18 answered with clear instructions for how to schedule a call
19 with a client, that would be extremely helpful as well.

20 THE COURT: Okay. Let me make a note.

21 Either of you have anything else to add?

22 MS. GREGORIO: No, your Honor. Thank you.

23 MR. OESTERICH: The only thing I would add your
24 Honor is that I think the scheduling of legal calls is a
25 complicated matter. Having seen it through the COVID time at

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1 MCC and MDC. It's just logistically very difficult. And it
2 takes an infrastructure and personnel, to the extent the Court
3 is contemplating a system whereby attorneys could schedule
4 calls within a certain timeframe, especially given that it's a
5 short-term facility. They can't wait three or four days. I
6 think those issues are tricky. I'm not sure how that cuts, but
7 I want to raise that from the experience through COVID at MDC
8 and MCC it was not seamless from the beginning, and it is
9 somewhat complicated.

10 THE COURT: I don't doubt that. I lived through COVID
11 and inmate cases myself. But I think we're going to have to do
12 that in some fashion. Now, you've got a lot of experience.
13 Your office has tons of experience with this, and I'm sure you
14 could be helpful to your client in working something out here.
15 And if whatever it is that I ultimately provide in a TRO needs
16 to be tweaked in a way that will be consistent with
17 practicalities and also with the rights of the detainees, I
18 will be ready to consider that. This is a first step, in my
19 view. And my conclusion here is that there is a very serious
20 threat of continuing irreparable injury, given the conditions
21 that I've been told about. I have no enforceable way of
22 assuring that any progress that, in fact, has been made won't
23 backslide very quickly.

24 On the state of the current record, the plaintiff
25 clearly has a high likelihood of success and that may change.

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1 But there will be a TRO in the course of the day. And I'll
2 post it to ECF and my thought is, that it would, absent
3 modification or extension, expire in 14 days or conceivably,
4 earlier. But that will be spelled out in the order.

5 Now, in so far as the preliminary injunction is
6 concerned, is this something that you are both prepared to do
7 entirely on papers, or am I going to have to take any evidence?

8 MS. GREGORIO: We would submit that we have provided
9 more than sufficient evidence for a finding on the papers and
10 would ask your Honor to rule on the evidence we provided. To
11 the extent that the government does submit evidence, we would
12 like an opportunity to reply and also assess whether additional
13 rebuttal evidence is needed on our end.

14 THE COURT: Mr. Oestericher?

15 MR. OESTERICH: I think that's a little hard for me
16 to evaluate at the moment. We would intend to put in a more
17 robust factual record, particularly a contemporaneous record.
18 And it may be that at least the government witness would want
19 to testify at a hearing so that we could answer the Court's
20 factual questions.

21 THE COURT: How much more time do you want for any
22 additional submissions on the preliminary injunction?

23 MR. OESTERICH: Briefing and factual or is there
24 going to be a --

25 THE COURT: Briefing and factual.

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1 MR. OESTERICH: I assume the plaintiff is going to
2 go first.

3 THE COURT: The plaintiff has gone first.

4 MR. OESTERICH: I see. So we would like until
5 Monday the 18th, maybe.

6 THE COURT: How does that sound, Ms. Gregorio?

7 MS. GREGORIO: That works for us.

8 THE COURT: How much time do you want to reply? Do
9 you know?

10 MS. GREGORIO: I believe we could reply by Thursday
11 the 21st.

12 THE COURT: That's okay with me. And if there is
13 going to be a request to take evidence, I have to have it in
14 writing, the request in writing, by the 21st. And then we'll
15 see where we are in terms of timing if there is such a request.

16 Now, Ms. Gregorio, are you going to make a class
17 motion?

18 MS. GREGORIO: We have filed a motion for class
19 certification. We filed it when we filed the case.

20 THE COURT: I was not aware of that.

21 Mr. Oestericher, when can you have your response in on
22 that?

23 MR. OESTERICH: A week from tomorrow, your Honor.
24 Is that the 20th?

25 THE COURT: Okay. And when would you like to reply,

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1 Ms. Gregorio?

2 MS. GREGORIO: We could reply by Friday the 22nd. I'm
3 sorry, are my dates wrong? Yes, Friday the 22nd.

4 THE COURT: Okay. Fine. Just so you have it in mind,
5 a date that I'm kind of holding in my mind as a possibility, if
6 there needs to be some evidence taken, is September 3rd. I'm
7 not committing to that, but it's a possibility. I'm just being
8 up front with you about what's in my mind about that.

9 Okay. Anything else we can usefully accomplish at the
10 moment, Ms. Gregorio?

11 MS. GREGORIO: Not for plaintiff, your Honor. Thank
12 you.

13 THE COURT: Mr. Oestericher?

14 MR. OESTERICH: Nothing else. We appreciate your
15 consideration, your Honor.

16 THE COURT: I appreciate the very good submissions by
17 both sides, especially Mr. Oestericher in your case, given the
18 time pressure.

19 MR. OESTERICH: Thank you, your Honor.

20 THE COURT: Okay, folks, we will be in touch.

21 (Adjourned)
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25